



Financial Services Tribunal

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DECISION NO. 2018-RSA-001(c)

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

BETWEEN: DOUGLAS WELDER **APPELLANT**

AND: REAL ESTATE COUNCIL OF BRITISH COLUMBIA **RESPONDENT**

BEFORE: JANE A. G. PURDIE, O.C., PANEL CHAIR

DATE: WRITTEN SUBMISSIONS on COSTS
CONCLUDING June 11, 2019

APPEARING: For the Appellant: Self-Represented
For the Respondent: Catherine Davies

DECISION ON COSTS OF THE APPEAL

OVERVIEW

[1] On February 21, 2019, I issued my decision in this appeal and gave the parties the opportunity to address the issue of costs in further submissions.

[2] The Real Estate Council of British Columbia (the "Council") seeks to have the Appellant pay costs in the amount of \$5,309.21, comprising: legal fees and taxes of \$2,464.00 (pursuant to the Supreme Court of BC tariff scale B); and disbursements of \$2,845.21.

[3] The Appellant opposes an order for costs.

AUTHORITY TO AWARD COSTS

[4] The Financial Services Tribunal (the "FST") has the power to issue an order requiring a party to pay all or part of the costs of another party pursuant to section 47 of the *Administrative Tribunals Act*, SBC 2004, c 45 (the "ATA"). Section 3.24 of

the FST's *Practice Directives and Guidelines* sets out 8 factors which I may consider in making a costs decision:

- whether there was conduct that was improper, vexatious, frivolous or abusive;
- whether the participant submitted a position that was manifestly unfounded;
- whether the participant unreasonably delayed or prolonged the proceeding, including any failure to comply with an FST undertaking or order;
- whether the participant assisted the Tribunal in understanding the issues;
- whether the participant unreasonably failed to cooperate with the other parties during the appeal;
- whether the participant failed to attend a hearing or other proceeding, or to send a representative, despite receiving notice;
- the degree of success in the proceeding; and
- any other matter the Tribunal considers relevant.

[5] After referring to sections 12(2) and 13(2) of the ATA which provide that a tribunal like the FST is not bound by its practice directives, the FST concluded in *Brewers Distributor Ltd. v Superintendent of Pensions*, Decision No. 2010-PBA-001(c) ("*Brewers*"), that (at para 13):

[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.

[6] The Tribunal in *Kadioglu v Real Estate Council* 2015-RSA-003(c), referring to *Brewers*, concluded that ultimately it is in the decision-maker's discretion as to what, if any costs should be awarded. I agree with that conclusion.

DISCUSSION

[7] The power to award costs is not a power which will be exercised in every appeal.

[8] The Respondent submits that costs should be awarded on the basis that the Respondent was successful on all grounds of appeal advanced by the Appellant, and that, in the Council's view, the Appellant unduly added to the length and complexity of the appeal by advancing issues which were "manifestly unfounded and unreasonably submitted".

[9] In particular, the Respondent alleges that the Appellant raised the issue of procedural fairness which was manifestly unfounded, that his conduct in doing so was frivolous, and that this added both to the complexity and length of the appeal.

[10] Additionally, the Respondent states that the Appellant's argument regarding the issue of the admissibility of discipline proceedings unnecessarily prolonged the

appeal proceeding, had no reasonable prospect of success and was manifestly unfounded.

[11] Finally, the Respondent alleges that the Appellant took an unfounded and unreasonable position in his argument regarding onus.

[12] The Appellant argued the Tribunal should not make an award of costs in this case. He conceded only that the degree of success in the proceeding could be a factor in a costs order since he was unsuccessful in any of his grounds of appeal. However, he also argued that it was the Respondent who prolonged the proceeding by failing to notify the FST that it had changed counsel.

[13] Both parties acknowledged the impact of the issue of the interpretation of section 87 of the *Legal Professions Act, SBC 1998, c 9* (the "LPA"). The Respondent indicated that this issue "comprised a significant portion, if not the most significant portion of the appeal", and the Appellant indicated that this issue was a novel issue without any previous significant case law or prior consideration by the FST.

[14] More than a third of the decision under appeal dealt with the issue regarding section 87 of the LPA. Neither party was alive to the issue prior to the underlying hearing. Indeed, it was the Chairman of the Council who raised the issue and required the parties to provide written submissions. The Appellant rightly emphasized this issue on his appeal to this Tribunal.

[15] I find that the Appellant's argument on the issue regarding section 87 of the LPA was not specious, and in and of itself does not justify an award of costs.

[16] Further, I do not find that any of the Appellant's other arguments unduly added to the complexity or length of the appeal; they were not frivolous, manifestly unfounded or unreasonable.

DECISION

[17] I am not satisfied that this is an appropriate case in which to exercise my discretion to award costs, and I decline to do so. Accordingly, the Respondent's application for costs is denied.

"Jane Purdie"

Jane A. G. Purdie, Q.C.

Panel Member, Financial Services Tribunal

June 20, 2019