



Financial Services Tribunal

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DECISION NO. 2017-RSA-001 (a)

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

BETWEEN: Cai Ming Yang **APPELLANT**

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

BEFORE: A Panel of the Financial Services Tribunal
Wendy A. Baker Q.C., Panel Chair

DATE: Conducted by way of written submissions
concluding on August 8, 2017

APPEARING: For the Appellant: Self-represented
For the Respondent: Jean P. Whittow Q.C., Counsel

APPEAL

[1] This appeal relates to conditions imposed on the appellant, Mr. Yang, following a qualification hearing before the Hearing Committee of the Real Estate Council of British Columbia ("REC").

[2] On March 9-10, 2017, the Hearing Committee held a hearing to determine whether the appellant was suitable to be licensed under the *Real Estate Services Act*, SBC 2004 c. 42 ("RESA"). The appellant was unrepresented at the hearing. At that hearing, the REC took the position that the appellant should not be licensed because he was "ungovernable". On May 1, 2017, the Hearing Committee delivered extensive reasons and found that the appellant was a person of good reputation and suitable to be licensed at the level and category for which he was applying.

[3] The Hearing Committee then imposed a number of conditions on the appellant, requiring the appellant to be subject to close or enhanced supervision for 6 months.

[4] It is the conditions imposed by the Hearing Committee which the appellant takes issue with in this appeal.

[5] The appellant argues that the Hearing Committee improperly imposed onerous conditions on his licence which have had a dramatic and negative impact on his life. The appellant seeks the following orders:

1. A declaration that the qualification hearing was improperly and unnecessarily scheduled and held.
2. The enhanced supervision conditions be struck.

3. The REC compensate the appellant for loss of income from February 2017 until he finds a strata manager position or, in the alternative, that the REC offer the appellant an appropriate job with corresponding salary and benefits until he reaches 65 years of age.
4. The REC pay the appeal and related costs.

PRELIMINARY ISSUE – Right of Appeal to the FST

[6] In expressing his concerns with the REC process in requiring a qualification hearing at all and then in imposing conditions of licensing on him, the appellant raised a question as to whether the RESA even actually provided him a right to appeal the conditions imposed on him. The appellant submitted that section 54 of the RESA specifically provides a right of appeal to an applicant who is refused to be licensed and to a *licensee* who has conditions imposed, however, he queried whether that right of appeal applied to him because he had not been refused and was not yet a licensee. The respondent submits that the power to impose conditions applies to all licensees, whether on application for renewal or a new licence, and that section 54(1)(b) of the RESA expressly permits appeal of conditions imposed under section 15(2)(a). The Respondent further submits that it would be contrary to principles of statutory interpretation and counter-productive to the appellant's case to interpret s.54 of RESA as restricting the right of appeal of conditions to only those who already have a licence.

[7] Section 54(1)(b) of the RESA provides that a licensee affected may appeal the imposition of restrictions and conditions on a licence under section 15(2)(a). Section 15(2)(a) states that the power to impose conditions is exercisable "on or before the date on which the licence is issued..." [emphasis added]. Section 15(4)(b) of the RESA provides that if the REC imposes a condition under s.15(2)(a) it must advise the applicant of their right to appeal to the FST. The Hearing Committee of the REC approved Mr. Yang as suitable to be licensed subject to certain conditions. I find that the decision of the Hearing Committee to attach conditions to the licence which the appellant is entitled to receive is an appealable decision and therefore sufficient to bring the appellant within the jurisdiction of the FST on this appeal.

STANDARD OF REVIEW

[8] In *Kadioglu v. Real Estate Council of BC and the Superintendent of Real Estate*, Decision No. 2015-RSA-003(b), para. 32, I summarized the relevant standards of review on appeals to the FST. The REC relies on this decision in its submission, and the appellant takes no issue with this submission. The applicable standards of review to the issues raised in this case are:

- (a) correctness for questions of law, including the construction of the RESA,
- (b) reasonableness for questions of fact and discretion, and
- (c) fairness, for questions of procedural fairness.

ISSUES

[9] The issues on appeal are:

1. Was the qualification hearing properly held?
2. Did the Hearing Committee err in imposing conditions on the appellant's licence?

1. Was the qualification hearing properly held?

[10] On or about October 31, 2016, the REC advised Mr. Yang that it would require his attendance under s. 13 of the RESA. Section 13 is engaged where the REC is of the view that a candidate is not suitable to be licensed. Pursuant to s. 13(3), the REC is required to give the applicant an opportunity to address the REC's concerns. The Rules of the Real Estate Council specify that a Hearing Committee will be constituted to address the suitability of the candidate.

[11] I find nothing improper in the manner in which this hearing proceeded. The REC properly gave notice to the appellant of the need for a hearing pursuant to s. 13 of the RESA. The appellant was given a full opportunity to address the concerns the REC raised with respect to his suitability to be licensed (although not the conditions imposed on his licence, which is discussed below). Ultimately the appellant prevailed and the Hearing Committee determined he was suitable to be licensed. In the result, I find that the qualification hearing was properly held.

2. Did the Hearing Committee err in imposing conditions on the appellant's licence?

[12] The Hearing Committee dealt extensively with the appellant's suitability as a licensee, and concluded that he was of good reputation and suitable to be licensed. The appellant passed the examinations, cleared the criminal record check and had no prior refusals of licensing or record of fraud or deceptive dealing.

[13] The REC had raised a number of concerns before the Hearing Committee which related to complaints the appellant brought to the REC against other licensees, litigation he brought in the courts, and correspondence he engaged in with the Minister of Finance and other public officials relating to concerns he had with his own strata and its management.

[14] All of the concerns and issues raised by the REC were thoroughly dealt with by the Hearing Committee. Ultimately the Hearing Committee found that the appellant had a stable family life and network of friends, had been gainfully employed and his employers found him to be a dedicated employee, and there were no questions about his honesty or integrity. The appellant followed all rules and procedures in meeting the educational requirements for a licence. The appellant responded to all inquiries and requirements that the REC laid out for him. He had no history of neglecting his duties or breach of trust, no record of engaging in misleading behavior to a professional organization or others. He showed respect in all court and other proceedings he was involved in. He had no

history of discipline proceedings, employment misconduct, breaching undertakings, or practicing without a licence.

[15] The primary concerns raised by the REC related to the appellant's history of litigation and complaints relating to his personal strata and its management. The Hearing Committee found:

190 The question left is whether Mr. Yang's repeated efforts to get the relief and remedy he thought appropriate, through the use of the REC complaint process and through court proceedings, demonstrate that he is "ungovernable." The Committee's conclusion is that they do not. He had a right to make complaints to the REC and to access justice through the courts. While he was found to have abused the court's process by trying to re-litigate certain issues in the judgement by Punnett, J., that does not demonstrate that he is "ungovernable." Once again, taking the matter to court demonstrates acceptance of the court's jurisdiction to decide matters. Mr. Yang argued that there was new information, case law and bases for relief. Punnett, J., found that while much of what was presented was caught by the law relating to issue estoppel and res judicata, and could not be re-litigated, parts were indeed new and had to be addressed.

191 In relation to making repeated complaints to the REC and asserting to the Minister of Finance and in court that the REC was not doing its job, it is, again, difficult to fit that in with the "ungovernable" concept discussed in the cases. In most such situations, a licensee has repeatedly violated rules and professional standards and has refused to accept findings against him. Here, Mr. Yang asserted that the REC was not living up to its own statute. While he was wrong in law in that in relation to the complaints he made, it would be passing strange to hold someone "ungovernable" because they called for a higher level of enforcement.

[16] The Hearing Committee did not accede to the REC submission that the appellant was ungovernable and found him suitable to be licensed.

[17] In the face of the finding by the Hearing Committee that the concerns raised by the REC were not valid as a basis to preclude licensing, did the Hearing Committee properly impose enhanced supervision conditions on the appellant's licence? For the following reasons I find that the Hearing Committee erred in imposing enhanced supervision conditions on the appellant's license.

Compliance with section 15 of the RESA

[18] The power to impose conditions on a license is found in s. 15 of the RESA. Section 15(1)(a) permits the REC to impose conditions on a licence as it considers necessary or desirable. Section 15(3) requires the REC to give notice to the applicant and provide the applicant with an opportunity to be heard. Section 15(4) specifically requires the REC to provide the applicant with written notice of the condition and the reason for it.

[19] I have reviewed the transcript of the hearing, and the issue of conditions appears to have arisen at the very end of final submissions. Counsel for the REC at the end of her submissions stated:

Now, I've just added a footnote there in paragraph 43 and 44, regarding conditions. I understand that under the Act if you want to consider conditions you have to call upon us specifically for that purpose. And that that's generally dealt with separately, so I haven't gone there for now. And I will when called upon to do that. [transcript p. 295]

[20] Following the appellant's submissions, the chair of the Hearing Committee made the following comments to the appellant:

Okay. I asked Ms. Whittow, because she pointed out in paragraph 43 of her written submission that section 15 of the Real Estate Act says that if we were to decide that conditions should be attached to you becoming a licensee that we had to give you notice of that. We will have to consider that and have made no decision whatsoever, but I want to invite you now to give us any submission that you might wish to make on this.

In some situations where the Council thinks it would be beneficial for the public interest and also for the licensee, that the licensee spend a period of time in what is called "close supervision" by a managing broker, and Council will spell that out. And close supervision in essence means that you have to work closely with the managing broker. You have to keep the managing broker informed of all of the work that you're doing and you have to present any written work to that managing broker so that they can review it. It doesn't mean that if you were in strata management services that you would be barred from going by yourself to a strata council meeting, but it would mean you had to keep your manager informed of everything that happened.

Do you have anything you wish to say to us about the possibility of us attaching a close supervision order as a condition if we were to decide that you should be given a licence? [transcript pp. 301-302]

[21] The appellant responded to these questions from the chair as follows:

I don't have any problem with this. I understand Council's concern, so I don't think I need to have another submission for that condition of licensing. I agree, I don't have an objection. [transcript p. 302]

[22] In its decision, the Hearing Committee found:

198 At the hearing, the Committee provided Mr. Yang with notice that it was considering whether, if he was licensed, conditions requiring close supervision by his managing broker should be required. He advised that he would consent to such close supervision.

[23] The Hearing Committee then set out eight detailed conditions on his licence, which required any managing broker to accept all of the duties contained in the conditions.

[24] The Hearing Committee provided the appellant with a very general oral overview of the kinds of conditions which had been attached to other licences and asked the appellant for his general reaction to such conditions. The appellant appeared to agree to the imposition of such conditions. However, s. 15 is designed to ensure the applicant is given express notice of proposed conditions. Such notice allows an applicant to fully consider the impact of the proposed conditions, and provide a meaningful and informed response. The exchange between the Hearing Committee and the appellant did not provide the appellant with full notice of the specific conditions which would be proposed, nor did it give the appellant a proper opportunity to respond to such conditions.

[25] I find that section 15 of the RESA is designed to give an applicant full disclosure of the specific terms in any proposed conditions. Notice is required to be given, and the REC is required to give reasons for the conditions.

[26] The REC argues that the notice given to the appellant was adequate, and that no specific form of notice is required under the RESA. I agree with the REC that *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC) establishes the content of the duty of procedural fairness. Fundamental to the assessment of the duty of procedural fairness is the concept that the affected party must know the case he is expected to meet, and be given a fair opportunity to respond.

[27] In this case, the imposed conditions are greater than would be required for an ordinary licensee. Some of the conditions are those which have been imposed in the face of a finding of professional misconduct (see *Re Dhaliwal*, below). I find that pursuant to s. 15 of the RESA the appellant was entitled to full disclosure of all of the proposed conditions, and was entitled to be given time to consider such conditions and make appropriate representations to the Hearing Committee before conditions were imposed. I do not accept that the conditions were minor and of little import, which seems to be the tenor of the REC's submission. On my review of the transcript I do not accept that the appellant was fully advised of the content of the conditions which were ultimately imposed, nor do I find that the appellant, who was unrepresented, fully appreciated that he was being asked to consent to conditions which were not expressly put to him. As such, I find that the process followed in imposing conditions was unfair to the appellant.

[28] The decision of the Hearing Committee relies on this imperfect "consent" of the appellant as its basis for imposing the conditions it did. The decision of the Hearing Committee, having rejected the submissions on the suitability of the appellant to be licensed as advanced by the REC, provides no further reasons as to why the conditions are required, or what deficiencies in the appellant the conditions are designed to address.

[29] I find that the appellant was not given full notice of the specific conditions proposed by the REC, and no reasons for the conditions were provided in the decision of the Hearing Committee. In the result, I find that the statutory requirements of the RESA were not met by the Hearing Committee in issuing the conditions it did. I also find that the REC and the Hearing Committee breached their duty of procedural fairness in failing to give the appellant proper notice of the proposed conditions, and failing to ensure the appellant was given an adequate opportunity to be heard in relation to the proposed conditions.

Were conditions justified?

[30] In the event I am wrong in my conclusions regarding the requirement for notice and the breach of procedural fairness as set out above, I have considered whether the conditions were properly imposed based on the facts in this case.

[31] The REC relies on *Anoliefoh v. Real Estate Council of British Columbia*, FST 2012-RSA-001(a) to establish that the decision whether to impose a condition is a discretionary one which will not be interfered with unless they are found to be unreasonable. This is consistent with the standard of review set out in *Kadioglu*.

[32] In its submission the REC states that the Hearing Committee had concerns about the appellant's litigious history and attempts to argue that the Hearing Committee had a concern that the appellant needed to attend counselling. I do not accept that the Hearing Committee identified any such alleged concerns as a basis for the conditions. Further, none of the conditions imposed have anything to do with an alleged concern about the need for the appellant to attend counselling.

[33] The REC relies on its original position on suitability, focusing on the litigation and complaints initiated by the appellant in relation to his private strata, and suggests that this history is sufficient to impose the conditions it did. However, the REC's position on this history was soundly rejected by the Hearing Committee. The Hearing Committee did not accept that the appellant acted improperly in dealing with his complaints in the way he did.

[34] In the result, I can find no basis in the decision of the Hearing Committee to found its imposition of any conditions.

[35] The REC has provided me with a number of authorities which it says support the imposition of conditions.

[36] The REC relies on the case of *Tedham (Re)*, 2014 LSBC 34 for the proposition that a condition, such as one directed at medical treatment, can be appropriate where a candidate has been found suitable for licensing. However, in *Tedham* the applicant had a history of alcohol and chemical dependency, various convictions in the US and Canada for criminal and customs offences, and had taken an assignment into bankruptcy. The applicant and the Law Society entered into an agreement as to terms and conditions that were acceptable to both the applicant and the Law Society, and the hearing panel adopted that agreement, and gave reasons as to how the conditions related to the concerns of the Law Society. This case has no application to the case before me, where there was no agreement between the parties on the conditions imposed, and no reasons given which related the conditions to any concerns of the Hearing Committee.

[37] The REC relies on *McOuat v. Law Society of British Columbia*, 1993 CanLII 1794 (BCCA) para. 17 for the proposition that conditions are not a substitute for the analysis of an applicant's suitability. In *McOuat* the court accepted the committee's decision that a person was not suitable and that conditions could not be imposed to address the applicant's lack of suitability. This case is inapplicable to the case before me, where the Hearing Committee found that the appellant was suitable and provided no reasons for the imposition of conditions.

[38] The REC relies on *Sarai (Re)*, 2010 LSBC 26 as an example of a case where conditions were imposed even where the applicant had established good character, repute and fitness. However, in *Sarai* the applicant had been previously suspended from practice for breaching a number of professional obligations including deficiencies in land transfers, breaches of undertakings, failure pay costs awards in breach of an agreement arising from a discipline hearing, failure to file trust reports, inadequate performance in his professional training course, and various other matters. As in the case of *Tedham*, the decision of the Law Society clearly gave reasons for the concerns the Law Society had with Mr. Sarai's ability to practice law, and how those concerns related to the conditions imposed. The case of *Sarai* has no application to the case before me.

[39] The REC notes that the final three conditions imposed by the Hearing Committee are the same as those applied in *Re Dhaliwal*, 2017 CanLII 2752 (BC REC). However, the terms referred to in *Re Dhaliwal* were part of a consent order made in the face of a finding that Mr. Dhaliwal had committed professional misconduct. No such finding has been made regarding the appellant and it is not clear to me why conditions which are appropriate to address professional misconduct would be imposed in an instance where the Hearing Committee rejected the submissions of the REC and found the appellant to be suitable for licensing.

[40] In the result, I find the imposition of conditions on the appellant is unreasonable in the circumstances. I strike all conditions imposed on the licence to which the appellant is entitled.

DECISION

[41] Pursuant to the *Financial Institutions Act*, s. 242.2(11), on an appeal the FST 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.

[42] The appellant has challenged the qualification hearing itself, and seeks a declaration that it was improperly held. I have found that the qualification hearing was properly held, and I decline to make the declaration sought by the appellant.

[43] The appellant seeks to have the enhanced supervision conditions struck. I have found the imposition of the conditions to be improperly made and unreasonable in the circumstances. As such, I vary the Hearing Committee's decision to remove the requirement for the listed enhanced supervision conditions of licensing and direct that all eight of the conditions are hereby struck.

[44] The appellant seeks compensation from the REC for loss of income or, in the alternative, for employment with the REC. The FST is empowered to hear appeals contesting licensing and regulatory enforcement decisions and does not have jurisdiction to make such an order. I decline to make the order sought in this respect by the appellant.

[45] The appellant seeks to have the REC pay his appeal and related costs. Pursuant to s. 47 of the *Administrative Tribunal Act*, and s. 242.1(7)(g) of the

Financial Institutions Act, the FST has the power to award costs. The parties have not provided full submissions on costs. I invite the appellant to provide his submissions on costs by September 7, 2017, following which the REC may provide its response submissions by September 14, 2017, with a right of reply to the appellant by no later than September 20, 2017.

"Wendy A. Baker"

Wendy A. Baker QC, Panel Chair
Financial Services Tribunal

August 25, 2017