BRITISH COLUMBIA

Financial Services Tribunal

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DECISION NO. 2018-RSA-002(a) and 003(a)

In the matter of an appeal under section 54 of the *Real Estate Services Act,* SBC 2004, c 42

BETWEEN:	Shahin Behroyan	**APPELLANT**
AND:	Real Estate Council of British Columbia and Superintendent of Real Estate	**RESPONDENTS**

BEFORE: Michael Tourigny, Panel Chair

DATE: Conducted by way of written submissions concluding on August 10, 2018

APPEARING: For the Appellant: John Douglas Shields, legal Counsel
For the Respondent Real Estate Council of British Columbia: Jean P. Whittow Q.C., Legal Counsel
For the Respondent Superintendent of Real Estate: Joni Worton, Legal Counsel

Application for Admission of New Evidence

OVERVIEW

[1] Shahin Behroyan, (the "Applicant"), a real estate agent licensed under the *Real Estate Services Act,* SBC 2004, c 42 (the "RESA"), has appealed under section 54(1)(d) of the RESA to the Financial Services Tribunal (the "Tribunal") from a finding of professional misconduct (the "Liability Decision") made by a Committee (the "Panel") of the Real Estate Council of British Columbia (the "Council") following a hearing, as well as from the resulting decision on penalty (the "Penalty Decision"). The alleged professional misconduct relates primarily to a bonus of

$75,000 claimed by the Applicant from his client, KH, in relation to the sale of residential property in West Vancouver which completed in January 2015.

[2] The Superintendent of Real Estate (the "Superintendent") filed a separate appeal under section 54(1)(d) of the RESA from the Penalty Decision.

[3] The parties agreed that these two appeals should be joined and heard together. The parties further agreed that the hearing of these appeals should be bifurcated to allow for the appeal from the Liability Decision to be decided prior to consideration of the Penalty Decision. These agreements of the parties were formalized by order of the Tribunal dated June 15, 2018, which order also provided that the appeals are to be heard by a single member of the Tribunal.

[4] Prior to the close of written submissions on the appeal from the Liability Decision, the Applicant applied for an order under subsection 242.2(8)(b) of the *Financial Institutions Act,* RSBC 1996, c 141 (the "FIA") to allow the following facts to be admitted as evidence on the appeal from both the Liability Decision and the Penalty Decision (the "New Facts"):

1. On June 04, 2018, a trust cheque for $75,000 was delivered by counsel for the Appellant to counsel for the seller, KH, in outstanding civil proceedings between KH and the Appellant.
2. That litigation remains outstanding.

[5] By letters dated July 27, 2018, both the Council and Superintendent advised the Tribunal that they consent to the order sought by the Applicant to admit the New Facts in both the appeal from the Liability Decision and the appeal from the Penalty Decision.

[6] By letter dated July 31, 2018, the Tribunal advised the parties that in order to be accepted the New Facts must meet the test for admissibility set out in subsection 242.2(8)(b) of the FIA. A schedule for the exchange of written submissions was set and written submissions were provided by the parties.

ISSUE

[7] Should the New Facts be admitted and added to the record as evidence on the appeal from the Liability Decision and/or the appeal from the Penalty Decision?

DISCUSSION AND ANALYSIS

Statutory provisions related to the introduction of new evidence before the Tribunal

[8] Subsection 40(1) of the *Administrative Tribunals Act,* SBC 2004, c 45 (the "ATA") which applies to the Tribunal by virtue of section 242.1(7) of the FIA, provides that the Tribunal may receive and accept any information it considers relevant, necessary and appropriate, whether or not it would be admissible in a court of law, subject to stated exceptions including:

> 40(4) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence.

[9] Subsection 242.2(8)(b) of the FIA states:

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

[10] Subsection 242.2(8)(b) of the FIA grants the Tribunal discretion to permit the introduction of new evidence if satisfied that the requirements of sub-subsections (i) and (ii) have been met. The Tribunal must be satisfied on a balance of probabilities that these requirements have been met *before* deciding whether to admit the new evidence. The burden of proof is on the applicant.

[11] Subsections 242.2(8)(b)(i) and (ii) of the FIA expressly limit the extent to which any testimony, documents or things may be admitted in evidence as contemplated in subsection 40(4) of the ATA. In result, I find that those specific provisions of the FIA are not overridden by the broad discretion afforded to the Tribunal under subsection 40(1) of the ATA.

[12] This interpretation is consistent with section 242.2(5) of the FIA which mandates that subject to subsection 242.2(8), appeals to the FST are to be on the record and must be based on written submissions.

[13] It should be remembered that the Tribunal replaced the Commercial Appeal Commission which used to conduct full *de novo* evidentiary hearings. In place of the former Commission, the legislature created an appeal to the Tribunal "on the record", subject only to subsection 242.2(8). The limited grounds on which the Tribunal can consider new evidence is consistent with the reforms creating the Tribunal.

[14] The consent of the parties to the admission of the New Facts, as is present in this case, does not obviate the requirement that the Tribunal must be satisfied on a balance of probabilities that the requirements of sub-subsections 242.2(8)(b)(i) and (ii) of the FIA have been met.

[15] In considering this application I have taken into account the fact that the issues addressed before the Panel, as well as on this appeal, are significant to the Applicant and his career as a real estate agent. I have also taken into account the public protection objectives of the RESA and the need for public confidence in the disciplinary processes followed by the Council under the RESA. Both the Applicant and the Council are entitled to a high degree of procedural fairness before the Tribunal on this appeal in general, and on this application in particular.

[16] It is not in dispute that the New Facts did not exist at the time that either the Liability or Penalty Decisions were made, so the issue to be determined is whether the New Facts are "substantial and material" to either decision.

Are the New Facts "substantial and material" to the appeal from the Liability Decision?

[17] The Applicant submits that the New Facts are substantial and material to two of the specific allegations of professional misconduct by the Applicant that the Panel found to have been proven in the Liability Decision.

[18] The particular allegations the Applicant refers to in his submissions are:

> 1.a. In or about November, 2014, the Appellant caused the seller of the Property and/or HG, her son and power of attorney, to purport to agree to pay a bonus of $75,000 over the remuneration called for in the Listing Agreement (the "Bonus") without HG's and/or the seller's informed consent, contrary to his duty to act in the best interests of his client and/or to avoid conflicts of interest pursuant to section 3-3 of the Council Rules; ("Allegation 1.a."), and
>
> 1.b. The Appellant represented to HG and/or the seller that the Bonus was required by the representative of persons interested in acquiring the Property, Mr. and Mrs. C, and/or in order to secure an offer for the Property, when one or both of these representations was untrue, which constitutes deceptive dealing pursuant to section 35(1)(c) of the RESA and/or a breach of the duty to act honestly pursuant to section 3-4 of the Council Rules; ("Allegation 1.b.")

[19] In relation to Allegation 1.a. the Applicant submits that the New Facts are both "material and substantial" as the $75,000 bonus was not paid directly to the Applicant by the client. Rather, the bonus was paid by the client to the brokerage that the Applicant worked for. The Applicant submits he never received the bonus from his brokerage.

[20] Allegation 1.a. relates to the Applicant's professional obligations associated with the conflict of interest arising from his claim for a bonus over and above the commission called for in the Listing Agreement. The wording of Allegation 1.a. is that the Applicant caused his client to "*purport to agree to pay a bonus of $75,000 over the remuneration called for in the Listing Agreement (the "Bonus")".* Allegation 1.a. does not allege that the client paid the bonus directly to the Applicant or that the Applicant received the bonus from his brokerage.

[21] While I find that procedural fairness dictates that the interpretation as to what is "substantial and material" for purposes of the admission of evidence under subsection 242.2(8)(b) of the FIA must be given a broad interpretation, I find that the evidence in question must not only be relevant, but must also be of real importance to live issues under appeal in order to meet the "substantial and material" standard required.

[22] I find that the New Evidence is not even relevant, let alone substantial and material to the factual foundation for or issues arising in Allegation 1.a.

[23] Allegation 1.b. relates to allegations of deceptive dealing and dishonesty being advanced against the Applicant, being that he represented to his client that the bonus was required by the buyer's agent and/or to secure an offer for the Property, when one or both of these representations was untrue.

[24] In relation to Allegation 1.b. the Applicant submits that the New Facts are both "material and substantial" on the basis that the bonus was in fact not required by the buyer's agent and was never received by her.

[25] Again, this submission by the Applicant fails to accept or address the actual substance of the allegation. Allegation 1.b. addresses what the Applicant was alleged to have represented to his client. It does not allege that the buyer's agent required or received the bonus. Allegation 1.b. alleges that the Applicant's representation to the effect that the buyer's agent was calling for the bonus was untrue. I find that the New Evidence is not relevant to, and again, is clearly not material or substantial to, the factual foundation or issues arising in Allegation 1.b.

[26] The Council submits that the New Facts are irrelevant to any issues arising in the Liability Decision. I agree. That the amount of the bonus was ultimately paid to the credit of outstanding civil proceedings between the parties relating to the bonus, some years later, is not relevant to the findings of liability for professional misconduct made in the Liability Decision.

[27] The Applicant has failed to establish on a balance of probabilities that the New Facts are substantial and material to his appeal from the Liability Decision and the application, insofar as it is related to the Liability Decision, is dismissed.

Are the New Facts "substantial and material" to the appeal from the Penalty Decision?

[28] In considering the appeal from the Penalty Decision, being either that brought by the Applicant or that brought by the Superintendent, the question will be whether the Panel committed a reviewable error based on the record before it. New evidence will be considered to support or oppose an appeal from penalty only where it is substantial and material to the decision.

[29] The Applicant submits that the New Facts are germane to the appeal from the Penalty Decision.

[30] The Council submits that in determining suitable penalty on the appeal from the Penalty Decision, the Panel, as original decision-maker, was entitled to consider whether the licensee had acknowledged his misconduct and taken appropriate remedial action.

[31] The Council goes on to submit that admission of the New Facts in the appeal of the Penalty Decision would allow the current circumstances of the dispute between the Applicant and the sellers, (in the outstanding civil proceedings), to be simply and accurately placed before the Tribunal.

[32] A review of the record confirms that the Panel was made aware of the existence of the civil proceedings. The Council submits that when making submissions on penalty to the Panel, legal counsel for the Applicant advised the Panel that his client had "disclaimed" the bonus as a mitigating factor. I also

observe that in paragraph [13] of its Penalty Decision, (when addressing the issue of whether the Applicant's client suffered any loss as a result of the professional misconduct found by the Panel to have been proven), the Panel found:

> …The $75,000 was held in trust after HG formally objected to the payment of the bonus prior to the completion of the sale. The money remains tied up in trust pending the resolution of the civil action brought by HG against Mr. Behroyan. That money has been lost to HG until Mr. Behroyan's renunciation of his claim to the funds following the Committee's decision on liability.

[33] The above quoted paragraph from the Penalty Decision confirms that the Panel was both aware of and took into consideration, when assessing penalty, that the Applicant had renounced his claim to the bonus and that the funds were tied up in trust pending resolution of outstanding civil proceedings between the parties.

[34] The New Facts add nothing to what was submitted to and taken into account by the Panel in its Penalty Decision other than the date the funds were paid into trust and that the litigation remained outstanding. The date of payment of the funds into trust and the fact that the litigation remained outstanding are not in issue on either appeal from the Penalty Decision.

[35] The New Evidence does not meet the requirement of being substantial and material to the appeals from the Penalty Decision. It cannot be said that the New Evidence is of any real importance to live issues in the Penalty Decision appeals.

[36] The Applicant has failed to establish on a balance of probabilities that the New Facts are substantial and material to his appeal from the Penalty Decision and the application, insofar as it related to the Liability Decision is concerned, is dismissed.

DECISION

[37] In conclusion, I dismiss the application and find that the New Facts are not admitted on either the appeal from the Liability Decision or the appeal from the Penalty Decision.

"Michael Tourigny"

Michael Tourigny
Member, Financial Services Tribunal

August 27, 2019