

2. On October 12, 2004, you faxed a *Residential Listing Input* form to the Edmonton Real Estate Board for the purpose of marketing the property on the Multiple Listing Service (“MLS”). The information you provided included the description of the property size as “over 1950 sq ft home ...” and reference to a “Dog Run – Fenced In” as a feature. The reference to “1950 sq ft” was based on the 181.4 m² entered by you on the form as the “Total Floor Area”.
3. You obtained the square footage figure from an existing survey. You did not measure the house to verify the square footage, nor did you verify the presence of a dog run. The house was not 1950 square feet in size nor was there a dog run.
4. On August 22, 2005, the price was again lowered to \$109,900 by amendment to the listing contract.
5. You did not provide your brokerage with a copy of this listing amendment.
6. Apart from amendment of the list price, the information on the MLS system remained until September 11, 2005 when you requested that the reference to ‘dog run’ be removed from MLS.
7. In September of 2005, D.H. and J.H. (the H.’s) became interested in purchasing the property.
8. On September 17, 2005, the H.’s signed a dual agency consent form to confirm that you were agency with both the H.’s as buyers and L.S. as seller.
9. On September 17, 2005, you prepared and had executed by the H.’s and L.S., Real Estate Purchase Contract 59722 for the purchase of the property. The total price was \$109,900, being \$500.00 deposit and \$109,400.00 new financing. The closing date on Purchase Contract 59722 was October 17, 2005.
10. In this contract you included the words “Realtor agrees to assist buyers in furnishing the home with basic furniture” as an “additional term of sale” in the contract.
11. You were not a party to Purchase Contract 59722 and did not sign any part of the contract as a party in acceptance of any terms of the contract.
12. Further you did not bring this provision to the attention of your broker and it was not approved by your broker.
13. On September 27, 2005, you obtained an amendment to the listing contract between the brokerage and L.S. wherein she agreed to “reimburse / pay” \$900.00 to you in exchange for furniture which you would provide to the H.’s pursuant to the provision concerning assisting the buyers in furnishing the property you included in the Purchase Contract. This amendment also listed furniture that was to be given by you to the H.’s as consideration for the \$900.00 payment.
14. The list of furniture was not appended nor incorporated in any way to the Purchase Contract 59722 nor was it accepted, approved by the H.’s as meeting whatever obligation that term entailed and nor was any release of that obligation provided by the H.’s with respect to that list of furniture.
15. On September 27, 2005, the buyers’ conditions were waived and Purchase Contract 59722 became binding.
16. On October 4, 2005, an amendment to the Purchase Contract 58722 was executed moving the possession date from October 17 to October 14, 2005.

17. Between September 27, 2005 and October 4, 2005, the H.'s asked you whether the garage square footage was included in the indicated size of the property. It was then that you confirmed the measurements for the property and advised the H.'s that the size was not 1950 square feet but rather approximately 1550 square feet.
18. On October 7, 2005, you faxed a correction of the property measurement to the Edmonton Real Estate Board for the purpose of correcting the size information on MLS.
19. As a result of the error in size of the property, there were negotiations between the buyers and you concerning a resolution. With the authorization of the broker, it was agreed between the buyers and the brokerage that the brokerage's commission would be reduced by \$5000 with this reduction passed on to the buyers as a reduction of purchase price in the amount of \$5000. The seller received the same net amount as before.
20. Further, as a result of the dispute over the error in square footage, the Buyers pressed you for more furniture, which you acquiesced to given the term of the contract was unclear.
21. Your conduct is deserving of sanction in that you:
 - a) Participated in the creation of a form of communication that you knew or ought to have known was false or misleading, contrary to **s.4(d) of the Code of Conduct**:
 - The MLS listing that the property was of a square footage of "over 1950" which was not true and was misleading with respect to the market value of the property; and
 - The MLS listing stated that there was a "dog run" which was not true and was misleading with respect to the market value of the property.
 - b) Failed to provide a trade record to your broker contrary to **Rule 23(e)**:
 - The Listing Amendment dated August 22, 2005, was not provided to the brokerage.
 - c) Participated in the creation of a contract or document the he knew or should have known was not legally binding, confusing or did not reflect any agreements already in place, contrary to **s.6(c) of the Code of Conduct**:
 - The term "Realtor agrees to assist buyers in furnishing the home with basic furniture" was not binding on the brokerage given that it was not authorized through any acceptance in the contract by you on behalf of the brokerage; and
 - The term was confusing as it did not clarify what was meant by "assist" nor what was meant by "furnishing"
 - d) Failed to obtain written approval of an inducement from your broker contrary to **Rule 24(2)**:
 - The term "Realtor agrees to assist buyers in furnishing the home with basic furniture" as a buyers term, was an inducement to assist, persuade or cause the buyers to enter into the particular real estate purchase; and
 - The term was not approved in writing by the broker.
 - e) Failed to fulfill your fiduciary duty to your client by failing to act in your client's best interests, contrary to **s.2(a) of the Code of Conduct**:

- The September 27, 2005 amendment to the Listing Contract provided that L.S. would pay \$900 you personally for furniture that would be provided to the buyers;
- Providing the buyers with furniture was not an obligation binding on L.S. under the purchase contract and it was not in her interest to provide compensation to you for this; and
- You failed to protect her interests by failing to direct her for independent advice given your interest in this amendment.

III) EVIDENCE

The Panel received an Admission of Conduct Deserving of Sanction pursuant to s. 46 of the *Real Estate Act* from Dr. Mitchell. In the document, Dr. Mitchell admitted to the allegations of fact and a breach of provisions of the *Real Estate Act Rules*, and admitted that his conduct, with the exception of allegation (b) which was withdrawn, was conduct deserving of sanction. The s.46 Admission with the details of the conduct is attached.

IV) SUBMISSIONS

Counsel on behalf of the Executive Director submitted a joint submission on sanction and costs signed by both the Executive Director and Dr. Mitchell. The submission set out both mitigating and aggravating factors considered. Dr. Mitchell has no prior disciplinary history, he admitted his conduct was deserving of sanction and he suffered financial loss as a result of his conduct. With respect to the incorrect square footage information, Dr. Mitchell provided \$5000 (and whatever furniture from his home that the Buyers desired) in compensation to the Buyers and without the need for litigation. With respect to the Listing Amendment whereby the Seller was to pay Dr. Mitchell \$900, this amount was never paid as the furniture originally intended to be sold to the Seller (to give to the Buyers) was never given or 'sold' to either party. General deterrence is a primary factor in this case. Attention to the accuracy of significant information about a property (the size) and attention to the proper drafting of contract terms is to be encouraged in the industry at large.

Taking into the mitigating factors the fines submitted were:

s.4(d) of the Code	\$1000.00
s.6(c) of the Code	\$ 500.00
s.24(2) of the Rules	\$ 100.00
s.2(a) of the Code	<u>\$1000.00</u>
For a total of	\$2600.00

It was further submitted that Dr. Mitchell pay costs of the investigation and hearing in the amount of \$1500.00 and successfully complete the Contracts course (and Representation Relationships course) of section 3 of REAP within 6 months of the date of the Panel's order on sanction.

Dr. Mitchell confirmed that he had signed the s.46 Admission of Conduct Deserving of Sanction and the joint submission on sanction agreeing with its contents.

V) FINDINGS AND ORDERS

On the basis of the returned Admission and section 47(2) of the *Real Estate Act*, Hearing Panel finds that the conduct of Dr. K. Albert Mitchell is conduct deserving of sanction.

As Dr. Mitchell has signed an Admission of Conduct Deserving of Sanction reducing the time and expense associated with a hearing and as he did suffer financially during this matter, the Panel accepts the joint submission as reasonable and appropriate.

The Panel encourages Dr. Mitchell and the industry as a whole to pay proper attention to any significant details regarding a property such as the size, as well as to the proper drafting of contract terms.

The Hearing Panel hereby orders that K. Albert Mitchell:

1. pay fines totaling \$2,600.00;
2. pay costs in the amount of \$1,500.00 and
3. complete the Contracts section (and Representations Relationships course) of section 3 of REAP within 6 months of the date of the Panel's order on sanction.

This Decision was made on 28th February, 2010

Connie Leclair, Chair

Marjorie King

Norm Jensen

THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF s. 39(1)(b) and s. 41 of the Real Estate Act, R.S.A. 2000, c. R-5, as amended

AND IN THE MATTER of a Hearing concerning the conduct of K. ALBERT MITCHELL while registered as a real estate associate with North Star Realty Corporation o/a Realty Executives North Star and currently a real estate broker registered with Advantage Commercial Realty Ltd. o/s AC Realty

ADMISSION OF CONDUCT DESERVING OF SANCTION

1. I, K. Albert Mitchell, of the City of Edmonton, in the Province of Alberta, hereby acknowledge that I have been given an opportunity to seek the advice of legal counsel. I hereby agree to the execution of this Admission of Conduct Deserving of Sanction voluntarily and of my own free will.
2. I, K. Albert Mitchell, admit to the allegations of fact and breaches of provisions of the Rules and Code of Conduct as set out in the attached Schedule "A" and admit that my conduct in this regard is conduct deserving of sanction pursuant to section 46 of the *Real Estate Act*.

DATED this 15th day of January **2010**.

Signed in the presence of

H.A.
Witness signature

K. Albert Mitchell
K. Albert Mitchell

H.A.
Print name of Witness

AFFIDAVIT OF EXECUTION

CANADA) I, H.A. of
))
) the city/town of Edmonton,
PROVINCE OF ALBERTA))
) in the Province of Alberta,
TO WIT:))
) MAKE OATH AND SAY THAT:

1. I was personally present and did see K. Albert Mitchell, named in the annexed instrument, who is personally known to me to be the person named therein, duly sign and execute the same for the purpose named therein.
2. The same was executed at the City of Edmonton, in the Province of Alberta, and that I am the subscribing witness thereto.
3. I know the said party and he is in my belief of the full age of eighteen years.

Sworn / Affirmed before me at the)
City of Edmonton, in the Province)
of Alberta, this 15th day of)
January, 2010.)
))
))

M.T.)
A Commissioner for Oaths in and)
for the Province of Alberta.)

H.A.)
_____) (signature of witness)

“Schedule A”

1. On October 5, 2004, I executed a *Listing Contract* with L.S. on behalf of North Star Realty Corporation o/a Realty Executives North Star (“North Star”), for the sale of her home in Two Hills, Alberta (the “property”). The listing was for a price of \$118,800.00, a term from October 5, 2004 to October 5, 2006 and provided for a commission of \$8000.00 inclusive of GST.
2. On October 12, 2004, I faxed a *Residential Listing Input* form to the Edmonton Real Estate Board for the purpose of marketing the property on the Multiple Listing Service (“MLS”). The information I provided included the description of the property size as “over 1950 sq ft home ...” and indicated there was a “Dog Run – Fenced In” as a feature. The reference to “1950 sq ft” was based on the 181.4 m² I entered on the form as the “Total Floor Area”.
3. I obtained the square footage figure from an existing survey. I did not measure the house to verify the square footage, nor did I verify the presence of a dog run. The house was not 1950 square feet in size nor was there a dog run.
4. Apart from amendment of the list price, the information on the MLS system remained until September 11, 2005 when I requested that the reference to ‘dog run’ be removed from MLS.
5. On August 22, 2005, the price was again lowered to \$109,900.00 by Amendment to the Listing Contract.
6. On September 17, 2005, the H.’s signed a *Dual Agency Consent* form to confirm that I was agent for both the H.’s as buyers and L.S. as seller.
7. On September 17, 2005, I prepared and had executed by the H.’s and L.S., Real Estate *Purchase Contract 59722* for the purchase of the property. The total price was \$109,900.00, being \$500.00 deposit and \$109,400.00 new financing. The closing date on Purchase Contract 59722 was October 17, 2005.
8. In this contract I included the words “*Realtor agrees to assist buyers in furnishing the home with basic furniture*” as an “*additional term of sale*” in *Purchase Contract 59722*.
9. I was not a party to *Purchase Contract 59722* and did not sign any part of the contract as a party in acceptance of this term.
10. Further I did not bring this term to the attention of my broker and it was not approved by my broker.

11. On September 27, 2005, I obtained an *Amendment to the Listing Contract* between the North Star and L.S. wherein she agreed to “reimburse / pay” \$900.00 to me personally in exchange for furniture which I expected to provide to the H.’s pursuant to the term I included in *Purchase Contract 59722*.
12. This *Amendment to the Listing Contract* also listed furniture that (as consideration for the \$900.00 payment by L/S. to me) that was to be transported by me to the H.’s.
13. The list of furniture was not appended nor incorporated in any way into *Purchase Contract 59722*.
14. On September 27, 2005, the buyers’ conditions were waived and *Purchase Contract 59722* became binding on the H.’s.
15. On October 4, 2005, an *Amendment to the Purchase Contract 58722* was executed moving the possession date from October 17, 2005, to October 14, 2005.
16. Between September 27, 2005 and October 4, 2005, the H.’s asked me whether the garage square footage was included in the indicated size of the property. It was then that I confirmed the measurements for the property and determined that the size was not 1950 square feet but rather approximately 1550 square feet. I advised the H.’s of this information.
17. On October 7, 2005, I faxed a correction of the property measurement to the Edmonton Real Estate Board for the purpose of correcting the size information on MLS.
18. As a result of the error in size of the property, the H.’s claimed compensation and I entered into negotiations with them. With the authorization of the broker, I agreed to reduce the brokerage’s commission by \$5000.00 and that this reduction would be passed on to the buyers as a reduction of purchase price of \$5000.00. The seller received the same net amount as before.
19. Further, as a result of the claim for compensation by the Buyers I acquiesced to giving them whatever furniture from (inside) my house that they desired regardless of price or value – none of which was any of the furniture (in my garage) originally intended in my \$900.00 Listing Agreement with the Seller (which Agreement originated as a ‘good will’ gesture).
20. My conduct is deserving of sanction in that I:
 - a) Participated in the creation of a form of communication that I knew or ought to have known was false or misleading, contrary to **s.4(d) of the Code of Conduct** as follows:

- The MLS listing that the property was of a square footage of “over 1950” which was not correct and
 - The MLS listing stated that there was a “dog run” which was not correct.
- b) Participated in the creation of a contract or document the he knew or should have known was not legally binding, confusing or did not reflect any agreements already in place, contrary to **s.6(c) of the Code of Conduct** as follows:
- The term “Realtor agrees to assist buyers in furnishing the home with basic furniture” was not binding and
 - The term was confusing as it did not clarify what was meant by “assist” nor what was meant by “furnishing”.
- c) Failed to obtain written approval of an inducement from my broker contrary to **Rule 24(2)** as follows:
- The term “Realtor agrees to assist buyers in furnishing the home with basic furniture” (as a buyers term), could be interpreted as an inducement (as defined in the Rules made pursuant to the Real Estate Act); and
 - The term was not approved in writing by the broker.
- d) Failed to fulfill my fiduciary duty to my client by failing to act in your client’s best interests, contrary to **s.2(a) of the Code of Conduct** as follows:
- The September 27, 2005 amendment to the Listing Contract provided that the seller would pay \$900.00 to me personally for furniture that I had offered to pay as gratuitously as a ‘good Samaritan’ to the buyers;
 - Providing the buyers with furniture was not an obligation binding on the seller under *Purchase Contract 59722*.