IN THE MATTER OF THE *REAL ESTATE SERVICES ACT,*

AND IN THE MATTER OF

CIU ZHU (DANIELLE) DENG

REASONS FOR DECISION

REGARDING LIABILITY

DATE AND PLACE OF HEARING:	March 12, 13 & 21, 2018 Office of the Real Estate Council Vancouver
DISCIPLINE HEARING COMMITTEE:	Richard J. Swift, Q.C. (Chair) Sukh Sidhu John Daly
Counsel for the Real Estate Council:	David T. McKnight Alexander Holburn Beaudin & Lang LLP
Counsel for the Respondent:	Jeffrey P. Scouten Hakemi & Ridgedale LLP
Court Reporter:	Colin Beaton

INTRODUCTION

[1] The hearing was conducted before a Discipline Hearing Committee (the "Committee") of the Real Estate Council of British Columbia (the "Council") pursuant to section 42 of the *Real Estate Services Act,* R.S.C. 2004, c.42 (the "RESA" or "Act") to consider whether Ms. Ciu Zhu (Danielle) Deng (the "Respondent" or "Licensee") committed professional misconduct within the meaning of section 35(1) of the Act.

[2] This matter relates to real estate services the Respondent provided to Ms. Huang (the "Complainant") in February and March 2013. The Respondent represented the Complainant who was seeking to purchase a family home. The Complainant alleged that the Respondent failed to disclose material information about the availability of a property, Unit 59, that the Complainant preferred and had previously sought to buy,

and as a result, this caused the Complainant to remove her conditions on an alternate property, Unit 134.

ISSUES

[3] The allegations set out in the Notice of Discipline Hearing dated January 25, 2018 are as follows:

a. Ms. Deng committed professional misconduct within the meaning of section 35(1)(a) of the RESA in that while representing the buyer with respect to the property located at XX163XX 82nd Avenue, Surrey she:

i. Failed to act with reasonable care and skill and failed to act in the best interest of her client when she failed to disclose to her client all material information with respect to the Property including the fact that she did not advise her client that an offer on this Property had collapsed until after her client had removed her conditions on another property, when she knew or ought to have known of her client's interest in the Property, contrary to sections 3-3(1)(a), 3-3(1)(f) and 3-4 of the Council Rules.

PRELIMINARY MATTERS

[4] The Respondent was represented by counsel at the hearing.

BURDEN OF PROOF AND EVIDENCE

[5] **The burden and standard of proof:** Under section 43 of the Act, the Committee may determine that the Respondent has committed professional misconduct or conduct unbecoming a licensee, or dismiss the matter.

[6] The burden of proof is on the Council to demonstrate that the Respondent committed professional misconduct or conduct unbecoming a licensee. The standard of proof is, as in every civil case, the balance of probabilities. The balance of probabilities means that the Committee must be satisfied, based on evidence that is sufficiently clear, convincing and cogent, that the occurrence of an event was more likely than not: *F.H. v. McDougall*, 2008 SCC 53.

[7] **The evidence that the Committee may accept:** As an administrative tribunal the Committee is not bound by court rules of evidence, in the absence of any statutory provision to the contrary, and may consider any evidence it considers relevant: *Wilson v. Esquimalt and Nanaimo Railway Company Co.*, [1922] 1 A.C. 202 (P.C.) [B.C.]; *Kane v. The Board of Governors (University of British Columbia)*, [1980] 1 S.C.R. 1105; *Hale v. B.C. (Superintendent of Motor Vehicles)*, 2004 BCSC 1358 at para. 23. The Committee may, however, draw upon principles underlying court rules of evidence to exclude or assess evidence.

[8] As a public authority, the Committee must also afford procedural fairness to a respondent where a decision may affect his or her rights, privileges or interests. This right includes a right to be heard. The Committee affords every respondent an

opportunity to respond to the case against him or her by providing advance notice of the issues and the evidence, and an opportunity to present evidence and argument. The Committee must determine facts, and decide issues set out in the Notice of Discipline Hearing, based on evidence. Committee members may, however, apply their individual expertise and judgment to how they evaluate or assess evidence.

REASONS

The evidence before the Committee

[9] The evidence in the hearing consisted of eight exhibits, which included a Books of Documents from the Respondent and the Council, as well as other exhibits. The Complainant Ms. Huang was called to give evidence on behalf of the Council. The Respondent Ms. Deng gave evidence on her own behalf.

Findings of fact

[10] The allegation against the Respondent is that while representing the Complainant with respect to the property located at #59 – 16318 – 82nd Avenue, Surrey, B.C. (the "Property" or "Unit 59"), she failed to act with reasonable care and skill and failed to act in the best interest of her client, the Complainant, when she failed to disclose to the Complainant all material information with respect to the Property. In particular, she did not advise the Complainant that an offer on this Property had collapsed until after the Complainant had removed her conditions on another, alternate property ("Unit 134"), when she knew or ought to have known of The Complainant's interest in the Property, contrary to sections 3-3(1)(a), 3-3(1)(f) and 3-4 of the Council Rules.

[11] The Complainant in the matter, Ms. Huang, met the Respondent, Ms. Deng, as the result of responding to an online advertisement placed by the Respondent in January of 2013. The Complainant, over the course of e-mail and telephone contacts with the Respondent, made it known to the Respondent that she, on behalf of herself and her husband, Mr. Zhang, was seeking the Respondent's assistance in purchasing a home for their family. While there is some discrepancy in the evidence as to whether or not the Respondent was aware that the Complainant's mother was included in the family unit, there is no dispute that it was common knowledge that the family unit consisted of at least the Complainant, Mr. Zhang, and their two children. Throughout these dealings with the Respondent, the Complainant acted on behalf of herself and Mr. Zhang. There was no evidence presented to contradict the Complainant's evidence that she acted at all times with the knowledge and consent of Mr. Zhang in dealing with the Respondent, and the Committee finds that the Complainant was so authorized. References to the Complainant include "Mr. Zhang" as the context may require.

[12] The Respondent had been a licensed Realtor for just over 2 years, and she had been a broker in approximately 10 deals to that point in her career, at the time of her initial contact with the Complainant. The Complainant had been a lawyer in her native China and was working in Vancouver for a lumber brokerage business. Both the Complainant and the Respondent appear to be very astute and intense individuals.

While credibility was not a serious issue to be determined by the Committee, it was apparent that both the Complainant and the Respondent were motivated to explain their evidence on every issue, however insignificant, to give it a self-serving tenor.

[13] The Complainant took an extremely active role in looking for a home. The Respondent pressed the Complainant on several occasions for specific criteria for the home to be purchased. Through correspondence between the Respondent and the Complainant, it became clear to the Respondent that the Complainant was intent on acquiring a townhouse (or free-standing house) in the Fleetwood area of Surrey, within walking distance of Walnut Road Elementary School. If it was a townhome, it should be an end unit, with at least 3 bedrooms "plus" an additional area that might be used as a bedroom/sleeping area. The price was not expressed as a firm amount, but clearly those within which had been recently listed in the $375,000 to $425,000 range were in an acceptable range. The Complainant advised the Respondent by e-mail on January 9, 2013 (Exhibit 2, Tab 3) that "they had consulted the bank and were told that there would not be a big problem for home of around $500,000."

[14] In the e-mail of January 9, 2013, the number of bedrooms is not specifically set out. In an e-mail the following day (January 10, 2013 Exhibit 2, Tab 5), the Respondent acknowledged that there were not any properties available on the market at that time, and she offered to set up automated e-mails for the Complainant, so that the Complainant would receive e-mail information as to listings fitting her criteria as soon as they were published.

[15] As more properties came on the market, the Respondent arranged for the Complainant to see a number of properties on Sunday, February 10, 2013 (Ex 2, Tab 9).

[16] None of the properties visited by the Complainant on that date were of interest to her, and her email to the Respondent of February 11 (Ex 2, Tab 11) sets out her reasons why she was not interested, including that one of them "is not an end unit. It is not private enough." In that same email, the Complainant refers to 4 units in Hazelwood Lane having been put on the market, and she says that "one of them is an end unit."

[17] The Complainant viewed two properties in the Hazelwood complex with the Respondent and made an offer to purchase Unit 60. Unit 60 was a 4-bedroom end unit, with all 4 bedrooms on one floor. There was a series of offers and counter-offers but, in the end, the Complainant was unsuccessful in her attempt to purchase Unit 60. Clearly, Unit 60 was attractive to the Complainant, and it was the evidence of both The Complainant and the Respondent that the Complainant would want to know if the successful offer on Unit 60 did not result in a completed sale. There was no evidence brought before this Committee as to whether or not Unit 60 was sold pursuant to that successful offer.

[18] On the evening of March 4, 2013, the Respondent forwarded to the Complainant an automated notification as set out in Exhibit 2, Tab 28. This notice states "the following new or updated properties match your search criteria." The address of the unit in question is given and describes it only as "4 bedrooms."

[19] The following morning, the Complainant and the Respondent visited two units in the Hazelwood development: Unit 134 and Unit 59.

[20] Unit 59 was 4 bedrooms, and it was an "inside" unit, rather than an "end" unit. The unit had been recently renovated and showed well. The Complainant's stated reason for wanting the end unit was because her daughter was learning to play piano and she did not want to disturb neighbours on both sides. In visiting Unit 59, however, the Complainant observed a piano and other musical instruments, and concluded that the anticipated sound issue was not a concern.

[21] Unit 134 was an end unit and had 3 bedrooms. One of the bedrooms had a large closet area, with a window, that the Complainant thought could be used as a sleeping area. Unit 134 had not been renovated.

[22] After viewing both units, the Complainant expressed to The Respondent her wish to put in an offer on both Unit 59 and Unit 134, presumably because either was acceptable and because she wanted to maximize her opportunity to acquire a home. The Respondent appropriately advised against making two offers and told The Complainant that she would have to choose which unit she wished to make an offer on. She chose Unit 59 for the offer and she instructed the Respondent to make the offer for $370,000. When she was advised by the Respondent that $370,000 was too low, she raised her offer, before being presented to the Seller, to $375,000. Once again, her offer (at $375,000) was unsuccessful, and she immediately instructed the Respondent to prepare an offer to purchase Unit 134.

[23] The offer of the Complainant to purchase Unit 134 was accepted, with conditions precedent (or "subject to's" as they are commonly called) on March 6, 2013 for the sum of $400,000. There were five "subject to's" all of which were to be satisfied on or before March 13, 2013. The condition most relevant to this proceeding is condition 2 as it appears in Ex 2, Tab 37:

> "2. Subject to the Buyer, on or before March 13, 2013, at the Buyer's expense, obtaining and approving an inspection report against any defect which reasonably may adversely affect the property's use or value. This condition is for the benefit of the Buyer."

[24] On Tuesday, March 12, 2013, the building inspection was scheduled for the mid-morning. The Complainant, Mr. Zhang and several of their friends and relatives were going to come to the inspection, so the Respondent (who was to let in the inspector) drove on her own. During the drive to the inspection, the Respondent received a telephone call from Mr. Steve Klassen, a realtor with Re/Max Treeland Realty, who was the listing agent of Unit 59, the unit which the Complainant had attempted to purchase immediately prior to making the offer on Unit 134. It was the Respondent's evidence that Mr. Klassen advised her that the prospective sale of Unit 59 had collapsed, and that he enquired as to whether or not the Complainant was still interested in acquiring Unit 59. the Respondent's evidence was that she told Mr. Klassen that the Complainant had

written a deal on another property and was then on her way to meet with the home inspector related to that other purchase.

[25] The Respondent did not advise the Complainant of Mr. Klassen's call, and it is the substance of the subject complaint whether or not the Respondent was under any obligation to pass on to the Complainant the information that she had received from Mr. Klassen.

[26] The home inspection of Unit 134 took place with a number of the Respondent's acquaintances in the home. Following the home inspection, there were discussions among the Complainant, Mr. Zhang, the inspector, and the Respondent. Quite probably other of the friends of the Complainant who were in attendance also took part in the discussion. The inspection had revealed certain issues regarding the condition of the Unit, including the fact that the boiler was nearing the end of its life expectancy. Roof replacement was going to be required imminently.

[27] The Complainant asked the Respondent to try to negotiate a reduction in the sale price before removing the "subject to inspection" clause. The Respondent successfully negotiated a $4,000 discount on the price, the Complainant removed the condition on the deal on March 13, 2013 and the purchase of Unit 134 by the Complainant was now a "solid" deal.

[28] On March 15, 2013, the Complainant learned, through an internet search of MLS Listings, that Unit 59 was back on the market, and that the listing was dated March 12, 2013, prior to the removal of the "subject to's" on Unit 134. When the Complainant learned this information, she became very unhappy with the Respondent. The Complainant's position was that she had wanted to buy Unit 59, in preference to Unit 134, and that had she, the Complainant, known that Unit 59 was back on the market, it was information that was relevant to her in deciding whether or not to remove the "subject to" clauses on Unit 134.

Findings on a failure to disclose

[29] The duties and obligations of a real estate agent to their client are prescribed by the RESA, the Real Estate Rules (the "Rules"), common law principles of agency and, where applicable, any contract for services entered into by the real estate agent and client. Rule 3-3 sets out licensees' responsibilities to clients, subject to being modified or made inapplicable by a written services agreement (Rule 3-3.1(1) and (2)). These duties include a requirement that licensees must "act in the best interests of the client" (Rule 3-3(a)) and a duty to "disclose to the client all known material information respecting the real estate services, and the real estate and the trade in real estate to which the services relate" (Rule 3-3(f)). Rule 3-4 also stipulates that, "When providing real estate services, a licensee must act honestly and with reasonable care and skill" (Rule 3-4).

[30] Rule 3-3(f) is consistent with the common law principles of agency. It is well established that agents have a common law duty to make full disclosure to their principal. This proposition was set out in *Ocean City Realty Ltd. v. A & M Holdings Ltd.,*

1987 CanLII 2872, 36 D.L.R. (4th) 94 (BC CA) (*"Ocean City"*), where the court held, "the obligation of the agent to make full disclosure… includes 'everything known to him respecting the subject-matter of the contract which would be likely to influence the conduct of his principal'…" (para. 20).

[31] Whether information is material is determined by an objective inquiry. The court in *Ocean City* (at para. 22) held: "the test is an objective one to be determined by what a reasonable man in the position of the agent would consider, in the circumstances, would be likely to influence the conduct of his principal."

[32] This Committee finds, then, that the Respondent was acting as the Complainant's buyer's agent for the purpose of finding a residence suitable to the Complainant. The Committee rejects the notion that there was a series of individual agency relationships, one for each property that the Complainant offered to purchase. This was not a series of individual agency relationships: there was only one continuing relationship.

[33] This Committee finds that the scope of the agency agreement between the Complainant and Mr. Zhang and the Respondent was to employ the services of the Respondent to assist them in acquiring a home in the Fleetwood area of Surrey, near Walnut Elementary School. The relationship was not created solely by the execution of the "Working with a Realtor" form, nor was it a new relationship entered into whenever an offer on a property was made, nor was it terminated by an unsuccessful offer. The Respondent confirmed her agreement to act as an agent of the Complainant and Mr. Zhang no later than February 13, 2013, and that relationship could have been terminated by either of the parties at any time thereafter. But it was not terminated and was in full force and effect at least until the purchase of Unit 134 was complete.

[34] The Respondent's counsel has urged this Committee to find that, even if this Committee construed the Respondent's role to be as broad as set out above, this Committee ought to find that the information was not material for several reasons.

[35] The Respondent submitted, first, that the Complainant was obligated, by a duty of good faith, to fulfill the condition precedent under the contract for Unit 134, and, therefore, had she not removed the condition relating to the inspection of Unit 134, she would have been in breach of her obligation under that agreement.

[36] The inspection report indicated deficiencies, however, and though their cost to deal with was relatively minor in relation to the sale price, they were such that both the seller and the Complainant perceived a risk that the deal would not go forward without a price reduction. The Complainant believed that she had the right to refuse to remove her condition, and the seller must have concurred with that conclusion or otherwise there was no reason for the seller to agree to a price reduction. Refusing to remove a condition where there is a basis in fact for not removing the condition is not an act of bad faith.

[37] Second, the Respondent did not think that Unit 59 was relevant, or it did not meet the criteria as stated by the Complainant. Most significantly, it was not an "end unit."

[38] Over the course of their dealings, the Complainant looked at a number of properties. Each property was unique and clearly the Complainant considered several factors more important than others. When the Complainant chose to put in an offer on Unit 59, in preference over Unit 134, she was clearly indicating to the Respondent that whatever variation Unit 59 has from any profile that the Respondent may have developed, having seen both Unit 134 and Unit 59, the Complainant preferred Unit 59. Whether it was the lower asking price for Unit 59, the state of decoration and renovation, or for any other reason, when faced with a choice between the two properties, Unit 59 was the Complainant's preference. As a real estate professional, the Respondent should have included that factor in any notional profile of the Complainant's list of criteria.

[39] Third, the Respondent stated in her evidence that the Complainant wanted Unit 134, and that Unit 59 was no longer relevant.

[40] Again, the Complainant did not say in her evidence that she did not like Unit 134. She simply said that she liked Unit 59 better. The Respondent was well aware of the Complainant`s preference as she wrote the unsuccessful offer on Unit 59, an offer that the Complainant increased prior to presentation.

[41] Fourth, the Respondent said in her evidence that there had been no opportunity to tell the Complainant about Unit 59 being back on the market.

[42] If the Respondent in fact believed that this information regarding Unit 59 was immaterial, then this explanation is of no assistance to her. Regardless, the Committee found that, in fact, there was more than sufficient opportunity for the Respondent to advise the Complainant of her telephone conversation with Mr. Klassen. The "awkwardness" that the Respondent referred to having been the result of the Complainant's allegedly snooping in a drawer would seem to be a deflection whereby the Complainant's behaviour is the reason for her not having been told of Unit 59. There was more than adequate opportunity to discuss a price reduction on Unit 134, and there was undoubtedly discussion of the options available to the Complainant at that point. To say that there was "no opportunity" to advise the Complainant of Mr. Klassen's call is simply not credible.

[43] Whether or not the Complainant had a right to refuse to remove the condition relating to the inspection, and whether or not she was legally bound to complete Unit 134, the fact is that the status of Unit 59 was relevant to the Complainant, and the Respondent knew, or ought to have known that to be the case. It is speculative what the Complainant would have done with the information had she been apprised of it in a timely manner. Whether she had the legal right to walk away from Unit 134, without consequence, or would have had to negotiate the terms of terminating that agreement are beyond the confines of this proceeding.

Findings on professional misconduct and/or conduct unbecoming

[44] The terms "professional misconduct" is defined under section 35 of the Act.

> **35** (1) A licensee commits professional misconduct if the licensee does one or more of the following:
>
> (a) contravenes this Act, the regulations or the rules;

[45] Under Rule 3-3(f), licensees must disclose "all known material information" regarding the real estate. The Respondent contravened this Rule by failing to disclose material information related to Unit 59. The Committee has concluded that a reasonable person in the position of the Respondent, knowing what the Respondent knew, would have considered the relisting of Unit 59 likely to influence the conduct of the Complainant. The information about Unit 59 was, objectively, "material" information for purposes of Rule 3-3(f). By extension, the Respondent's failure to disclose material information was not in the best interests of the client, contrary to Rule 3-3(a), and a failure to act with reasonable care and skill, contrary to Rule 3-4.

[46] The Respondent's conduct contravenes the Rules and amounts to professional misconduct within the meaning of the RESA.

CONCLUSION

[47] The Discipline Hearing Committee decided that the Respondent did commit professional misconduct within the meaning of section 35(1)(a) of the *Real Estate Services Act,* in that she

(a) failed to disclose to her client all material information with respect to the Property including the fact that she did not advise her client that an offer on this Property had collapsed until after her client had removed her conditions on another property, when she knew or ought to have known of her client's interest in the Property, contrary to sections 3-3(1)(a), 3-3(1)(f) and 3-4 of the Council Rules.

OUTSTANDING ISSUES

[48] The Committee will hear evidence and submissions from the parties concerning orders under section 43(2) of the Act, and expenses under section 44(1) of the Act, and any other actions available to the Committee, at a date, time and place to be set. Once the Committee has arrived at a decision on these issues, it will issue additional reasons that will form a part of this decision, make an order under section 43(2) of the Act, and make such other orders under the Act as the Committee may deem appropriate.

[49] Once the Committee has made orders under Part 4, Division 2 of the Act, the Respondent will have a right to appeal to the Financial Services Tribunal under section 54(1)(d) of the Act. The Respondent will have 30 days from the date of the penalty decision: *Financial Institutions Act*, R.S.B.C. 1996, ch. 141, section 242.1(7)(d) and *Administrative Tribunals Act*, S.B.C. 2004, section 24(1).

DATED at VANCOUVER, BRITISH COLUMBIA this 4th day of May, 2018.

Richard J . Swift, Q.C.
Discipline Hearing Committee Chair

Sukh Sidhu
Discipline Hearing Committee Member

John Daly
Discipline Hearing Committee Member

REBCBC File 12-388

LIST OF EXHIBITS

Exhibit 1	-	RECBC - Book of Documents
Exhibit 2	-	Respondent's Document Book for Hearing
Exhibit 3	-	Ponderosa Estates Strata Plan (16080 – 82nd Avenue, Surrey, B.C.)
Exhibit 4	-	Hazelwood Lane Strata Plan (16318 – 82nd Avenue, Surrey, B.C)
Exhibit 5	-	Map showing location of Walnut Road Elementary in relation to Ponderosa Estates and Hazelwood Lane.
Exhibit 6	-	E-mail from The Complainant to Ms. Deng dated February 8, 2013
Exhibit 7	-	Real Estate MLS Listings
Exhibit 8	-	E-mail from Ms. Deng dated Mach 19, 2013