

2016-003

DECISION OF THE DISCIPLINE COMMITTEE
WITH RESPECT TO FINDING OF FACT

In the matter of a Discipline Committee Hearing held pursuant to Section 23(1) of *The Act to Incorporate the New Brunswick Real Estate Association* (the "Act"):

BETWEEN

The New Brunswick Real Estate Association (the "Association")

- and -

Gerald Webster

Date of Hearing: June 8, 2016

Place of Hearing: NBREA Boardroom, 22 Durelle St., Fredericton, NB

Members of Committee: Alan VanWart, Chair
Jacques Piche
Mona Payne
Joan Hayes
Edouard Allain, Government Appointee

Appearances: John Townsend, QC, Counsel for the Association
Gerald Webster, Respondent

UPON the following charges, as directly quoted from the Notice of Hearing ("you" refers to Respondent), submitted by John Townsend, Prosecutor appointed by the Association:

1. While acting in a Limited Dual Agency capacity you accepted a deposit cheque (the "deposit") in the amount of \$5,000 from [REDACTED] ("AB") in connection with the purchase of a business (gas station) located at 762 Route 880, Lower Millstream, NB known as PID 00119339 and deposited it to bank account number 2153 1998-255 maintained at the Bank of Montreal, McAllister and Westmorland Branch, Saint John, New Brunswick (the "Trust Account") on September 14, 2014.

2. The Agreement of Purchase and Sale entered into by AB provided for a closing date of October 31, 2014, and that an environmental assessment, satisfactory to the buyer must be provided by September 26, 2014.
3. You informed AB that this closing date and date for the completion of the environmental assessment were to be extended to be April 29, 2015 and April 24, 2015, respectively, and AB signed an agreement to such effect dated April 9, 2015.
4. Ultimately the seller could not provide a satisfactory environmental assessment and AB requested the return of the deposit.
5. By email dated December 7, 2015, you informed AB that the seller would not consent to the return of the deposit and you would be referring the matter to the "the law court" to "sort it out".
6. By trust account audit conducted on November 30, 2015, by E F , Trust Inspector for the New Brunswick Real Estate Association, he determined that on June 10, 2015, you transferred the deposit from the trust account to your general account.
7. As a result you:
 - i. Misappropriated the deposit and breached the provisions of section 20 of the *Real Estate Agents Act*, Chap 215, S.N.B, 2011; and
 - ii. Misled your client as to the status of the trust deposit and failed to protect his interests in violation of Article 3 of the Realtor® Code (Primary Duty to Client) all in accordance with the complaint of AB dated January 21, 2016.

All as set out in the Complaint, thereby committing acts of professional misconduct, in violation of the said Articles of the REALTOR® Code (effective December, 2011), and punishable under subsections 23(4) and 23(5) of the *Act*.

Mr. Townsend presented on behalf of the Prosecution.

Mr. Webster self-represented.

Both Parties acknowledged the composition and jurisdiction of the Committee to hear and determine the complaint.

The Chair explained the distinction between a single hearing and a dual hearing format and stated the intention of the Committee to conduct the hearing in the single hearing format. Mr. Townsend objected to the single hearing format and requested a dual hearing. The Chair confirmed that the Committee would first make a determination of the evidence on the merits and, if necessary, would conduct a second hearing to determine penalty at a later date.

The Committee accepted the following documentary evidence:

- Exhibit 1 –Notice of Hearing
- Exhibit 2 -Book of Relevant Documents

In addition to the documentary evidence noted above, the committee heard witness testimony from:

- AB, Complainant
- CD, Complainant's brother
- EF, NBREA Trust Account Inspector
- Respondent Gerald Webster

All witnesses, with the exception of the Respondent, were sequestered until they were called to testify.

Summary of Witness Testimony:

AB was the first to testify. He stated he came to Canada in 2013 and was introduced to Mr. Webster by his brother (CD), who had been in Canada for a while and was more familiar with the Canadian real estate process. AB said on September 14, 2014, he submitted an offer to purchase a property near Sussex (Millstream Service Centre) which included a gas bar, convenience store and residential buildings comprised of a 'trailer home' and an apartment building. Mr. Webster acted as dual agent in the transaction. The offer included a \$5000 deposit.

AB stated the offer was subject to a satisfactory environmental assessment (Clause 8 of the Agreement to Purchase and Sale) to be completed by September 26, 2014. The closing date was set at October 31, 2014, however the deal did not close due to delays in completing the environmental assessment. An environmental assessment was done by Fundy Engineering (December 2014). An amendment to change the closing date to April 29, 2015 was executed April 9, 2015. No other amendments were executed.

AB stated the environmental assessment concluded that the property should be restricted to commercial use only and that further investigation was required to fully determine the state of the property, especially the water source. He felt the property did not satisfy his intended use (which included residential) without further funds being spent to assess and/or remediate. He communicated these concerns to Mr. Webster. Through Mr. Webster, he learned that vendor did not want to pay for further assessment or potential remediation. AB wanted a clear property, without having to pay more money and decided to withdraw his offer to purchase. AB decided the environmental assessment was unsatisfactory. With his withdrawal, he requested a return of the \$5000 deposit.

Subsequent communications, mostly via email, occurred between AB and Mr. Webster. AB testified that Mr. Webster said he needed permission of the owners to

return the deposit. After much delay, Mr. Webster stated that the deposit would be paid to the courts to determine ownership of the deposit (December 7, 2015). AB stated he requested, via emails to Mr. Webster throughout January 2016, that the deposit be forwarded to the court as Mr. Webster had previously indicated. The deposit was never paid into court, nor was it returned to the Complainant. AB registered a complaint with NBREA against Mr. Webster on January 21, 2016.

AB testified, on May 24, 2016, his brother, CD noticed that Mr. Webster was at his office and went to see him about the deposit. Mr. Webster indicated to CD that if AB dropped the complaint, Mr. Webster would pay the \$5000 out of his own pocket. In CD's presence Mr. Webster phoned NBREA to inquire if the complaint could be dropped if the issue was resolved between he and the Complainant. AB stated he never personally discussed dropping the complaint with Mr. Webster.

During his cross-examination, Mr. Webster questioned AB about the results of the Fundy Engineering report and communication from the Department of Environment, Province of New Brunswick, specifically where each indicated that the property was contaminated. Mr. Webster stated the property passed the environmental assessment for commercial use.

Mr. Webster said he tried to send the deposit to the court but was told to keep the money in his trust account.

In his re-examination of the witness, Mr. Townsend noted Clause 8 stated the environmental assessment results had to be "satisfactory to the buyer".

CD was next to testify. His testimony concurred with his brother regarding the circumstance of finding and making an offer on the property in question. He stated the environmental assessment completed by Fundy Engineering uncovered a previous report from 2006, in which problems with the property were identified.

When the (AB & CD) showed Mr. Webster this report, Mr. Webster indicated he was not previously aware of it. Mr. Webster told them that, while the letter from the Department of the Environment stated the property could be used for commercial purposes only and not for residential without investigation and potential remedies, that assessment was just a 'formality' and they could stay on the property as the current owners had been living there for a number of years. Both AB & CD decided that they did not want to put any more money into assessing the property and they knew they would be liable to remedy any problems if they went through with the purchase. Furthermore, Ultramar, with whom they had negotiated a gas supply deal, withdrew their interest due to environmental problems with the property.

CD's testimony concurred with his brother's description of the day he visited Mr. Webster when he was asked to drop the complaint in exchange for payment of the deposit. CD responded to Mr. Webster that he would discuss the issue with his brother. He stated up until this day, Mr. Webster said on a number of occasions that he needed the owner's permission to return the deposit and, later, that he was putting the money into court.

Mr. Webster cross examined the witness. He asked about the Complainant's dealings with the BDC bank which had initially agreed to provide funding. CD stated that, upon receipt of the environmental assessment, and their subsequent decision not to proceed with the sale, he and his brother requested a refund of money they had deposited with the bank as part of a funding arrangement. At first the bank refused to provide the refund, but after contacting the Ombudsman, the (AB & CD)'s money was refunded. CD noted they dealt with that bank upon the recommendation of Mr. Webster.

EF, NBREA Trust Account Investigator was the third witness to testify. Mr. Townsend referred EF to his trust account audit report contained in the Book of Relevant Documents (Exhibit 2). EF stated the report resulted from a follow up audit he performed on the trust account activity of Mr. Webster's company, Realty Executives Saint John (Unity Realty). EF noted a \$5000 deposit was paid by AB in reference to the Millstream Service Centre and deposited in the trust account on September 30, 2014. On June 10, 2015, a cheque for \$5000 from the trust account was written to Unity Realty Inc. (notation Millstream). EF said he noted from the bank record that the general account was low on funds at this time and had other pending transactions which may not have been covered without the influx of funds.

As part of the audit, EF had a discussion with Mr. Webster regarding movement of the \$5000. He stated Mr. Webster advised him that the deal had fallen through and that the Sellers told him the deposit should be forfeited by the Buyer, but he (Mr. Webster) should take the funds for all the work he had done.

Mr. Townsend referred EF to an invoice, on Realty Executives letterhead, to a Mr. [REDACTED] (lawyer), regarding the commission to be paid on the Millstream Service Centre Ltd. sale, dated July 23, 2016. EF stated he found the invoice in the transaction file and noted the invoice indicated the \$5000 was "Deposit in Trust" to be deducted from the total amount of commission owed but a review of supplied bank records indicated the \$5000 was already withdrawn from the trust account.

EF stated the transaction file contained emails from AB requesting refund of the deposit, evidence that the deposit was in dispute. EF said he advised Mr. Webster to return the \$5000 to the trust account immediately, regardless of its disputed status.

Mr. Webster had no questions for EF.

Gerry Webster took the stand to testify in his defense. Mr. Webster stated he spent hundreds of hours helping the (AB & CD) to obtain property and that he gave them quotes from three different environmental companies. Mr. Webster affirmed, prior to the Fundy Environmental report, he was not aware of the 2006 environmental report which had previously identified problems on the property. He stated the property was occupied for the past 40 years. A recent spill from a school bus resulted in the Seller having to remediate the site at an expense of over \$50,000 and this is why the Seller did not want to spend any more money.

Mr. Webster stated the environmental assessment condition (Clause 8 of the Agreement to Purchase and Sale) had a deadline of September 26, 2014. The deal did not close by October 31, 2014 and an amendment with an extension was not executed until April 9, 2015. The Buyers refused to close as they said they were dissatisfied with the environmental assessment. Mr. Townsend noted there was no signature of the Seller on the amendment and he asked Mr. Webster if the complete signed amendment was on file. Mr. Webster replied that he did not know. Mr. Webster admitted he wrote a cheque from the trust account to the general account which probably should have been written directly to the Vendor. He said he knew the Buyer was requesting the money back and therefore the deposit was in dispute. Mr. Webster stated he informed the Vendor of the \$5000 payment to Unity Realty but does not think he told the Buyer.

Mr. Webster stated he put funds (\$5000) into the trust account May, 2016, as requested by the Financial and Consumer Services Commission.

Submissions:

Mr. Townsend summarized the facts of this case as follows:

- 1) Clause 8 of the Purchase and Sale clearly required an environmental assessment satisfactory to the Buyer. The Buyer was not satisfied with the environmental status of the property and did not want to complete the transaction. He requested return of his \$5000 deposit.
- 2) It was not the Seller's right to tell Mr. Webster he could take the \$5000 deposit. At the very least, the Real Estate Agents Act clearly defines how a dispute over ownership of a deposit is handled.
- 3) The \$5000 deposit in the trust account was not Mr. Webster's money. There was no evidence there was a valid reason to transfer this money to the general account.

Mr. Townsend stated Mr. Webster's actions constitute a misappropriation of funds and a breach of trust. As a dual agent, Mr. Webster owed fiduciary duty to both parties. He did not represent the interests of the buyer; he was deceptive in that he never told the buyer he had paid the \$5000 to himself and he lied to the buyer regarding his intent to pay the deposit in to court, even after he already took the money.

Mr. Townsend said there was more than sufficient evidence to sustain the two charges contained in the Notice of Hearing items 7 (i) & 7 (ii). He submitted Mr. Webster was looking out for himself as demonstrated by his attempts to have the complaint withdrawn prior to this hearing. Mr. Townsend noted the Complaint and Discipline Procedures Manual does not contain provisions to allow the withdrawal of a complaint and, furthermore, NBREA's obligation as a regulator is to pursue a complaint to protect the public. This ensures that a Complainant cannot be bought to eliminate a professional misconduct issue.

Mr. Webster submitted that the Buyers executed an extension to the contract therefore the condition that the environmental assessment had to be to their satisfaction was not relative. The property was found acceptable according to the environmental assessment report. He questioned who the deposit money belonged to when the buyers failed to complete the contract.

Findings:

After considering all of the evidence and the submissions of the parties, the Committee determines that Gerald Webster is guilty of the charges contained in the Notice of Hearing, which constitute professional misconduct.

The Committee accepts the testimony of witnesses as evidence that Mr. Webster misappropriated the deposit and breached the provisions of section 20 of the *Real Estate Agents Act*, Chap 215, S.N.B, 2011. The Committee accepted testimony that Mr. Webster misled his client, AB, as to the status of the trust deposit and failed to protect his interests in violation of Article 3 of the Realtor® Code (Primary Duty to Client).

In accordance with s. 25(1) of *the Act*, Mr. Webster may appeal this decision within thirty (30) days from the date of the decision.

DATED this 21st day of June, 2016.



Alan VanWart, Chair, on behalf of the Committee