

**IN A MATTER BEFORE  
THE AGENTS LICENSING BOARD  
OF THE NORTHERN TERRITORY**

**APPLICATION FOR DISCIPLINARY ACTION**

**BETWEEN:** **REGISTRAR OF LAND, BUSINESS  
AND CONVEYANCING AGENTS**  
Applicant

**AND** **DUNLOP & WRIGHT REAL ESTATE  
PTY TLD trading as DUNLOP &  
WRIGHT REAL ESTATE**  
First Respondent

**MELINDA MAY CORAZON DUNLOP**  
Second Respondent

Date of hearing: **15th November, 2011**

Chairperson:	Sue Philip
Real Estate Member:	Diane Davis
Real Estate Member:	David Forrest
Departmental Member:	Robert Bradshaw
Consumer Representative	Donald Hudson

Appearances:

Applicant Nikolai Christrup

Respondent David Francis

**STATEMENT OF REASONS FOR DECISION**

**Background**

1. On the 28<sup>th</sup> September 2011 the Applicant, the Registrar of Land Business and Conveyancing Agents, made application to the Board under Section 68(2) Agents Licensing Act (hereinafter called "ALA") for Disciplinary Action against the Respondents, Dunlop and Wright Pty Ltd, trading as Dunlop and Wright Real Estate (hereinafter called "Dunlop and Wright") and Melinda May Corazon Dunlop (hereinafter called "May Dunlop") on the ground set out in Section 67(1) (c) ALA of breaches of the rules of conduct for agents, such rules being contained in Section 65 ALA.

2. The Respondents are licensed Real Estate Agents, Dunlop and Wright, holding Real Estate and Business Agent's Licence AL717, and May Dunlop, holding AL716. Such licences were granted on 28<sup>th</sup> August 2008 and were renewed regularly, remaining in force until 30<sup>th</sup> November 2011 when they fall due for renewal.

3. Dunlop and Wright is a registered company under the Corporations Act 2001 (Cth). Since 5<sup>th</sup> June 2008, May Dunlop and Tamarind Lee Ling Wright (hereinafter called "Ms Wright") have been the Directors of the company. On the 28<sup>th</sup> August 2008, Dunlop and Wright appointed May Dunlop as Business Manager pursuant to Section 110A of the ALA.

4. Following out- of -session consideration of the Application, the Board, on 30<sup>th</sup> September 2011, determined under Section 68(4) to hold an Inquiry. On 17<sup>th</sup> October 2011, an amended application was made by the Registrar joining a further party, Ms Wright, but that amended application was subsequently discontinued. The matter was set down for hearing on 15<sup>th</sup> November 2011, the parties being given formal notice of such date on 31<sup>st</sup> October and further notice on 7<sup>th</sup> November that the Registrar would continue with the original application only. At the hearing, the Registrar was represented by Counsel, Mr Nikolai Christrup while Mr David Francis appeared on behalf of the Respondents.

### **The Issues**

5. The issues in this Inquiry were:
- a. a consideration by the Board as to whether the Respondents' actions amounted to a breach of the rules of conduct as contemplated by the terms of section 65 ALA;
  - b. if so, the appropriate disciplinary sanction.

### **Relevant Legislation**

6. Disciplinary action may be taken against a licensed agent on the grounds provided in Section 67 of the Act.

#### **67. Grounds for disciplinary action**

(1) *Subject to this Part, the Board may take disciplinary action in accordance with this Part against a licensed agent on one or more of the following grounds:*

*(c) the licensed agent has been guilty of a breach of the rules of conduct for agents;*

7. Applications for such action are made under Section 68

**68. Applications for disciplinary action**

*(2) The Registrar may apply, by notice in writing, for disciplinary action to be taken against a licensed agent on one or more of the grounds referred to in section 67.*

*(4) Where –*

*(a) subject to subsection (5), an application for disciplinary action to be taken against a licensed agent is lodged in accordance with this section; or*

*(b) the Board considers that there may be grounds under section 67 for disciplinary action to be taken against a licensed agent,*

*the Board shall hold an inquiry.*

8. The Applicant relied on Sections 65(1) (a), 52(4), 55 and 59 of the ALA to ground the Application.

**65. Rules of conduct**

*(1) A licensed agent who –*

*a) breaches this Act or the regulations, whether or not the licensed agent is found guilty of an offence in respect of the breach;*

*is guilty of a breach of the rules of conduct for agents.*

**52. Operation of trust account**

*(4) A licensed agent shall not withdraw money from a trust account maintained by him or her except for the purpose of:*

*(a) payment of his or her commission under contract;*  
*or*

*(b) payment to, or disbursement according to the directions in writing of, the person for whom, or on whose behalf, the money was received; or*

*(c) repaying a debt lawfully required to be repaid from trust moneys.*

### **55 Accounting records**

*(1) A licensed agent shall keep such accounting records as disclose particulars of:*

*(a) all trust moneys received from day to day by the agent on behalf of each principal for whom he or she acts; and*

*(b) all payments made by the agent from day to day out of the trust moneys so received.*

*(2) A licensed agent shall:*

*(a) keep the accounting records referred to in subsection (1):*

*(i) in written or printed form in the English language; or*

*(ii) so as to enable them to be readily accessible and readily convertible into written or printed form in the English language; and*

*(b) cause those records to be kept in such a manner that they can be conveniently and properly audited; and*

*(c) retain those records for a period of not less than 6 years after the date on which the last entry in those records was made.*

*Maximum penalty: If the offender is a natural person – 100 penalty units or imprisonment for 12 months.*

*If the offender is a body corporate – 500 penalty units.*

**59 Audit**

*(1) A licensed agent shall ensure that the agent's accounting records relating to trust moneys received and paid by the agent during the prescribed period are audited within 3 months after the expiration of each prescribed period.*

*(1A) It is a defence to a prosecution for an offence against subsection (1) if the licensed agent charged with the offence proves that:*

*(a) the licensed agent engaged an auditor to carry out the audit at a time when the auditor would reasonably be expected to complete the audit within the period specified in that subsection, but the auditor had failed to do so; and*

*(b) a written statement was forwarded to the Registrar by the auditor or the licensed agent before the expiration of the period specified in that subsection setting out the reasons for the auditor's failure to complete the audit and specifying the period within which the audit will be completed.*

*(2) A licensed agent shall produce to the auditor at an audit the auditor's report in respect of the last preceding audit.*

*Maximum penalty: 20 penalty units or imprisonment for 3 months.*

9. In the event of the Board granting the applications, the Respondents may be dealt with as provided in Section 69 of the Act.

**69. Powers of Board after inquiry**

*(1) Where, at the conclusion of an inquiry conducted pursuant to section 68(4), the Board is satisfied that it is authorised to take disciplinary action against a licensed agent, the Board may –*

*(a) reprimand or caution the agent;*

*(b) by notice in writing, impose a fine not exceeding 50 penalty units on the agent;*

*(c) by notice in writing, suspend the licence of the agent until the expiration of the period, or the fulfillment of a condition, specified in the notice; or*

*(d) by notice in writing, revoke the licence of the agent.*

### **Conduct of the Matter**

10. The Board was provided with Briefing Papers including the Audit Report and various correspondences between the Respondents and the Registrar of Land, Business and Conveyancing Agents. The Papers also included a Statement of Facts, Contentions and Evidence prepared by Counsel for the Registrar. After consideration of the Statement, Counsel for the Respondents indicated his clients' willingness to proceed on the basis of that Statement, admitting the facts and breaches contained therein.

11. As a result of reaching such agreement, the parties further agreed that the matters to be inquired into by the Board at the hearing were limited to questions of mitigation and penalty. The Board was addressed by Counsel for all parties in respect of those issues.

### **The Facts**

12. Dunlop and Wright carried on business as Real Estate Agent from 28<sup>th</sup> August 2008 until 1<sup>st</sup> June 2011 when it ceased to trade. At all material times, May Dunlop was the Business Manager appointed pursuant to Section 110A ALA.

13. From 1 July 2009 to 30 June 2010, Dunlop and Wright operated the following trust accounts within the meaning of Part V of ALA ('the Trust Accounts') with the Darwin Branch of the ANZ Bank:

(a) a rental trust account identified as BSB 015901 Account 482040194 for holding rental trust funds ('the Rental Trust Account');

(b) a security deposit trust account identified as BSB 015901 Account 481902928 for holding security deposits ('the Security Deposit Trust Account'); and

(c) a sales trust account identified as BSB 015901 Account 482033621 for holding sales deposits and advertising funds ('the Sales Trust Account').

14. On 8 June 2011, the Registrar received a heavily qualified report dated 8 June 2011 detailing the audit of the Trust Accounts prepared by Byrne D Haigh of BDH Consulting Pty Ltd together with comments from May Dunlop in response. The Audit Report was qualified as follows:

(A) Dunlop & Wright Real Estate Pty Ltd did not keep accounting records relating to all trust monies received and paid in accordance with the Act;

(B) The records were not ready within a reasonable time for examination under section 59(1) of the Act.

Further, the report noted that the Board was required to be informed of the following matters:

- (1) Delays in the completion of reconciliation processes and review led to a trust monies and trust accounts going into credit balance;
- (2) Delays also resulted in a number of trust account transactions being unable to be identified within a reasonable time frame and being fully reconciled;
- (3) A number of transactions were recorded twice resulting in overpayments to owners.

15. The Respondents failed to ensure accounting records were audited by 30 September 2010. May Dunlop requested extensions for the lodgement of the 2009/2010 audit report of the Trust Accounts, due to Ms Wright's illness and further work required by their accountant, on 29 September 2010, 21 October and 2 December 2010. These requests were granted by Ms Parsell, Deputy Registrar extending time for lodgement until mid-December. On 18 January 2011, May Dunlop contacted Ms Parsell, Deputy Registrar advising that further work was required to be completed in regards to the record keeping and that on completion of this work the auditor would be available to sign off and have the report delivered by the first week in February 2011. On 27 May 2011, May Dunlop advised Ms Parsell that the audit had been completed and that she was awaiting the final report from the auditor. Ms Parsell required the audit report be finalised as a matter of priority. The audit of the Trust Accounts for the period 1 July 2009 to 30 June 2010 was not completed until 8 June 2011. That delay, from January 2011 to 8 June 2011, amounted to a breach of Section 59(1) ALA by Dunlop and Wright in that it failed to ensure that its accounting records relating to trust monies for the period 1 July 2009 to 30 June 2010 were audited by 30 September 2010 and that breach further constituted a breach of the rules of conduct for agents pursuant to Section 65(1)(a) ALA.

16. Dunlop and Wright failed to keep proper accounting records relating to the Trust Accounts. In relation to the Rent Trust Account from 1 July 2009 to 30 June 2010, there were transactions to the net value of \$44,810.19 which, on 8 June 2011, could not be reconciled or accounted for as at 30 June 2010. Similarly, in the case of the Security Deposit Trust Account, from 1 July 2009 to 30 June 2010, there were transactions to the net value of \$3,911.00 which on 8 June 2011 could not be reconciled or accounted for as at 30 June 2010. These failures to keep proper accounting records amounted to a breach of Section 55(1) ALA by Dunlop and Wright, in that it failed to keep such accounting records as disclosed particulars of all trust moneys received from day to day by the agent on behalf of each principal for whom it acted and all payments made by it from day to day out of the trust moneys so received. By virtue of section 65(1)(a) ALA Dunlop and Wright thereby breached the rules of conduct for agents.

17. Dunlop and Wright withdrew money from the Trust Accounts contrary to Section 52(4). On 25 February 2010, it paid itself out of the Sales Trust Account \$9,796.50 in respect of sales commission for acting for the owner of 9 Kirra

Crescent, Batchelor; and \$16,828.00 in respect of sales commission for acting for the owner of 2 Gosse Circuit, Gunn. On the same day, Dunlop and Wright again paid itself a further \$16,828.00 out of the Sales Trust Account in respect of sales commission for 2 Gosse Circuit, Gunn, that amount constituting a double payment of sales commission already paid. On 1 April 2010, Dunlop and Wright again paid itself a further \$9,796.50 out of the Sales Trust Account in respect of sales commission for acting for the owner of 9 Kirra Crescent, Batchelor and a further \$16,828.00 out of the Sales Trust Account in respect of sales commission for acting for the owner of 2 Gosse Circuit, Gunn. In both cases the sales commission due under the contracts with the owners had already been paid on 25<sup>th</sup> February. These extra payments were not payments within the meaning of Sections 52(4)(b) or (c) ALA and amounted to breaches of Section 52(4) ALA by Dunlop and Wright in that the withdrawals from the Sales Trust Account were for purposes other than:

- (i) payment of its commission under contract;
- (ii) payment to, or disbursement according to the directions in writing of the person for whom, or on whose behalf, the money was received;

Or

- (iii) repaying a debt lawfully required to be repaid from trust moneys.

The breaches of Section 52(4) amount to a breach of the rules of conduct for agents By Dunlop and Wright by virtue of Section 65(1)(a) ALA.

18. May Dunlop failed to exercise substantive and effective control as business manager of Dunlop and Wright. She permitted Ms Wright to be in full or sole control of Dunlop and Wright's financial management from 1 July 2009 to April 2010. This included allowing Ms Wright, between 1 July 2009 to April 2010, to be in full or sole control of authorisation of withdrawals from the Trust Accounts, recording transactions relating to the Trust Accounts in Dunlop and Wright's MYOB and Console software and the reconciliation of the Security Deposit Trust Account and Rental Trust Account. At the same time she failed to adequately review the withdrawals, or the authorities to withdraw, from the Trust Accounts, the recording of transactions relating to the Trust Accounts in the MYOB and Console software and the reconciliation of the Security Deposit Account and the Rental Trust Account. Further, she did not take steps until April or May 2010 to determine when the Security Deposit Account and the Rental Trust Account had last been reconciled in circumstances where such reconciliation had not taken place since December 2009.

19. If May Dunlop had exercised substantive and effective control of the day-to-day operations of Dunlop and Wright's office as required by section 110A(5), the breaches by Dunlop and Wright, detailed in paragraphs 15, 16 and 17 would not have occurred. May Dunlop's breaches of Section 110A amount to a breach of the rules of conduct for agents pursuant to section 65(1)(a).



## Determination

20. On the basis of admissions made by the Respondents the Board determined that Dunlop and Wright had breached Sections 52(4), 55 and 59 ALA and such breaches constituted a breach of the rules for conduct of agents contained in Section 65, in particular Section 65(1)(a). The Board further determined that May Dunlop breached section 110A(5) ALA, such breach constituting a breach of the rules for conduct of agents contained in Section 65, in particular Section 65(1)(a). Having determined that the Respondents had committed breaches of the rules of conduct in Section 65(1), the Board was authorised to take disciplinary action under Section 67(1)(c).

21. In considering the nature of the disciplinary action to be taken against the Respondents, the Board considered submissions on penalty from Mr Christrup and matters in mitigation put by Mr Francis.

22. The Board considered the breaches of the ALA to be serious and substantial breaches of the Rules of Conduct specified in section 65. Matters involving stewardship of trust monies require the highest degree of care and responsibility which patently was not exercised in this case. However, the Board also accepted that there was no suggestion of dishonesty or fraud on the part of either Respondent. No member of the public has suffered any loss or made any complaint against the Respondents.

23. In the case of Dunlop and Wright, the Board noted that while the ALA imposes the primary obligation for compliance with the Act on the licence holder, the breaches arose out of the failure of the Business Manager to exercise substantial and effective control. Dunlop and Wright ceased to trade on 1<sup>st</sup> June 2011, its licence suspended and the process of winding up the business commenced. Responsibility for payment of its debts has been accepted by May Dunlop who is undertaking discharge of them. The Board did not consider this a case in which the company's licence should be revoked; nor did it consider, given the already heavy financial burden placed on May Dunlop and the interests of creditors, the imposition of a penalty to be appropriate. In the circumstances, the Board determined a reprimand under Section 69(1)(a) to be the appropriate penalty.

24. The Board found that May Dunlop acted throughout the matter with honesty, co-operating fully with the audit process and making full and frank admissions to the Board. The Board commended her on her efforts to discharge the debts of Dunlop and Wright and noted her personal losses as a result. Further the Board accepted that the failure to exercise substantive and effective control of the day-to-day operations of Dunlop and Wright arose out of the breakdown of her personal and professional relationship with Ms Wright, her co-director. What may well have been an effective management arrangement, whereby the financial control of the business was entrusted to Ms Wright, both a

director of the company and an experienced office manager, fell apart with the collapse of their personal relationship. When it became apparent in September 2009 that Ms Wright was no longer discharging her responsibilities in maintaining the financial records and management of the business, May Dunlop was obliged to take action. She did not do so until April 2010. Whatever may be the meaning of "substantial and effective control" in Section 110A, that delay fell below the acceptable standard. The Board noted the character references provided for May Dunlop and her numerous awards and achievements in determining that, subject to conditions listed below, the appropriate penalty to be imposed on May Dunlop was a caution.

### Action

The Board determined at the Inquiry held on 15th November 2011 that it was satisfied that the First Respondent, Dunlop and Wright Pty Ltd trading as Dunlop and Wright Real Estate, had committed breaches of the rules of conduct for agents that justified disciplinary action against it. In exercise of its powers under Section 69(1), the Board reprimanded the First Respondent.

The Board further determined that it was satisfied that the Second Respondent, Melinda May Corazon Dunlop, had committed breaches of the rules of conduct for agents that justified disciplinary action against her. In exercise of its powers under Section 69(1), the Board cautioned the Second Respondent and directed her to refrain from taking the following action for a period of six months from the date of service of notice of this decision :

- (a) acting as a business manager appointed under Section 110A of the Act;
- (b) carrying on business as a real estate agent or business agent otherwise than as an employee;
- (c) acting as a director of a company carrying on business as a real estate agent or business agent.

For the Board

  
Suzanne Philip  
Chairman  
8/12/2011