

DECISION NO. 2012-RSA-001(a)

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

BETWEEN: Chinweobi (Chiobi) Anoliefoh **APPELLANT**

AND: Real Estate Council of British Columbia **RESPONDENT**

BEFORE: Paula E. Barnsley, Panel Chair

DATE: Conducted by way of written submissions
concluding on September 7 , 2012

APPEARING: For the Appellant: self represented
For the Respondent: David P. Berger, Counsel

I. INTRODUCTION

[1] The Appellant, Chinweobi (Chiobi) Anoliefoh, resigned his position as managing broker for Century 21 City View Realty ("City View") on June 1, 2011. The *Real Estate Services Act*, SBC 2004, c. 42 ("*RES Act*") requires a managing broker to surrender his licence when he is no longer associated with a real estate brokerage. The Appellant surrendered his licence, with the intention of applying for re-instatement when he found work with another brokerage. On February 27, 2012, the Real Estate Council ("REC") received an application from the Appellant for re-instatement of his licence, as well as an application by Global International Real Estate Consultants Limited ("Global") for a brokerage licence. Global's application named the Appellant as the proposed managing broker.

[2] Around three months before his application for reinstatement, the Appellant received a Notice of Discipline Hearing from legal counsel for REC, alleging numerous contraventions of the *RES Act* and Real Estate Council Rules ("Rules") during his tenure as managing broker at City View. The discipline hearing was scheduled for May 29 and 30, 2012. In his reinstatement application, the Appellant indicated that he was the subject of pending disciplinary proceedings.

[3] Following a February 29, 2012 telephone discussion with counsel for REC, the Appellant agreed to a qualification hearing. The Appellant requested that the discipline hearing be moved ahead, but REC declined, instead proposing to convert

the discipline hearing to an earlier qualification hearing. The Appellant agreed as he needed to return to work and earn an income. A letter from counsel for REC to the Appellant dated March 12, 2012 confirms the change in the type of hearing, advises that the hearing is scheduled for March 15 and 16, 2012, and notes that the issues for the Qualification Hearing Committee ("Committee") will include those set out in the Notice of Discipline Hearing.

[4] In a written decision dated May 10, 2012 ("Decision"), the Committee denied the Appellant's application for a managing broker's licence and placed conditions on his ability to re-apply for that level of licence. Although the Appellant did not apply for an associate broker licence, the Qualification Hearing Committee determined that he was eligible for a licence at this level. By Notice of Appeal filed June 12, 2012, the Appellant now appeals the decision of the Committee.

II. PRELIMINARY ISSUE – NEW EVIDENCE

[5] The Appellant attached three exhibits to his Notice of Appeal that were not in evidence at the Qualification Hearing. The appeal submissions for REC state that REC has no objections to the exhibits attached to the Notice of Appeal being accepted as evidence for the purposes of this appeal. Counsel for REC also applied to have two documents introduced into evidence on this Appeal. In his reply submissions, the Appellant states that he has no objection to the admission into evidence of the documents submitted by REC counsel.

[6] An appeal to the Financial Services Tribunal ("FST") is an appeal on the record. As the FST member who is considering this appeal, I may allow new evidence to be introduced on the appeal if I am satisfied that the new evidence is "substantial and material to the decision" and either did not exist or was not discovered, or discoverable with reasonable diligence, at the time of the original decision. (*Financial Institutions Act*, RSBC 1996, c. 141, s. 242.2(8)) I am not authorized to allow new evidence simply on the consent of the parties.

[7] The evidence that the Appellant seeks to admit existed at the time of the Qualification Hearing. One of the documents is a letter that was written after the appeal, but the content of the letter is evidence that existed at the time of the Hearing. One of the documents that REC seeks to admit is also pre-existing evidence. Evidence that existed at the time of the Qualification Hearing (pre-existing evidence) but that was not produced at the Hearing is not necessarily new evidence on appeal. Pre-existing documents may be admitted on appeal if they may be considered part of the Record (*Superintendent of Financial Institutions v. Insurance Council of British Columbia et al.*, November 10, 2006, FST 06-026, Financial Services Tribunal).

[8] For the following reasons, and absent submissions to the contrary, I find that the following documents are admissible on this appeal on the basis that they may be considered part of the Record:

(i) Appellant's document - August 22, 2011 letter to the Appellant from REC legal counsel advising that a Notice of Discipline Hearing would follow in due course. This letter is part of a series of communications contained in the Record (Book of Documents) that notifies the Appellant about disciplinary proceedings.

(ii) Appellant's document - Accountant's Report for City View for year ending June 30, 2009, dated November 9, 2009. The Appellant referred to this document in his testimony, and the Decision refers to the Appellant's failure to submit this report into evidence as support for the Committee's finding that his testimony was unreliable.

(iii) Appellant's document - June 6, 2012 letter to the Appellant from Peet Nienaber, CA regarding the software used by City View. At the hearing, the Appellant testified that the accounting problems at the brokerage were a direct result of problems with new accounting software. The Decision notes that the Appellant had not provided corroborating evidence for this assertion. The REC submissions state that that the letter "could have been material to the decision as to whether the Appellant had control of the books, records and accounts of the brokerage". In his submission, the Appellant says that he intended to call the author of the letter to testify at the discipline hearing scheduled in May 2012, but Mr. Nienaber was not available to testify at the Qualification Hearing. In light of the speed at which the hearing was scheduled, three days after REC wrote to the Appellant confirming that the Discipline Hearing scheduled for May 29 and 30 would be converted to a Qualification Hearing scheduled for March 15 and 16, I accept that availability of this professional may have been problematic.

(iv) Respondent's document - Order in Urgent Circumstances and the affidavit of Lisa Holst sworn in support of that Order, both dated November 23, 2011. At page 17 of the Decision, the Order in Urgent Circumstances is discussed as a factor in finding that the Appellant was not suitable to be qualified as a managing broker. Ms. Holtz gave testimony at the hearing about the Order and the background circumstances to REC seeking the Order.

[9] The second document that REC seeks to admit is a memorandum of Lisa Holst, REC Director, Accounting and Audit, to David Berger, REC Director Legal Services dated August 9, 2012 ("August 2012 Memorandum"), which provides an update on the status of the trust account shortage incurred by City View. At the Qualification Hearing Ms. Holst testified that City View was in receivership, the receiver had not yet completed the distribution of trust funds, and that there was a crystallized shortage at that point of around \$18,000.00. The trust account shortage was a significant factor in the discussion of public harm in the Decision. I am satisfied that this memorandum is new evidence that is "substantial and material to the decision".

[10] I order that the following documents be added to the Record on this appeal:

- (i) August 22, 2011 letter to Mr. Chiobi Anoliefoh from REC legal counsel;
- (ii) Accountant's Report for City View for year ending June 30, 2009, dated November 9, 2009;
- (iii) June 6, 2012 letter to Mr. Chiobi Anoliefoh from Peet Nienaber, CA; and
- (iv) Order in Urgent Circumstances and the affidavit of Lisa Holst, both dated November 23, 2011.

[11] I further order that the August 2012 Memorandum be admitted as evidence on this appeal pursuant to s. 242.2(8) of the *Financial Institutions Act*.

III. BACKGROUND

Chronology

[12] The Appellant has been licenced under the *RES Act* or its predecessor legislation since 1982. Since 1991 he has been licenced as a managing broker. He has no prior discipline history with REC.

[13] From 1991 to 2007, the Appellant was managing broker at Aceeca Development Ltd., a firm that he owned with a partner. He sold his partnership interest in 2007 and became managing broker at City View, which was adding a real estate portfolio to its already existing insurance business. The Appellant held a 1% interest in City View.

[14] Sometime in 2008, City View purchased accounting software called Lone Wolf. City View's bookkeeper was trained to use this software. The bookkeeper left her job in late 2008, after training her replacement over a two week period.

[15] The Appellant testified that in 2009 he started to notice that the monthly statements showed shortages in the trust account, in particular with the property management portfolio. The Appellant informed City View's directors and they agreed to cover the shortage in the trust account. In the months that followed, trust shortages continued to show on the monthly statements, and the owners of City View, at the Appellant's urging, continued to cover the shortages. The Appellant believed that he did not have to report the trust shortages to REC if they were covered within 10 days of being discovered. During this time, the Appellant was trying to identify the cause of the accounting problems. He formed the opinion that the Lone Wolf program was the cause, but was unable to convince the owners to cease using this software. By the end of 2009 the Appellant's concerns that the brokerage was not operating in full compliance with the *RES Act* and Rules had reached the point where he met with the owners and advised that they faced two choices – either to sell the brokerage or close it. The owners decided to sell, and the ownership of City View changed on October 1, 2010.

[16] The Appellant continued as managing broker at City View under the new ownership until May 31, 2011.

[17] June 30 is City View's financial year end, and October 31 is the due date for its annual Accountant's Report to be filed with REC. The Appellant recommended he simply ask the accountant who had historically prepared the Accountant's Report for City View to do the June 30, 2010 report. However, the new owners of City View wanted to use their own accountant. On October 20, 2010, the Appellant wrote to REC requesting an extension of time to file the report, to November 30. The Accountant's Report did not make the extended deadline, but was filed on December 7.

[18] The Accountant's Report filed on December 7, 2010 ("2010 Accountant's Report") includes a four page list of exceptions identified in the trust audit. City View Accountant's Reports for previous years had not identified any exceptions.

[19] Ms. Lisa Holst, CA is employed by REC as the Director of Accounting and Audit. She appeared as a witness for REC at the Qualification Hearing. She testified that the list of exceptions in the 2010 Report, which included shortages in two trust accounts amounting to more than \$30,000.00, was of such concern to REC that an Office and Records Inspection was scheduled without delay. The former owners were ordered to deposit funds into the trust accounts to cover the shortages, which they did by December 23, 2010.

[20] Ms. Sunita Ishri holds a CMA professional designation and an associate degree in economic crime. She is employed by REC as an auditor/investigator and appeared as a witness for REC at the Qualification Hearing. Ms. Ishri conducted an office and records inspection of City View on December 22 and 29, 2010, and January 13, 2011. Her findings and conclusions are reported in her Office and Records Inspection Report (Including Trust Account Reconciliations as November 30, 2010) dated February 1, 2011 ("Initial Inspection Report").

[21] Ms. Holst wrote to the Appellant on February 2, 2011, enclosing a copy of the Initial Inspection Report, requesting his response to the Report and notifying him that the Report and his response would be forwarded to REC's Compliance Department. REC received the Appellant's response on February 11, 2011, and made further requests for information which the Appellant provided. On March 8, 2011, the Appellant wrote to Ms. Holst enclosing the last of the information that REC had requested and advising that City View had complied with other REC requests or recommendations in the Initial Investigation Report relating to the trust accounts.

[22] On March 23, 2011, Ms. Holst wrote to the Appellant advising that, based on the information provided in the course of the inspection, the net trust fund shortage at November 30, 2010 was estimated at \$8,826.92. The former owners had deposited \$32,394.95 into the trust accounts in December 2010, and this letter authorizes the return of the difference between that amount and the

estimated trust shortage, subject to a holdback of \$3,247.50 pending further information and clarification.

[23] On April 13, 2011, Ms. Holst wrote to the Appellant authorizing the release of the \$3,247.50 holdback. \$2,597.50 was authorized for release to the former owners, and \$650.00 was released for transfer to City View's new rental trust account. The net trust account shortage at November 30, 2010 was calculated at \$8,826.92. This letter advises the Appellant that REC was closing the audit with respect to the trust shortage for the period to November 30, 2010, and that a follow-up audit would occur within the next six months.

[24] On May 9, 2011, REC Compliance Manager wrote to the Appellant advising that, based on observations in the Office and Records Inspection Report, an inquiry had been commenced into his conduct pursuant to the *RES Act*, s. 37(1). The Appellant's responding letter dated May 15, 2011 indicates that his contract with City View ended April 30 and that he would no longer represent City View as managing broker effective June 1, 2011.

[25] On May 10, 2011 the Appellant wrote to City View owner and director Zian Aladina giving notice that he would be terminating his position as managing broker effective June 1, 2011. This letter requests payment of \$16,500 in unpaid wages for the time period from November 2010 through May 2011. At the Qualification Hearing the Appellant testified that City View had not paid his past wage claim and that he had initiated a legal action in Small Claims Court to recover the wages owed to him by City View.

[26] Around May 31, 2011, before his licence expired and because he was pressed for income due to his employer's refusal to pay for the previous six months, the Appellant wrote up a sale that would close in November. When the sale closed in November, the Appellant's commission was forwarded to City View.

[27] The Appellant surrendered his managing broker licence to REC as of June 1, 2011, because he was no longer associated with a brokerage. The Appellant's licence expired on July 11, 2011.

[28] After the Appellant left, City View continued to operate as a brokerage. REC renewed City View's brokerage licence and licenced two managing brokers.

[29] On June 28, 2011, REC Compliance Manager wrote to the Appellant advising that the REC Complaints Committee had decided to conduct a discipline hearing against him, and a Notice of Discipline Hearing would be forwarded in due course. On August 22, 2011, legal counsel for REC wrote to the Appellant advising that a Notice of Discipline Hearing would be forwarded in due course.

[30] On September 22 and 23, 2011 REC auditor, Jenny De Castris, inspected the office and records of City View. The Re-Office and Records Inspection Report (Including Trust Account Reconciliations as at August 31, 2011) ("Follow-up Inspection Report") concludes that "there remain several issues that have not yet

been resolved and an overall lack of necessary controls in place to ensure ongoing compliance with [RES Act] and the Council Rules." The Follow-up Inspection Report was forwarded to the Compliance department for further consideration and a further follow-up was to be scheduled within six months.

[31] Mahmoud Ahamed, managing broker for City View subsequent to the Appellant, responded to the Follow-up Inspection Report in a letter to REC dated October 29, 2011. The letter lists changes that Mr. Ahamed made to correct deficiencies identified in the Follow-up Report. Mr. Ahamed noted that he had no prior experience as managing broker and "was trying very hard to get up to speed". Ms. Holst replied to Mr. Ahamed on November 7, 2011, noting that he had not properly responded to items #1, 2, 5, 7 and 8 of the Follow-up Inspection Report.

[32] On October 31, 2011, REC received the City View Accountant's Report for the year ending June 30, 2011 ("2011 Accountant's Report"). This report was prepared by the same accountant who prepared the Report for the year ending June 30, 2010 (that is, the new owners' accountant). The 2011 Report includes a two page "List of Exceptions - Trust Audit", that shows unreconciled differences from previous year to current year of \$5,665.77 in one trust account and \$2,371.86 in another, and shows net shortage (four trust accounts) between trust assets and liabilities of \$13,077.26 (shortages in three accounts and overage in one account). One trust account (main trust account) had a shortfall of \$18,761.35, while another (commission trust account) showed an overage of \$10,033.57. Two property management trust accounts showed shortages of \$329.86 and \$4,019.62.

[33] On November 1, 2011, REC Accounting and Audit Manager wrote to Mr. Ahamed requesting a written response to explain each of the exceptions, the unreconciled differences, and the \$18,761.35 trust account shortage in the Accountant's Follow-up Report.

[34] In his reply to the Accounting and Audit Manager dated November 14, 2011, Mr. Ahamed said that he could not provide the explanations requested because the owners planned to wind down the brokerage and had no motivation to rectify the issues. Mr. Ahamed said he believed the owners had planned to wind down for some time.

[35] On November 16, 2011, legal counsel for REC issued a Notice of Discipline Hearing to the Appellant and City View alleging numerous contraventions of the RES Act and Rules relating to trust accounts, financial records and brokerage records during the time frame from January 2008 to February 1, 2011. The Hearing was scheduled for May 29 and 30, 2012.

[36] City View's brokerage licence was suspended on November 23, 2011 under an Order in Urgent Circumstances ("OIUC"). The Court ordered OIUC froze City View's bank accounts and a receiver was appointed. Ms. Holtz's affidavit in support of the OIUC indicates her concern over a trust account shortage of approximately

\$18,000 and information provided by City View's then managing broker, Mr. Alladina, that the trust account would not be replenished to the extent needed to complete a pending real estate transaction.

[37] In January 2012 the Appellant communicated with Ms. Holst regarding payment of the \$10,897.46 in commission due to him from City View for the pre-sale he made in May 2011 that closed in November 2011. The matter was then in the hands of the Court appointed receiver.

[38] On February 27, 2012, REC received an application from the Appellant, for reinstatement of his licence as a managing broker for a new brokerage, Global International Realty. On the application, the Appellant indicated that he was applying for three categories of licence – trading services, rental property management services and strata management services. The Appellant also indicated that he was the subject of a pending discipline proceeding.

[39] Also on February 27, REC received an Application for Brokerage Licence from Global, which named the Appellant as its proposed managing broker. Among the documents submitted with this application are a Balance Sheet for Global National as at February 21, 2011 and a notarized declaration sworn by the Appellant attesting that the attached balance sheet "is true and correct to the best of my knowledge and belief." In fact the balance sheet does not balance.

[40] On February 29, 2012, the Appellant and REC legal counsel had a telephone discussion regarding converting the Discipline Hearing scheduled for May 29-30 to a Qualification Hearing to be scheduled March 15-16. This conversation is confirmed in a letter from REC counsel to the Appellant dated March 12, 2012.

Qualification Committee Decision

[41] The Qualification Committee decided that the Appellant was not currently suitable to be licensed as a managing broker because he had little control over the brokerage, City View, resulting in public harm. The Committee concluded that the Appellant was immediately eligible to be licensed as an associate broker in the categories of services for which he had been previously licensed and experienced, namely trading services and rental property management services. The Appellant's application for licensing in the category of strata management services was denied because the Committee found no evidence of previous licensing in this category. The Qualification Committee also placed conditions on the Appellant's ability to apply for managing broker licensing in the future. The Committee ordered REC to reject any application by the Appellant for a managing broker licence before May 10, 2015 (three years from the date of the decision). Further, the Committee imposed an education requirement. "[A]s a condition of continued licensing as a managing broker, Mr. Anoliefoh must successfully complete the Broker's Licensing Course as provided by the Real Estate Division, Sauder School of Business at the University of British Columbia in the time period as directed by the Council."

[42] The Committee identified three areas where they preferred evidence of Ms. Holst and Ms. Ishri over that of the Appellant. Despite the Appellant's testimony to the contrary, the Committee accepted that management service agreements missing from City View's files were never found or produced to Ms. Ishri, that there were no monthly trust liability listings prepared and Ms. Ishri had to completely reconstruct trust liability listings in order to determine the trust shortages, and that the accounting errors did not result from the accounting software system itself but from improper use of the software. These appear to be the key findings on which the Committee decided that the Appellant did not qualify for licensing as a managing broker.

[43] The Decision identifies the following "additional reasons" for determining that the Appellant was not currently suitable to be licensed as a managing broker:

- (i) Order in Urgent Circumstances and appointment of a Receiver to manage and distribute trust funds;
- (ii) Marginalization as managing broker;
- (iii) Application for re-licensing;
- (iv) Inability to oversee books and records;
- (v) Business reputation.

August 2012 Memorandum

[44] The August 2012 Memorandum provides an update on the status of the receivership of City View. This evidence was not before the Qualification Committee, although some of the events referred to occurred before March 15, 2012.

[45] After the OIUC "freeze order" was executed, REC determined, from the information then available, that the City View trust accounts had a total trust shortage of approximately \$3,956.63 at November 23, 2011.

[46] On January 12, 2012, the Real Estate Compensation Fund provided \$8,986.18 to the Receiver to ensure that a pending City View transaction could be completed. On April 14, 2012, the Receiver repaid the Real Estate Compensation Fund from brokerage funds collected at that time.

[47] On May 17, 2012, the Receiver advised REC (Ms. Holst) that he had received a trust replacement cheque in the amount of \$10,036.60. On October 3, 2011, City View had posted a deposit in the amount of the cheque to the ledgers and had paid commissions, but had not physically deposited the cheque. Thus the trust account was overdrawn. The original cheque, by then stale-dated, was subsequently found in the brokerage deal file for the related transaction.

[48] After the Receiver deposited the replacement cheque, the City View trust accounts were sufficiently funded to ensure all public trust fund claims could be satisfied, and approximately 83% of licensee commission claims could be paid.

[49] At August 9, 2012 there were no claims for trust money from members of the public that had not been satisfied. There were outstanding claims for commissions payable to former licensees in the amount of \$7,673.88, including claims of \$2,800 by the Appellant. There is an unidentified replacement cheque in the amount of \$6,659.08 but at the date of the Memorandum it had not been determined whether the cheque represents funds payable to City View or to a particular licensee.

IV. ISSUES

[50] There were two issues before the Qualification Committee:

- (i) Does the Appellant meet the requirements in the *RES Act* and Rules to be licensed as a managing broker in the categories of trading services, rental property management services and strata management services?
- (ii) If so, is it necessary or desirable to impose conditions and restrictions on the licence?

[51] The Appellant alleges that the Qualification Committee decisions on both of these issues are based on errors in facts and misinterpretation of the *RES Act*, and that the penalty imposed in the Decision is punitive and excessive. Specific concerns identified in the Notice of Appeal are:

- a) the Committee failed to consider the chronological order of events that occurred after his resignation from City View on June 1, 2011;
- b) the Committee relied on testimony from Ms. Holst that was false, misleading or erroneous;
- c) REC declined to move the Discipline Hearing forward as the Appellant requested and instead convened a Qualification Hearing; and
- d) the penalty imposed by the Committee is both punitive and excessive.

[52] The issues that I must decide are essentially the same as those before the Qualification Committee. In addition, the Appellant has raised the issue of whether the hearing process, including the conversion of the hearing from a discipline to a qualification hearing, was unfair.

V. SUBMISSIONS

[53] Both the Appellant and Respondent provided lengthy and detailed submissions. I have thoroughly reviewed all submissions and the following is a summary of some of the main points.

Appellant – Initial Submissions

[54] The Appellant accepts that he, as managing broker of City View, bears responsibility for the problems identified in the Initial Inspection Report, but

submits that the sole cause of accounting and financial errors and irregularities during his tenure as managing broker was the Lone Wolf accounting software. His position is that he took all reasonable steps to correct the problems after they were identified, and worked diligently to follow the REC recommendations that arose from the Initial Inspection Report. He argues that the REC investigation triggered by the exceptions in the 2010 Accountant's Report showed that the exceptions lacked merit, and that the trust shortage did not exist. In support, the Appellant points to the fact that REC authorized the return of money that the previous owners were ordered to deposit into the trust account to cover the shortage identified in the 2010 Accountant's Report, and the April 13, 2011 letter from REC stating that the audit was closed.

[55] The Appellant submits that there is no merit to the testimony of Ms. Holst and Ms. Ishri that he had abdicated his responsibilities as managing broker, or that he allowed the owners to marginalize him from the business to the extent that he was unable to perform his duties under the *RES Act* and Council Rules. The Appellant says he had no problems with supervision of the brokerage accounts before City View started using the Lone Wolf accounting software. He further says that he had no problems in his relationship with the previous owners of City View, and the main contention in his disagreements with the new owners was compliance with the recommendations in the Initial Investigation Report.

[56] The Appellant says that the new owners of City View did not agree with the Initial Inspection Report or with the Appellant's recommendations on how to correct the problems identified in the Report, and impeded his efforts to ensure that City View was in compliance with the Report and the *RES Act* and Rules. He says that he notified REC of his untenable position in his May 30, 2011 letter. He notes that after he left City View, REC renewed the City View brokerage licence and licensed two managing brokers. REC also accepted the 2011 Accountant's Report for the year ending June 30, 2011.

[57] The Appellant submits that the Committee unfairly found him responsible for events that occurred after he was no longer associated with City View, and in particular the events that led to the OIUC. He says that the issues that ultimately triggered the OIUC arose several months after his tenure as managing broker ended.

[58] The Appellant submits that Ms. Holst falsely testified that the public was defrauded with crystallized losses amounting to \$18,000. Further, her testimony that she did not know, or was unable to pinpoint any person responsible for the loss implied that the Appellant was responsible, even though the losses were not identified until many months after the Appellant left City View. The Appellant says that there were no losses to the public identified when he was managing broker, and that all shortages identified in the Initial Investigation Report were replaced by the previous owners. Further, REC conducted a follow-up office and record inspection in October 2011, which documented that the recommendations in the Initial Investigation Report were not being implemented by the managing brokers who succeeded the Appellant.

[59] The Appellant submits that Ms. Ishri's testimony confirmed that neither the crystallized shortage of \$18,000 estimated by Ms. Holst nor the OIUC resulted from errors while he was managing broker. Further, at the time of the Hearing, the investigation by the receiver had not yet concluded so the amount of loss, if any, was then unknown.

[60] The Appellant says that when he applied for reinstatement of his licence he was under extreme financial pressure and needed to return to work. He asked REC to move his discipline hearing forward, but REC would not agree and instead proposed to convene a Qualification Hearing at an earlier date if the Appellant would consent. The Appellant says that REC's refusal to move the discipline hearing ahead as he requested put the onus on him to defend himself in difficult circumstances. By that time, the OIUC was in place, which closed the brokerage and made it difficult to call or subpoena witnesses associated with the brokerage and to access documents.

[61] The Appellant says that one of the main reasons for the decision of the Committee was that it accepted evidence of REC witnesses that "many of the concerns that gave rise to the Order in Urgent Circumstances" occurred while he was managing broker of City View. He submits he had no way of refuting that evidence because of the closure of City View's offices due to the OIUC.

[62] The Appellant submits that the Qualification Committee was unreasonable in considering errors in the balance sheet that accompanied the Application for Brokerage Licence as a reason for denying his application for licensing as a managing director. The application was completed by a licensed insurance company who had all their operation in place and wanted to add a real estate portfolio to the existing insurance agency. The Appellant relied on their knowledge and experience, and had no reason to believe they would make errors in completing the balance sheet.

Respondent - Submissions

[63] REC submits that the Committee followed the correct procedures in section 10 of the *RES Act* and section 2-6 of Council Rules in conducting the Qualification Hearing. The Appellant consented to the Hearing and its conversion from a Discipline Hearing to a Qualification Hearing. The Appellant did not want to wait for the Discipline Hearing and the Qualification Hearing was scheduled to accommodate the Appellant's application for a licence. The Appellant was aware of the allegations against him in the Notice of Discipline Hearing and of REC's concerns as to his suitability for licensing as a managing broker.

[64] REC submits that the Committee properly applied, and did not misinterpret, the *RES Act* and Council Rules relating to qualification for licensing (*RES Act*, s. 10 and Rule 2-6), responsibilities of a managing broker (*RES Act*, ss. 6(2) and 25; Rules 3-1(1)(3), 7-4, 7-5 and Part 8). REC submits that the Qualification Committee properly found that the Appellant was not suitable to be licensed as a

managing broker because the evidence showed he failed to ensure that City View kept proper books and records, he failed to ensure that the persons with day-to-day handling of rental accounts and related bookkeeping were sufficiently competent, capable and knowledgeable, and he abdicated his control of the brokerage to the owners.

[65] REC denies that the Qualification Committee failed to consider important events that occurred after June 1, 2011. REC says that the Committee considered all of the evidence but paid particular attention to the period from July 1, 2009 to June 1, 2011. The Appellant was managing broker during that two year period.

[66] REC submits that Ms. Holst did not provide false evidence or attempt to mislead the Qualification Committee. REC further submits that when Ms. Holst gave evidence of a trust shortage of \$18,000, it was not clear whether the time frame she was referring to was immediately before the Order in Urgent Circumstances or at the time of the Hearing. On this appeal Ms. Holst provided her August 2012 Memorandum, which provides an update on the status of the trust shortage. REC submits that Ms. Holst had no intention of misleading the Committee as to the extent of the trust shortage, but the figures kept changing over time.

[67] REC submits that, having found the Appellant unsuitable for licensing as a managing broker, the Qualification Committee had to decide how long he should have to wait before re-applying and whether he should have to take any courses as a condition of re-licensing. REC further submits that the three year waiting period for re-application and the requirement to complete the Broker's Licensing Course provided by the Real Estate Division, Sauder School of Business at the University of British Columbia imposed by the Qualification Committee is consistent with the penalty imposed in a 2001 decision of a Hearing Committee constituted under the *Real Estate Act*.

[68] REC submits that the FST should defer to the Committee's findings on questions of fact, mixed fact and law, and assessment of credibility based on the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick* [2008] 1 S.C.R. 190.

Appellant – Reply Submissions

[69] In reply to REC's submission that it followed the correct procedure in conducting a Qualification Hearing and declining to move the Discipline Hearing forward, the Appellant submits that REC ought to have convened a discipline hearing after its follow-up inspection on September 22-23, 2011 indicated that the new owners of the brokerage had no intention of implementing the recommendations in the first inspection report. The Appellant says that a timely disciplinary hearing would have resolved ongoing brokerage problems quickly and avoided the need for the OIUC. The Appellant further submits that the Committee ought to have considered only the narrow issue of qualification, and left the

broader structural issues of the brokerage and public interest to be addressed by a Disciplinary Hearing.

[70] The Appellant submits that the Outline of Facts in REC's submission leaves the impression that he was responsible for events that occurred after he no longer worked at the brokerage. Although REC stated that the relevant time frame for the Qualification Committee to consider was July 1, 2009 to June 1, 2011, the first reason that the Committee gave for denying the Appellant's application for a managing broker's licence was that REC issued the OIUC and appointed a receiver to manage and distribute trust funds. The Appellant points out that the drastic action to issue the OIUC did not occur until November 23, 2011, months after he had left the brokerage.

[71] The Appellant submits that he was not marginalized by the owners of the brokerage, as found by the Committee. He acknowledged that he often had disagreements with both the previous and new shareholders of the brokerage, but these disagreements were almost always about transactions or activities that were, or might be, contrary to the *RES Act* and Rules. The Appellant says that he communicated with REC by telephone about these disagreements for directions about how he should handle the issues. He submits that REC's characterization of his disagreements as "marginalization" minimized his efforts to move the shareholders toward compliance with the *RES Act* and REC Rules and amounted to a "double standard".

[72] The Appellant says that REC's submission confirms that REC was aware of the continuous problems at the brokerage after he left City View. The Appellant submits that if the new owners of the brokerage had taken his advice and implemented the recommendations in the first record inspection report, the OIUC would not have been necessary and the main reason for the Qualification Committee's decision would not have existed.

[73] In reply to REC's submission that Ms Holst did not intend to mislead the Qualification Committee regarding the extent of trust shortages, the Appellant submits that the Committee's decision would have been different if Ms Holst had made it clear in her testimony that all errors and account shortages identified in the Initial Inspection Report were replaced to the extent of excess funding before the Appellant left the brokerage.

[74] In reply to REC's submissions that the Qualification Committee did not base its finding that the Appellant was not qualified for licensing as a managing broker on errors of fact and misinterpretation of the *RES Act* and Council Rules, the Appellant says that he has been a managing broker for 25 years with no record of complaint or discipline. All the banking and accounting errors identified in the Inspection Report were due to the Lone Wolf accounting software and the use of that software by unqualified or untrained office staff. The Appellant did not use the software himself and, as the accounting errors compounded over time, he relied on the brokerage external accountant and bookkeeper for advice. The Appellant says that the "main bone of contention" in the Initial Inspection Report was the trust shortage of around \$32,000.00 that the previous shareholders

replaced, and which was subsequently returned to them. The Appellant further submits that if the 2010 Accountant's Report were correct, the exceptions would have been accumulated from previous years, but there was no mention of any of these exceptions in the Accountant's Report for the previous year.

[75] In reply to REC's submission that he provided no evidence to the Committee that he had done anything to rectify the gaps in his knowledge of bookkeeping and accounts management, the Appellant submits that the Committee, as well as REC, knew or should have known that, to maintain his managing broker licence continuously over 22 years, the Appellant must have completed at least 12 credit courses in real estate office management and related courses on a two year licensing cycle.

[76] In reply to REC's submissions in support of the finding that the Appellant lacked a good business reputation, the Appellant submits that he has an unblemished record of 22 years as a managing broker, which should not be called into question based on other peoples' actions and events over which he had no control.

[77] The Appellant submits that the three year waiting period imposed by the Qualification Committee for him to reapply for a managing broker's licence is "punitive, excessive and unreasonable". He says that by the time he is able to re-apply, he will have been without a licence for 4 ½ years. He will be forced to retire with an uncertain future and a tainted career.

VI. ANALYSIS

A. Deference to the Committee's findings of fact and credibility

[78] In a recent decision (*Westergaard v. British Columbia (Registrar of Mortgage Brokers)*, 2011 BCCA 344), the British Columbia Court of Appeal clarified that the *Dunsmuir* test for determining the appropriate standard of review applies to the review by a generalized court of decisions made by specialist tribunals, and does not govern the standard of review that the specialist tribunal must apply.

[79] There is no oral testimony on this appeal. This limit on the scope of the appeal is set out in s. 242.2 of the *Financial Institutions Act*, and provides a rationale for deferring to the findings of fact and assessments of credibility made by the Committee. The FST appeal process is not a re-hearing, and therefore does not have the advantage that the Committee had of seeing and hearing the witnesses in person. Therefore, I will accept the Committee's findings of fact and credibility unless I determine that those findings and assessments are not reasonable based on the evidence.

B. Requirements to be licensed as a managing broker met?

Qualification criteria for managing broker

[80] Section 10 of the *RES Act* and sections 2-6 to 2-10 of the Rules set out the requirements that an applicant must meet, to the satisfaction of REC, in order to be granted a licence. The Committee concluded that the Appellant did not meet the requirement in section 10(a) – that “the applicant is of good reputation and suitable to be licensed at the level and in the category for which the applicant is applying.” The Committee was satisfied, however, that the Appellant was sufficiently reputable and suitable for licensing as an associate broker.

[81] Section 6(2) of the *RES Act* and 3-1 of the Rules set out the responsibilities of a managing broker, and section 3-2 sets out the responsibilities of associate brokers and representatives. Section 3-4 of the Rules requires licensees at all levels to act with honesty and reasonable care and skill when providing real estate services. By finding the Appellant qualified for licensing as an associate broker but not a managing broker, the Committee indicated its lack of confidence in the Appellant’s abilities to perform the responsibilities of a managing broker. These responsibilities include:

RES Act, s. 6 Brokerage must have a managing broker

6 (2) A managing broker licensed in relation to a brokerage acts for the brokerage for all purposes under this Act, and is responsible for

- (a) the exercise of the rights conferred on the brokerage by its licence,
- (b) the performance of the duties imposed on the brokerage by its licence, and
- (c) the control and conduct of the brokerage's real estate business, including supervision of the associate brokers and representatives who are licensed in relation to the brokerage.

Rules s. 3-1 (1) *Supervision* – A managing broker must

- (a) be actively engaged in the management of their related brokerage,
- (b) ensure that the business of the brokerage is carried out competently and in accordance with the Act, regulations, rules and bylaws, and
- (c) ensure that there is an adequate level of supervision for related associate brokers and representatives and for employees and others who

perform duties on behalf of the brokerage.

(2) *Knowledge of improper conduct* – If the managing broker has knowledge of conduct that the managing broker considers

(a) may constitute professional misconduct, or conduct unbecoming a licensee, on the part of a related licensee, or

(b) may be improper or negligent conduct, in relation to the provision of real estate services, on the part of

(i) a related licensee, or

(ii) an employee of the brokerage or any other person associated with the brokerage,

the managing broker must take reasonable steps to deal with the matter.

(3) *Accounts and records* – A managing broker must

(a) ensure the trust accounts and records of the brokerage are maintained in accordance with the Act, regulations, rules and bylaws, and

(b) ensure proper management and control of documents and other records related to licensing and regulatory requirements.

July 1, 2009 to June 1, 2011 time frame

[82] There is no issue as to the Appellant's honesty. Both Ms. Holst and Ms. Ishri were very clear in their testimony that they did not find any evidence of intentional wrong doing by the Appellant. There was no intention to mislead REC or defraud the public. Neither Ms. Holst nor Ms. Ishri had concerns with the Appellant being licensed as an associate broker. However, both these witnesses expressed concern about the Appellant's supervisory abilities and his abilities to responsibly oversee proper maintenance of brokerage records and the management of trust funds.

[83] With regard to the supervision responsibilities, the Appellant testified about difficult aspects of his relationships with both the original owners and the new owners of City View. He described a power struggle between himself and the original owners regarding how to handle accounting issues that arose with the transition from manual accounting to use of accounting software. He testified that

the same type of power struggle was repeated when new owners took over City View. Ms. Ishri testified that the original owners of City View operated in a language and culture that the Appellant was not part of, which put the Appellant "outside the control sphere" regarding the books, records and cash transactions. In his testimony the Appellant confirmed that he relied on the person at City View who was responsible for the accounting, who also happened to be one of the directors, with regard to oversight of the cash transactions and other issues where there was a language barrier. When Ms. Ishri attended at City View to do the inspection for REC in December 2010, the new owners had taken over. Ms. Ishri testified that during her attendance at City View it was clear to her that the Appellant had a "nominal role" in the management of the brokerage. He was "no longer privy to" accounting information and records.

[84] The Decision identifies the Appellant's "marginalization as a managing broker" by both the original owners and new owners as one of the reasons for finding the Appellant not currently suitable to be licensed as a managing broker. The Appellant objects to the characterization that he was marginalized and says that his conflicts with the owners were over his efforts to get them to comply with the recommendations in the Initial Report and to otherwise comply with the *RES Act* and Rules. In my view, the evidence supports a finding that, while he was managing broker at City View, the Appellant's relationships with the owners impeded his ability to "ensure that the business of the brokerage was carried out competently and in accordance with the Act, regulations, rules and bylaws". I am also convinced by the evidence that the Appellant failed to ensure that there was "an adequate level of supervision" for representatives, employees and others who performed duties on behalf of the brokerage. (Rule 3-1(1))

[85] With regard to a managing broker's responsibilities relating to accounts and records, there is ample evidence in the Record (Initial Investigation Report, documented communications between Ms. Ishri or Ms. Holst and the Appellant, testimony of Ms. Holst and Ms. Ishri) that the books and records at City View were in a serious state of disarray when inspected by Ms. Ishri in December 2010 and January 2011. The Appellant testified, and stated in a letter (Exhibit 1, Tab 15), that his expertise as a managing broker is not in accounting, and he relies on the expertise of others, both internal and external to the brokerage, to keep the books and records of the brokerage and maintain brokerage accounts. However, as Ms. Ishri pointed out in her testimony, the managing broker is ultimately responsible to ensure that records and accounts are adequately maintained. The authority to prepare documentation can be delegated, but responsibility to ensure that the trust accounts and records of the brokerage are maintained in accordance with the Act, regulations, rules and bylaws, and to ensure proper management and control of documents and other records cannot be delegated. The evidence indicates that the Appellant simply accepted that others were taking appropriate care of accounts and records and he signed off on what these others presented to him.

[86] The Appellant's position that the Lone Wolf software caused the problems identified in the Initial Inspection Report is not supported by the evidence. The Appellant presented a letter from Peet Nienaber, the external accountant involved

with City View while the brokerage was owned by the original owners. This letter confirms "that operation of the software used to record the transactions at [City View] was challenging, as the software was not very user friendly and required a certain amount of knowledge to operate and insight to ensure that the transactions were recorded correctly. Evidently the recording of journal entries was the worst." This letter falls far short of explaining many of the problems that Ms. Ishri observed, such as "... service agreements were missing, rental agreements were missing. There were post-dated cheques held incorrectly, ... the monthly financial statements to the owners were incomplete or inadequate." Ms. Holst testified that the problems with the Lone Wolf software were caused by errors in data entry or errors due to improper use of the software, not by the software itself. Mr. Nienaber's letter corroborates, rather than contradicts, Ms. Holst's evidence. The fact that the software was not user friendly does not absolve the managing broker from ensuring that adequate training is provided to those who use the software.

[87] The REC inspection of City View by Ms. Ishri was triggered by the "List of Exceptions – Trust Audit" and identification of a trust shortfall in the 2010 Accountant's Report. REC ordered the former owners to deposit an amount equal to the shortfall into the trust account. The Appellant argues that the 2010 Accountant's Report was proven to be invalid by Ms. Ishri's investigation, the April 13, 2011 letter from REC stating that the audit was closed, and the fact that REC authorized return of funds to the original owners. I find no merit in this argument. Ms. Ishri's investigation disclosed many shortcomings in City View's accounting and recordkeeping, and revealed legitimate concerns about the Appellant's ability to perform the responsibilities of a managing broker. The audit took several months to complete because the accounting documents and records were in such a state of disarray. The investigation revealed that there was a trust account shortfall of almost \$9,000 at November 30, 2010, and accordingly REC did not authorize the return to the original owners of all the funds that they had deposited into the trust account.

[88] The Appellant says that the former owner's accountant's report (2009 Accountant's Report) disagrees with the 2010 Accountant's Report prepared by the new owner's accountant. The Appellant says that, when compared with the 2010 Accountant's Report for approximately the same period, the difference between the two reports "is astounding". However, the 2009 Accountant's Report is for the year ending June 30, 2009, and the 2010 Accountant's Report is for the year ending June 30, 2010. There is no mention of any trust account shortage in the 2009 Accountant's Report, but I am not persuaded by the Appellant's submission that the absence of accumulated exceptions from the previous year means that the "List of Exceptions – Trust Audit" in the 2010 Accountant's Report must be incorrect.

[89] The Initial Investigation Report and subsequent spot audit reports to the close of the audit on April 13, 2011 show the state of City View record keeping and accounts at November 30, 2010. The Appellant left City View and returned his managing broker's licence to REC on or around June 1, 2011. There is no

accountant's report showing the state of the trust accounts at June 1, 2011. The Appellant says that there were no trust account shortages when he left City View. However, the 2011 Accountant's Report, for the year ending June 30, 2011, shows a net trust liability of \$13,077.26. The included "List of Exceptions – Trust Audit" shows that some of the recommendations from the Initial Investigation Report had not been fully resolved. The Appellant was managing broker for all but the last month of the period covered by the 2011 Accountant's Report.

[90] The Appellant lays the blame on the new owners for the failure to follow through on the recommendations in the Initial Investigation Report and to make changes in the operation of the brokerages to comply with the *RES Act* and Rules. The difficult relationship between the Appellant and the new owners may explain the continuation of record keeping and accounting problems throughout his tenure at City View, but it also demonstrates weakness in the Appellant's ability to perform the duties of a managing broker.

[91] To this point, I have discussed only the evidence relating to the period that the Appellant was managing broker of City View. Based on my review of this evidence and my consideration of the parties' submissions, I share the Committee's concerns about the Appellant's abilities to perform the responsibilities of a managing broker. There is ample evidence in the testimonies of Ms. Holst and Ms. Ishri, in the documentary evidence, as well as in the Appellant's own testimony, that raises serious concerns about the Appellant's performance of the managing broker's supervision and accounts and records responsibilities during his tenure as managing broker at City View. The Appellant's explanation that all of the problems at City View stemmed from difficulties with the Lone Wolf software is simply not borne out by the evidence.

[92] In *Westergaard* the BC Court of Appeal stated: "Absurdity would result if the registrar was unable to consider all the relevant facts when determining suitability for registration." Thus the Committee was not limited to the time frame that the Appellant was managing broker at City View in determining his suitability to be licensed at that level.

Order in Urgent Circumstances and Receivership

[93] The Decision lists the Order in Urgent Circumstances (OIUC) and appointment of a receiver to manage and distribute funds as one of the Committee's additional reasons for finding that the Appellant was unsuitable to be licensed as a managing broker. The Appellant points out that that REC did not seek the OIUC until November 22, 2011, almost six months after he left City View. In the interim, City View had two other managing brokers. REC appointed these managing brokers despite being aware that City View owners had no motivation to comply with the recommendations in Ms. Ishri's Report and had a history of acting against managing broker advice.

[94] Ms. Holst testified that REC did not apply for the OIUC because of ongoing accounting problems, but because City View was winding up the brokerage and

had submitted an incomplete winding up report that did not disclose all expected information on the trust accounts. REC was convinced that the information would not be forthcoming from City View and decided that the only way to protect the public interest was to obtain an OIUC to freeze the brokerage bank accounts and have a receiver appointed. Ms. Holst testified that REC was unable at the time of the hearing to pinpoint a person responsible for the state of the accounts at City View at the time REC applied for the OIUC. She said that the amount of the trust account shortage was not yet determined, but the public was out funds. When asked whether she had a feeling for what the trust account shortage was, Ms. Holst replied: "Well, there has been a crystallized shortage of \$18,000 already."

[95] I have read the transcript of Ms. Holst's testimony in its full context, and I was left with the impression that she was speaking of a crystallized trust account shortage of \$18,000 at the time of the hearing. REC submits that Ms. Holst had no intention of giving misleading evidence, but the amount of the loss changed over time, and when she gave the testimony about the \$18,000 shortfall, it was unclear whether this loss was at the time of the hearing or at the time REC sought the OIUC.

[96] On this appeal REC has provided the August 2012 Memorandum as well as Ms. Holst's affidavit in support of the OIUC. These documents clarify the trust shortage amounts as determined at the time of seeking the OIUC (approximately \$9,000) and at the time of the hearing (\$3,956.63), and provide an update on the status of the receivership. The receivership investigation was ongoing at the time of the hearing. On January 12, 2012, the Real Estate Compensation Fund provided \$8,986.18 to the Receiver to complete a pending transaction. On April 14, 2012 (after the Hearing), the Receiver repaid the Real Estate Compensation Fund from amounts that the Receiver had collected. On May 17, 2012, a law firm notified REC that a cheque in the amount of \$10,036.60 was being deposited into the Receiver's trust account. This amount should have been deposited on October 3, 2011. It was discovered that the brokerage had posted a deposit in this amount to the ledgers, but had not physically deposited the cheque. The original cheque was subsequently discovered in the brokerage deal file for the relevant transaction. With the deposit of that cheque, the trust account was sufficiently funded to ensure all public trust fund claims could be satisfied. At the date of the memorandum (August 9, 2012), there were no claims for trust money from the public that had not been satisfied. There were outstanding claims for commissions payable to former licensees of the brokerage in the amount of \$7,673.88. This includes claims by the Appellant (\$2800.69) for commissions and HST. The receivership is holding an unidentified replacement cheque dated April 18, 2012 from a law firm in the amount of \$6,659.08. The cheque is related to a transaction that has a signed Contract of Purchase and Sale dated April 8, 2008. At August 9, 2012 it had not yet been determined whether the \$6,659.08 is due to the brokerage or to the licensee.

[97] The evidence before the Committee did not include the August 2012 Memorandum, the OIUC or Ms. Holst's affidavit in support of the OIUC. I have the benefit of that additional evidence, which clarifies that there was no actual

public harm in the nature of trust account liabilities that could not be met caused by the Appellant. Had the cheque for \$10,036.60 been deposited when it was posted on October 3, 2011, there would have been no need for the Real Estate Compensation Fund to provide \$8,986.18 to the Receiver in January 2012. The Appellant had not worked at City View for more than five months when the failure to deposit the posted cheque occurred.

[98] Based on all of the relevant evidence, including evidence that was not before the Committee, I find that the Appellant cannot reasonably be held responsible for the OIUC and appointment of a receiver, or for any public harm relating to the circumstances that gave rise to the OIUC. Although the books and records were probably not in proper order when the Appellant left City View, the Appellant was not the managing broker at all times relevant to the OIUC.

Application for brokerage licence

[99] On February 27, 2012, REC received the Appellant's application for reinstatement as a managing broker as well as an Application for Brokerage Licence by Global which identifies the Appellant as managing broker. Among the reasons in the Decision for denying the Appellant a managing broker's licence is that the balance sheet included in the Application for Brokerage Licence did not balance, and the information on the balance sheet contradicted the information in the subordination agreement. The Appellant argues that denying his licence on the basis of the licence application was unreasonable. While the errors in the balance sheet alone may not be sufficient to deny a licence, the Committee reasonably and appropriately considered them as corroborating evidence of the Appellant's failure to scrutinize financial documents before signing off on them, which is inconsistent with the responsibilities of a managing broker.

Not currently suitable to be licensed as a managing broker

[100] Although the Committee's finding that the Appellant was responsible for the OIUC or for any related public harm is unreasonable based on the evidence (including evidence that was not before the Committee), I find the Committee's conclusion that the Appellant is "not currently suitable to be licensed as a managing broker" to be reasonable. While the Appellant may not be responsible for the OIUC, the Committee's denial of the managing broker's licence is well supported by the evidence that, while the Appellant was managing broker, City View's books and records were in serious disarray and that the Appellant failed to adequately oversee those persons to whom he delegated responsibility for the accounting aspects of brokerage management.

Strata management services

[101] In his Application, the Appellant asks for reinstatement of his licence as a managing broker in three categories. He was previously licensed in only two categories – trading services and rental property management services. I agree with the Qualification Committee's conclusion that the Appellant did not provide

evidence of training or experience in the third category, strata management services. I confirm the Qualification Committee's refusal to licence the Appellant in this category at any level of licensing.

C. Should conditions and restrictions be imposed?

[102] REC submits that, having found the Appellant unsuitable for licensing as a managing broker, the Committee had to decide how long he should wait before re-applying and whether he should have to take courses as a condition for re-licensing.

[103] The Decision based the conditions for the Appellant on the February 26, 2002 decision of the REC Discipline Committee in *Real Estate Council v. Zahir Karim and Louis James Bongiovanni*. Mr. Karim owned a brokerage that employed him as a licensed real estate sales person. Mr. Bongiovanni was the managing broker. The Discipline Committee found that Mr. Karim misappropriated funds and breached various sections of the *RES Act*. Mr. Bongiovanni was found to be negligent and incompetent in that he was not in active control of the brokerage and failed to properly supervise Mr. Karim. The Discipline Committee cancelled Mr. Bongiovanni's licence, imposed a waiting period of three years, and imposed an educational requirement. REC says that the Appellant, like Mr. Bongiovanni, allowed others to have complete control of the office.

[104] Although in a different context, the BC Court of Appeal noted in *Westergaard v. British Columbia (Registrar of Mortgage Brokers)*: "Applications for registrations or renewal are fundamentally different from disciplinary proceedings ..." Because of the differences between the two types of proceedings, it is important to be cautious when applying decisions made in discipline cases to the qualification context. The conclusions about Mr. Bongiovanni were made in a discipline context, where REC had the burden of proving its case. In the Qualification Hearing, the burden was on the Appellant to prove that he was qualified. The greater procedural protection in the disciplinary context is consistent with the decision maker's power to impose penalties. The Qualification Committee has no power to impose penalties. However it does have a duty to impose conditions on licences if necessary or desirable for the protection of the public interest.

[105] The decision of whether to impose a condition on a licence under s. 15 of the *RES Act* is discretionary. I will not interfere with the Committee's conditions unless I find them to be unreasonable.

[106] I find that the Committee reasonably imposed the condition that the Appellant must successfully complete the Broker's Licensing Course as provided by the Real Estate Division, Sauder School of Business at the University of British Columbia. The evidence shows that the Appellant lacks the skills necessary to properly oversee the accounting and bookkeeping aspects of a brokerage. The Committee considered that, despite 22 years experience as a managing broker, the Appellant acknowledged that he did not consider himself to be strong in

keeping books and records, he provided no evidence that he did anything to improve his knowledge in this weak area, and he lacked the skills to properly oversee the work of those to whom he delegated this type of work. The Appellant testified that he had taken courses in the area of contract enforcement and writing of contracts to maintain his licence over the years, but there is no evidence that he sought upgrading in management of books and records or accounting. The educational requirement is appropriately connected to the public interest in ensuring that the Appellant is sufficiently skilled to carry out the responsibilities of a managing broker set out in s. 6 of the *RES Act* and s. 3-1 of the Rules.

[107] Although the legislation does not specifically provide for a waiting period to re-apply after a licence has been denied or a condition imposed, I accept the rationale articulated by the Commercial Appeals Commission (predecessor of FST) in *Khosla v. Real Estate Council of British Columbia*, September 30, 2000, CAC-9904, that a waiting period may be necessary for administrative expediency. The waiting period is not a penalty, but a "minimum period of ineligibility that the respondent prescribes in a given case [that] is a reflection of the degree of unsuitability displayed and is commensurate with the time required to establish that a person who has not been suitable may be suitable." (*Khosla*, p. 7)

[108] Since there may be a punishment aspect to waiting periods imposed following disciplinary hearings, it is appropriate to look at cases that arose from a qualification context for guidance as to what is a reasonable waiting period for the Appellant to apply for reinstatement. In *Khosla*, a five year waiting period for re-application was imposed on an applicant on the basis that his situation equated to white collar fraudulent crime. In *Atwal v. Real Estate Council of British Columbia*, February 1, 2011, FST 2010-RSA-001(a), the FST determined that a three year waiting period was reasonable. Mr. Atwal had applied for reinstatement of his expired real estate licence and was found not suitable to be licensed based on dishonest behaviour outside his profession, including that he had been found liable for fraud against ICBC in a civil action alleging fraud.

[109] There is no suggestion of any fraudulent activity associated with the Appellant. Nor is there evidence that anyone supervised by the Appellant misappropriated any funds. The Committee found that the Appellant's inability to properly manage City View caused public harm. In part, this was based on the finding that the Appellant was responsible for the circumstances that led to the OIUC, which I determined to be unreasonable based on new evidence provided on this appeal. The evidence does not establish any actual public harm caused by the Appellant. However, the Initial Investigation Report identified many shortcomings in the Appellant's management of City View, including a trust shortfall of around \$9,000 at November 30, 2011, that put the public interest at risk of potential harm. The fact that the former owners covered the shortfall and avoided actual public harm does not alter the fact that \$9,000 was unaccounted for while the Appellant was responsible for overseeing the trust accounts at City View.

[110] The Committee was concerned that the Appellant minimized his role in the mismanagement of City View by blaming the Lone Wolf software and untrained

users for all of the problems identified in the Initial Investigation Report, and the new owners of City View for the incomplete implementation of the Report recommendations. Although his testimony and submissions showed a tendency to externalize blame for these problems, the Appellant did acknowledge that he, as managing broker, was ultimately responsible. I am confident that the duties and responsibilities of a managing broker will be emphatically reinforced in the Broker's Licensing Course provided by the Real Estate Division, Sauder School of Business at the University of British Columbia.

[111] What must the Appellant do to become suitable? He must demonstrate that he has acquired the level of knowledge and skills appropriate to competently carry out the responsibilities of a managing broker, and accept that a managing broker bears full responsibility for competently managing all aspects of a brokerage. The waiting period should reflect the minimum time that it would take the Appellant to become suitable.

[112] In my view the evidence in this case supports a shorter waiting period than was assessed for Mr. Atwal, where his dishonesty raised serious public interest concerns. It follows that I find the three year waiting period to be unreasonable in the Appellant's circumstances. Further, that waiting period was imposed on the basis that the Appellant was to blame for the OIUC and that there was a crystallized loss of trust account funds amounting to around \$18,000.

[113] I find that one year from the date of this appeal decision is a reasonable minimum period of ineligibility for the Appellant, provided that he has successfully completed the Broker's Licensing Course provided by the Real Estate Division, Sauder School of Business at the University of British Columbia within that time. One year is the time frame in which the Sauder School of Business requires the Broker's Licensing Course to be completed. In weighing the public interest, I have considered that at the expiry of the waiting period the Appellant will simply be in a position to re-apply. He will again be required to demonstrate to REC that he is then suitable to be licensed as a managing broker, and the public interest will be a factor that REC will consider before issuing a licence with or without conditions attached.

D. Unfair procedure?

[114] REC responded to the Appellant's application for reinstatement of his managing broker's licence by proposing that the Discipline Hearing scheduled for late May be converted to a Qualification Hearing in mid-March. A discipline hearing and a qualification hearing are different processes for different purposes, and the concept of converting one of these processes into another is confusing. In effect, what REC did in this case, with the Appellant's consent, was hold a timely qualification hearing and abandon a discipline hearing. There is nothing inherently unfair in doing so and nothing in the relevant legislation that prohibits this.

[115] Qualification and Discipline procedures are governed by different provisions in the *RES Act* and Rules. When a decision is made to abandon a discipline process and follow a qualification process, the important thing is that the appropriate mandate is followed. In the previous section, I have discussed the potential for blurring the distinction between a condition on a licence, which a qualification decision maker may impose, and a penalty which only a discipline decision maker may impose. The waiting period imposed by the Committee was based on a penalty imposed in a discipline decision. Any unfairness from this has been corrected on this appeal.

[116] The Appellant submits that the Committee should not have considered the broad structural issues of the brokerage and public interest, which are discipline and not qualification issues. In fact, a qualification decision maker has a broader scope of inquiry than a disciplinary committee, and public interest is very much a factor in making a qualification decision. (see *Khosla, Atwal, Westergaard*, cited above)

[117] Subject to the discussion of penalty in the previous section, I am not convinced that the Appellant suffered procedural unfairness arising from the decision to hold a qualification hearing rather than a discipline hearing. The qualification process was triggered by the Appellant's application for reinstatement as a managing broker, and he requested an earlier hearing. Even if the disciplinary hearing had been moved ahead, as the Appellant requested, the issue of his suitability for licensing would not have been resolved at that hearing. He would still have had to go through the qualification process.

[118] The Appellant says that his ability to defend himself was unfairly impacted by the OIUC, and that REC had sufficient knowledge of problems at City View to have held a timely disciplinary hearing before applying for the OIUC. My mandate on this appeal is limited to reviewing the Decision and the fairness of the hearing process. I have no authority to review REC's decision to apply for the OIUC. In any event, Ms. Holst's affidavit sets out the public interest grounds for the OIUC application, and there is no evidence that REC acted improperly or unfairly in relation to the Appellant in making that application.

VII. Conclusions

[119] Based on my review of the evidence and the reasoning discussed above, my conclusions on the issues are as follows:

- (i) The Appellant does not at this time meet the requirements in the *RES Act* and Rules to be licensed as a managing broker;
- (ii) The Appellant does not at this time meet the requirements in the *RES Act* and Rules to be licensed at any level of licensing in the category of strata management services;

- (iii) The Appellant is qualified to be licensed as an associate broker in the categories of trading services and rental property management services;
- (iv) An associate broker licence issued to the Appellant will include the condition that he must successfully complete the Broker's Licensing Course as provided by the Real Estate Division, Sauder School of Business at the University of British Columbia before he is eligible to apply for licensing as a managing broker; and
- (v) The Appellant is ineligible to re-apply for licensing as a managing broker until the later of one year from the date of this decision and the date of his successful completion of the Broker's Licensing Course described in paragraph (iv).

[120] Accordingly, I allow the appeal in part and vary the Committee's decision by reducing the period of ineligibility to apply for a managing broker's licence from three years from the date of the Committee's decision to one year from the date of this appeal decision.

"Paula Barnsley"

Paula E. Barnsley, Panel Chair
Financial Services Tribunal

October 22, 2012