



# Financial Services Tribunal

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## DECISION NO. 2017-RSA-002(b)

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:** THEODORE F. STROCEL, Q.C., PANEL CHAIR

**DATE:** WRITTEN SUBMISSIONS CONCLUDING ON  
JANUARY 19, 2018

**APPEARING:** For the Appellant: Roger Bruce Schoen  
For the Respondents: Jean Whittow, Q,C and  
Joni Worton

## OVERVIEW

[1] Roger Bruce Schoen, (the "Appellant") appeals to the Financial Services Tribunal (the "FST" or the "Tribunal") from two decisions of the Real Estate Council of British Columbia (the "Respondent", "Council" or "RECBC"). The first decision was given on March 27, 2017 and found that Mr. Schoen had committed numerous professional transgressions (the "Liability Decision"). The second was rendered on July 5, 2017 and imposed on Mr. Schoen various penalties (the "Penalty Decision").

[2] The Council opposes the appeal. The second named respondent, the Superintendent of Real Estate, has not participated in the appeal other than to register its agreement with the submissions of the RECBC.

## FACTS

[3] The Appellant is the former managing broker of Tumbler Ridge Realty (2013) Ltd. (the "Brokerage"). He ceased being managing broker when the Brokerage's

license was suspended on May 9, 2014 under a Suspension Order and Order to Freeze Property issued under sections 45 and 46 of the *Real Estate Services Act*, SBC 2004, c. 42 ("RESA"). The effect of the orders was that Mr. Schoen's license was rendered inoperative. His license eventually expired. Prior to this, Mr. Schoen had been a licensed realtor since 1987, and a managing broker in various concerns since 1993.

[4] Mr. Schoen was hired as managing broker of the Brokerage in July 2013. His contract stated that he was to be paid \$3,000 per month for his services. The owners of the brokerage, JM and his wife, AC (the "Owners"), were not licensed by the RECBC. On April 30 and May 1, 2014, complaints were made to the RECBC by two rental property management clients of the Brokerage to the effect that it had failed to make payment of funds to which they were entitled, and had failed to provide an accounting.

[5] Between May 7 and May 9, 2014, RECBC staff attended the Brokerage in Tumbler Ridge in order to conduct an inspection of its books. The staff discovered that the Brokerage was not compliant with the statute, rules and regulations under the RESA, and that significant funds were missing from the trust account.

[6] On May 9, 2014, the aforesaid orders were issued. On May 22, 2014, the Supreme Court of British Columbia appointed a Receiver for the Brokerage. On May 26, 2014, the Council filed a Petition in the Supreme Court of British Columbia against the Owners seeking recovery of monies taken from the Brokerage's trust account.

[7] Over the course of the next year, the RECBC made exhaustive investigations regarding the financial operations of the Brokerage, which were hampered to a large degree by the fact that the Brokerage had very little documentation or record-keeping regarding its financial affairs. From May to October 2014, the staff conducted an audit and reconstruction of the Brokerage's records from bank documents. On October 31, 2014, the Council completed a report, calculating a shortfall in the Brokerage's trust account of over \$80,000.

[8] In February 2015, the Owners made payment to the RECBC to cover the shortfall, resolving that litigation. By May 2015, the Receiver was able to distribute some \$240,000 it had seized or recovered to 82 clients of the Brokerage, upon which the Receiver was discharged.

[9] In the Liability Decision, the Respondent found that "Mr. Schoen refused or failed to meet with REC staff when requested and both before and after the suspension, provided only grudging and limited assistance with the REC investigation of the brokerage's books and records".<sup>1</sup>

[10] Furthermore, the Respondent found that the Appellant knew very little about the operations of the Brokerage, particularly about its accounting and financial record-keeping. This finding was based upon the uncontroverted evidence of the Director of Accounting and Audit for the Council, and the Council's Compliance

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<sup>1</sup> Liability Decision at para. 40.

Officer. They gave a considerable body of evidence at the hearing attesting to the Appellant's ignorance of the Brokerage's operations and financial affairs.

[11] On September 20, 2016, Council issued a Notice of Hearing to the Appellant. The hearing was originally scheduled to commence January 17, 2017, but after the Appellant asked for an adjournment, the hearing was rescheduled to March 3, 2017. The Appellant did not attend the hearing on March 03, 2017. The Panel found that the Appellant had been served with the Notice of Hearing, and proceeded in his absence.

[12] In his submission to this Tribunal, the Appellant explains his absence as follows: <sup>2</sup>

With no other options available to me, I wrote a letter to council denouncing the hearing as a sham, refusing to participate in this gross Abuse of Judicial Powers. Further, that in my opinion it would be nothing more that [sic] a Kangaroo style hearing with a predetermined conclusion and a rubber stamping by the Council which it exactly turned out to be.

[13] On March 27, 2017, the Respondent issued the Liability Decision. In it, the Respondent found that the Appellant committed professional misconduct by failing to fulfil his duties as managing broker as required by the RESA, its Regulations and the RECBC Rules (the "Rules"). The Respondent held that as a managing broker the Appellant was required to perform certain fundamental duties relating to the supervision and management of the Brokerage, and that the evidence was "overwhelming" that he did not do so.<sup>3</sup>

[14] In particular, the Respondent found the following: <sup>4</sup>

114. On the basis of all of the evidence the Committee determined that the Respondent Roger Bruce Schoen committed professional misconduct within the meaning of section 35(1)(a) of RESA when, contrary to sections 6(2) and 25 of the RESA and sections 3-1(1)(a), (b) and (c), 3-1(3), 8-1, 8-3, 8-6 and 8-10 of the Rules, he failed to:

- (a) fulfill his responsibilities as managing broker for the performance of the duties imposed on the brokerage by its licence;
- (b) ensure that the business of the brokerage was carried out competently and in accordance with RESA and the Rules;
- (c) have control and conduct of the brokerage's business;
- (d) be actively engaged in the management of the brokerage;
- (e) ensure that the brokerage maintained and retained proper books and records, trust accounts, records and ledgers, appropriate and timely reconciliations, and proper rental property management

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<sup>2</sup> Appellant Submissions at p.4.

<sup>3</sup> Liability Decision at paras. 96-108.

<sup>4</sup> Liability Decision at para. 114.

records, and more particularly, with respect to clients Mahar and 0745755 BC Ltd.;

(f) ensure that there was an adequate level of supervision for representatives, employees and others who performed duties on behalf of the brokerage; and

(g) ensure that rental funds were deposited into Mahar's bank account in accordance with his written instructions.

[15] The Respondent delivered the Liability Decision to the Appellant and set a schedule for the delivery of submissions in relation the appropriate penalty to be applied in the circumstances. Both the Appellant and RECBC filed submissions and replies.

[16] On July 5, 2017, the Respondent issued the Penalty Decision, in which it determined the following penalty was appropriate in the circumstances:<sup>5</sup>

a. That pursuant to section 43(2)(g) of RESA Mr. Schoen is prohibited from applying for a license as a managing broker under RESA for a period of 5 years from the date of this decision:

b. That pursuant to section 43(2)(g) of RESA Mr. Schoen is prohibited from applying for all other categories of licensing under RESA for a period of 2 years from the date of this decision;

c. That further, in relation to any re-licensing application, Mr. Schoen will be required to take and pass all of the courses required for his application category as if he had never been licensed before;

d. That further, if he successfully applies for relicensing otherwise than as a managing broker, subject to the further direction or order of a hearing committee under section 10 of RESA, Mr. Schoen must remain under close supervision of a managing broker of the brokerage with which he is licensed for a period of 2 years;

e. That pursuant to section 43(2)(h) and section 44 of RESA Mr. Schoen pay to the REC the sum of \$55,667.71 as enforcement expenses; and

f. That pursuant to section 43(2)(i) of RESA Mr. Schoen pay to the REC the sum of \$10,000 as a discipline penalty.

### SCOPE OF THE APPEAL

[17] The Appellant filed a Notice of Appeal on July 30, 2017. In it, he identified the July 05, 2017 Penalty Decision as the decision which he was appealing. The decision he seeks from the Tribunal is as follows:

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<sup>5</sup> Penalty Decision at para. 98.

[18] To have the costs of the hearing cancelled. To have all other charges against me "stayed". To have my license back without restriction. The Real Estate Council Reprimanded.

[19] The Appellant made further submissions on November 14, 2017. In both his Notice of Appeal and his written submissions, the Appellant focusses his efforts on explaining why he feels the Penalty Decision, in particular, was incorrect and unfair. However, many of the Appellant's arguments attack the Liability Decision as well as the Penalty Decision. The submissions of the Respondent, filed December 20, 2017, address the appeal as if it is an appeal of both decisions. Therefore, I will treat this as an appeal of the Liability Decision and the Penalty Decision.

### NEW EVIDENCE

[20] In his submissions to this Tribunal, the Appellant is highly critical of the evidence accepted by the Respondent in the discipline hearing, and offers new evidence of his own. As stated earlier, the Appellant did not attend the hearings that resulted in the Liability Decision, either to test the evidence given by the witnesses through cross-examination, or to offer his own conflicting evidence and present himself to the same cross-examination in front of the RECBC.

[21] The hearing conducted by the Respondent was the appropriate venue for the Appellant to present evidence and to test the credibility of the witnesses presented to make the case against him. He purposely declined the opportunity.

[22] The FST is an appellate body, and the limitations on new evidence it may consider are found at sections 242.2 (5), (6) and (8) of the *Financial Institutions Act*, RSBC 1996, c. 141, which state as follows:<sup>6</sup>

(5) Subject to subsection (8), an appeal is an appeal on the record, and must be based on written submissions.

(6) For the purposes of subsection (5), the record consists of the following:

(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;

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

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<sup>6</sup> *Financial Institutions Act* [RSBC 1996] c. 141 at ss. 242.2(5),(6) and (8).

(8) On application by a party, the member considering the appeal may do the following:

- (a) permit oral submissions;
- (b) permit the introduction of evidence, oral or otherwise, if satisfied that new evidence has become available or been discovered that
  - (i) is substantial and material to the decision, and
  - (ii) did not exist at the time the original decision was made, or, did exist at that time but was not discovered and could not through the exercise of reasonable diligence have been discovered.

[23] Although the Appellant has made no application to present new evidence, I will treat his submissions as an implicit application in that regard. The Respondent opposes the introduction of the new evidence with the exception of the exchange of correspondence between counsel and the Appellant regarding his offer to surrender his broker's license in order to discontinue matters against him (the "Settlement Correspondence").

[24] Prior to ruling on the admissibility of the new evidence I pause to note that several of the documents which the Appellant has attached to his submissions are actually RECBC decisions regarding other licensees who have resigned their licenses. These decisions are authorities, not new evidence, and as such they are admissible and I have considered them in my decision on this appeal.

[25] I have thoroughly reviewed the Appellant's submissions and have found nothing in them that shows that his proposed new evidence is substantial and/or material to the decision the FST has to make in this instance. The majority of what he has offered consists of unsupported assertions of fact. Further, all of the new evidence that the Appellant is seeking to have considered by the FST existed at the time the original decision was made, and should have been proffered by the Appellant at the discipline hearing where it could have been properly tested.

[26] Accordingly, with the exception of the authorities provided by the Appellant (which are not, in any event, new evidence), the proposed new evidence is inadmissible.

[27] With respect to the Settlement Correspondence, while it is true that this evidence existed at the time of the original decision, it was not necessarily "discoverable" in that it is a class of information normally inadmissible in such proceedings on the basis of the law of settlement privilege.

[28] Having said that, the Appellant made submissions regarding the settlement discussions between him and counsel for the Respondent in the penalty stage of the underlying proceeding. Indeed, the Penalty Decision contains a fulsome discussion

and assessment of this issue and the underlying facts.<sup>7</sup> Although the Respondent did not make a ruling as to the admissibility of the evidence in the penalty proceeding, because the Respondent considered the argument and underlying factual basis, this Tribunal has enough information to address the Appellant's argument on this point without resort to the documents attached to his submissions. In other words, insofar as its materiality to the decision in the present case, it is not necessary for me to consider this evidence in order for me to properly consider the Appellant's ground of appeal that the Respondent was wrong in refusing to accept his license resignation.

[29] For the above reasons I will not allow the Settlement Correspondence into the record of evidence before me on this appeal.

### STANDARD OF REVIEW

[30] The Appellant has not made submissions with respect to the standard of review to be applied by this Tribunal to its review of the Penalty and Liability Decisions. The Respondent has referred me to a recent decision of this Tribunal in *Kadioglu v. Real Estate Council of BC and the Superintendent of Real Estate*, Decision No. 2015-RSA-003 (b), and summarizes the standard of review adopted by Member Baker (as she then was) as follows: a) correctness for questions of law; b) reasonableness for questions of fact, discretion and penalty; and c) fairness, for procedural fairness questions.

[31] The standard of review to be applied by this Tribunal in the present case describes the degree of deference it will give the Respondent.

[32] With respect to questions of law, the Respondent is well-versed in its view of the laws governing licensed real estate in British Columbia. However, this Tribunal is an expert appeal tribunal with identical knowledge. As was noted in *Hensel v. Registrar of Mortgage Brokers*, Decision No. 2016-MBA-001(a):<sup>8</sup>

...[W]here the first instance regulator has made a finding of law, the Tribunal has generally held that deference is not required. Indeed, just as our court system proceeds based on the institutional premise that an appeal judge knows as much about the law as does a trial judge, the Tribunal is also entitled to proceed on the premise that the legislature intended that the specialized Tribunal would correct legal errors made by the first instance regulator.

I agree with the reasoning outlined above and for the purposes of this appeal the standard of review regarding interpretations of law will be correctness.

[33] Regarding questions of fact, discretion and penalty, in the present case, the Respondent alone heard the testimony of the witnesses and had the opportunity to assess their credibility and demeanour, and ultimately their believability. During the

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<sup>7</sup> Penalty Decision at paras. 73-74.

<sup>8</sup> *Hensel v. Registrar of Mortgage Brokers*, Decision No. 2016-MBA-001(a) at para 18.

hearing and throughout this process, it necessarily exercised discretion, which included the assessment of the penalty based on the facts found. This Tribunal has consistently applied a standard of reasonableness to issues of fact, penalty and/or discretion, and I see no reason in the present case to deviate from that approach. In other words, if the Respondent's findings of fact, exercise of discretion and/or assessment of penalty fall within a range of reasonable outcomes, I will not disturb them.

[34] With respect to the issues in this appeal which can best be characterized as issues of mixed fact and law, I have decided that the appropriate standard of review is reasonableness. Although the standard of review for issues of mixed fact and law may vary based on the particular context of each case, the more fact-intensive and the less law-focused the issues are, the more deference this Tribunal should give to the original decision-maker. I find that the factual matrix weighed heavily in the Respondent's assessment of professional misconduct in the present case, and the interpretation of the legislation required in the assessment was straightforward and uncomplicated. Therefore I will assess these issues against a reasonableness standard.

[35] In its proceedings, the Respondent made procedural decisions, such as the decision to proceed with its hearing in the absence of the Appellant. The Appellant has complained of this in his submissions. I will review these decisions using a fairness standard. If the procedural decisions adopted by the Respondent were fair in the circumstances, I will not disturb them. If they were unfair, I will.

[36] Similarly, the Appellant has at various times throughout his submissions implied or explicitly stated that the Respondent and/or its agents were biased against him. As an issue of procedural fairness and natural justice, I will also review the complaint of bias using a fairness standard.

## **ISSUES ON APPEAL**

[37] Having reviewed the Appellant's submissions, it seems to me the issues he has raised for review are as follows:

- (a) Issues of Procedural Fairness:
  - (i) regarding the failure of the Respondent to interview the Appellant during the investigation;
  - (ii) regarding the Respondent's refusal to accept the surrender of the Appellant's license;
  - (iii) regarding the delay in holding the hearing;
  - (iv) regarding the Respondent holding the hearing in the Appellant's absence; and,
  - (v) regarding the Appellant's perception that the Respondent and/or its agents were biased against him.
  
- (b) Issues of Mixed Fact and Law:
  - (i) regarding the Appellant's compliance with the RESA, its Regulations, and the RECBC Rules;

- (ii) regarding the requirement that the Appellant be present at the Brokerage in order to perform his duties; and,
  - (iii) regarding the responsibility of the Appellant for the actions of others at the Brokerage.
- (b) Issues of Law:
  - (i) regarding the Respondent's jurisdiction to commence action to recover the funds missing from the Brokerage's trust account; and,
  - (ii) regarding the Respondent's jurisdiction over the Appellant, as a former licensee, with regards to hearings and/or administering penalties.
- (c) Issues of Fact:
  - (i) regarding the believability of the evidence of the Director of Accounting and Audit, and the Compliance Officer;
  - (ii) regarding the authenticity of documents used in the hearing; and,
  - (iii) regarding the Appellant's perception that evidence at the hearing was either embellished or grossly exaggerated.
- (d) Issues of Discretion and/or Penalty:
  - (i) regarding the assessment of the enforcement expenses;
  - (ii) regarding the assessment of the discipline penalty; and,
  - (iii) regarding the failure of the Respondent to contact the RCMP.

## ANALYSIS

### (a) Issues of Procedural Fairness

#### *(i) Failure to interview the Appellant during the investigation*

[38] In his Notice of Appeal, the Appellant complains that he has "never been formally interviewed by anyone from the Real Estate Council pertaining to this matter", and that "I believe the information I had to offer at that time had real value and would have been of great help and possibly shortened the length of the investigation considerably thereby reducing costs."<sup>9</sup>

[39] There is no rule of law or procedure that requires the Respondent to engage in a "formal" interview before a hearing in this matter. That being said, the record shows that the staff of the Respondent reached out to the Appellant multiple times via telephone and other correspondence. They invited him to meetings at the Brokerage. They offered him considerable opportunity to provide his information to them. It is clear from the facts and evidence that the Appellant purposely refused to answer, and in contrast to his complaint in this regard, was himself a major cause of delay in the RECBC's investigation of the Brokerage. If the Appellant had

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<sup>9</sup> Appellant Notice of Appeal p. 1 at para. 5.

any information to offer at the time, he was not forthcoming with it and cannot now complain of unfairness caused by his own behaviour.

[40] As a ground of appeal in this matter, it is without merit.

**(ii) Refusal of the Appellant's offer to surrender his license**

[41] The Appellant complains that on two separate occasions, and well before the hearing took place, he tried to mitigate expenses by offering to permanently surrender his license. He says it was unfair of the Respondent not to accept his offer as it had done in previous cases involving licensee professional misconduct.

[42] Again, there is no rule of law or procedure that requires the Respondent to accept the surrender of the Appellant's license. It is apparent that the reason negotiations failed was that the Appellant failed to accept any responsibility for the debacle that was left in his wake at the Brokerage.

[43] The Respondent concluded in its Penalty Decision: "Mr. Schoen does not acknowledge any misconduct and took no steps of significance to cooperate in the investigation, to remedy the shortfall in trust funds, or to prevent any recurrence of such wrongdoings".<sup>10</sup>

[44] The Appellant has provided RECBC decisions which record the Respondent accepting the surrender of a licensee accompanied by a lifetime ban on re-applying for a license without an admission of liability. He submits that it is unfair that he was not entitled to the same treatment.

[45] However, none of those examples were licensed as managing brokers. None of them were entrusted with other people's money. By his license, he was. The duties and responsibilities of a managing broker are much higher than that of a salesperson. Accordingly, the Respondent is obliged to treat this situation much more seriously, with a view to maintaining public confidence in the real estate profession. There is nothing unfair about the Respondent's refusal to accede to Mr. Schoen's request.

**(iii) Delay in holding the hearing**

[46] The Appellant complains that "[t]he Council did not exercise Procedural Fairness because of the lengthy time it took to bring this investigation to a conclusion. This long lengthy delay of 34+ months by anyone's standards was totally unfair, unethical, and prejudicial to my defense."<sup>11</sup> He cites his "constitutional rights" as authority for his position<sup>12</sup> and made some reference to provisions of the 1982 *Charter of Rights and Freedoms* (the "Charter") in his submissions to Council in the underlying proceedings.

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<sup>10</sup> Penalty Decision at para. 90.

<sup>11</sup> Appellant submissions p. 5 at para. 4.

<sup>12</sup> Appellant Reply submissions at p. 2.

[47] In the Liability Decision, the Respondent pointed out that the provisions of section 11 of the *Charter* are not applicable to professional disciplinary proceedings such as these,<sup>13</sup> citing *Blencoe v. British Columbia (Human Rights Commission)* 2000 SCC 44, a decision of the Supreme Court of Canada.

[48] I am not considering the Appellant's submissions on delay in the context of any "constitutional rights" the Appellant may or may not have in this regard. Instead, I have confined my analysis of this point to the issues of procedural fairness raised by the allegation of undue delay.

[49] In the administrative law context, inordinate delay can lead to procedural unfairness in cases where "significant prejudice" has resulted either in the form of a party's inability to answer the case against him or her, or in the form of the delay being so inordinate as to amount to an abuse of process.<sup>14</sup> I find no such prejudice exists in the present case, and, furthermore, much of the delay the Appellant complains of was caused directly or indirectly by his own actions.

[50] Much of the year after the discovery of the missing money was spent in reconstructing records that the Appellant was supposed to have prepared but did not, in discovering the extent of the loss, and in taking action to recover missing moneys. Further, the time from the issuance of the Notice of Hearing in late 2016 to the hearing date was not long, and parts of it were taken up with requests from the Respondent for a delay in the hearing date.

[51] The Appellant has not shown that he was unable to answer the case against him as a result of the delay, nor has he shown that this is one of the "extremely rare"<sup>15</sup> cases in which delay has rendered the proceedings an abuse of process. I find no unfairness caused by delay in this case.

**(iv) Holding the hearing in the Appellant's absence**

[52] In his submission, the Appellant complains that the Respondent breached procedural fairness in holding the hearing "without my presence".<sup>16</sup> This is quite remarkable, considering that later in his submissions he states that he "wrote a letter to council denouncing the hearing as a sham, refusing to participate in this gross Abuse of Judicial Powers".<sup>17</sup>

[53] In a disciplinary proceeding under RESA, if a party is properly served, the hearing committee may proceed in the absence of the licensee. The statute provides as follows:

**42 (1)** If notice of a discipline hearing has been given in accordance with section 40 (3) [*notice*], a discipline committee may proceed with the discipline hearing, whether or not the licensee appears in person

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<sup>13</sup> Liability Decision at para. 6.

<sup>14</sup> *Blencoe* at paras. 101-122.

<sup>15</sup> *R. v. Power*, [1994] 1 S.C.R. 601 at p. 616 as cited in *Blencoe* at para 120.

<sup>16</sup> Appellant submissions at p. 1.

<sup>17</sup> Appellant submission p. 4 at para. 2.

and whether or not the licensee is represented by legal counsel at the hearing.

[54] Before proceeding, the Respondent found that the Appellant had been properly served. In fact, the Respondent has not alleged that he was not served.

[55] The Appellant was served with the Notice of Hearing on October 26, 2016. The hearing date was altered at the request of the Appellant to March 3, 2017. On February 24, 2017, the Appellant sent his letter stating his intention not to attend.

[56] Both the Notice of Hearing and the Statute make clear that the hearing was able to proceed in the Appellant's absence if he did not attend. The Appellant made a conscious decision not to attend the Hearing at his own peril. He cannot now complain of its consequences. This ground of appeal fails.

**(v) Bias**

[57] In multiple places in his submissions to this Tribunal the Appellant alleges various iterations of bias against the Respondent and/or its agents.

[58] The allegations made by the Appellant in this regard range from accusing the two individuals who investigated the Appellant and the Brokerage of being "pathological liars" who provided "tainted testimony",<sup>18</sup> to suggesting that the entire hearing process undertaken by the Respondent was no more than a "Kangaroo style hearing with a predetermined conclusion".<sup>19</sup>

[59] Additionally, the Appellant makes allegations against counsel for the Respondent concerning what he says are her inappropriate motives for refusing to accept surrender of his license on behalf of Council, as well as her overall integrity and competence in handling the Respondent's case against him.<sup>20</sup>

[60] In the Penalty Decision, the Respondent details allegations of bias and intentional wrongdoing which were made by the Appellant throughout the course of that proceeding. In that decision, the Respondent found the Appellant had made the comments without offering any evidence to "back up such serious and outrageous allegations", and went on to alert the Appellant to the possible legal costs consequences of making such "baseless" allegations.<sup>21</sup>

[61] I find that in the present case, as in the underlying proceeding, the Appellant has made serious allegations of bias and intentional wrongdoing against the Respondent and its agents without providing any credible evidence to back these allegations up. In every example the Appellant provides of the Respondent's alleged bias, the Appellant either states the bias exists with no further comments which

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<sup>18</sup> Appellant Reply at p. 2.

<sup>19</sup> Appellant Reply p. 4 at para. 3.

<sup>20</sup> See for example Appellant submissions at p. 1-3.

<sup>21</sup> Liability Decision at paras. 42-44.

support the allegation, or states the bias exists and provides additional unsupported factual assertions which are often unrelated to the particular bias issue.

[62] For example, the Appellant alleges counsel for the Respondent intentionally refused to accept his offers to surrender his license as a means of ensuring she could “rack up” legal fees for a full hearing.<sup>22</sup> He further alleges counsel then tried to “cover up her tracks”.<sup>23</sup> He proffers no evidence in support of these allegations.

[63] I find the Appellant’s allegations of bias against the Respondent are unsubstantiated, unwarranted, and at times very discourteous. At best, these allegations amount to conjecture. I find this ground of appeal has no merit.

**(b) Issues of Mixed Fact and Law**

**(i) General compliance with RESA and the Rules**

[64] In his Notice of Appeal, the Appellant states: “I truly believe that I was fully compliant with RESA and performed all my duties effectively and with due diligence.”<sup>24</sup>

[65] The Appellant does not deny that money was taken improperly from the trust accounts of the Brokerage. He does not deny that the monthly reconciliations that he was supposed to prepare and initial were never prepared. He does not deny that the records the Respondent found to be missing were missing. It appears, therefore, that the Appellant’s above assertion of compliance and due diligence is an assertion that the Appellant disputes that it was his duty to properly record the transactions and to protect the monies held in trust by the Brokerage.

[66] The role of a managing broker is stated in section 6 of RESA as follows:

- 6(1) Subject to the rules, a brokerage
  - (a) must have one or more managing brokers licensed in relation to the brokerage, and
  - (b) may only provide real estate services that are permitted by the licence of a managing broker who is licensed in relation to the brokerage.
- (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

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<sup>22</sup> Appellant Reply at p.4.

<sup>23</sup> Appellant Reply at p.3.

<sup>24</sup> Notice of Appeal p.3 at para. 2.

(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.

[67] The obligation to maintain books and records is stated in section 25 of RESA as follows:

25 A brokerage must maintain proper books, accounts and other records in accordance with the rules, and must keep these records in British Columbia.

[68] The responsibility of a managing broker to manage and supervise the brokerage is contained both in the above provisions of the RESA, and in several of the RECBC Rules, including: Rule 3-1(1) requiring a managing broker to be actively engaged in the management of the brokerage and the supervision of brokerage staff; Rule 3-1(2) requiring a managing broker to ensure proper management and maintenance of brokerage records; and Rules 7-4, 8-2 and 8-3 detailing specific responsibilities of a managing broker relating to trust accounts and specific trust accounting records.

[69] In the Liability Decision, the Respondent set out these and other relevant provisions of the legislative regime relating to the specific duties and responsibilities of a managing broker, and reasonably concluded that as managing broker the Appellant was required to be involved in, and was fully responsible for the management and record-keeping of the trust accounts of the Brokerage. Overall, the Respondent found that the RESA and the Rules required the Appellant to be in "active control and management" of the Brokerage, and that the evidence was "overwhelming" in showing that he was not.<sup>25</sup> The Respondent considered, in detail, the evidence regarding the improper state of affairs investigators discovered at the Brokerage, and the Appellant's apparent lack of knowledge and control over what had been going on. As in the present appeal, in the underlying decision the Appellant provided no evidence regarding how he met his duties under RESA and the Rules. In my view, the Respondent's conclusion that the Appellant was guilty of professional misconduct for failing to live up to his duties under RESA and the Rules was reasonable.

**(ii) *The Appellant's presence at the Brokerage***

[70] The Appellant submits:<sup>26</sup>

[T]here is no written law that I could find in the RESA to substantiate the Council's allegations of misconduct with respect to my attendance in the office. NOTHING I found states that to be compliant:

1- A Managing Broker MUST be in the office to perform his/her due diligence.

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<sup>25</sup> Liability Decision at para. 96.

<sup>26</sup> Appellant submissions at p. 20.

2- A Managing Broker MUST be in his/her office X number of days per week/month or year to be compliant with the Act.

[71] This appears to be a mischaracterization of the findings of the Respondent, which are best stated in the Liability Decision as follows:<sup>27</sup>

Whether it is the lack of evidence of attendance at TRR's premises on any regular basis or the lack of supervision and instruction of TRR's employees, it is clear he failed to meet his duties. Whether it is a lack of accounting records, annual report, bank records, bank reconciliations, trust account ledgers and supporting documentation or evidence of knowledge of how many agents, employees, clients and complaints there were, he failed to meet his duties.

[72] The duties described here are statutory. The RECBC is entitled to prescribe or encourage standards necessary in order to perform those duties. A managing broker can ignore those standards, as the Appellant has done, but he does so at his own peril. If he fails in his duties because of his failure to adhere to industry standards or the standards set by RECBC, he cannot excuse himself from this failure by arguing that those standards are not also enshrined in legislation.

***(iii) The Appellant's responsibility for the actions of others at the Brokerage***

[73] The Appellant states as follows:<sup>28</sup>

To me this situation of [the Owners] taking money out of the Trust Accounts behind my back is no different than if I was a Manager of a large bank and one of my most trusted employees was embezzling money from the bank right under my nose.

[74] The Appellant appears to be saying that the Respondent should not have found him guilty of professional misconduct because the Owners of the Brokerage engaged in subterfuge and he had no way of knowing the Brokerage was operating inappropriately.

[75] However, this is not a tenable argument. The Respondent found the Appellant guilty of numerous counts of professional misconduct relating to his overall lack of management and trust account oversight, all detailed in paragraph 114 of the Liability Decision. The fact that trust money was wrongfully taken by the Owners, whether or not they engaged in deception to do so, was the result of the failure of the Appellant to properly manage the Brokerage; an example of the damage that was caused by his professional misconduct.

**(c) Issues of Law**

***(i) The Respondent's jurisdiction to commence action to recover the funds missing from the Brokerage's trust account***

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<sup>27</sup> Liability Decision at para. 98.

<sup>28</sup> Appellant Notice of Appeal at p.6.

[76] The Appellant states:<sup>29</sup>

The Council took it upon themselves to use all the resources of the Council to file a law suite [sic] in the Supreme Court of Canada on behalf of a private citizen. I believe the Council had no authority to act in this manner as the Council was not the one out of the Funds, it was a private citizen ... that was out the money and it should have been him filing the law suit in the Supreme Court and at his cost of time and money, not the Councils.

[77] Strictly speaking this is not relevant to this Appeal. However, it was quite necessary that the RECBC take action to recover those funds. Under Section 109 of RESA, the Real Estate Compensation Fund Corporation is established for the purpose of maintaining a fund to pay people, like the private citizen referred to above, who are victimized in these circumstances. It is in the best interests of the RECBC to protect that fund by taking action to recover monies taken from its victims, so that the fund is not unnecessarily depleted. Under section 67 of RESA, the Corporation is specifically authorized to take such action. In this case, it was entirely within the Respondent's jurisdiction to take action to recover the Brokerage's missing trust account money.

**(ii) *The Respondent's jurisdiction over the Appellant***

[78] The Appellant argues that because he did not have a current license at the time of the Liability and Penalty Decisions, the Council could not take action against him. He states: "[t]herefore the Council at that point in time had in fact no legal jurisdiction over me with regards to hearings and or administering any penalties."<sup>30</sup>

[79] The short and concise answer to the Appellant's argument on this point is contained in in Part 4 of RESA, concerning *Discipline Proceedings and other Regulatory Enforcement*, and in particular section 34, which states as follows:

34 For the purpose of this Part, "**licensee**" includes a former licensee in relation to matters that occurred while the person was a licensee.

[80] The Respondent had the jurisdiction to take the within proceedings against the Appellant.

**(d) Issues of Fact:**

**(i) *regarding the believability of the evidence of the Director of Accounting and Audit, and the Compliance Officer;***

**(ii) *regarding the authenticity of documents used in the hearing; and***

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<sup>29</sup> Appellant submissions at p. 7.

<sup>30</sup> Appellant submissions at p.8.

**(iii) regarding the Appellant's perception that evidence at the hearing was either embellished or grossly exaggerated**

[81] The Appellant did not attend the hearing of his own choice. He was offered the opportunity to cross-examine the witnesses he now disparages, present his own evidence in counterpoint to theirs, and debate the authenticity of the documents he now disputes.

[82] I have not accepted any of the new evidence urged on me by the Appellant under the terms of my earlier findings. But even if I did, the Appellant's submission that much of the evidence was either embellished or grossly exaggerated is not borne out. Neither are the complaints against the witnesses or the documents. The Appellant makes a considerable number of unsubstantiated claims which I reject entirely.

[83] The Respondent duly considered the evidence presented to it and gave a detailed and carefully considered judgment. It is not the function of this Tribunal to reconsider the evidence before the Respondent afresh. In my reading of the evidence accepted by the Respondent, the judgments are entirely reasonable in view of the evidence before it.

**(e) Issues of Discretion and/or Penalty**

**(i) The assessment of the enforcement expenses**

[84] In his Notice of Appeal, the Appellant states as follows:<sup>31</sup>

The enforcement expenses are outrageous, disproportionate, and totally unfair which in it [sic] itself amounts to a severe penalty. The Council has charged me with all the expenses yet I was never the main focus of the investigation. The main focus of the investigation was the complaint of missing money taken out of the Trust Funds by the Owners.

[85] Section 43(2)(h) of RESA provides that following a finding of misconduct, a discipline committee may require the licensee to pay amounts in accordance with section 44(1) and (2), which provide that the discipline committee may require the licensee to pay expenses incurred by the real estate council in relation to either or both of the investigation and discipline hearing to which the order relates, providing they do not exceed the amount prescribed by regulation.<sup>32</sup> They may include remuneration expenses incurred in relation to employees, officers or agents of the Council or members of the discipline council.

[86] The Affidavit of PG of April 10, 2017, added to the Record by decision of FST December 20, 2017 (2017-RSA-002(a)), sets out the basis for the claim for enforcement expenses and the items claimed. It is based upon the regulation.

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<sup>31</sup> Notice of Appeal at p.1.

<sup>32</sup> In particular, the *Real Estate Services Regulation* BC Reg. 506/2004 at s. 4.2.

[87] The hearing expenses claimed in the present case are confined to the hearing as regards the Appellant. These expenses are in line with the regulation, and they are reasonable.

[88] The Appellant compares these costs to his impression of costs of other proceedings. Costs in other proceedings are not relevant, particularly where the Legislature has ruled on the extent of the expenses that may be claimed and awarded by the Respondent.

**(ii) The assessment of the discipline penalty**

[89] The Appellant complains that the discipline penalty is “totally unreasonable” and the time limit for cancellation amounts to a lifetime ban as he is 71 years old.<sup>33</sup>

[90] The penalty prevents the Appellant from applying for a license as a managing broker for 5 years, and from applying for any other category of licence for 2 years. Additionally, the penalty imposes qualification conditions and an administrative penalty of \$10,000.

[91] The provisions of RESA concerning penalty in effect at the time of the Respondent’s finding regarding the Appellant’s misconduct are as follows:

- 43(1)** After a discipline hearing, the discipline committee must
- (a) act under this section if it determines that the licensee has committed professional misconduct or conduct unbecoming a licensee, or
  - (b) in any other case, dismiss the matter.
- (2) If subsection (1) (a) applies, the discipline committee must, by order, do one or more of the following:
- (a) reprimand the licensee;
  - (b) suspend the licensee's licence for the period of time the committee considers appropriate or until specified conditions are fulfilled;
  - (c) cancel the licensee's licence;
  - (d) impose restrictions or conditions on the licensee's licence or vary any restrictions or conditions applicable to the licence;
  - (e) require the licensee to cease or to carry out any specified activity related to the licensee's real estate business;
  - (f) require the licensee to enrol in and complete a course of studies or training specified in the order;
  - (g) prohibit the licensee from applying for a licence for a specified period of time or until specified conditions are fulfilled;

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<sup>33</sup> Appellant submission p. 3.

- (h) require the licensee to pay amounts in accordance with section 44 (1) and (2) [*recovery of enforcement expenses*];
- (i) require the licensee to pay a discipline penalty in an amount of
  - (i) not more than \$20 000, in the case of a brokerage or former brokerage, or
  - (ii) not more than \$10,000, in any other case;
- (j) require the licensee to pay an additional penalty up to the amount of the remuneration accepted by the licensee for the real estate services in respect of which the contravention occurred.

[92] The penalty decision of the Respondent is fully contemplated by the statute.

[93] The panel considered the appropriate legal principles concerning penalty and prior cases which establish a range of disposition and the relevant factors to be taken into consideration. The Appellant has not challenged the authorities, or the analysis done by the Respondent.

[94] The Respondent found that the nature, gravity and consequences of the Appellant's conduct were severe. He was licensed to perform the role of a managing broker by the RECBC, and he utterly failed in his responsibilities. This finding regarding the severity of the Appellant's misconduct is reasonable.

[95] The Appellant did not (and still does not) acknowledge any misconduct, and at the time took no steps to cooperate with the investigation or to recover the missing trust funds. He was uncooperative and unnecessarily aggressive throughout all levels of the process.

[96] The Appellant's age is not relevant to the penalty in the present case. It is a matter of circumstance that the misconduct occurred at this time in his life, but that does not change the factors that the Respondent must consider in reaching its decision on penalty.

[97] The Respondent decided that a substantial penalty was required in order to ensure that public confidence in the real estate profession is maintained. In my view, the decision of the Respondent in this regard is not unreasonable, and there is no basis for me to disturb it.

***(iii) The failure of the Respondent to complain to the RCMP***

[98] The Appellant submits that the Respondent should have complained to the RCMP about the behaviour of the former owners.

[99] Any action that may or may not have been taken by the Respondent regarding the Owners of the Brokerage is not relevant to this hearing or the findings of the Respondent regarding the Appellant.

**CONCLUSION**

[100] I have no basis to interfere with the evidentiary findings of the Respondent. Nor do I find any breach of procedural fairness on the part of Respondent. I have not accepted any of the Appellant's legal arguments. I find that the penalties imposed are reasonable.

[101] For these reasons, I dismiss the appeal on all grounds. The Penalty Decision and the Liability Decision are confirmed. The stay of the Penalty Decision, issued pursuant to section 55(2) of RESA is now lifted.

[102] The Respondent seeks its costs of this appeal. Pursuant to section 47 of the *Administrative Tribunals Act*, and section 242.1(7)(g) of the *Financial Institutions Act*, the FST has the power to award costs.

[103] Neither party has provided submissions on costs. As it is the Respondent who seeks costs, I will invite the Respondent to make submissions by **May 03, 2018**, following which the Appellant may provide a response by **May 10, 2018**, with a right of reply to the Respondent no later than **May 17, 2018**.

"Theodore F. Strocel, Q.C."

Theodore F. Strocel, QC  
Financial Services Tribunal

April 19, 2018