

IN THE MATTER OF
THE REAL ESTATE AGENTS ACT
S.N.B. 2011, c. 215

- and -

IN THE MATTER OF
GERALD DAVID WEBSTER & UNITY REALTY INC.
(doing business as REALTY EXECUTIVES SAINT JOHN)

REASONS FOR DECISION AND ORDER*

ORDER OF THE DIRECTOR OF CONSUMER AFFAIRS

**Restriction on publication: Where necessary, this decision has been anonymized to comply with the Right to Information and Protection of Privacy Act, S.N.B. 2009, c R-10.6.*

Date of Order: 19 July 2016

To:

Gerald David Webster

c/o 33 Hanover Street
Saint John, New Brunswick
E2L 3G1

Unity Realty Inc.

d/b/a Realty Executives Saint John
33 Hanover Street
Saint John, New Brunswick
E2L 3G1

IN THE MATTER OF
THE REAL ESTATE AGENTS ACT

S.N.B. 2011, c. 215

- and -

IN THE MATTER OF
GERALD DAVID WEBSTER & UNITY REALTY INC.
(doing business as REALTY EXECUTIVES SAINT JOHN)

REASONS FOR DECISION

1. Background

- [1] On 18 December 2015, pursuant to an Investigation Order dated 17 December 2015, the Consumer Affairs Division of the Financial and Consumer Services Commission (“**FCNB**”) seized files for the purposes of an investigation into the affairs of Unity Realty Inc., doing business as Realty Executives Saint John (“**Unity**”), licence no. 114422, and its manager Gerald David Webster (“**Webster**”), licence no. 136396.
- [2] The Investigation Order was granted after having reviewed the report of a Trust Inspector for the New Brunswick Real Estate Association (the “**Inspector**”).
- [3] FCNB Staff (“**Staff**”) reviewed five (5) files seized from the offices of Unity. Staff found the following issues with these files that may have been in violation of the *Real Estate Agents Act*, (the “**Act**”). Specifically, Staff identified that:
- Some deposits were not deposited into the trust account in a timely manner and funds were withdrawn early;
 - There was often a lack of details on cheques and deposit slips, which make it difficult to trace transactions. In some instances, Staff were unable to determine to whom deposit refund cheques were issued;
 - A trust ledger or a trust journal was not maintained;
 - Staff saw no evidence of monthly reconciliations being done; and
 - These issues arose on files when Webster represented both seller and buyer.

[4] Of greatest concern was a deposit that was transferred from Unity's Trust Account to its General Account on 10 June 2015 in relation to a non-completed mixed commercial/residential transaction. I will refer to this as the "**ABC Property Transaction**".

1.1 ABC Property Transaction

[5] On 14 September 2014, Webster received a deposit in the amount of \$5,000 from AB, the intended purchaser, in relation to a mixed commercial/residential property transaction. Webster acted for both the intended vendor and the intended purchaser in this transaction.

[6] The initial intended closing date was 31 October 2014. This did not occur.

[7] An Amendment to the Purchase and Sale Agreement dated 9 April 2015 proposed that the closing date be amended to 29 April 2015. The copy of the Amendment in Webster's file contained only the signature of the intended purchaser, AB.

[8] The property transaction ran into a number of complications, mostly arising out of environmental assessments performed on the property.

[9] There was no documentation in Webster's file indicating that a new closing date was agreed to between the parties. There was also no documentation in Webster's file indicating that the transaction was ever completed.

[10] On 10 June 2015, Webster transferred, by cheque, the deposit funds of AB from Unity's Trust Account to its General Account.

[11] There were two invoices in Webster's file for this transaction. Each invoice had a different date, and each of those dates were after Webster had transferred the \$5,000 from Unity's Trust Account to its General Account.

[12] In each invoice, Webster indicated that the \$5,000 was still in Unity's Trust Account. It does not appear that either of the invoices was ever sent.

[13] In August 2015, AB contacted Webster requesting the return of his \$5,000 deposit funds. To date, these funds have never been returned to AB.

[14] When questioned about the transaction by the Inspector on November 30, 2015, Webster indicated that the intended vendor told Webster that he could keep the \$5,000 for "all of the work he had done." The Inspector advised Webster to return the deposit to the Agency trust account immediately.

- [15] Webster did not comply with this direction.
- [16] The Inspector, in his report, also noted that Unity's General Account may have been in overdraft at the time these funds were transferred from the Trust Account.
- [17] AB subsequently filed a complaint with both the New Brunswick Real Estate Association and with FCNB in regard to this deposit.

1.2 Meeting with FCNB Staff

- [18] On 28 April 2016, Webster met with Compliance and Enforcement Staff of FCNB pursuant to this investigation.
- [19] When questioned about the transfer of AB's deposit from Unity's Trust Account to its General Account, Webster stated that the intended vendor had obtained approval from the Minister of Environment and Local Government regarding the environmental assessment conducted on the property. Consequently, in Webster's view, the intended vendor had met all of the outstanding conditions in the Agreement of Purchase and Sale.
- [20] Further, Webster indicated that it was his belief that, where an intended purchaser does not complete a transaction after all of the intended purchaser's conditions having been met, the deposit, in such a case, belonged to the vendor and not to the purchaser.
- [21] However, nothing in Webster's file confirmed that:
- the agreement to extend the closing date had been signed by both parties;
 - the environmental condition had been satisfied at the time Webster withdrew the funds from Unity's Trust Account;
 - the transaction had closed at the time Webster withdrew the funds from Unity's Trust Account;
 - the seller had agreed to forfeit the deposit; or
 - the transaction had closed at all.

- [22] Furthermore, AB had already contacted Webster requesting the return of his deposit, indicating, at the very least, that the status of the deposit was in dispute.
- [23] Subsequent to the meeting with FCNB Staff, on 6 May 2016, Webster was directed in writing to pay the \$5,000 deposit into Court on an interpleader application, pursuant to subsection 21(2) of the *Act*.
- [24] Webster was further directed to provide proof of the deposit into Court to Staff by 27 May 2016.
- [25] Webster did not provide this proof to Staff.

1.3 Opportunity To Be Heard Meeting

- [26] On 6 June 2016, Webster was directed to attend a meeting scheduled for 23 June 2016. Webster was advised that the purpose of this meeting was to provide Webster with an opportunity to be heard with respect to his non-compliance with the direction contained in the 6 May 2016 letter, and to determine whether his continued licensure was in the public interest, pursuant to subsection 10(2) of the *Act*.
- [27] On 7 June 2016, Webster contacted both Staff and the NBREA indicating that he had received the 6 June 2016 letter from the Director of Consumer Affairs. He further indicated that he had deposited the \$5,000 back into his Trust Account and provided a copy of an online deposit made on 26 May 2016.
- [28] Additionally, Webster indicated that he had contacted the Court, but that the Court “directed [him] to leave it in [Unity’s] trust account” until further directions were provided.
- [29] Staff requested that Webster provide confirmation of this direction from the Court as well as copies of all relevant court applications.
- [30] Webster did not provide any such confirmation.
- [31] On 23 June 2016, a meeting was held at the Saint John offices of FCNB. Neither Webster nor any representative of Unity attended the meeting.
- [32] On 30 June 2016, Webster was informed in writing that, following the opportunity to be heard on 23 June 2016, his manager’s licence was suspended, as was the agent’s licence of Unity.

[33] Webster was given until 8 July 2016 to comply with the 9 May 2016 direction and provide confirmation of proof of deposit into Court of the disputed deposit. Webster was informed that failure to comply with this direction would result in the cancellation of his manager's licence.

[34] Neither Webster nor any representative of Unity complied with this direction.

2. Analysis and Decision

[35] Section 10(2) of the *Act* reads as follows:

10(2) The Director may suspend or cancel a licence if he or she is of the opinion it is in the public interest to do so.

[36] In determining whether suspending or canceling a licence is in the public interest, a review of the requirements of the *Act* and the alleged breaches is appropriate.

[37] Section 18 of the *Act* requires that an agent maintain an interest-bearing trust account for deposits.

[38] Sections 20 of the *Act*, addressing payments made into and out of the trust account, reads as follows:

20 No money shall be drawn from a trust account except in accordance with the terms on which it was received

[39] Section 21 of the *Act* designates the Agent as trustee of the deposit, held on behalf of both parties to a transaction:

21(1) Subject to subsection (3), an agent who receives a deposit on a trade in real estate shall hold it as trustee on behalf of all the parties to the trade in accordance with their respective rights under the offer or contract and not as agent for any one of them, and the agent shall have the responsibility to pay or account for it to the proper party.

[40] Based upon the information gathered by Staff in their investigation, and based upon the information provided by Webster, I conclude that Webster violated section 20 of the *Act*.

[41] Nothing in Webster's file indicated that the ABC Property Transaction had closed. Nothing in Webster's file indicated the intended purchaser had forfeited his right to a refund of his deposit. On the contrary, the intended purchaser requested a return of his deposit.

- [42] I am particularly concerned with the Inspector's finding that Unity's General Account may have been in overdraft at the time these funds were transferred from the Trust Account.
- [43] As is clear from the wording of subsection 21(1) of the *Act*, Unity held AB's deposit monies as a trustee on behalf of all of the parties to the trade, and not as an agent for any one of them.
- [44] By appropriating the deposit – ostensibly at the behest of one of the parties, although there was no evidence in the file confirming this claim – neither Unity nor Webster met their fiduciary duty as trustee.
- [45] To date, the deposit has still not been returned to AB.

3. Order

- [46] The licence of Gerald David Webster as manager of Unity Realty Inc., carrying on business as Realty Executives Saint John, licence no. 136396, is hereby cancelled pursuant to subsection 10(3) of the *Real Estate Agents Act*.
- [47] The licence of Unity Realty Inc., licence no. 114422, is also cancelled pursuant to subsection 10(2) of the *Act*.
- [48] Pursuant to subsection 10(5) of the *Act*, neither Gerald David Webster nor Unity Realty Inc. is entitled to apply for a new licence under the *Real Estate Agents Act* for a period of one year from the date of this decision.
- [49] Pursuant to subsection 10(7) of the *Act*, Gerald David Webster and Unity Realty Inc. are to return their cancelled licences without delay to the Director of Consumer Affairs.

Dated this 19th day of July 2016.

Original decision signed by Suzanne Bonnell-Burley, Q.C.

Suzanne Bonnell-Burley, Q.C.
Director of Consumer Affairs
Financial and Consumer Services Commission
Suite 200, 225 King Street
Fredericton, New Brunswick E3B 1E1
Tel: 866-933-2222

Fax: 506-658-3059