



Financial Services Tribunal

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DECISION NO. 2017-RSA-001(b)

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 September 1, 2017

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

DECISION ON COSTS OF APPEAL

[1] On August 25, 2017, I issued my decision in this appeal, and gave the parties the opportunity to address costs in further submissions.

[2] The Appellant seeks his costs from the Real Estate Council. He claims an appeal fee of \$850, and says that he spent approximately 145 hours on the preliminary motions and the appeal itself.

[3] The Real Estate Council opposes any order for costs and takes the position that the Appellant was only partially successful on appeal, and not successful on his preliminary application to adduce new evidence. If costs are to be awarded, the Council submits only \$1,000 should be awarded, based on a calculation of reasonable tariff fees under the BC Supreme Court Rules and taking into account the Appellant's mixed success.

Power to award costs

[4] Pursuant to s. 47 of the *Administrative Tribunals Act* and s. 242.1(7)(g) of the *Financial Institutions Act*, the FST has the power to issue an order requiring a party to pay all or part of the costs of another party.

[5] The FST has issued Practice Directives and Guidelines which include criteria which the FST may consider in determining whether a participant (party) is liable to pay the costs of another party. These criteria include:

- (a) whether there was conduct that was improper, vexatious, frivolous or abusive;

- (b) whether the participant submitted a position that was manifestly unfounded;
- (c) whether the participant unreasonably delayed or prolonged the proceeding, including any failure to comply with an FST undertaking or order;
- (d) whether the participant assisted the Tribunal in understanding the issues;
- (e) whether the participant unreasonably failed to cooperate with the other parties during the appeal;
- (f) whether the participant failed to attend a hearing or other proceeding, or to send a representative, despite receiving notice;
- (g) the degree of success in the proceeding; and
- (h) any other matter the Tribunal considers relevant.

[6] The Practice Directives and Guidelines further state that the FST will calculate costs using the BC Supreme Court Rules as a general guideline.

[7] Sections 12(2) and 13(2) of the *Administrative Tribunals Act* provide that a tribunal, in this case the FST, is not bound by its practice directives. In *Brewers Distributor Ltd.*, 2010-PBA-001(c), the FST concluded that,

[13] ... While one would normally expect the Guidelines to be applied where applicable, despite their non-binding status, it can equally be said that the assessment of costs, including as to quantum, is traditionally very much a matter for the decision-maker's discretion, and not one to be rigidly carried out.

[8] This reasoning was accepted in *Kadiolgu*, 2015-RSA-003(c)), and while not binding upon me, I find the reasoning continues to be applicable to the appeal before me. I will refer to the criteria in the FST Practice Directives and Guidelines, and to the BC Supreme Court Rules, but ultimately in this decision I am exercising my discretion as to what, if any, costs should be awarded to the Appellant.

Discussion

[9] While the FST has the power to award costs, this is not a power which is exercised in every appeal. In other words, costs are not routinely awarded to the successful party. I make the following observations which are relevant to my assessment of whether costs are properly payable:

- (a) in this appeal the Appellant was successful on the main issue before me, namely whether the Council appropriately attached conditions to his licence;
- (b) the Appellant was unsuccessful on the issue of whether the qualification hearing was improperly scheduled and held; and
- (c) the Appellant was also unsuccessful in establishing one of the remedies he sought.

[10] The Appellant brought two interlocutory applications. He was successful in his application to have the appeal expedited, and was unsuccessful in his application to adduce new evidence. I find that the Appellant's success or failure on these interlocutory applications is relevant only as to whether he is entitled, potentially, to obtain his costs of those applications. In assessing whether the Appellant is entitled to his costs generally, I find that the outcome of these applications would only have relevance if I found that the applications were abusive in some way, which I do not so find.

[11] I found the Appellant proceeded in this appeal reasonably. While his challenge to the scheduling of the qualification hearing was unfounded, it did not materially add to the complexity of the proceeding. His failure to obtain one of the remedies sought resulted from a misunderstanding of the scope of authority of the FST, and did not appear to me to be motivated by any intention worthy of censure.

[12] I find that the Appellant achieved substantial success on this appeal, and is entitled to an award of costs for the appeal.

[13] I decline to make an order of costs in relation to the interlocutory applications. The Appellant was unsuccessful on the application to adduce new evidence, and so is not entitled to costs of this application. The application to expedite was a simple request, only two paragraphs in length, which was not seriously opposed by the Council. As such, I do not find it appropriate in the circumstances to award any costs in relation to the application to expedite.

Award

[14] I find that in relation to this appeal the most closely applicable tariff items under the BC Supreme Court Rules are tariff items 6 (prosecuting a proceeding, range of units 1-10) and 36 (written argument, range of units 1-10).

[15] As this matter was of ordinary difficulty, the most appropriate unit value for the starting point of my costs assessment is \$100/unit.

[16] Taking into account the factors set out above as gleaned from the BC Supreme Court Rules, and factoring in my own assessment of reasonable costs, I find that the Appellant is entitled to costs of the appeal in the amount of \$1,000.

[17] The only disbursement provided to me by the Appellant for consideration was the filing fee of \$850. I find that the Appellant is entitled to his filing fee in the amount of \$850.

[18] In summary, the Council is ordered to pay to the Appellant's costs in the total amount of \$1,850.

"Wendy A. Baker"

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

October 6, 2017