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FINANCIAL SERVICES TRIBUNAL

DECISION NO. 2015-RSA-003(b)

In the matter of an appeal pursuant to section 54 of the *Real Estate Services Act* S.B.C. 2004, c. 42 to the Financial Services Tribunal under section 242.2 of the *Financial Institutions Act*, R.S.B.C. 1996, c. 141

BETWEEN:	Murat Kadioglu	**APPELLANT**
AND:	Real Estate Council of British Columbia and Superintendent of Real Estate	**RESPONDENTS**

BEFORE: Wendy A. Baker, QC, Panel Chair

DATE: Conducted by way of written submissions concluding on June 29, 2016

APPEARING:

For the Appellant:	Self-represented
For the Respondent:	Jessica S. Gossen
For the Superintendent:	Sandra A. Wilkinson

APPEAL

[1] Ahmet Murat Kadioglu ("the Appellant" or "Mr. Kadioglu"), appeals to the Financial Services Tribunal (the "FST") from a November 10, 2015 decision of the Discipline Committee of the Real Estate Council of British Columbia ("Council"). Embedded within this appeal are two additional decisions of the Discipline Committee: a decision rendered on July 20, 2015 which found that Mr. Kadioglu had committed professional misconduct within the meaning of section 35(1)(a) of the *Real Estate Services Act* SBC 2004, c. 42 (the "Liability Decision"), and a decision rendered on May 14, 2015 which dismissed an application by Mr. Kadioglu to have the proceeding dismissed due to an issue with the Committee Chair in February 2015 (the "Recusal Decision"). The November 10, 2015 decision imposed various penalties on Mr. Kadioglu (the "Penalty Decision") following the Liability Decision.

[2] The Council opposes the appeal. The second named respondent, the Superintendent of Real Estate, agrees with the submissions of the Council, and made its own submissions on the jurisdiction of the FST to determine constitutional questions.

BACKGROUND

Key Facts

[3] Mr. Kadioglu is a licensee under the *Real Estate Services Act*, SBC 2004, c. 42 (the "RESA"), and has been licenced since 2004.

[4] The Liability and Penalty Decisions arose from Mr. Kadioglu's conduct in July and August 2011, when he wrote an agreement on July 24, 2011 for the purchase of a property. On July 24, 2011 he was employed by and a licencee with Homeland Realty. On July 25, 2011 his licence was transferred to Amex-Fraseridge.

[5] Century 21 was the listing agent for the property. In the Century 21 files was an executed contract for purchase and sale on a Homeland form, which stated that the deposit was held at Homeland. When the time came to complete the transaction, Century 21 contacted Homeland to address the mechanics of the closing.

[6] Homeland was surprised by the call from Century 21 as it had no record of the transaction, and did not hold the deposit money. Ultimately, it was discovered that the deposit was held by Amex-Fraseridge. Homeland contacted the Council, and the investigation that followed gave rise to the hearing before and decisions of the Discipline Committee.

[7] The Committee found that Mr. Kadioglu produced a later version of the purchase and sale agreement, which had been altered to show both the buyer and seller as agreeing to Mr. Kadioglu working with Amex-Fraseridge as the brokerage for the buyer. This altered document was not provided to the sellers or their agent.

[8] The issue before the Committee was whether Mr. Kadioglu improperly altered sales documents without the knowledge and consent of the sellers, and whether Mr. Kadioglu improperly transferred a transaction properly completed through Homeland, to Amex-Fraseridge.

Hearing and Appeal Process

[9] This matter has had a convoluted path.

[10] The Notice of Hearing was issued on December 27, 2012.

[11] The first discipline hearing was set for August 2013, but was adjourned due to witness unavailability. The hearing was reset for October 2013, but was further adjourned due to the Appellant's request for further document production.

[12] The discipline hearing was then scheduled for hearing on July 15 and 16, 2014. This hearing was adjourned due to a conflict of interest on the part of one committee member. On August 21 and 22, 2014 the hearing was held before a three person panel of the Discipline Committee. Submissions were made in writing after the hearing, with final submissions received in December 2014.

[13] On April 8, 2015, prior to a decision being rendered by the Committee, Mr. Kadioglu filed an application to have all claims against him dismissed. The basis for his application was that on February 19, 2015 the Chair of the Committee had sent

an email to the other members of the Committee, and to the lawyer assisting the Committee in an administrative capacity, inquiring about the history of the investigation leading to the hearing. The email was also copied to the lawyer who represented the Council before the Committee. The email was brought to the attention of the director of legal services for the Council, who advised all members of the Committee, including the Chair, that the Committee could only rely on the evidence presented at the hearing and could not make its own inquiries as to what happened before the matter came before them.

[14] Independent counsel was engaged by the Council to address the ramifications of the email sent by the Chair. On March 18, 2015 the independent counsel advised the parties that the Chair had recused himself from the hearing, and the decision would be made by the remaining two Committee members.

[15] Mr. Kadioglu asserted in his application that his rights to procedural fairness were violated because the Chair was entitled to seek additional information relating to the prosecution of the matter, and the director of legal services wrongfully interfered with that inquiry and wrongfully compelled the Chair to resign.

[16] On May 14, 2015 the Committee, consisting of the remaining two members, rendered a decision on Mr. Kadioglu's application to have all claims against him dismissed. In this Recusal Decision, the Committee dismissed Mr. Kadioglu's application.

[17] On July 20, 2015 the Committee rendered its Liability Decision, finding that Mr. Kadioglu had committed professional misconduct.

[18] The penalty phase of this matter then commenced. All submissions were made in writing, and were completed in September 2015. On November 10, 2015 the Penalty Decision was rendered by the Committee.

[19] In the Penalty Decision the Committee ordered that Mr. Kadioglu:

(a) be suspended for 30 days;

(b) pay enforcement expenses of $14,001.74 to the Council within 6 months of the Decision;

(c) at his own expense, enroll in and successfully complete Components 1 and 3 of the accelerated Residential Trading Services Applied Practice Course, or other course as directed by the Executive Officer, within 6 months of the Decision.

[20] In the Penalty Decision the Committee further ordered that if Mr. Kadioglu failed to comply with the above orders, the Committee may suspend or cancel his licence without further notice or the opportunity to be heard.

[21] On December 4, 2015 Mr. Kadioglu filed an appeal to the FST.

[22] On January 11, 2016 Mr. Kadioglu applied to the FST to have additional documents added to the appeal record, and to have the appeal bifurcated. On February 18, 2016 I denied Mr. Kadioglu's application.[Decision No. 2015-RSA-003(a)]

[23] Mr. Kadioglu's notice of appeal alleges breaches of procedural fairness, erroneous findings of fact, failure to consider the totality of the evidence (including refusing to admit crucial evidence) and misapprehending, ignoring or not properly considering Mr. Kadioglu's testimony.

[24] The notice of appeal and Mr. Kadioglu's submission organize his grounds of objection in different ways. Since his written submission is the more comprehensive document, I will summarize his position by using the headings in his written submission, and will use the notice of appeal to supplement as appropriate.

[25] Part 1 of the Appellant's written submission is organized around the following headings:

> "Tampering with Judges and Mistrial"
>
> Under this heading, the Appellant has argued that it was unlawful for the discipline committee to render its decision with only 2 panel members after the Chair's resignation, which breached the RESA, the common law, procedural fairness and the Charter. This submission includes claims of reasonable apprehension of bias arising from the resignation and from the alleged conduct of the prosecutor, whose conduct generally is alleged to have been grounded in bad faith and improper purposes (Argument, para. 16).
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> "Abuse of Discretion"
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> Under this heading, the Appellant submits that:
>
> a. The matter was not validly initiated under s. 37(1) of the RESA because it was a commission claim, not a consumer complaint, and thus was not authorized by s. 37(1), which is overbroad if it does authorize this action.
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> b. The enforcement action was abusive because no action was taken against the managing broker who participated in the transaction, who is responsible and liable for transactions they process. Instead, the prosecutor pursued "charges" against the Appellant because of a previous complaint that was withdrawn by the complainant. Further, the enforcement action was contrary the Council's explicitly stated rules that "it will not get involved in any dispute between realtors and brokerage firms". The commission claim by the complaining broker was adjudicated and rejected by the Provincial Court.
>
> c. There was unreasonable delay in getting the matter to hearing, which violated his Charter rights to a hearing within a reasonable time, and a late amendment to the Notice of Hearing violated his right to be informed without unreasonable delay of the "specific offence".
>
> d. The Appellant was singled out for prosecution, with the prosecution using the other party "as a witness to convict the Appellant" rather than also proceeding against that party.
>
> e. The Complaints Committee, which the Appellant only learned about after filing a Supreme Court Petition, was also subject to a reasonable

apprehension of bias as the Committee included a person with whom the Appellant had a conflict over a business transaction.

"Absence of Authentic Documents"

Under this heading, the Appellant argues that the investigation was flawed for failure to obtain original documents, relying on copies "which may have been sanitized or doctored to avoid any accusations of wrongdoing against the broker, as suggested by the long time gap between [the] complaint and receipt of documents by the Respondent." The Appellant further argues that the Respondent did not seek or obtain (and refused to subpoena) Century 21 documents other than what the seller's agent chose to show the Respondent. All this resulted in the hearing becoming "an exercise in speculation".

"The Witnesses"

Under this heading, the Appellant argues that "none of the witnesses [relied on by the Council] could have been characterized as unbiased or credible by any reasonable criteria".

The Appellant further alleges that the prosecutor did not provide a list of witnesses that would testify at the hearing, and did not ask the Appellant if he wished to call any witnesses.

[26] From Part II of Mr. Kadioglu's submission, the following additional claims arise:

a. That "in the closing minutes of the proceeding", the prosecutor tendered new evidence which had no evidentiary value, and which breached the Appellant's right to procedural fairness. The Appellant submits that it was as breach of procedural fairness to admit new evidence in the closing minutes of the hearing, as the panel could not have made a determination about the Appellant's handwriting without evidence from an expert.

b. That the Committee reached the "ludicrous conclusion" based on the false testimony of Mr. Tong and Mr. Sharma that he had not been fired on July 21, 2011, and disregarded the fact that Mr. Sharma was unable to produce an original document from the transaction file.

c. That the Committee also unreasonably concluded that the Appellant had altered the contract after acceptance. The Appellant submits that "there was no enforceable contract on July 24, 2011" and he did not change the contract after acceptance and submits that the Committee's "hypothesis about the Appellant's motive ... is pure fiction that is contradicted by the facts".

d. That the Committee's decision could not meet the relevant standard of proof of "clear and cogent" evidence, and effectively imposed a presumption of guilt on the Appellant. The Appellant's position here is summarized at paragraph 35 of his written submission as follows:

> Respondent RECBC has failed to prove any of its allegations against the Appellant since it failed to produce any clear or

> cogent evidence and relied on disparate fragments of unauthenticated and uncorroborated copies of documents, and testimony by biased witnesses, to prove an imaginary plot allegedly hatched by the Appellant against his new brokerage, a clear beneficiary of the transaction who demonstrated no intent to return the contract or its proceeds to Homeland Realty. According to this far-fetched story the victim of the Appellant's alleged transgressions was not even Homeland Realty but his new broker. The impaired Committee disregarded the fact that alleged victim of this fiction, Mr. Sharma and Amex Fraseridge, retained the Appellant's services for four years after the event. The proceedings, and its aftermath, and the lengths to which the Respondent has gone to deny justice to the Appellant, reads like a fictitious psychological thriller.

e. That the penalty, including the costs, should be set aside as excessive, both in relation to the conduct and in comparison to comparable decisions in similar matters "most of which were resolved at the outset with a reprimand". The Appellant submits that his exercise of his right to defend himself resulted in a highly disproportionate penalty wrongly characterized as a failure to show "remorse". He also submits that some of the costs were due to the Committee Chair's resignation, and its decision to retain counsel, which was not his doing. The Appellant submits:

> It is obvious to the Appellant from the foregoing that this case was not only based on bias and prejudice, but it was prejudged as well, and the purpose of the hearing was nothing but to rubber-stamp the prosecution's judgment.

ISSUES

[27] For the purpose of articulating my decision, I have summarized the issues, or grounds of appeal, raised by Mr. Kadioglu as follows:

(a) Error in making findings of fact in a perverse or capricious manner, or without regard to relevant evidence, including:

(i) improperly rejecting Mr. Kadioglu's evidence and preferring the evidence presented by the Council,

(ii) finding an enforceable contract was made on July 24, 2011,

(iii) failing to find that Mr. Kadioglu was terminated on July 21, 2011,

(iv) accepting the evidence of Mr. Sharma that he hired Mr. Kadioglu on July 25, 2011 and had not met him before that date, and

(v) speculating that Mr. Kadioglu processed the transaction through his new broker to make more profit.

(b) Failure to observe rules of natural justice, procedural fairness, including:

(i) proceeding on the basis of a complaint from a broker, not a consumer,

(ii) proceeding outside the authority provided in s. 37(1) of the RESA,

(iii) allowing a prosecution based in malice or improper purpose and/or motivated by a complaints committee member with whom Mr. Kadioglu had a business conflict,

(iv) permitting counsel for the Council to address an inquiry made by the Chairman of the disciplinary committee which resulted in the Chairman stepping down before the Liability Decision was rendered,

(v) making the Liability and Penalty decisions in a panel of two, after a three person panel heard all evidence, and

(vi) unreasonable delay and failure to notify Mr. Kadioglu of the case against him.

(c) Breach of Mr. Kadioglu's *Charter* rights.

(d) Issuance of excessive penalties.

DISCUSSION AND ANALYSIS

Standard of Review

[28] Mr. Kadioglu did not expressly address the standard of review applicable to this appeal. The Council submitted that the standard of reasonableness was applicable to all grounds raised by Mr. Kadioglu, relying on *Parsons v. Real Estate Council of British Columbia*, Decision No. 2015-REA-002(d).

[29] In *Hensel v. Registrar of Mortgage Brokers*, Decision No. 2016-MBA-001(a), October 19, 2016, the Tribunal discussed the standard of review that applies to decisions of first instance decision-makers on questions of fact, law and discretion. At paras. 14-19, the Tribunal Chair held:

> [14] Neither the *Mortgage Brokers Act* nor the *Financial Institutions Act* prescribes a particular standard of review to govern Tribunal appeals[1]. However, the Tribunal is itself protected by a privative clause and a legislated standard of review vis-a-vis the courts: *Financial Institutions Act*, s. 242.3, *Administrative Tribunals Act*, s. 58.
>
> [15] Because the Tribunal is a specialized appeal tribunal and not a generalist court, it is appropriate to approach with a degree of caution those judicial authorities that, in recognition of the distinct institutional roles of courts of law and tribunals, have addressed the standard of review to be applied by generalist courts to specialized tribunals. I therefore respectfully differ from the Registrar when she submits that given the lack of statutory direction, the "starting point" in determining the standard of review to be applied by the Tribunal to the

Registrar's decision is *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190. In my view, the correct starting point is to recognize that when the legislature creates a statutory right of appeal, each right of appeal must be considered contextually, on its own terms and in view of its larger purposes. As noted in *British Columbia (Chicken Marketing Board) v. British Columbia (Marketing Board),* 2002 BCCA 473 at para 15, the words ["may appeal"] do not have a fixed meaning and must be read having regard for the legislative scheme and for the purposes of the Act.

[16] In the absence of a legislated standard of review, the Tribunal should not proceed by reflex as if it were a generalist court hearing a judicial review or appeal from a specialized first instance decision-maker. It would make little sense for the legislature to create a specialized administrative appeal tribunal to merely parrot a court. The legislature, by vesting the Tribunal with a strong privative clause, has made clear that the Tribunal, within its exclusive jurisdiction, is deemed to possess expertise that a generalist court does not have: *Administrative Tribunals Act*, section 58(1).

[17] In recognition of these principles, the Tribunal has developed its own appellate "standard of review" jurisprudence. It has held that the case for deference to a first instance regulator is most compelling where the first instance regulator has made findings of fact. Since the Tribunal, unlike the Commercial Appeals Commission it replaced, is required to hear appeals on the record rather than conduct hearings de novo, the Tribunal's decisions properly accord deference where an appeal takes issue with evidentiary findings and related assessments. The rationale for this deference is the same rationale appellate courts use in granting deference to factual findings of trial judges. As noted by this Tribunal in *Nuguyen v. Registrar of Mortgage Brokers*, July 20, 2005, p. 9. "Deference must be given to the findings of fact and the assessments of credibility made by the Registrar who actually experienced the hearing procedure, heard the witnesses, saw the documentary evidence and, combined with his experience and knowledge given his position as Registrar of Mortgage Brokers, was in the best position to make the findings of fact found in his decision".

[18] On the other hand, where the first instance regulator has made a finding of law, the Tribunal has generally held that deference is not required. Indeed, just as our court system proceeds based on the institutional premise that an appeal judge knows as much about the law as does a trial judge, the Tribunal is also entitled to proceed on the premise that the legislature intended that the specialized Tribunal would correct legal errors made by the first instance regulator. I note that the British Columbia Court of Appeal has considered this position to be a reasonable one in *Westergaard v. British Columbia (Registrar of Mortgage Brokers),* 2011 BCCA 344.

[19] The Tribunal has not spoken definitively on whether or to what extent the Tribunal, given its specialized function, owes deference to a first instance decision-maker on matters of penalty. One question that arises here is whether given the Tribunal's specialized legislative role, its application of a "reasonableness" test to a question of penalty might differ from that applied by a generalist court to a decision of a professional regulatory body: see for example: *Kulkarni v. Insurance Council of British Columbia* (Decision No. 2014-FIA-001(a)), May 29, 2014; *Parsons v. Real Estate Council of British Columbia*, (Decision No. 2015-RSA-002(d)), November 13, 2015. As this case does not involve an appeal from penalty, I leave that issue to another day.

[footnote omitted]

[30] In *Mann v. Insurance Council of British Columbia*, Decision No. 2015-FIA-002(a), Member Lewis considered whether the reasonableness test applied to a penalty determination and determined that there should be "no downward adjustment" in the standard applied by the Tribunal in penalty cases: see para. 39. I will apply that approach in this decision.

[31] This leaves the standard of review for issues of procedural fairness. It has been held on judicial review that it is not really appropriate to speak in terms of "correctness" and "reasonableness" where procedural fairness is concerned. The more appropriate question is simply to ask whether the decision-maker under appeal or review acted fairly in all the circumstances: *Seaspan Ferries Corp. v. British Columbia Ferry Services Inc.* 2013 BCCA 55 at paras. 47-52. In my view, that test is also appropriately applied by the Tribunal in deciding whether the proceedings below were fair, albeit from our unique perspective with specialized knowledge of the industry sectors that fall within the Tribunal's responsibility.

[32] In summary, I will apply the following standards of review:

(a) correctness for questions of law, including the scope of s. 37(1) of the Act and the allegation of a breach of Charter rights;

(b) reasonableness for questions of fact, discretion and penalty,

(c) fairness, for procedural fairness questions.

Alleged Errors in the Assessment of Evidence

[33] The Committee received extensive evidence, including the relevant files from Homeland, Amex-Fraseridge and Century 21. The Committee also heard oral testimony from Mr. Kadioglu, Mr. Tong of Homeland, Mr. Garvey of Century 21, Mr. Gramek of Century 21, and Mr. Sharma of Amex-Fraseridge.

[34] In the Liability Decision the Committee extensively reviewed the evidence of all witnesses. Detailed reasons were given which carefully articulated the assessment of the evidence before the Committee.

[35] Ultimately the Committee found that it could not accept the testimony of Mr. Kadioglu:

> The Committee determined that the testimony of the Council's witnesses presented a version of the events that was believable, was supported by the documentary evidence, and was corroborated by one another. Mr. Kadioglu's testimony, on the other hand, was contradictory, inconsistent with the testimony given by the Council's witnesses, and provided for a version of the events that was just not plausible.

[36] Deference is heightened when faced with credibility findings. As found by the Supreme Court of Canada in *Q v. College of Physicians and Surgeons*, 2003 SCC 19:

> [38] Finally, however, the need for deference is greatly heightened by the nature of the problem – a finding of credibility. Assessments of credibility are quintessentially questions of fact. The relative advantage

> enjoyed by the Committee, who heard the *viva voce* evidence, must be respected.
>
> [39] Balancing these factors, I am satisfied that the appropriate standard of review is reasonableness *simpliciter*. The reviewing judge should have asked herself whether the Committee's assessment of credibility and application of the standard of proof to the evidence was unreasonable, in the sense of not being supported by any reasons that bear somewhat probing examination.

[37] In assessing the reasonableness of the Committee's credibility findings, I am guided by the BC Court of Appeal in *Faryna v. Chorny* (1951), 4 W.W.R. (N.S.) 171 in which, at para. 10, the Court stated that an assessment of credibility must rest on not only the demeanour of the witnesses, but also whether the testimony of a witness accords with "probabilities which surround the currently existing conditions."

[38] The Committee extensively reviewed all of the evidence it received, and the testimony it heard. The Committee carefully assessed the credibility of the witnesses, and weighed their testimony against each other and against the documentary evidence.

[39] Mr. Kadioglu raised an issue with respect to the Council's tendering of documents from his licencing file in rebuttal to the evidence of Mr. Kadioglu that certain handwriting on relevant documents was not his. Mr. Kadioglu argued that the Committee erred in receiving these documents, submitting that they were inadmissible and had no evidentiary value by any legal standard. He also submitted that the Committee could not receive the licencing documents without a thorough review of handwriting samples by an expert.

[40] The Committee was entitled to receive the licencing documents into evidence. The documents were relevant business records maintained by the Council. Mr. Kadioglu had an opportunity to challenge the records, and his response to questions about the veracity of documents produced in evidence, including the licencing documents, is thoroughly reviewed at page 18 of the Liability Decision.

[41] The Committee was entitled to weigh the documentary evidence from the licencing file along with all the other evidence which was before it when assessing the credibility of Mr. Kadioglu. The fact that the Committee did not agree with Mr. Kadioglu's submissions relating to the licencing documents is not an error.

[42] Mr. Kadioglu further challenged the findings of the Committee which he says contradict a Small Claims Court decision of Judge Bahen in *Kadioglu v. Tong*. In that case Mr. Kadioglu sued Mr. Tong for wrongful dismissal and Mr. Tong counterclaimed against Mr. Kadioglu for a commission on the sale of the property which gave rise to the facts founding the Liability Decision herein. However, Judge Balen made no findings which are relevant to the issues herein. Judge Balen actually found that neither Mr. Kadioglu nor Mr. Tong (the defendant) had proven their case. While Judge Balen recited the evidence presented by each party, no findings of fact were made and the claim and counterclaim were dismissed. The Committee committed no error in not relying on the decision of Judge Balen.

[43] I find that the Committee reasonably and carefully reviewed the evidence before it. On the key findings which the Committee made in coming to the Liability Decision, the Committee had ample evidence before it which would support the conclusions it made.

[44] One of the key findings which underpins the Liability Decision is the finding that Mr. Kadioglu made the contract on July 24, 2011 while still licenced through Homeland. This finding was supported by the evidence of the licencing authority which showed Mr. Kadioglu was licenced through Homeland until his licence transferred to Amex-Fraseridge on July 25, 2011, the contract itself which indicated it was a Homeland contract, the evidence of Mr. Sharma and the evidence of Mr. Tong, Mr. Gramek and Mr. Garvey. The Committee had ample evidence before it to support its finding on this point, and was not unreasonable in rejecting the evidence of Mr. Kadioglu.

[45] The finding of the Committee that Mr. Kadioglu was hired by Amex-Fraseridge on July 25, 2011 was supported by the evidence of Mr. Sharma and the documents produced, including the Homeland contract which was signed on July 24, 2011. This was a reasonable conclusion by the Committee.

[46] Similarly, the Committee had before it the evidence of Mr. Gramek and Mr. Garvey, the actual file of Century 21, and the evidence of Mr. Sharma. Based on this evidence the Committee found that the sellers were never informed until virtually the date of closing that Homeland was not the broker for the buyers. The Committee was not unreasonable in rejecting the evidence of Mr. Kadioglu that the sellers knew at the time they accepted the offer that the buyers' broker was Amex-Fraseridge.

[47] The Committee was required to assess the credibility of the evidence in relation to virtually all of the material findings it made. The Committee supported its findings with reference to the evidence it relied on, and provided reasons which indicate how it assessed the evidence. As such, I find that the Committee's findings of fact are reasonable and I have no basis to interfere with the credibility assessment which was made in this case.

Alleged Failure to Observe Rules of Natural Justice and Procedural Fairness

Complaints and investigation process of the Council

[48] Mr. Kadioglu alleges that the Council had no authority to prosecute him or investigate him where the issues were originally raised as a complaint by a person. In this case, Mr. Kadioglu says the complaint was made by Mr. Tong as part of a dispute about the payment of certain fees. Mr. Kadioglu further says that the Council allowed a prosecution based in malice or improper purpose and/or motivated by a member of the Council's complaints committee (a different entity from the Discipline Committee whose decisions are under appeal) with whom Mr. Kadioglu had a business conflict.

[49] Section 37(1) of the *RESA* permits the Council to commence an investigation on its own initiative, or on the complaint of a person, and limits investigations to those where professional misconduct or conduct unbecoming a licensee has been

raised in relation to a licensee. The Council was empowered under s. 37 of the Act to investigate Mr. Kadioglu for professional misconduct in the manner it did. There is nothing that prevents the Council from investigating a complaint brought to its attention by another broker.

[50] With respect to the allegation that a member of the complaints committee had a prior negative involvement with the Appellant which would give rise to perception of bias, there is nothing in the evidence before me which would substantiate that allegation. Further, the complaints committee has no power other than to recommend that a hearing process be initiated.

[51] The involvement of the complaints committee of the Council precedes the actual hearing of the Discipline Committee. Mr. Kadioglu was given full notice of the issues to be raised before the Discipline Committee in advance of the hearing, and was given a full opportunity to call evidence and make submissions to address the issues raised against him. Procedural fairness demands that a person in the position of Mr. Kadioglu be given notice of the allegations against him, and a full opportunity to address such allegations. Mr. Kadioglu, through the hearing process, was advised of the allegations against him and was given a full opportunity to call evidence, cross examine witnesses and make submissions. As such, even if there was any evidence of bias on the part of the complaints committee, and I see none on the evidence before me, such bias would not extend to the hearing before the Discipline Committee, which Committee was comprised of people who did not participate in the recommendation of the complaints committee that a hearing process be initiated.

Recusal of Chair of Committee

[52] The Chair of the Committee recused himself after he sent an email to the other committee members, copying counsel for the Council, wherein he sought additional information regarding the investigation by the Council. No further information was provided to the Committee as a result of this email. Mr. Kadioglu was promptly notified of the relevant facts, and provided with the email in question.

[53] Mr. Kadioglu challenged the process whereby the Chair recused himself and Mr. Kadioglu sought to have all proceedings against him dismissed. Mr. Kadioglu chose to argue the application by way of written submissions.

[54] The test to determine whether a reasonable apprehension of bias exists is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude?" The grounds for the apprehension must be substantial.[1]

[55] Contrary to the submissions of Mr. Kadioglu, the Committee is constrained in what it is entitled to review in coming to its decision. The Committee in the Recusal Decision correctly found that it cannot receive information outside the hearing process, and cannot instigate its own investigation.

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[1] *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 SCR 369 at pp. 394-395; *Wasylyshen v. Law Society (Saskatchewan)*, [1987] 3 W.W.R. 289 (Sask. CA)

[56] There was no evidence that the remaining two committee members had met or discussed with the Chair his reasons for sending the email, or that any of the members had pre-judged the decision or was biased against any party to the proceeding.

[57] I am satisfied that no reasonable apprehension of bias or procedural unfairness arose as a result of the email request made by the Chair, or the subsequent recusal of the Chair. I find that no reasonable apprehension of bias has been established.

Committee of Two Members

[58] Mr. Kadioglu alleges that it was procedurally unfair for the two remaining Committee members to continue their deliberations and render a decision following the recusal of the Chair.

[59] Pursuant to s. 83 of the *RESA*, in the event one member of a discipline committee is unable to complete the hearing, the remaining members of the committee are expressly permitted to continue the hearing and exercise the powers of the committee.

[60] Mr. Kadioglu has not established any right at common law or under any legislation which would require the Committee to "declare a mistrial and at the very least return the matter to a newly constituted panel of 3 members", as asserted in his submissions.

[61] I have found that no reasonable apprehension of bias arose from the recusal of the Chair, and there is a clear statutory power granted to the Committee to continue its deliberations and render a decision following the Chair's recusal. Mr. Kadioglu has not established any breach of procedural fairness or natural justice when the Committee rendered its Liability, Recusal and Penalty Decisions in a panel of two members.

Delay and Notice of Case Against Appellant

[62] Mr. Kadioglu asserts that the case against him was prosecuted with significant delays, and these delays have created a procedural unfairness. Mr. Kadioglu asserts that four years passed between the investigation and the hearing.

[63] The Notice of Hearing was issued in December 2012. The hearing took place on August 21-22, 2014, approximately 1.5 years after the Notice of Hearing was issued. The first hearing was actually set for August 2013, and was adjourned various times either with the consent of the Appellant, or at the request of the Appellant. The parties then took a further four months to complete their submissions. Completion of the Liability Decision was then interrupted by the Appellant's motion for a dismissal of all claims in April 2015.

[64] The Liability Decision was rendered in July 2015, followed by the Penalty Decision in November 2015. While the process took some time to complete, there were regular steps taken to advance the proceedings. There was no extended period of time when the matter was abandoned by the Council to the prejudice of the Appellant. I do not find there to be unreasonable delay in the progress of this matter. Throughout the hearing process no action was taken against the Appellant

which would interfere with the operation of his practice. The Appellant has not established any breach of natural justice or any unfairness or prejudice arising from the timeline this matter has followed.

[65] Mr. Kadioglu also alleges that he did not know the case he had to meet. He was advised of the allegations made against him by way of the Notice of Discipline Hearing dated December 27, 2012. This Notice was amended twice, on September 18, 2013 and July 28, 2014. The RESA requires a Notice of Discipline Hearing to be given at least 21 days before the hearing. The Council complied with the requirements under the RESA.

[66] The Notice of Discipline Hearing clearly states the transaction which is the subject of the hearing, and provides details of the allegations against him in relation to the specific transaction. Having reviewed the Notice of Discipline Hearing and the Liability Decision itself, I am satisfied that Mr. Kadioglu was given sufficient notice of the case he had to meet.

[67] I do not accept that a breach of natural justice or procedural unfairness has arisen through the time it took to bring this matter to completion, or through the content of the Notice of Discipline Hearing, as amended.

Alleged *Charter* Breaches

[68] Mr. Kadioglu in submissions, although not in his notice of appeal, argues that both the respondent Council and the Committee acted in violation of sections 7, 11 and 15 of the *Canadian Charter of Rights and Freedoms*.

[69] The FST is established pursuant to the *Financial Services Act* [RSBC 1996] c. 141. Section 242.1(7)(d) of that Act establishes that s. 44 of the *Administrative Tribunals Act* [SBC 2004] c. 45 ("ATA") applies to appeals conducted by the Tribunal.

[70] Section 44 of the ATA states that the FST does not have jurisdiction over constitutional questions. The FST has considered whether a charter remedy is a constitutional question within the meaning of s. 44 of the ATA. In *Cook v. Registrar of Mortgage Brokers*, 2011-MBA-001(a), the FST considered s. 44 of the ATA, the definition of "constitutional questions" in the ATA, and the *Constitutional Question Act*. The FST in *Cook* found that the appellant was making an application for an individual constitutional remedy in that he was seeking to have a summons set aside on the basis of a *Charter* violation. The FST held:

> [46] While the Appellant has subsequently said that this 'is not strictly a *Charter* issue', his argument is clearly founded on the *Charter* principles discussed in *Jarvis*. All his grounds and arguments flow from and rely on the *Charter*. Even in suggesting that the determination of this issue 'does not require any form of *Charter* analysis', he states that 'The Registrar's improper exercise of that power may result in a *Charter* breach'. In my view, the inquiry the Appellant wishes to have the Tribunal make into the nature of the investigation can only be relevant if the characterization the Appellant seeks to impress upon the FST would give rise to a *Charter* breach.
>
> …

> [49] As discussed above, there is no question that, in this case, the Appellant is asking the FST to exercise its existing remedial powers to set aside a Summons, in vindication of his *Charter* rights, on the ground that the Summons was issued for an improper constitutional purpose. In doing so, the Appellant is clearly seeking a remedy under s. 24(1) of the *Charter*: *R. v. Conway*, [2010] 1 S.C.R. 765 at para. 22. It follows that notice under s. 8 of the *Constitutional Question Act* is required unless the Appellant is seeking a remedy 'consisting of the exclusion of evidence or consequential on such exclusion.'

[71] While not bound by the FST's decision in *Cook*, I find the reasoning persuasive. While the Appellant herein asserts that he is not seeking a constitutional remedy, he is seeking to have the appeal allowed, in part, in vindication of what he says are breaches of his Charter rights. Mr. Kadioglu states that the following *Charter* rights were breached: his right to have a hearing within a reasonable time under s. 11(b), his right to be advised of the specific offence levelled against him in a timely way under s. 11(a), and his right to have a hearing free of bias and prejudice under s. 11(d). Mr. Kadioglu also referred to s. 7 (right to life, liberty and the security of the person) and s. 15(1) (equality rights) in his submissions on his right to have a three person panel render the decision under appeal; however, he did not articulate how those sections had application to the arguments he advanced.

[72] Without getting into the merits of any of these claims, the reasoning in *Cook* is directly applicable to the *Charter* positions advanced by the Appellant herein. I find that the Tribunal does not have jurisdiction to entertain a remedy under s. 24(1) of the *Charter*, which is in substance what the Appellant is seeking in his argument relying on the *Charter* sections described above. As the Appellant has not met the threshold jurisdictional question, I have not considered the merits of his positions in relation to the *Charter*.

Penalties

[73] The standard of review of penalty decisions is one of reasonableness.[2]

[74] The question is whether the Penalty Decision, taken as a whole, provides tenable support for the penalties awarded. The fact that different penalties could have been issued is not determinative of error. The matter which I must decide is whether the Committee based its Decision on facts which could support the penalties ordered.

[75] The Committee ordered a 30 day suspension, payment of enforcement expenses of approximately $14,000, and enrollment in certain courses at Mr. Kadioglu's expense. Section 43 of the *RESA* requires the discipline committee to make one or more of certain orders if a finding of professional misconduct has been

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[2] Parsons, supra; Anoliefoh v. Real Estate Council of British Columbia (2012-RSA-001(a)) October 22, 2012 at para. 105; Superintendent of Real Estate v. Real Estate Council and Ashworth: Ashworth v. Real Estate Council and Superintendent (FST 05-012; 05-105), January 31, 2007 at para. 59 and 89.

made. The orders, one or more of which must be ordered, include the suspension of a licence for a period of time the committee considers appropriate, requiring the enrolment in and completion of a course of studies or training, and payment of enforcement expenses.

[76] In coming to the Penalty Decision, the Committee considered factors which included:

(a) the Council's mandate to protect the public, maintain high professional standards, and preserve public confidence in the integrity of the profession,

(b) Mr. Kadioglu's failure to acknowledge responsibility or remorse for his actions,

(c) Mr. Kadioglu's behavior which the Committee found to be self-serving and intentionally dishonest,

(d) Mr. Kadioglu's failure to understand his professional obligations,

(e) the fact that while the clients could have been harmed by Mr. Kadioglu's conduct, in fact they were not harmed, and

(f) a previous disciplinary order entered into by consent with Mr. Kadioglu in 2012 which ordered a 7 day suspension of Mr. Kadioglu, payment of enforcement expenses of $1,000, and completion of a Real Estate Trading Services Remedial Education Course.

[77] The Committee also considered the factors relevant to disciplinary dispositions, as set out in *Law Society of British Columbia v. Batchelor* [2013] L.S.D.D. No. 29.

[78] The Council asked the Committee to order a 45-60 day suspension, a $5,000 penalty, enforcement expenses and certain educational courses.

[79] The Committee expressed concern that Mr. Kadioglu was progressing into more serious professional misconduct behaviour since the 2012 consent order. The Committee also found that, based on the evidence and submissions by Mr. Kadioglu before them, both at the liability hearing and in relation to the Penalty Decision, Mr. Kadioglu had deficiencies in his understanding of and competence in agency and contract law. These deficiencies existed even though Mr. Kadioglu had recently taken the Real Estate Trading Services Remedial Education Course.

[80] In determining the appropriate penalties, the Committee reviewed five orders made by the Council in other cases. The Committee accepted that two of the cases analysed were useful comparators to Mr. Kadioglu's case. These cases, Gupta (December 12, 2006 Consent Order) and Parsons (April 27, 2012 Consent Order) each ordered a 30 day suspension.

[81] In relation to enforcement expenses, the *Real Estate Services Regulation*, s. 4.2, sets out the Council's authority to recover enforcement expenses. The regulation was considered by the Committee in assessing the enforcement expenses submitted by the Council. The regulation schedules a tariff of costs that might be claimed. To the extent the Council's expenses are in line with the regulation, it cannot be said that the expenses are unreasonable. The Council

submitted expenses for witness fees for 4 witnesses, and disbursement expenses for photocopies, court reporter and process server. All of these costs are in line with the regulation.

[82] The regulation also permits administrative expenses of $1,500 per day for a hearing panel of three members. The Council claimed three days at $907 per day for the hearing, which included three members at the time of the original hearing. The claim put forth by the Council is less than permitted under the regulation, and I see no error in accepting a lesser amount than the regulation permits.

[83] Finally, the regulation permits a claim for legal services in the amount of $150 per hour, for a person employed by the Council, for all reasonably necessary legal services. The Council claimed 8.3 hours per day for each of the three days of hearing (25 hours in total) and 40 hours for time spent up to the hearing and including written submissions.

[84] In the history of this case, the lawyer for the Council prepared the following submissions:

(a) October 10, 2014 – submissions as to fact and verdict

(b) December 1, 2014 – reply to Mr. Kadioglu's submissions

(c) April 23, 2015 – response to notice of application by Mr. Kadioglu

(d) August 19, 2015 –submissions as to penalty

(e) September 15, 2015 - reply to Mr. Kadioglu's submissions on penalty

[85] In addition to the submissions prepared, the lawyer for the Council would have spent time preparing for the oral hearing. In light of the extensive history of these proceedings, which have spanned almost four years, legal fees claimed for 40 hours of legal work performed in addition to the days of oral hearing is not unreasonable.

[86] I can see nothing in the Penalty Decision of the Discipline Committee which is not reasonably supported by the evidence before the Committee. The order for suspension was based on a number of relevant factors based in the evidence before the Committee and a review of applicable prior Orders of the Council. The enforcement expenses are authorized by regulation. The requirement for further education was grounded in the Committee's finding that Mr. Kadioglu did not have a solid grasp of fundamental principles that are required to practice as a professional in this industry. These findings were clearly based on all of the evidence before the Committee, including the Committee's assessment of Mr. Kadioglu.

DECISION

[87] I have no basis to interfere with the evidentiary findings of the Committee. As such, all of Mr. Kadioglu's grounds of appeal relating to the alleged evidentiary errors of the Committee (see summary at para. 27(a), above) are dismissed.

[88] I find no breach of procedural fairness or natural justice, and no reasonable apprehension of bias, on the part of either the Council or the Discipline Committee.

As such, all of Mr. Kadioglu's grounds of appeal relating to such allegations (see summary at para. 27(b), above) are dismissed.

[89] I find that the FST has no jurisdiction to entertain a Charter remedy. As such, Mr. Kadioglu's grounds of appeal relating to the alleged Charter breaches of the Council and the Committee (see summary at para. 27(c), above) are dismissed.

[90] I find that the penalties imposed by the Committee are reasonably supported by the evidence before the Committee, and are consistent with Orders made in other cases or are supported by the *RESA* and the *RESA* regulation. As such, Mr. Kadioglu's grounds of appeal relating to the alleged excessive penalties (see summary at para. 27(d), above) are dismissed.

[91] For the reasons expressed above, I dismiss Mr. Kadioglu's appeal on all grounds.

[92] The Penalty Decision, which is technically the decision under appeal, is confirmed. The Liability and Recusal Decisions, which were inferentially raised on this appeal, are also confirmed.

[93] The stay of the Penalty Decision which issued pursuant to s. 55(2) of the *RESA* is now lifted.

[94] The Council seeks its costs of this appeal, and of the preliminary application of Mr. Kadioglu dated December 4, 2015. Pursuant to s. 47 of the *Administrative Tribunal Act*, and s. 242.1(7) of the *Financial Institutions Act*, the FST has the power to award costs.

[95] Neither party has provided full submissions on costs. As it is the Council which seeks costs, I invite the Council to provide submissions on costs by February 17, 2017, following which the Appellant may provide its response submissions by February 24, 2017, with a right of reply to the Council by no later than March 3, 2017.

"Wendy A. Baker"

Wendy A. Baker, QC, Panel Chair
Financial Services Tribunal

February 1, 2017