

**EMPLOYMENT STANDARDS TRIBUNAL**  
In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act*

- by -

Butch Zaprawa  
("Zaprawa")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

<b>ADJUDICATOR:</b>	Barry Goff
<b>FILE NO:</b>	96/515
<b>DATE OF HEARING:</b>	January 9, 1997
<b>DATE OF DECISION:</b>	February 20, 1997

## DECISION

### APPEARANCES

Butch Zaprawa                      for himself  
Gillian Shipman                      for the Employer  
Julie Brassington                      for the Director

### OVERVIEW

This is an appeal by Butch Zaprawa ("Zaprawa") pursuant to Section 112 of the *Employment Standards Act* (the "Act") against Determination No. CDET 003708 which was issued by a delegate of the Director of Employment Standards (the "Director") on August 15, 1996. The Director determined that Parklane Ventures Ltd. ("Parklane") had not contravened Section 17(1) of the Act. Zaprawa appealed the Determination on September 5, 1996. Zaprawa argues that commissions are still owing by Parklane Ventures Ltd.

### ISSUE TO BE DECIDED

The issue to be decided is whether Zaprawa is entitled to commissions from Parklane.

### FACTS

- Zaprawa was employed as a sales representative for Parklane Ventures Ltd. from November 27, 1995 to February 15, 1996 on a commission basis. Zaprawa provided the following memo:

#### MEMO

TO:                      Gina  
FROM:                      Steve  
RE:                      Butch Zaprawa  
DATE: November 30, 1995

Butch Zaprawa's official start date is Monday, November 27, 1995. For the months of Dec. and Jan. "only" Butch Zaprawa will be guaranteed a minimum of \$2,500.00 as a training allowance. For the months of Dec. and Jan. this \$2,500.00 amount will be non-icpable [sic] [non-refundable] should there be no sales written and accepted during this time. However, please deduct \$2,500.00 from commission owed on the first two

sales (with subjects removed) written during the months of Dec. and Jan. only. The commission remaining on the first two sales made in Dec. and Jan. will be paid out as per the regular commission agreement. As of February 01, 1996 Butch will be paid as per normal commission agreement with a repayable draw of \$2,500.00 against commission, etc.

Thank you.

Steve

cc: Bob C. and Butch Z.

There is a further agreement signed by Zaprawa regarding termination.

#### TERMINATION

Upon termination of employment, for whatever reason, the leaving professional sales representative will be paid 75% of the commission for homes sold, to be paid only after mortgage approval, receipt by Parklane of the down payment as shown on the Offer to Purchase and occupancy of the home by the purchaser. The balance of commission will go to the professional sales representative designated by Parklane to service and complete the transaction.

- Zaprawa is not a licensed realtor. Zaprawa claimed commissions on sales of Lot No. 77 (Job 8977) and Lot No. 9 (Job 8909). The employer and complainant agree the commission is owed on Lot No. 77 but dispute the amount. The Employer contends no commission is owed on Lot 9.

Zaprawa contends he is entitled to 75% of the commission owing on Lot 9. Zaprawa argues that the \$2,500.00 advance for January should not be deducted from the commission on the sale of Lot 77. Zaprawa sold Lot 77 on January 17 with a closing date of January 25th. According to Zaprawa the purchaser could not attend on January 25 but provided a deposit cheque and signed the form for the subject removal on February 1st. The employer contends that the sale was made on January 25th as there was no requirement or request for an extension of the subject clause. Zaprawa contends that as the cheque was not received and the form confirming subject removal was not signed until February 1st, the sale could not be considered complete in January and therefore no commissions were earned in January.

Zaprawa negotiated an offer to purchase agreement subject to financing for Lot 9 on January 5, 1996. The potential purchaser did not arrange for financing prior to the close of this purchase agreement. Zaprawa and the purchaser signed an extension to the agreement until February 27, 1996. That document reads as follows:

**PARKLANE**

**CHANGE TO CONTRACT & EXTRAS**

Prepared by Butch Zaprawa

Please extend subject of financing to Feb 27/96 from contract dated 05 January/96.

Customer is still awaiting funds from overseas.

Zaprawa left the employ of Parklane on February 15, 1996. The purchasers for Lot 9 were again unable to secure financing and the contract for purchase of Lot 9 was cancelled on February 27, 1996, the date the extension expired. The same purchasers made another offer to purchase agreement on March 30, 1996 with another salesperson and signed another contract subject to financing. Zaprawa maintains that the termination provisions (supra) which provide an entitlement of 75% of commission applies in the instance of Lot 9. He argues that Parklane Ventures could have extended the offer to purchase again but chose instead to require cancellation of the purchase just to deny him a commission. Parklane submits that

"the subject to financing clause, relating to funds coming from Singapore, could not be removed because the funds had not arrived and there was no firm date for when the funds would be available. On the basis of a conditional sale, Parklane was not able to make the custom changes to the home that the purchasers had requested. It was for this reason that the purchasers decided to allow their conditional offer to lapse on the designated date of February 27, 1996. The cancellation is a standard document which allows Parklane to proceed with marketing of the home as necessary."

"Throughout the month of March there were many meetings and discussions with the purchasers trying to find a way to purchase the home and yet not put Parklane at risk of installing custom extras into a home which had only an unconditional sale in place. Through the efforts of Mr. Girard, a compromise arrangement was reached with respect to the inclusion of certain extras into a "builder's spec" home and a new offer was written on March 30, 1996. This situation was monitored continually as work progressed, to determine what changes might be incorporated into the home and at what stage. Funds finally arrived from Singapore and the subject clause removed on June 2, 1996."

## ANALYSIS

Zaprawa agreed on cross-examination that if the cheque had been provided on January 25th for Lot 77 in addition to the removal of the subject clause, that a commission would have been earned in the month of January and therefore the \$2,500.00 allowance for January would have been repayable in its entirety to Parklane. The only issue then is whether the sale was completed on January 25th or on February 1st when Zaprawa was provided with a cheque from the purchaser. This is a typical offer to purchase agreement where the prospective purchaser agrees to purchase a lot and/or home at a fixed price on a certain date subject to certain conditions. In this case the purchaser has agreed to purchase subject only to suitable financing on or before the date (January 25th) set out in the offer to purchase document. As noted in the Director's delegate's report, according to the Real Estate Board, unless extensions have been applied for and agreed to by both parties this is the closing date. The agreement between Zaprawa and Parklane regarding the training allowance is very clear. The \$2,500.00 for December and January is non-refundable to Parklane only in the event that "no sales are written and accepted during this time". The sale in January of Lot 77 demonstrates the standard procedure used to arrive at a contract. The prospective purchaser offered to buy at a given price on an agreed date subject to financing. The vendor (Parklane) agreed to the terms and conditions set out in the offer. The purchaser removed the only subject provision on the date agreed to, January 25th. It is at this point that the purchaser has offered terms without subject clauses which the vendor has agreed to and the parties have arrived at a contract. The sale is complete at this point and attracts the conditions of employment permitting the employer to deduct the training allowance for a January sale. Zaprawa is entitled to the full commission for this sale less the \$2,500.00 training allowance. I am satisfied in this case that the purchaser did remove the subject provision on or before January 25th because there is no extension document regarding Lot 77. The fact that the subject removal document and the additional downpayment cheque were not executed until February 1st does not extend the offer to purchase and acceptance until February 1. The sale closed on January 25th. The purchaser was simply not able to attend the Parklane office to conclude the paperwork.

The same analysis can be applied to the second issue regarding Lot 9. Zaprawa as the agent for the vendor, Parklane, received an offer to purchase for Lot 9 subject to financing. The subject condition, financing, was not removed from the offer by the agreed date and the parties entered into an extension of the offer to purchase until February 27th with a continuation of the subject to financing provision. Zaprawa left the employ of Parklane on February 15th. The documents provided on file and again at the hearing into this matter confirm that the subject to financing provisions were not removed on February 27th and the contract was not concluded. The documents provided clearly show that the contract was cancelled and a new contract was established on March 30th. Based on the same analysis as set out on the first case, a contract was not concluded for Lot 9 and therefore no commissions are owing to Zaprawa for the sale of Lot 9.

The potential sale that Zaprawa was engaged in on behalf of the vendor was cancelled some time after Zaprawa left the employ of Parklane. The sale was not concluded and therefore no commission is payable to Zaprawa under the terms of his agreement with Parklane.

I am sympathetic to the fact that Zaprawa expended considerable effort to establish the sale of Lot 9 in the beginning but receives no remuneration for that effort. I note that Parklane was and may still be prepared to offer some portion of the commission notwithstanding its position now confirmed here that it was not obliged to do so.

**ORDER**

I order pursuant to Section 115 of the Act that Determination No. CDET 003708 be confirmed.

---

**Barry Goff**  
**Adjudicator**  
**Employment Standards Tribunal**