

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

- and -

IN THE MATTER OF
K. WALTER MOORE and TOWN & COUNTRY MARKET REALTY LTD.

REASONS FOR DECISION AND ORDER*

ORDER OF THE DIRECTOR OF CONSUMER AFFAIRS

**Restriction on publication: 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: 11 January 2015

To:

K. Walter Moore
434 Westmill Settlement Road
Hoyt, New Brunswick
E5L 2J3

Town & Country Market Realty Ltd.
1072 Onondaga Street
Oromocto, New Brunswick
E2V 1B8

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

IN THE MATTER OF
K. WALTER MOORE and TOWN & COUNTRY MARKET REALTY LTD.

REASONS FOR DECISION

1. Background

- [1] On 31 March 2015, pursuant to an Investigation Order dated 27 March 2015, the Consumer Affairs Division of the Financial and Consumer Services Commission ("**FCNB**") performed a trust account inspection on Town & Country Market Realty Ltd. ("**TCMR**"), licence no. 114294, and its manager K. Walter Moore ("**Moore**"), licence no. 136184.
- [2] FCNB Staff ("**Staff**") reviewed all trust account and general account statements, deposit books, cheque stubs and sales and listing files for the period of 01 January 2013 to 27 February 2015. They also requested the 2013 and 2014 financial statements.
- [3] Moore did not want to provide the requested documents until he spoke with his lawyer and the Director of Consumer Affairs. He also stated that Staff did not have the right to inspect his operating account because he processes personal transactions through his operating account.
- [4] Moore further indicated that all of the 2013 and 2014 documents were not located on the premises, but were with his accountant and at his personal residence. Nonetheless, as the 2015 sales files and trust account documents were on site, Moore agreed to make these documents available; however, before providing the sales files to Staff, Moore inspected the contents of each file and he removed documents from some of them.
- [5] Staff were unable to inspect or confirm the contents of the removed documents.
- [6] On 01 April 2015 and 02 April 2015, Moore provided the remaining requested documents. However, given the delay in receiving the documents and the

fact that Moore removed documents from the 2015 files, there is a risk that Staff was not permitted access to all of the required documents.

[7] During the preliminary review, Staff identified several issues with deposits and withdrawals that may have been in violation of the *Real Estate Agents Act* (the “**Act**”). Primarily, Staff identified that:

- several deposits were received for the sale of properties where TCMR represented both the seller and the buyer, and these were placed directly into the operating account of TCMR upon receipt and not into the trust account;
- there were some minor delays in placing deposit funds into the trust account;
- in some of the sales record sheets, the closing date was scratched out and a new date was penciled in without the required initials from all parties, and the new date could not be supported by other documents on file;
- there was a pattern of funds being withdrawn from the trust account before the closing date of the sale; and
- TCMR operating expenses were paid with cheques from the trust account, which resulted in the trust account being temporarily overdrawn and NSF charges occurring in the trust account.

[8] Additionally, in reviewing both TCMR’s 2013 and 2014 financial statements and the operating account, Staff had concerns over the financial position of TCMR and believed that there was a risk to the trust account. Based upon Staff’s inspection, TCMR appeared to be experiencing cash flow issues, as the operating account was often in overdraft or there was a small amount of funds in the account, and trust funds were being used for business operations.

[9] On 24 July 2015, after the completion of a preliminary review of the books and records inspected, the Director of Consumer Affairs requested further information from Moore.

[10] On 07 August 2015, Moore provided additional information to the Director.

[11] This information was reviewed by Staff. Staff advised the Director that further information was required from Moore in order to complete their inspection.

[12] On 09 September 2015, the Director requested additional further information from Moore.

[13] Moore provided this additional further information on 18 September 2015.

[14] On 28 September 2015 Staff completed their inspection report on the trust account for TCMR and Moore.

2. Findings of the Inspection

[15] In their report, Staff identified deposit discrepancies of significance when TCMR represented both the seller and the purchaser. In 2014, four sales resulted in the deposits being placed directly in TCMR's operating account prior to the closing date.

Property No. 1

[16] On 06 October 2014, \$4,000 was received as a deposit for the purchase and sale of Property No. 1 and deposited into the operating account on 07 October 2014. The operating account deposit book indicated funds were "*commission for sale on [Property No. 1].*"

[17] The Purchase and Sale Agreement indicated that the closing date was 14 November 2014. Staff concluded that these funds should have been placed in the TCMR trust account.

Property No. 2

[18] On 09 December 2014, a deposit of \$5,000 was received with an additional \$5,000 to be received when all conditions pursuant to the Purchase and Sale Agreement were met. The Agreement indicated that the closing date was 05 March 2015. It was not indicated in the client file if the funds received were by cheque or cash.

[19] Funds of \$5,000 were deposited into the TCMR operating account on 09 December 2014, indicating "*cash from K Walter Moore*". Staff noted that the file included a letter from the lawyer for the vendor dated 06 March 2015 remitting to TCMR the remaining commission due on the sale of the property (\$3,842.50). The amount remitted indicates that \$10,000 was previously received as a deposit, as the total commission due (pursuant to the commission report) was \$13,842.50. There was no sales record sheet included in the file for this transaction.

Property No. 3

[20] On 04 September 2014, \$10,000 was received as a deposit and deposited into the operating account on 05 September 2014. The deposit book indicated funds were "*commission for [Property No. 3].*"

[21] The Purchase and Sale Agreement indicated that the closing date for Property No. 3 was 28 November 2014. Included in the file was a letter from a lawyer on 01 December 2014, stating the excess commission of \$2,937.50 shall be payable to the estate of AB. Staff traced this amount to the operating account and noted \$2,937.50 was withdrawn on 02 December 2014.

Property No. 4

[22] On 03 October 2014, \$1,000 was received as a deposit to be held in trust and, according to the Purchase and Sale Agreement, the deposit was to be increased to \$7,500. The Agreement further indicated that the closing date was 28 November 2014.

[23] The \$1,000 deposit was directly placed in the operating account on 07 October 2014, while the remaining \$6,500 was deposited directly into the operating account on 09 October 2014. There was no information included in the file indicating that the closing date was prior to 28 November 2014.

Funds withdrawn from Trust

[24] For the purposes of their inspection, Staff reviewed 17 files of TCMR and Moore. Of the sample of withdrawals that were tested, in 59% of the cases (or 10 out of 17 transactions), funds were withdrawn from trust prior to the closing date and placed in TCMR's operating account.

[25] Additionally, Staff identified that the TCMR operating account was often in overdraft or had little cash on hand when Staff identified the transactions. Staff concluded that funds were withdrawn from trust ahead of the closing dates in order to fund the operations of TCMR.

[26] Staff identified several discrepancies to support their assertion that funds were withdrawn inappropriately. For instance:

- Sales records sheets had the original closing date crossed out and replaced with the date the funds were withdrawn from the trust account and the changes made were not initialed by all parties to the transaction;
- Funds were withdrawn from the trust account prior to the closing date indicated on the signed and accepted Purchase and Sale Agreement;
- Funds were withdrawn from the trust account prior to the closing date in transactions where other evidence on file suggested the transaction had not yet been closed. Such other evidence included items such as closing inspection documents, letters indicating the approved financing of buyers, as well as commission and sales reports; and
- Funds were withdrawn from the trust account prior to the commission earned being received from the lawyers for the buyer and prior to remitting commission owed to third party salespersons of the buyer.

[27] Additionally, during the inspection of the trust account bank statement for September 2014, Staff identified possible evidence of misappropriation of

trust funds, as Moore wrote a number of cheques from the TCMR trust account to pay for operating and personal expenses. The total of the cheques written was \$1,934.93, while \$1,600 was subsequently credited back to the account as NSF. The cheques written were to cover expenses for:

- a Bell Aliant bill;
- a NB Power bill;
- the personal MasterCard of Moore; and
- a loan directly to Moore.

[28] An amount of \$1,600 was credited back to the trust account as NSF, and an NSF fee was also charged against the trust account. TCMR did not appropriately maintain a monthly Trust account ledger and, as a result, the actual shortage of funds in trust could only be estimated by Staff.

[29] Based on the transactions reviewed, Staff concluded that the trust account was in arrears by \$380.78 as at 30 September 2014 and by \$470.78 as at 31 December 2014.

[30] Staff further inquired of Moore to provide explanations relating to funds being withdrawn from the trust account prematurely for five transactions. These transactions related to files where the closing date was crossed out and changed to match the date the funds were withdrawn. There was no evidence in the sales files to corroborate this new closing date.

[31] Moore subsequently indicated that a former employee was responsible for all the paperwork and accounting for TCMR transactions and he would need to reach out to the employee to provide an explanation. However, Staff identified that in all of these cases, Moore's signature was on the cheque authorizing the withdrawal of funds.

[32] Staff further inquired of Moore as to why funds used to cover the operating expenses of TCMR and Moore were paid from the trust account, and requested that he provide evidence that these funds were subsequently deposited back into the trust account.

[33] Moore informed Staff that this was simply a mistake of using the wrong cheque book and later provided evidence to show that the funds withdrawn from the trust account for personal operating expenses were repaid.

[34] However, when Staff reviewed the evidence provided by Moore, Staff concluded it did not corroborate his assertions.

[35] Rather, the funds that Moore indicated were used to repay expenses appeared to have been funds received and deposited in trust from a sales transaction. As a result, Staff have no evidence to suggest that Moore ever repaid the funds that were inappropriately withdrawn from the trust account to pay for operating expenses.

[36] Staff concluded that Moore may have violated subsections 19(1) & 19(2), section 20 and subsection 23(1) of the Act. They further concluded that Moore was a significant risk to the real estate industry and recommended evaluation of his real estate manager's licence by the Director of Consumer Affairs. Consequently, they also recommend evaluation of the real estate agent's licence of TCMR.

3. Opportunity To Be Heard Meeting

[37] On 03 November 2015, the Director of Consumer Affairs requested a meeting with Moore pursuant to subsection 10(2) of the Act. The meeting was scheduled for 17 November 2015. Moore was personally served with this request on 06 November 2015.

[38] On 12 November 2015, legal counsel for Moore contacted the Director of Consumer Affairs and advised that he would be seeking an adjournment of the 17 November 2015 meeting in order to review the materials at issue and to prepare for the meeting. This adjournment was granted.

[39] On 04 December 2015, legal counsel for Moore indicated he would attend at the FCNB office in Fredericton on 08 December 2015 to review the records, documents and files at issue. FCNB Staff also prepared a letter for Moore's legal counsel which summarized the concerns which were raised in the inspection report. Legal counsel for Moore did not attend on that date, although he selected an alternative date after discussion with Staff. Legal counsel for Moore did not attend the FCNB office on that date either.

[40] On 11 December 2015, the Director of Consumer Affairs received an e-mail from the Registrar of the New Brunswick Real Estate Association ("**NBREA**") enclosing a letter, signed by Moore, and addressed to the Fredericton Real Estate Board, the New Brunswick Real Estate Association and the Canadian Real Estate Association, which read:

To Whom it may concern,

Please be advised that effective immediately, I, K. Walter Moore, with Town and Country Market Realty Ltd., will no longer be a member of these associations.

Dated this 11th day of December, 2015.

Regards,

K. Walter Moore

[41] On 15 December 2015, the Director of Consumer Affairs sent another letter to Moore and to his legal counsel requesting a meeting with Moore pursuant to subsection 10(2) of the Act. The meeting was scheduled for 22 December 2015.

[42] On 18 December 2015, Staff received a letter from legal counsel for Moore in response to the 15 December 2015 request. In the response, legal counsel for Moore indicated:

- He was advised that Moore had retired as a realtor effective 11 December 2015;
- Moore has resigned as a member of the New Brunswick Real Estate Association, the Fredericton Real Estate Board and the Canadian Real Estate Association; and
- As a result of Moore no longer being a member of these associations, neither he nor Moore would be in attendance at the meeting scheduled for 22 December 2015.

[43] The meeting proceeded on 22 December 2015. At the meeting, legal counsel in the Enforcement Division and Compliance Staff of the Consumer Affairs Division presented their findings.

[44] Neither Moore nor any representative of TCMR attended the meeting.

4. Analysis and Decision

[45] 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.

[46] 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.

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

[48] The relevant portions of sections 19 and 20 of the Act, addressing payments made into and out of the trust account, are as follows:

19(1) Subject to subsection (2), an agent shall pay without delay into the agent's trust account all money received in connection with a trade other than money which belongs to the agent.

19(2) When an agent receives a cheque as a deposit with an offer, the agent shall not be required to place the cheque into the agent's trust account before the offer is accepted, but the agent shall place the cheque into the agent's trust account without delay on the acceptance of the offer.

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

[49] 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.

[...]

21(3) Despite subsection (1), an agent may receive a deposit as agent for one party to a trade in real estate if the offer or contract under which the deposit is received so provides and every other party acknowledges this provision in writing, either in a separate document or in a separate part of the offer or contract.

[50] Section 23 of the Act requires that an Agent maintain proper books and records at the Agent's office:

23(1) An agent shall keep at the agent's office, or at any other place authorized by the Director in writing, the books, records and accounts in connection with the agent's business that may be necessary to show and readily distinguish

(a) *all money received from or on behalf of and all money paid to or on behalf of others, and the amount of money held on behalf of each person, and*

(b) *all money received and paid on the agent's own behalf.*

23(2) The books, records and accounts referred to in subsection (1) shall be kept up to date.

[51] Staff, upon the completion of their inspection, concluded that Moore may have violated subsections 19(1) & 19(2), section 20 and subsection 23(1) of the Act. I will address these breaches individually.

Section 19

[52] Deposits are, pursuant to the Act, to be placed "without delay" into the Agent's trust account. In each of the four property transactions outlined in paragraphs 16 – 23, *supra*, Moore deposited the monies received as deposits into the operating account of TCMR.

[53] In each instance, Moore deposited these funds as commissions ostensibly "earned". However, in each instance, the monies deposited as "commissions" were not funds that belonged to Moore. They were deposits, received from clients, well in advance of the closing date of each real estate transaction.

[54] I find therefore that Moore breached his obligation to deposit monies received directly into his trust account without delay in each of the four property transactions.

Section 20

[55] More troubling still, it would appear that, in September 2014, Moore misappropriated trust funds to cover the operating expenses of TCMR. As a result, the trust account was in arrears in both September 2014 and December 2014.

[56] It is important to note that section 20 of the Act specifically states that "[n]o money shall be drawn from a trust account except in accordance with the terms on which it was received". As stated in the purchase and sale agreements in these property transactions, these funds were received as deposits, not for covering the expenses of TCMR.

[57] By using trust funds to finance the operations of TCMR, I find that Moore breached his obligation as trustee of his clients' funds.

Section 23

[58] FCNB Staff noted that Moore did not keep his 2013 and 2014 documents at his office in compliance with 23(1)(a) and 23(1)(b) of the *Act*. He indicated that those documents were located with his accountant and at his personal residence.

[59] The *Act* is clear: business documents “*that may be necessary to show and readily distinguish all money received from or on behalf of and all money paid to or on behalf of others, and the amount of money held on behalf of each person, and all money received and paid on the agent’s own behalf*” are to be kept at the Agent’s office or at any other location authorized by the Director of Consumer Affairs in writing. Moore did not request nor was he authorized to keep TCMR documents at a location other than the agent’s office.

[60] While this is a technical violation of the *Act*, I find this to be more symptomatic of the overall lack of compliance with the *Act* displayed by Moore in his operation of TCMR.

Section 32

[61] I wish to briefly comment on the scope of section 32 of the *Act*. During the inspection conducted by Staff, Moore advised them that they did not have the right to inspect his operating account because he processed personal transactions through his operating account.

[62] Whether or not it is appropriate for Moore to conduct his personal affairs by means of his business accounts is outside of my jurisdiction pursuant to the *Real Estate Agents Act*. I will therefore draw no conclusions from that.

[63] However, as noted by the inspection and, as I have concluded in paragraphs 55 – 57, *supra*, Moore used not only his business operating account but the TCMR trust account for personal transactions. The appropriateness, or moreover the inappropriateness, of those actions are well within my jurisdiction pursuant to the *Real Estate Agents Act*.

[64] Section 32 of the *Act* allows broad powers of inquiry to the Director or to a person authorized by the Director. The powers under section 32, paragraphs (c) and (d) of the *Act* include *the authority to*:

- (c) *examine and inquire into a book, paper, document, correspondence, communication, negotiation, transaction, investigation, loan, borrowing or payment to, by, on behalf of, in relation to or connected with that agent, manager or salesperson, and*
- (d) *examine and inquire into a property, asset or thing owned, acquired or alienated in whole or in part by a person referred to in paragraph (c) or by a person acting on behalf of or as agent for that person.*

[65] I wish to make it clear that the inspectors authorized by the Director of Consumer Affairs have the statutory authority to examine any book, paper or document identified in section 32 and, pursuant to subsection 32(6) of the Act, those powers are those of a commissioner appointed under the *Inquiries Act*.

[66] The Director of Consumer Affairs is tasked with ensuring compliance with the *Real Estate Agents Act*. This authority is to protect the public interest. To quote from Laskin, J.A. in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, (1999), 43 O.R. (3d) 257 (ON CA), at page 272, cited with approval by Mr. Justice Iacobucci in [2001] 2 S.C.R. 132, 2001 SCC 37, at page 148

The purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets. The past conduct of offending market participants is relevant but only to assessing whether their future conduct is likely to harm the integrity of the capital markets.

[67] Likewise, the public interest role of the Director of Consumer Affairs pursuant to section 10 of the Act is protective and preventive, to be exercised in order to prevent future harm to the public. In order to do so, it is crucial that compliance with the Act be ensured, and that the statutory authority of Staff be respected by those regulated under the Act.

Effect of Moore's Resignation

[68] As noted above, and as confirmed by his legal counsel, Moore has resigned from the NBREA effective 11 December 2015.

[69] Section 18 of the *New Brunswick Real Estate Association Act*, S.N.B. 1994, c. 115 reads as follows:

18(1) *Subject to subsection (2), no person shall trade or represent to trade in real estate in the Province, either privately or employed by another, unless that person is the holder of a licence in good standing under the Real Estate Agents Act and is registered under the provisions of this Act and by-laws.*

18(2) *Within six months after the date this Act comes into effect, all persons who are licenced to trade in real estate and intend to do so shall become members of the Association.*

[70] It has been suggested that Moore's resignation from the NBREA renders moot the review of his licence under the *Real Estate Agents Act*. I disagree.

[71] Moore's ability to act as a Realtor is also dependent upon his holding a licence in good standing pursuant to the *Real Estate Agents Act*. Further, while the effect of Moore's resignation from the NBREA is that he is not presently a "member in good standing" of the NBREA, nothing precludes him from reinstating his registration under the *New Brunswick Real Estate Association Act* at any time.

[72] The purpose of this hearing is to determine whether it is in the public interest that Moore continue to be licensed under the *Real Estate Agents Act*. His membership in the NBREA is immaterial to that determination.

[73] Moore disregarded his obligation to place his clients' monies in trust on numerous occasions.

[74] Moore appeared to alter documents to "back date" the closing date of real estate transactions to coincide with his depositing of client funds into his operating account. These new closing dates were not supported by other documents in Moore's own files.

[75] Moore also used client trust funds to pay the operating expenses of TCMR, which clearly contravened his obligation as trustee of those client funds.

[76] I therefore find that Moore's general lack of compliance with Act and his multiple breaches of his statutory obligations with regard to his clients' funds make his continued licensure pursuant to the *Real Estate Agents Act* incompatible with the public interest.

5. Order

[77] The licence of K. Walter Moore as manager of Town & Country Market Realty Ltd., licence no. 136184, is hereby cancelled pursuant to subsection 10(3) of the *Real Estate Agents Act*.

[78] The licence of Town & Country Market Realty Ltd., licence no. 114294, is also cancelled pursuant to subsection 10(2) of the *Act*.

[79] Pursuant to subsection 10(5) of the *Act*, neither K. Walter Moore nor Town & Country Market Realty Ltd. 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.

[80] Pursuant to subsection 10(7) of the *Act*, K. Walter Moore and Town & Country Market Realty Ltd. are to return their cancelled licences without delay to the Director of Consumer Affairs.

Dated this 11th day of January 2016.

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