



Financial Services Tribunal

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DECISION NO. 2016-RSA-001(a)

In the Matter of an appeal under the *Real Estate Services Act*, S.B.C. 2004, c. 42

BETWEEN: Danielle (Cui Zhu) Deng **APPELLANT**

AND: Real Estate Council of British Columbia and **RESPONDENTS**
Superintendent of Real Estate

BEFORE: Wendy A. Baker, Q.C. Panel Chair

DATE: Conducted by way of written submissions
concluding on January 16, 2017

APPEARING: For the Appellant: Jeffrey Scouton, Counsel
For the Respondent: Joni Worton, Counsel
For the Respondent: David T. McKnight, Counsel

PRELIMINARY DECISION APPLICATION TO AMEND NOTICE OF APPEAL

[1] On December 16, 2016, the Appellant made an application to amend her grounds of appeal. In her original Notice of Appeal, the Appellant set out a number of grounds of appeal including the following:

3. The process by which the hearing was conducted was unfair in that legal counsel acting as prosecutor, and members of the hearing panel, intervened excessively during the course of the cross-examination that Ms. Deng attempted to conduct of Ms. Huang.

[2] On September 28, 2016, the Appellant filed her written Submissions, and expanded this ground of appeal as follows:

17(a) There was a lack of procedural fairness (or, otherwise put, a breach of natural justice) in the manner in which the hearing was conducted. The aspect of alleged procedural unfairness relied on, in particular, is that the hearing panel allowed Prosecuting Counsel to intervene excessively during the course of the cross-examination that Ms. Deng tried to conduct of Ms. Huang.

[3] In this application, the Appellant seeks to amend her Notice of Appeal to further expand the grounds of appeal related to the alleged unfair conduct of the hearing as follows:

(a) that the hearing panel erred in allowing Prosecuting Counsel to ask a patently leading question of Ms. Huang during the course of her direct examination on a matter of substance, that being, in particular, the question put to the witness found at page 17, line 3 of the Transcript;

(b) that the hearing panel erred by failing to afford reasonable assistance to the Appellant, as an unrepresented party, to ensure that the hearing was conducted in a fair manner by failing to inform the Appellant of the importance of fully covering all material points relative to her defence in her evidence in chief and in her cross-examination conducted of Ms. Huang, and in curtailing through suggestion she was wasting the hearing panel's time in the Appellant's cross-examination of Ms. Huang;

(c) that the hearing panel erred in allowing Prosecuting Counsel to ask further questions of Ms. Huang (at pages 66-67 of the Transcript), after the completion of the Appellant's cross-examination and questioning by the panel chair, on matters not arising from their questions or the answers given by the witness;

(d) that the hearing panel erred in not affording the Appellant the opportunity to ask further questions of Ms. Huang following the panel chair's questioning of her and the further questions asked by Prosecuting Counsel described above;

(e) that the remarks made by the panel chair during the course of her questioning of the Appellant found at pages 137 to 141 of the Transcript give rise to a reasonable apprehension that she had prejudged, before hearing submissions after the conclusion of the evidence, that the Appellant was guilty of professional misconduct, and thereby gave rise to a reasonable apprehension of bias.

[4] The Appellant submits that the proposed grounds of appeal should be allowed as they relate to her overall concern about the fairness of the conduct of the hearing, and as the interests of justice and ensuring the integrity of the Council's hearing process will be served by the addition of these new grounds.

[5] While the Appellant has filed her initial submissions for the appeal, the Respondents have not. As such, the Appellant says there is no prejudice to the Respondents if the order sought is granted.

[6] The Respondent Council says that it is not just to allow the Notice of Appeal to be amended at this juncture for the following reasons:

(a) the Appellant has provided no explanation for the lateness of the request, and the grounds are all based on the hearing record which is unchanged from the date of filing the appeal;

(b) the application is an improper attempt to take advantage of the Tribunal's discretion to extend certain deadlines;

- (c) if the Appellant is allowed to raise new grounds in the absence of special circumstances, the finality of the appeal process would be compromised;
- (d) the proposed amendments are outside the four corners of the original Notice of Appeal;
- (e) the questioning of the Appellant by the chairperson of the panel cannot reasonably give rise to a challenge of bias, and is unrelated to existing grounds of appeal; and
- (f) there is no prejudice to the Appellant if the grounds are not amended, and there will be prejudice to the Council if the amendments are granted, in particular in relation to the late addition of the allegation of reasonable apprehension of bias.

DECISION

[7] The Respondent Council, supported by the Superintendent of Real Estate, submits that the test for allowing an amendment of grounds of appeal is set out in *Superintendent of Real Estate v. Real Estate Council of BC and Richard Valouche*, 2015-RSA-001(b).

[8] In *Valouche* the Tribunal discussed the appropriate approach to be taken in an application to amend grounds of appeal:

[11] The threshold legal context of this application is section 22(2)(c) of the *Administrative Tribunals Act*, SBC 2004, c. 45, which requires that a Notice of Appeal to a tribunal "state why the decision should be changed". That provision is made applicable to appeals to the FST by section 242.1(7) of the *FIA*. ...

[12] There does not appear to be any provision either in the governing legislation or in the *Guidelines* concerning an amendment to a Notice of Appeal, but both counsel appear in their submissions to accept (clearly or tacitly) that such amendments can occur, and I believe they are probably right to do so; I expect the FST has the ability to control the process before it, and that this would extend to entertaining such amendment requests. It would possibly be of some significance that the *Guidelines*, while not discussing amendments to a Notice of Appeal, do contemplate certain other procedural orders (for instance, an extension of time to file a Notice of Appeal), but in the absence of any controversy on the issue here, I will proceed on the basis that the FST does indeed have authority to permit amendments to a Notice of Appeal where thought appropriate.

[13] Moving forward, it is not immediately clear what test should be applied on an application to amend a Notice of Appeal, and neither party has made mention of the point. I am aware that:

- (a) generally, amendments to pleadings are allowed by our Courts so long as they disclose a cause of action (or a defence, as the

case may be), and otherwise comply with rules governing pleadings, subject however to the weighing of any actual prejudice arising therefrom (see *British Columbia (Civil Forfeiture) v. Vu*, 2012 BCSC 1476, varied 2013 BCCA 279; and *Peterson v. 469690 B.C. Ltd.*, 2014 BCSC 1531);

(b) the British Columbia Court of Appeal (whose Rules permit the amendment of a Notice of Appeal: see Court of Appeal Rules, Rule 12) has applied an “interests of justice” test to whether an amendment of a Notice of Appeal should be permitted (see *Shannon v. Gidden*, 1999 BCCA 461); and

(c) demonstrating a difference in at least one other jurisdiction, the Nova Scotia Court of Appeal (whose Rules also permit applications for an amendment to a Notice of Appeal) applies a twofold analysis on such motions of whether the amendment is reasonably necessary and, if so, the extent of any resulting prejudice (see *Nyiti v. University College of Cape Breton*, 2009 NSCA 54).

[14] In the absence of argument on the issue, I am inclined to apply an “interests of justice” measure to this application. The low threshold applied to proposed amendments to general court pleadings is too permissive in the context of this appeal process, all of the stages of which are governed by prescribed timelines. By the same token, I see no reason for the FST to be fettered by a requirement of reasonable necessity before allowing such an amendment. Rather, leave to amend a Notice of Appeal should be given if in all of the circumstances it is just to do so. Such an approach affords this tribunal appropriate flexibility in the exercise of its discretion, and no other considerations are necessary.

[9] I accept the reasoning of the Tribunal as set out above in *Valouche* is applicable to the application before me.

[10] The grounds of appeal which the Appellant seeks to advance set out at paragraphs [3](a)-(d) above all relate to the conduct of the hearing itself. In various ways the grounds assert that the process followed during the presentation of evidence and questioning of the witnesses was procedurally unfair to the Appellant.

[11] I am satisfied that proposed grounds at paragraphs [3](a)-(d) are all connected with the allegation of unfair process set out in the Appellant’s original ground number 3 such that they fall “within the four corners” of the original Notice of Appeal. I find that the new grounds do not raise new issues *per se* but rather provide more specifics and details of the more general allegation. I also find that more particulars of the general complaints raised by the Appellant are helpful in the overall appeal process.

[12] The proposed ground of appeal set out in paragraph [3](e) raises the issue of an alleged reasonable apprehension of bias on the part of the panel chair. This

proposed ground of appeal also arises in the context of arguments about procedural unfairness at the hearing itself. While an allegation of bias may at first instance appear to be of a different quality than the other allegations of procedural unfairness raised herein, I find that it is similarly tied to the original ground of appeal filed by the Appellant, namely that members of the hearing panel improperly intervened in the conduct of cross-examination. I am satisfied that the proposed ground of appeal that the conduct of the panel chair in questioning Ms. Huang gave rise to a reasonable apprehension of bias is sufficiently connected to the original ground of appeal number 3 to be considered "within the four corners" of the Notice of Appeal.

[13] The Council provided me with law addressing the ultimate issue, namely the test which the Appellant must meet in order to succeed on an allegation of reasonable apprehension of bias. I am not prepared to decide on the basis of the submissions before me that there is no reasonable prospect of success on this ground of appeal.

[14] The Council has not identified any prejudice to it if these grounds are pursued, other than having to respond to the new grounds. The Council has not yet filed any submissions in response to the Appellant, and no new material is required to be filed in order to address these new grounds. I do not accept that the Council is prejudiced by having to respond to the proposed amended grounds of appeal.

[15] The Appellant has not provided an explanation for the lateness of this application or any special circumstances explaining the timing of the application. While it would have been preferable to raise these more detailed grounds earlier, I do not find the timing of the application to be fatal to it. I find that there is no prejudice to the Council arising from the timing of the application, and I do not accept the appeal process will be compromised if I make the order sought. I also do not accept that the Appellant is taking advantage of the discretionary power of the Tribunal to extend deadlines.

[16] I find that in all the circumstances it is just to exercise my discretion to allow the proposed amendments to the grounds of appeal sought by the Appellant. Leave is also granted to the Appellant to make further written submissions as to those additional grounds.

[17] The schedule for providing the parties' written submissions on the appeal will now resume as follows:

- a. The Appellant may file any further written submissions on the additional grounds of appeal on or before Tuesday **March 28, 2017**;
- b. The Respondents (Real Estate Council and Superintendent of Real Estate) must file their written submissions on or before Thursday **April 20, 2017**; and

- c. The Appellant may file a written reply to the submissions of the Respondents, should she wish to do so, on or before Friday **May 5, 2017**.

" Wendy A. Baker"

Wendy A. Baker, Q.C.
Panel Chair
Financial Services Tribunal

March 7, 2017