IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kadioglu v. Real Estate Council of British Columbia,* 2017 BCSC 2252

Date: 20171207
Docket: S171617
Registry: Vancouver

Between:

Murat Kadioglu

Petitioner

And

Real Estate Council of British Columbia, Financial Services Tribunal, and Superintendent of Real Estate

Respondents

Before: The Honourable Mr. Justice Greyell

Reasons for Judgment

The Petitioner, Murat Kadioglu:	Appearing on his own behalf
Counsel for the Respondent, Real Estate Council of British Columbia:	D.T. McKnight
Counsel for the Respondent, Financial Services Tribunal:	F.A.V. Falzon, QC
Counsel for the Respondent, Superintendent of Real Estate:	S.A. Wilkinson
Place and Date of Hearing:	Vancouver, B.C. August 18, 2017
Place and Date of Judgment:	Vancouver, B.C. December 7, 2017

[1] Murat Kadioglu seeks judicial review of decisions of the Discipline Hearing Committee of the Real Estate Council of British Columbia (the "Council") finding him guilty of professional misconduct, suspending him for 30 days and ordering him to pay costs, and a decision of the Financial Services Tribunal ("FST") dated February 1, 2017, upholding the Council's liability, disciplinary and penalty decisions.

[2] On June 15, 2017, Mr. Kadioglu amended his petition to assert that the Council's disciplinary action was unconstitutional and seek declarations that sections 37(1), 83(3) and 44(1) of the *Real Estate Services Act*, S.B.C. 2004, c. 42 ("*RESA*") are unconstitutional.

[3] The Council, the FST and the Superintendent of Real Estate are respondents to Mr. Kadioglu's petition, and all are opposed to the relief he seeks.

[4] The Council and FST submit that the decision properly under review in this petition is the FST's decision, not the decisions of the Council, and that the applicable standard of review is that of patent unreasonableness. The Council submits that the FST's decision should be upheld. The FST made submissions with respect to the applicable administrative law principles and how the petitioner's *Charter* arguments should be dealt with.

Background

[5] Mr. Kadioglu was granted a license to sell real estate under the provisions of *RESA* in 2004. In early July 2011, Mr. Kadioglu was employed by and a licensee of Homeland Realty ("Homeland"). On July 25, 2011, his license was transferred to Amex-Fraseridge Realty ("Amex-Fraseridge"), another realty company. At the time, Century 21 Realty ("Century 21"), another realty company, was the listing agent for a property on East Pender Street in Vancouver, BC (the "Property").

[6] In late August 2011, the managing broker of Homeland filed a complaint with the Council alleging that he had been informed by Century 21 that the Property was subject to a contract of purchase and sale written by Mr. Kadioglu on July 24, 2011.

Homeland's complaint was that it had not received a report of the transaction, a copy of the contract of purchase and sale or the deposit money, as was required.

[7] The Council's complaints committee conducted an investigation into the complaint on January 23, 2012, and concluded that a disciplinary hearing was warranted.

[8] After a number of adjournments, the matter came on for hearing before a Discipline Hearing Committee (the "Committee") on August 21 and 22, 2014. The allegations against Mr. Kadioglu were that:

> (a) he failed to apply reasonable care and skill and/or act honestly in that he prepared an offer on July 24, 2011, on his former brokerage's form indicating that the brokerage was providing agency to the buyer, and subsequently, after acceptance, made changes to the Contract of Purchase and Sale, including changing the Contract to indicate the Contract had been prepared by his subsequent brokerage on July 27, 2011 and that the deposit was now payable to the new brokerage in trust, contrary to section 3-4 of Council Rules and/or section 35(1)(c) of the RESA;
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> (b) in contravention of section 3-4 of Council's Rules, he failed to act honestly when he made the above-noted changes without authorization or consent of his former brokerage to make those changes; and
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> (c) in contravention of section 3-4 of the Council's Rules and/or section 35(1)(c) of RESA, he failed to act honestly when he turned into his brokerage the amended Contract which indicated that he had written the contract after he became licensed with the brokerage which was not true.

[9] The hearing did not conclude within the time set and the Committee directed the parties to file written submissions.

[10] Before the Committee reached its decision, the Chair of the Committee made an inquiry to the Committee's legal clerk about the history of the investigation leading to the hearing. The email doing so was copied to the Council's legal counsel. The Council retained and received advice from independent legal counsel, after which the Chair recused himself from the Committee. The two remaining members of the Committee continued the Committee's work.

[11] Independent legal counsel wrote to the parties advising them of the Chair's recusal asking them to make submissions with respect to the Chair's inquiry. Mr.

Kadioglu applied to have all claims against him dismissed on the basis that he had been denied procedural fairness. The Committee dismissed Mr. Kadioglu's application on May 24, 2015, advising him that it would continue deliberations on the merits of the complaint (the "recusal decision").

[12] On June 2, 2015, Mr. Kadioglu filed a petition in this Court, seeking an order that the disciplinary proceedings against him be discontinued on the basis that s. 37(1) of *RESA* is overbroad, disproportionate, arbitrary, and susceptible to abuse of authority and vexatious, frivolous, and/or prejudicial claims against licensees that are inconsistent with the purposes of *RESA*.

[13] Section 37(1) of *RESA* reads:

> 37 (1) On its own initiative or on receipt of a complaint, the real estate council may conduct an investigation to determine whether a licensee may have committed professional misconduct or conduct unbecoming a licensee.

[14] Prior to the application coming on for hearing, on July 20, 2015, the Committee issued its liability decision, finding that Mr. Kadioglu had committed professional misconduct within the meaning of s. 35(1)(a) of *RESA*.

[15] Mr. Kadioglu applied to this Court to have the Committee's decision set aside or stayed. The application was heard by Mr. Justice Skolrood on July 29, 2015, who dismissed it on the basis that it was premature, as the complaint had not been finally dealt with by the Committee, and that there was an appeal to the FST from the Committee's decision.

[16] On November 10, 2015, the Committee issued its penalty decision, in which it ordered that Mr. Kadioglu:

> (a) be suspended for 30 days;
>
> (b) pay enforcement expenses in the amount of $14,001.74 to the Council within six months of the decision; and
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> (c) at its own expense, enrol 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.

[17] On December 4, 2015, Mr. Kadioglu filed an appeal of the penalty decision of the Committee to the FST. His grounds of appeal were:

> (a) the Council and the Committee failed to observe principles of natural justice, procedural fairness or other procedure they were required by law to observe;
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> (b) the Council and Committee based their decisions to prosecute and penalize the petitioner on erroneous findings of fact they made in a perverse and capricious manner or without regard to the material before them, or material that was available to them from reliable extraneous sources;
>
> (c) the Council and the Committee erred in law making the decision to prosecute and to penalize the petitioner and they failed to have regard to the totality of evidence properly before them, for rejecting significant evidence before them, and for refusing to admit crucial material evidence without justifiable grounds; and
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> (d) the Committee erred in misapprehending, ignoring or not properly considering the petitioner's testimony and the testimony of witnesses at the hearing.

[18] The appeal to the FST was based on the record of the Committee's proceedings and the parties' written submissions. The material before the FST included the November 10, 2015 penalty decision, the July 20, 2015 liability decision and the May 14, 2015 recusal decision.

[19] On February 1, 2017, the Panel Chair of the FST issued written reasons, in which she dismissed Mr. Kadioglu's grounds of appeal. She found that there was no basis to interfere with the evidentiary findings of the Committee, found no breach of procedural fairness or natural justice and no reasonable apprehension of bias on the part of either the Council or the Committee. She found that the penalty imposed by the Committee was reasonable.

[20] The Chair also found that the FST had no jurisdiction to entertain a remedy under s. 24(1) of the *Charter* and dismissed the ground of appeal relating to the alleged *Charter* breaches.

The Grounds for Review Raised in the Petition

[21] Mr. Kadioglu asserts numerous and wide-ranging grounds for review, many of which focus on the decisions of the Committee and the manner in which it conducted

its disciplinary proceedings against him. The relevant grounds for review are those which focus on the FST's decision.

[22] Mr. Kadioglu claims that the FST should have declared a mistrial because, in his view, the Chair of the disciplinary panel appointed under *RESA* "had misgivings about whether the Council had followed due process prior to the hearing" and "resigned from the panel since he obviously felt that [Mr. Kadioglu] was not being treated with procedural fairness and the Committee was turned into a kangaroo panel" (Kadioglu Submission, August 18, 2017). Mr. Kadioglu challenged the authority of the two remaining committee members to continue with the hearing. It is his position that the Committee should have, at that stage, declared a mistrial.

[23] Mr. Kadioglu submits:

> FST adjudicator had before her incontrovertible evidence that the Council tampered with the judges' decision and instructed the panel to omit all evidence related to my claims of procedural fairness. It was plain and obvious that the chief panel member had been compelled to resign as a result. It is unthinkable that if, let's say a similar incident happened at a BC Court of Appeal proceeding and a judge felt compelled to resign, a panel of 2 judges would continue. It's just not possible.

[24] Mr. Kadioglu also argues in his amended petition that the FST erred in determining that it had no jurisdiction to consider the *Charter* issues he raised on the appeal. He asserts that the FST failed to adequately consider his procedural fairness concerns arising from the Committee's process, and that the FST's decision "rubber-stamped the decision of the broken panel". Mr. Kadioglu also asserts that the FST (and the Committee) and three provisions of *RESA* breached his rights under a number of provisions of the *Charter*.

[25] For the reasons that follow, all of the grounds of review raised by Mr. Kadioglu must be dismissed.

Analysis

[26] It is necessary to commence with the provisions of the statutes governing the mandates of the Council and the FST insofar as they are relevant to the issues raised by Mr. Kadioglu.

The Real Estate Council

[27] The Council is a statutory body constituted by s. 73(1) of *RESA*. The objectives of the Council are set out in s. 73(2), which are to:

> (a) administer, subject to the oversight and direction of the superintendent under section 89.1, this Act and the regulations, rules and bylaws,
>
> (b) maintain and advance the knowledge, skill and competency of its licensees, and
>
> (c) uphold and protect the public interest in relation to the conduct and integrity of its licensees.

[28] The Council has the authority under Part 2 of *RESA* to grant licenses to individuals or brokerages to provide real estate services. The Council has the authority to grant, refuse, restrict, or amend licenses: Part 2, Division 3 of *RESA.*

[29] Pursuant to s. 36 of *RESA,* a person may make a complaint against a licensee to the Council "if the person believes that a licensee may have committed professional misconduct or conduct unbecoming a licensee." Upon receipt of a complaint, s. 37 grants the Council power to conduct an investigation to determine whether the complaint is justified. Section 39 provides for the establishment of a hearing committee as a discipline committee if the Council decides disciplinary proceedings are warranted. Section 83 also provides for the power to establish hearing committees.

[30] Section 83(3), one of the provisions impugned in Mr. Kadioglu's amended petition, provides that

> (3) If a hearing committee member is unable for any reason to continue to serve on the hearing committee after a hearing has been commenced, the vacancy does not invalidate the proceedings and the remaining members may continue the hearing and exercise the powers of the hearing committee.

[31] Section 44(1), also impugned by Mr. Kadioglu, provides:

> (1) A discipline committee may, by an order under section 43(2)(h*) [recovery of enforcement expenses]*, require the licensee to pay the expenses, or part of the expenses, incurred by the real estate council in relation to either or both of the investigation and the discipline hearing to which the order relates.

[32] Section 43(1) of *RESA* requires a discipline committee to either dismiss a complaint or make a discipline order under s. 43(2). Section 54(1)(d) provides that a licensee subject to a discipline order has the right to appeal to the FST:

> **54** (1) Appeals to the financial services tribunal may be made as follows:
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> …
>
> (d) the person subject to the order, or the superintendent, may appeal an order of a discipline committee under Division 2 *[Discipline Proceedings]* of this Part;
>
> …

The Financial Services Tribunal

[33] The FST is an administrative appeal tribunal established under the *Financial Institutions Act*, R.S.B.C. 1996, c. 141 ("*FIA*"). The FST's mandate under the *FIA* is to entertain appeals from six prescribed statutory bodies constituted under several provincial statutes, one of which is *RESA*. Others include the *Credit Union Incorporation Act*, R.S.B.C. 1996, c. 82, s. 98; the *Pension Benefits Standards Act*, S.B.C. 2012, c. 30, s.127; the *Mortgage Brokers Act*, R.S.B.C. 1996, c. 313, s. 9; and the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41, s. 37.

[34] Sections 242.3(1) and (2) of the *FIA* provide that the FST has "exclusive jurisdiction" to inquire into matters conferring jurisdiction on the tribunal and that its decisions on these matters are final and conclusive and not open to question in any court:

> **242.3** (1) In respect of this Act or any other Act that confers jurisdiction on the tribunal, the tribunal has exclusive jurisdiction to
>
> (a) inquire into, hear and determine all those matters and questions of fact and law arising or requiring determination, and
>
> (b) make any order permitted to be made.

> (2) A decision of the tribunal on a matter in respect of which the tribunal has exclusive jurisdiction is final and conclusive and is not open to question or review in any court.

[35] The appeal before the FST was, as required by ss. 242.2(5) and (6) of the *FIA*, based on the record of the Committee. It was not a trial de novo.

> **242.2** …
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> …
>
> (5) Subject to subsection (8), an appeal is an appeal on the record, and must be based on written submissions.
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> (6) For the purposes of subsection (5), the record consists of the following:
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> (a) the record of oral evidence, if any, before the original decision maker;
>
> (b) copies or originals of documentary evidence before the original decision maker;
>
> (c) other things received as evidence by the original decision maker;
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> (d) the decision and written reasons for it, if any, given by the original decision maker.
>
> …

[36] Section 242.2(11) of the *FIA* describes the options open to the FST following a review of a decision:

> **242.2** …
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> …
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> (11) The member hearing the appeal may confirm, reverse or vary a decision under appeal, or may send the matter back for reconsideration, with or without directions, to the person or body whose decision is under appeal.
>
> …

The *Administrative Tribunals Act*

[37] Section 242.1(7) of the *FIA* sets out several sections of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 ("*ATA*"), which apply to the FST. These provisions include s. 1 and s. 58.

[38] "Privative clause" is defined in s. 1 of the *ATA* as:

> ...provisions in the tribunal's enabling Act that give the tribunal exclusive and final jurisdiction to inquire into, hear and decide certain matters and questions and provide that a decision of the tribunal in respect of the matters within its jurisdiction is final and binding and not open to review in any court;

[39] Section 58 provides:

> **Standard of review with privative clause**
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> **58** (1) If the Act under which the application arises contains or incorporates a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
>
> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> > (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
> >
> > (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
> >
> > (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
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> (3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion
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> > (a) is exercised arbitrarily or in bad faith,
> >
> > (b) is exercised for an improper purpose,
> >
> > (c) is based entirely or predominantly on irrelevant factors, or
> >
> > (d) fails to take statutory requirements into account.

The Decision Properly Under Review

[40] To the extent that Mr. Kadioglu seeks to have the decisions of the Committee set aside, it is clear on the law that the only decision this Court has jurisdiction to review is the decision of the FST: *United Steelworkers, Paper and Forestry, Rubber,*

Manufacturing, Energy Allied Industrial and Service Workers International Union, Local 2009 v. Auyeung, 2011 BCCA 527, at para. 33:

> [33] I shall return to the question of reasons, but, in my view, the Board's understandable reluctance to be obliged to give reasons is not sufficient grounds to open original decisions to court intervention by way of judicial review. While a party may wish to have an original decision and the reasons for it reviewed judicially, the Legislature has limited the scope of review. It is not for the court to determine whether the original decision is patently unreasonable, unfair or incorrect. If the Board concludes the original decision is not inconsistent with the principles expressed or implied in this *Code* or in any other Act dealing with labour relations, a court on judicial review is entitled to determine whether that conclusion is patently unreasonable, unfair or incorrect. If it is not, there the matter should end.

[41] In *Cariboo Gur Sikh Temple Society (1979) v. British Columbia (Employment Standards Tribunal)*, 2016 BCSC 1622, at paras. 19 and 20, Mr. Justice Ball wrote:

> [19] Only the Decision of the Tribunal is subject to review by this Court; not the determination by the Delegate: *Yellow Cab Company Ltd. v. Passenger Transportation Board*, 2014 BCCA 329 at paras. 40-41. As stated in *Canwood v. Bork*, 2012 BCSC 578 at paras. 16-17, with respect to the inability of the court to review the initial determination by the Delegate:
>
> > [17] It is clear that the original Director's determination is not the subject of this judicial review. The Legislature has put in place a statutory scheme providing for appeals of determinations by the Director. That process is protected by a privative clause. As Mr. Justice Pitfield said in *Laguna Woodcraft (Canada) Ltd. v. British Columbia (Employment Standards Tribunal)*, [1999] B.C.J. No. 3135 (S.C.) [*Laguna*] at para. 11:
> >
> > > Under the Employment Standards Act an appeal lies to the Tribunal from any decision made by the director. Judicial review, in the ordinary course, is not available where there is an appeal to higher authority. The judicial review should be pursued, where appropriate and necessary, in relation to decisions of the Tribunal and not of the director.
>
> [20] Nonetheless, the determination of Delegate forms part of the background for this hearing and will inform the Court's review.

[42] The regulatory scheme in the present case provides for an appeal from the Committee's decisions to the FST, a body which has "exclusive jurisdiction". Section 242.3(2) of the *FIA* makes it clear that this Court has no jurisdiction to entertain such

an appeal. Accordingly, this Court's review must be limited to the decision of the FST.

Standard of Review

[43] To succeed, Mr. Kadioglu must establish that the FST's decision offended the applicable standard of review set out in s. 58 of the *ATA* above.

[44] The applicable standard of review is the patently unreasonable standard: see *Gorenshtein v. British Columbia (Employment Standards Tribunal)*, 2016 BCCA 457 at paras. 25-26:

> [25] The notions of bias and reasonable apprehension of bias are issues of natural justice and address the integrity of the adjudicative process. The appellants' challenge to the standard of review applied by the judge proposes that questions of natural justice arising from the delegate's determination considered, and then reconsidered by the Tribunal, come within s. 58(2)(b) of the *Administrative Tribunals Act* rather than s. 58(2)(a). This can be correct only if the question of bias or reasonable apprehension of bias on the part of the delegate, is not (adapting the words of s. 110 of the *Employment Standards Act*) a matter or question of fact, law or discretion arising or required to be determined in an appeal or reconsideration.
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> [26] In my view, the finding there was no bias or reasonable apprehension of bias requires a finding of fact against a legal standard. In this case, such a question was required to be determined by the Tribunal. It was, therefore, a matter over which the Tribunal had exclusive jurisdiction within the meaning of s. 110 of its home statute. Accordingly, under the *Administrative Tribunals Act* s. 58(2)(a), not s. 58(2)(b), applies to establish the standard of review as patently unreasonable.

[45] In *British Columbia Teachers' Federation/Surrey Teachers' Association v. British Columbia Public School Employers' Association/The Board of Education of School District No. 36 (Surrey)*, 2015 BCSC 1411 [*BC Teachers*], at paras. 17-18, the court said:

> [17] "Patently unreasonable" does not mean "patently wrong": Health Sciences Assn. of British Columbia v. British Columbia (Industrial Relations Council) (1992), 91 D.L.R. (4th) 582 at 598 (C.A.) [Health Sciences].
>
> [18] A decision is patently unreasonable if it is clearly irrational such that there is no tenable line of reasoning to support it: Pacific Newspaper Group Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 2000, 2014 BCCA 496 at para. 39. As explained by Madam Justice Ballance

at para. 65 of Victoria Times Colonist v. Communications, Energy and Paperworkers, 2008 BCSC 109, aff'd. 2009 BCCA 229 [Victoria Times]:

> 65. When reviewing for patent unreasonableness, the court is not to ask itself whether it is persuaded by the tribunal's rationale for its decision; it is to merely ask whether, assessing the decision as a whole, there is any rational or tenable line of analysis supporting the decision such that the decision is not clearly irrational or, expressed in the Ryan formulation, whether the decision is so flawed that no amount of curial deference can justify letting it stand. If the decision is not clearly irrational or otherwise flawed to the extreme degree described in Ryan, it cannot be said to be patently unreasonable. This is so regardless of whether the court agrees with the tribunal's conclusion or finds the analysis persuasive. Even if there are aspects of the reasoning which the court considers flawed or unreasonable, so long as they do not affect the reasonableness of the decision taken as a whole, the decision is not patently unreasonable.

The FST's Consideration of the Committee's Assessment of the Evidence

[46] The FST had before it and was required to consider the full record of proceedings of the Committee in reaching its decisions. Its reasons demonstrate that the Chair of the FST panel gave full consideration to the record, in addition to seeking submissions from all parties concerning the record. The FST Chair placed the weight she saw fit on those portions of the record the Chair thought relevant to her decision. This was her function.

[47] At paras. 37, 38, 41 and 47, she addressed the Committee's approach to assessing the evidence before it:

> [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 paragraph 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."
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> [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.
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> …
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> [41] The Committee was entitled to weigh the documentary evidence from the licensing 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 licensing documents is not an error.
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> …
>
> [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.

[48] At para. 43, the Chair found that the Committee reasonably and carefully reviewed the evidence before it. She concluded that the Committee, in coming to its conclusion on liability, "had ample evidence before it which would support the conclusions it made".

[49] There is simply no basis to argue that the Chair's approach to the manner in which the Committee assessed the evidence before it was patently unreasonable. I dismiss Mr. Kadioglu's complaints that the FST's decision, in upholding the Committee's decision, failed to properly weigh the evidence, including the documentary evidence before the Committee.

The FST's Consideration of Mr. Kadioglu's Procedural Fairness Arguments

[50] The FST Chair addressed Mr. Kadioglu's procedural fairness arguments at paras. 48-67. Her key findings are as follows:

> [49] …The Council was empowered under s. 37 of [*RESA*] to investigate Mr. Kadioglu 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] … [E]ven 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.
>
> …

> [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. …
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> …
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> [61] …[T]here 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.
>
> …
>
> [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.

[51] The FST Chair addressed Mr. Kadioglu's complaints that the Committee Chair had a dispute with his fellow Committee members over an issue of alleged procedural unfairness and resigned for that reason. The record demonstrates that Mr. Kadioglu is clearly wrong in making such assertions. The record establishes that the Chair resigned after being advised that the communication he had with what Mr. Kadioglu calls the "prosecution" was inappropriate. The Chair took no issue with recusing himself. Section 83(3) of *RESA* clearly permitted the remaining members of the panel to "continue with the hearing and exercise the powers of the hearing committee" in the absence of the Chair. Mr. Kadioglu's submission that the Chair's resignation was an "extraordinary event" not covered by s. 83(3) because of "tampering" with the panel's decision making process clearly was not supported by the record.

[52] The FST Chair concluded that there was no reasonable apprehension of bias arising from the Committee Chair's recusal; that is, there was a clear statutory provision which permitted the Committee to proceed in the event that a hearing committee member was unable "for any reason" to continue to serve on the hearing committee after a hearing has been commenced. In my view, the FST Chair's reasons were not patently unreasonable. In fact, I consider her correct in coming to the conclusion she did.

[53] I agree with the FST Chair in her conclusion there was no procedural unfairness to the petitioner throughout the course of the proceedings before the Committee, or in the manner the complaint came before the Committee, or in the manner the complaint was disposed of and the penalty assessed.

The Petitioner's *Charter* Arguments

[54] The petitioner submits that ss. 37(1), 44(1) and 83(3) of *RESA* are contrary to the *Charter*. When asked to particularize the alleged *Charter* breaches, Mr. Kadioglu responded that s. 37(1) of *RESA* infringes the principles of fundamental justice and ss. 7, 8, 9, 11(a-d), and 15(1) of the *Charter*, that s. 44(1) of *RESA* infringes the principles of fundamental justice and ss. 8, 9 and 11(a-d) of the *Charter,* and that s. 83(3) of *RESA* offends ss. 11(d) and 15(1) of the *Charter.*

[55] The FST addressed Mr. Kadioglu's arguments with respect to alleged breaches of ss. 7, 11 and 15 of the *Charter* by both the Council and the Committee. The Panel Chair noted that, pursuant to s. 44 of the *ATA*, the FST does not have jurisdiction over constitutional questions. At para. 72 of her decision, she wrote that "[w]ithout getting into the merits of any of these claims…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…"

[56] As pointed out by the Council and the FST in their responses to Mr. Kadioglu's *Charter* arguments, the Panel Chair addressed the substance of his complaints with regard to the applicable administrative law principles of bias, delay and procedural fairness. The Panel Chair found that the Committee gave Mr. Kadioglu adequate notice of the case he had to meet, that no breach of natural justice had occurred due to delay, and that the Committee Chair's recusal did not give rise to a reasonable apprehension of bias. As noted above, Mr. Kadioglu has failed to establish that any of these findings is patently unreasonable.

[57] In my view, Mr. Kadioglu is simply using the *Charter* to recast his argument that he was denied a fair hearing when the Chair of the disciplinary panel recused himself and the hearing continued with two members. He says the remaining

members were not “fair, independent or impartial”, with reference to s. 11(d). The FST addressed this concern with respect to administrative law principles and the statutory scheme governing the Committee. Mr. Kadioglu says he had the right to be judged by a full panel of three members like everyone else going through the disciplinary process, with reference to s. 15. The FST addressed this concern, correctly finding that he had no right to be judged by a panel of 3 members, pursuant to *RESA*. Further, the FST has expressly found that Mr. Kadioglu was not disadvantaged by the Committee sitting as a panel of two. The FST did not accept the submission of Mr. Kadioglu that the Committee composed of two members was, as he submits, “a broken and tampered panel of 2 members”.

[58] In short, there is no factual foundation underlying Mr. Kadioglu’s assertion that his *Charter* rights have been offended.

[59] Further, as submitted by the respondent Council, Mr. Kadioglu has failed to show that the *Charter* sections he relies on are engaged in this case. Section 11 of the *Charter* only applies to those who are “charged with an offence”, not those subject to administrative sanctions: *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 [*Wigglesworth*]. The Committee’s disciplinary proceedings are administrative in nature, and cannot be said to “involve the imposition of true penal consequences”: *Wigglesworth,* at para. 24. Mr. Kadioglu has not shown that the life, liberty and security interests protected by s. 7 are engaged, and has failed to meet the threshold for those interests as discussed in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] S.C.R. 307, 2000 SCC 44. With respect to s. 15, Mr. Kadioglu has not made out differential treatment on the basis of discrimination on a listed or analogous ground. Sections 8 and 9 simply do not apply to his situation.

[60] I also note that Mr. Kadioglu did not raise his constitutional arguments in the proceedings before the Committee. He raised his *Charter* arguments for the first time before the FST. As a general rule, it is inappropriate to raise *Charter* issues for the first time on judicial review, as recently affirmed by the Court of Appeal: see *Denton v. British Columbia Workers’ Compensation Appeal Tribunal)*, 2017 BCCA

403 [*Denton*], citing with approval to *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245. The rationale for the rule is that courts should have the benefit of "a complete factual context and a developed record" in considering *Charter* challenges with respect to administrative decisions: *Denton,* at para. 49.

[61] The declarations sought by the petitioner with respect to the constitutionality of ss. 37(1), 83(3) and 44(1) of *RESA* were added to Mr. Kadioglu's amended petition in June of 2017. These *Charter* arguments should have been raised before the Committee, not subsequently on a judicial review of the FST's decision. Regardless, Mr. Kadioglu has failed to adduce sufficient evidence to establish that these provisions of *RESA* are unconstitutional.

Conclusion

[62] For the reasons stated above, it is my view that this application for judicial review must be dismissed. The FST does not seek costs. The Council does seek costs. The Council will have 15 days from the date these reasons are released to provide written submissions to the court addressed through Supreme Court scheduling to my attention. Mr. Kadioglu will have a further ten days within which to file a response regarding costs.

"Greyell J."