



FINANCIAL SERVICES TRIBUNAL

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DECISION NO. 2017-RSA-002(a)

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

BETWEEN: Roger Bruce Schoen **APPELLANT**

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

BEFORE: Wendy A. Baker, QC, Panel Chair

DATE: Conducted by way of written submissions
concluding on December 14, 2017

APPEARING: For the Appellant: Self-represented
For the Real Estate Council: Jean Whittow, QC, Counsel
For the Superintendent: Joni Worton, Counsel

DECISION ON PRELIMINARY APPLICATION TO ADDUCE ADDITIONAL EVIDENCE

[1] On December 11, 2017, the Financial Services Tribunal received an application from the Real Estate Council seeking to introduce two affidavits into the record on this appeal. The first is the affidavit of Mr. Gorman sworn April 10, 2016, and the second is the affidavit of Mr. Oogur sworn April 28, 2016.

[2] Section 242.2(6) of the *Financial Institutions Act* sets out the content of the record on an appeal. The record consists of:

- (a) the record of oral evidence, if any, before the original decision maker,
- (b) copies or originals of documentary evidence before the original decision maker,
- (c) other things received as evidence by the original decision maker, and

(d) the decision and written reasons for it, if any, given by the original decision maker.

[3] There are two issues raised in this application:

(a) Have any relevant documents which were before the decision maker been excluded from the record?

(b) Are documents which were not before the decision maker admissible as new evidence on appeal?

[4] Pursuant to s. 242.2(6) of the *Financial Institutions Act*, the record on this appeal only includes the documents which were before the decision maker.

[5] The Real Estate Council submits that the Gorman Affidavit was omitted from the record in error, and was in fact filed with Real Estate Council's discipline committee in support of the Real Estate Council's penalty submission. This is confirmed by the Superintendent.

[6] Paragraph 26 of the penalty decision references the Gorman Affidavit, and the enforcement expenses ordered by the discipline committee track the content of the Gorman Affidavit.

[7] I am satisfied that the Gorman Affidavit was in evidence before the decision maker and should be admitted as part of the record on this appeal.

[8] Section 242.2(8) of the *Financial Institutions Act* permits an application to be made to adduce additional evidence. In order to allow new evidence on appeal I must be satisfied that the new evidence is substantial and did not exist at the time of the original decision or could not have been discovered with reasonable diligence at that time.

[9] The Oogur Affidavit was known to the Real Estate Council at the time of the original decision. It was obtained by the Real Estate Council almost one year before the hearing.

[10] I do not have a discretion to accept new evidence which falls outside the test set out in s. 242.2(8). As such, I decline to accept the Oogur Affidavit into evidence in this appeal.

DECISION

[11] I order that the Gorman Affidavit shall form part of the record on this appeal.

[12] The Real Estate Council's application to admit the Oogur Affidavit into evidence on this appeal is denied.

" Wendy A. Baker"

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

December 20, 2017