BRITISH COLUMBIA

Financial Services Tribunal

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**DECISION NO. 2018-RSA-004(a)**

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

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| **BETWEEN:** | Cui Zhu (Danielle) Deng | **APPELLANT** |
| **AND:** | Real Estate Council of British Columbia and Superintendent of Real Estate | **RESPONDENTS** |
| **BEFORE:** | A Panel of the Financial Services Tribunal<br>Michelle Good, Panel Chair | |
| **DATE:** | Conducted by way of written submissions concluding February 07, 2019 | |
| **APPEARING:** | For the Appellant: | Self-Represented |
| | For the Respondent Real Estate Council: | David T. McKnight |
| | For the Respondent Superintendent: | Joni Worton |

## OVERVIEW

[1] Cui Zhu (Danielle) Deng (the "Appellant") appeals the May 04, 2018 decision (the "Liability Decision") of a Discipline Committee (the "Committee") of the Real Estate Council of British Columbia (the "Council") which found that she had committed professional misconduct within the meaning of section 35(1)(a) of the *Real Estate Services Act,* SBC 2004, c 42 (the "RESA"). Ms. Deng also appeals the August 08, 2018 decision of the Committee (the "Penalty Decision") which ordered the following:

a. that she pay a discipline penalty of $5000.00;

b. that she be subject to enhanced supervision for a minimum period of 12 months on certain conditions;

c. that she complete remedial education courses; and

d. that she pay $50,285.52 in enforcement expenses.

[2] The Appellant asks this Tribunal for the following relief:

a. an order reversing both the Liability and Penalty Decisions;

b. an order requiring the Council to provide the Appellant with original transcripts of the hearing; and [1]

c. an order for the payment of certain enumerated costs against the Council.

[3] The Respondent Council and Respondent Superintendent of Real Estate oppose the relief sought and ask that the appeal be dismissed with costs.[2]

## BACKGROUND

*Appeal History*

[4] On July 13, 2017, the Financial Services Tribunal (the "Tribunal") set aside a decision of the Council (the "Underlying Decision") finding the Appellant had committed professional misconduct. In the Underlying Decision the Tribunal held that the Appellant's right to procedural fairness had been breached in the course of the hearing process. As a result, the Tribunal ordered that the matter be remitted back to the Council for reconsideration.

[5] The Council held a new hearing which took place in March of 2018, and which resulted in the Liability and Penalty Decisions currently under appeal.

*Liability Decision*

[6] The Liability Decision found that the Appellant had committed professional misconduct within the meaning of section 35(1)(a) of the RESA by failing to act in the best interests of her client contrary to Rule 3-3(f) of the Council's Rules (the "Rules"), and by failing to act with reasonable care and skill contrary to Rule 3-4 of the Rules. This occurred when she failed to disclose material information to her client regarding a property which her client wanted to purchase.

[7] The complainant, the Appellant's former client, alleged that the Appellant failed to advise her that a housing unit she had expressed interest in was available before the complainant concluded a contract of purchase and sale on a different housing unit. A sale on the desired unit had failed while the complainant was negotiating terms of sale on a different unit. The finding of professional misconduct was based on the evidence before the Committee that the Appellant knew of her client's preference for a particular unit; that she knew the preferred property became available before the subjects were removed on the sale of a different property; and that she failed to advise her client that the preferred property was available for purchase.

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[1] This request was denied in a preliminary decision of the Chair of the FST issued November 30, 2018.

[2] The Superintendent of Real Estate adopted the submissions of the Council and did not make independent submissions regarding the merits of the appeal or the two preliminary applications dealt with in this decision (Application to amend Notice of Appeal and Application to Adduce New Evidence). Therefore, through the course of this decision I will reference the submissions of the Council as representative of both Respondents.

*Penalty Decision*

[8] In its Penalty Decision, the Committee explicitly articulated the provisions of the RESA that empower it to make penalty decisions and provide the guidelines for such penalty decisions. The Council sought a penalty of $7,500.00 and its expenses in the amount of $50,285.52. After consideration, the Committee ordered a lower penalty of $5000, and the full amount of enforcement expenses.

## PRELIMINARY MATTERS

*Preliminary Decision: Appeal Record*

[9] Prior to the record closing on this appeal, several preliminary decisions were rendered by the Chair of the FST, including decisions which admitted certain additional documentary evidence into the appeal record. In particular, the Chair held that correspondence between Counsel for the Council and the Discipline Committee in the underlying proceeding should have been included in the record as it provided evidence to the Committee regarding how enforcement expenses were calculated. Further, the Chair held that the Council's submissions on penalty should have been included in the record as they provided evidence to the Committee regarding the breakdown of the enforcement expenses.

*Outstanding Applications*

[10] On October 29, 2018 the Appellant made an Application to the FST to adduce new evidence consisting of two strings of email correspondence between the Appellant and a third party, and one text message string between the Appellant and a third party. On October 30, 2018, the Appellant made another Application to the FST to amend her Notice of Appeal to revise her specific grounds of appeal.

[11] On November 20, 2018 the Chair of the FST ruled that the Appellant's above applications would be decided as part of the decision on the merits of this appeal. As such, I will consider each of these applications in this decision.

*Application to Amend Notice of Appeal*

[12] Upon consideration of the Amended Notice of Appeal and the submissions made by the Appellant and the Respondents, I note that each party has had time to consider the Amended Notice of Appeal. Likewise, the Respondent Council has not filed an objection to admitting the Amended Notice of Appeal. Indeed, the parties have tailored their submissions to consider each of the grounds of appeal articulated in the Amended Notice of Appeal. As such, admitting the Amended Notice of Appeal does not prejudice any party, and therefore I order that it be admitted.

*Application to Admit New Evidence*

[13] Section 242.2(8) of the *Financial Institutions Act,* RSBC 1996, c 141 (the "FIA") describes the framework within which new evidence may be admitted in FST appeals:

> 242.2 …(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.

[14] Therefore, in order for me to admit new evidence, I must be satisfied that the proposed new evidence is substantial and material to the decision, and that it did not exist or was not discovered or could not have been discovered through the exercise of reasonable diligence.

*Conversation with Listing Agent of Unit 60*

[15] The conversation with the listing agent for Unit 60 was via text message and took place prior to the filing of the original complaint against the Appellant. It is submitted as evidence that the complainant was flexible in terms of what kind of unit she was interested in. If the Appellant considered it substantial and material to the decision, she had ample opportunity to raise it in the Underlying Hearing. The Appellant offers no submission in support of how this conversation meets the test of new evidence. Given that the email string existed and could have been raised at the time of the Underlying Hearing, I find that it does not meet the legislated test for the admission of new evidence.

*Conversations between Complainant and Appellant Regarding Offer*

[16] Again, these exchanges between the complainant and the Appellant in the form of email strings, occurred prior to the filing of the original complaint against the Appellant. The Appellant argues that the fact the complainant instructed her to increase the complainants offer on Unit 134 is evidence of her preference for that unit over Unit 59. The issue of the instructions to increase the purchase price was raised during the Underlying Hearing. It is therefore neither new nor was it undiscoverable at the time of the Underlying Hearing. I find that this evidence does not meet the legislated test for the admission of new evidence.

*Conclusion Regarding New Evidence Application*

[17] I find that none of the items the Appellant seeks to admit as new evidence meet the legislative criteria for the admission of evidence as, in each instance, the evidence was available at the time of the Underlying Hearing and I deny her application in its entirety.

## ISSUES ON APPEAL

[18] Having decided that the Amended Notice of Appeal is admitted, I will consider the issues specifically articulated in the Amended Notice, along with related issues that the Appellant has raised through the course of her arguments.

[19] With respect to the liability decision, these issues include:

a. whether the Committee erred in failing to consider contradictory statements made by witnesses;

b. whether the Committee erred in finding that the Appellant knew or ought to have known her client's interest in the property of Unit 59;

c. whether the Committee erred in finding that the Appellant failed to act in the best interests of her client by failing to disclose "material information";

d. whether the Committee erred in finding that the Appellant failed to act honestly and with reasonable care and skill;

e. whether the Liability Decision evidenced bias and/or prejudice against the Appellant;

f. whether the Committee erred by relying on Consent Orders previously made in determining whether the Appellant had committed professional misconduct;

g. whether the Committee denied the Appellant the right to natural justice.

With respect to the Penalty Decision these issues include:

h. whether the penalties assessed against the Appellant were reasonable considering the principle of proportionality; and

i. whether the enforcement expenses assessed against the Appellant were reasonable?

## STANDARD OF REVIEW

[20] With respect to standard of review, the Appellant submits:

> The Appellant agrees that the standard of review should be reasonableness and correctness, but it is not technically a "binding" test for determining standards of review by the FST because appeals to the FST are not judicial reviews. The Appellant agrees that fairness and discretion should apply.

[21] The Appellant further notes that the FIA is silent on the question of standard of review.

[22] The Respondent also makes submissions with respect to standard of review, citing *Kadioglu v. Real Estate Council of BC and Superintendent of Real Estate*, Decision No.2015-RSA-003(b) ("*Kadioglu*") at para 32 where Tribunal Member Baker held that questions of law are decided on a standard of correctness;

questions of fact, including discretion and penalty, are decided on the standard of reasonableness; and questions with respect to procedural fairness are to be decided on the standard of fairness.

[23] Given that the decisions of the Tribunal are not subject to precedent, it behooves the Tribunal to clearly establish the appropriate standard of review in each appeal.

[24] The Tribunal relies on section 58(1) of the *Administrative Tribunals Act*, SBC 2004 c 45 (the "ATA") which states that in relation to the courts, the FST is considered an expert tribunal as pertains to all matters over which it has exclusive jurisdiction.

[25] The Tribunal will not necessarily apply the standard of review that is exercised in matters under judicial review. In *Westergard v British Columbia (Registrar of Mortgage Brokers)*,2011 BCCA 344 ("*Westergard*"), the Court established that the standard of review as articulated by the Supreme Court of Canada for judicial review does not apply in cases before a specialist tribunal.

[26] *Hensel v Registrar of Mortgage Brokers*, 2016-MBA-001(a) ("*Hensel*") held that since the Tribunal is required to hear appeals on the record as opposed to conducting hearings *de novo*, it must accord deference in instances where an appeal takes issue with evidentiary findings and findings of fact. However, with respect to findings regarding questions of law, the Tribunal in *Hensel* held that a specialized Tribunal, like an appellate judge is "entitled to proceed on the premise that the legislature intended that the specialized Tribunal would correct legal errors made by the first instance regulator"(at para 18).

[27] In *Kadlioglu* the Tribunal considered the findings in *Seaspan Ferries Corp v. British Columbia Ferry Service Inc.*, 2013 BCCA 55 ("*Seaspan*") and agreed that the standard of review applicable when addressing issues of procedural fairness is best described as a standard of fairness (*Seaspan* at para 55).

[28] This Tribunal addressed the question of the standard of review of questions of mixed fact and law in *Schoen v Real Estate Council of BC and Superintendent of Real Estate*, Decision no 2017-RSA-002(b) ("*Schoen*"). Paragraph 34 is instructive, wherein the Tribunal stated that the standard "may vary based on the particular context". The Tribunal must give more deference to decisions that are more fact-intensive and less law-focused.

[29] In summary, I agree with and adopt the following standards of review articulated and refined in *Westegard*, *Hensel*, *Kadlioglu*, *Seaspan*, and *Schoen*:

a. Correctness for questions of law;

b. Reasonableness for issues of fact, discretion or mixed fact and law, and;

c. Fairness for issues of procedural fairness.

*Standard of Review of Penalty Decision*

[30] The Respondents submit that, in spite of subsequent decisions regarding the standard of review to be applied to penalty decisions, the reasonableness test as confirmed in *FST Decision No. 2015-FIA-002(a)* ("*Mann*") continues to apply.

[31] I cannot agree. In FST Decision No. 2017-FIA-002(a) the Chair found at paragraph 77 that"

> …it is my view that the Tribunal should unapologetically accept that the Legislature expected it to intervene in any penalty appeal where it finds that there has been an error in principle as opposed to an "error" in line-drawing by the Insurance Council, and that it is for the Tribunal to determine where an error in principle has occurred. The Tribunal should apply this test not as if it were a court, but should apply it from its specialized institutional vantage point and with a careful eye to the public interest. It is for the Tribunal to arrive at its own specialized judgments about what is a reasonable penalty range. In this way, the Tribunal can grant appropriate respect to Insurance Council decisions and precedents without treating those decisions and precedents as if only the Insurance Council had a legitimate say in how to protect the public interest. The Tribunal is not required to define the range of reasonable outcomes in the same way as would a court.

[32] It is expected that a specialist Tribunal will intervene in a penalty decision when it determines there are errors in principle; it must be prepared to thoroughly engage in the question of what amounts to a reasonable penalty, not simply apply a high level deference to the original panel.

[33] This higher level of scrutiny and corresponding lower level of deference arises from the Tribunal's duty to protect the public interest as articulated in the legislation. While reasonableness remains the standard of review on penalty decisions, it goes beyond whether or not the regulations or guidelines were followed in assigning a penalty and allows the Tribunal to consider reasonableness in all the circumstances.

[34] While the Tribunal must be cautious about not replacing the original tribunal's discretion with its own, it must apply its discretion to consider whether or not the penalty decision is reasonable in the broader context of the case before it.

## ANALYSIS

### *a. Did the committee err in failing to consider the contradictory statements made by witnesses?*

[35] The Appellant argues that some weight should have been given to the fact that the complainant's testimony indicates that witness SK told the complainant that he advised the Appellant that the deal on Unit 59 had fallen through on a March 12. The significance of this particular date is that the evidence shows that the inspection on Unit 134 was scheduled for March 12. This is a critical finding as it demonstrates that Unit 59 was still available before the sale was concluded on Unit 134. Alternatively, SK gave evidence that he did not specify a particular date that he advised the Appellant when the deal collapsed.

[36] The Committee made a finding of fact that the phone call from SK advising the Appellant that the deal on Unit 59 had fallen through occurred on the day the inspection was scheduled for Unit 134. Accepting that the inspection was scheduled for March 12, the Committee also made a finding of fact that the Complainant was made aware of the availability of Unit 59 on March 12.

[37] At paragraph 34 of the Appellant submissions, she states that the inspection of Unit 134 was scheduled for March 12.

[38] The date of the inspection is not a matter of contention between the parties and the Appellant does not at any point dispute that the inspection occurred on March 12.

[39] The difference in the evidence between the complainant and SK is not contradictory. It was reasonable for the Committee to agree with the complainant's evidence that the Appellant was told of the deal collapse on March 12 as this was the date of the inspection. It makes no difference to the outcome of the Committee's ultimate decision in the case.

[40] In effect, this alleged contradiction between the evidence is a difference without a distinction. It is reasonable to deduce that the complainant's evidence was based on the fact that the Appellant became aware of the Unit 59's availability on the inspection date, March 12.

[41] The Appellant argues that the complainant offers false evidence by stating that the listing agent advised her that the unit was still available on March 12. As noted above, the evidence supports that the listing agent advised the Appellant that the preferred unit was available on the date of the inspection of the less preferred unit. The evidence shows the inspection occurred on March 12. There is no evidence to support the Appellant's contention that the complainant knowingly or at all made false statements to the RECBC.

[42] I find that the Committee was reasonable in its acceptance that the complainant became aware on March 12 that the sale on Unit 59 had collapsed and therefore this ground of appeal has no merit and must fail.

***b. Did the Committee err in finding that the Appellant knew or ought to have known her client's interest in the property of Unit 59?***

[43] The Appellant argues at paragraph 81 of her submissions that prior to determining whether or not she failed to disclose material information to the complainant, the committee should have first determined whether or not the Appellant actually knew or ought to have known of the complainant's interest in Unit 59.

[44] Contrary to the Appellant's assertion, the Committee carefully reviewed the evidence before it and came to the conclusion that the Appellant did actually know that the complainant preferred Unit 59.

[45] At paragraph 38 of its ruling, the Committee found:

> …When the complainant chose to put in an offer on Unit 59 in preference over Unit 134 she was clearly indicating to the respondent that whatever variation Unit 59 has

> from any profile that the Respondent may have developed, having seen both Unit 134 and Unit 59, the Complainant clearly preferred Unit 59.

[46] At paragraph 43 of the Liability Decision, the Committee explicitly makes a finding that the Appellant knew or ought to have known her client's preference for Unit 59. As I have already stated, this Tribunal will accord a high level of deference to such findings of fact. Even if the Committee was not satisfied that the Appellant actually knew that the complainant preferred Unit 59, it was entirely open to it to determine that the Appellant ought to have known given the information she was privy to with respect to the complainant's preferences and her actions during the period that she was making an offer on Unit 59.

[47] The Committee's finding that the Appellant knew or ought to have known the complainant's preference for Unit 59 was reasonable based on the evidence before it as described in paragraph 38 of the Decision.

[48] The Appellant offers no credible argument that the Committee did not have a sufficient evidentiary foundation to make that finding.

[49] I find that the Committee was reasonable in finding that the Appellant knew or ought to have known the complainant's preference for Unit 59.This ground of appeal has no merit and must fail.

### *c. Did the Committee err in finding that the Appellant failed to act in the best interests of her client by failing to disclose "material information"?*

[50] The Appellant argues that the complainant was not legally able to walk away from the sale of the less preferred unit and therefore she was actually working in her client's interests to facilitate that sale. The Committee addresses this argument at paragraph 43 of the liability decision where it states that regardless of whether the complainant could have cancelled the sale agreement on the less desired unit, the Appellant still had a duty to notify her client of the availability of Unit 59.

[51] The Committee reviewed the evidence before it and found that the complainant had a preference for Unit 59. Therefore, given that the sale of Unit 134 had not concluded, and further, given that the complainant had a good faith basis for not completing the sale on Unit 134, the Committee found that the fact that Unit 59 was still available for sale was information material to the complainant.

[52] By the Appellant's own definition of material information, that it is information important to the complainant, the evidentiary foundation of the Committee's decision that this was in fact material information is reasonable in all the circumstances.

[53] The Committee carefully articulated the rules applicable to an Agent's duty to disclose. Further, the jurisprudence cited by the Committee in its ruling makes it abundantly clear that the duty to disclose is a broad duty.

[54] To this end, the Committee relied on the decision in *Ocean City Realty Ltd., v. A&M Holdings Ltd*., 1987 CanLII 2872 ("*Ocean City*") wherein the BC Court of Appeal decided that an agent's duty to make full disclosure includes "everything known to him respecting the subject matter of the contract which would be likely to

influence the conduct of his principal...". This establishes that an agent's duty to disclose is a very onerous one.

[55] The Committee further noted that the Court found in *Ocean City* that the test as to whether or not an agent has met their duty disclose is an objective one, to be determined by what a reasonable person in the position of the agent would consider, in the circumstance would be likely to influence the conduct of his principal.

[56] When appearing before the Committee, the Appellant was represented by Counsel who argued vigorously on her behalf on this point and those arguments were each given consideration and rejected by the Committee.

[57] The Committee decided that the fact that Unit 59 was still available was material information and disclosure of it was within an Agent's duty to disclose. This decision was arrived at by a careful review of the evidence and law before the Committee.

[58] The Committee carefully considered the facts and evidence and arrived at the conclusion that the disclosure of the information that Unit 59 was still available was likely to influence the conduct of the complainant.

[59] I agree with the Council's submission that the Appellant is asking the FST to rehear aspects of the original complaint. This is simply not open to her on this appeal.

[60] The Appellant argues that some responsibility rests with the complainant in this matter and submits the principle of "caveat emptor", which places an onus on a buyer to ensure their interests are protected in a transaction, should apply. There is ample support in law that this principle applies as between seller and purchaser in real estate transactions. However, caveat emptor is a common law principle which does not apply to complaints against realtors.

[61] I find that the Committee was reasonable in its finding that the Appellant knew that the sale on Unit 59 failed prior to her client concluding a sale on another Unit. I also find that the Committee was reasonable in its finding that the Appellant failed to provide material information to her client. For these reasons I find that this ground of appeal must fail.

### *d. Did the Committee err in finding that the Appellant failed to act honestly and with reasonable care and skill?*

[62] The Committee found that the breach of the Appellant's duty to disclose all material information as prescribed by s. 3-3(a) of the Rules also constituted a failure to act with reasonable skill and care as prescribed by section 3-4 of the Rules.

[63] Notably, the Committee did not find that the Appellant acted dishonestly. It did find, however, that in failing to disclose material information to the complainant she failed to act with reasonable skill and care as prescribed by section 3-4 of the Rules.

[64] At paragraph 51 of her reply submissions, the Appellant argues that the Committee's findings are outside the range of acceptable outcomes and lack evidentiary record, transparency and intelligibility.

[65] I do not agree. The Committee carefully considered the evidence, and its decision is clear and logically consistent. The factual and evidentiary foundation set out by the Committee demonstrates clearly that the Appellant failed to disclose material information to the complainant.

[66] Once again, the Appellant appears to be attempting to re-argue the facts of the case which is not open to her to do on this appeal.

[67] For these reasons I find that this ground of appeal must fail.

***e. Did the Liability Decision evidence prejudice or bias against the Appellant?***

[68] The Appellant makes no submissions that would allow me to conclude that the Committee acted in a biased or prejudicial manner. The Committee made findings of fact with respect to the reasons the complainant preferred Unit 59, and those findings were reasonable based on the evidence before it.

[69] The Appellant argues on appeal that there is a material difference between a piano and a keyboard as it pertains to unacceptable noise factors which the complainant was concerned about. In the Appellant's submission, this distinction was important evidence which the Committee overlooked. The Appellant argued that it was important evidence that members of the complainant's family would have been playing a piano in the unit. According to the Appellant, because a piano is louder than a keyboard, and because there was a keyboard in Unit 59 when her client viewed it, the Appellant had sufficient basis to conclude her client was not interested in Unit 59. If the Appellant or her Counsel believed there was a material difference between a piano and a keyboard, the time to make submissions to that end, was at the hearing not on appeal.

[70] I do not find that this argument about the Committee's handling of the matter of the piano versus the keyboard evidences any bias or prejudice as the Appellant has alleged. The Appellant offers nothing further for me to form a conclusion that the decision of the Committee was biased or prejudicial against her.

[71] I find that the Committee was reasonable in its finding that the Appellant failed to act with reasonable skill and I find that this ground of appeal has no merit and must fail.

***f. Did the Committee err by relying on Consent Orders previously made in determining whether the Appellant had committed professional misconduct?***

[72] While the Committee notes at paragraph 29 of the Penalty Decision that the jurisprudence provided by the Council was helpful to it, it does not anywhere in the decision enumerate any cases that it considered itself to be bound by.

[73] It is clear to me that the Liability Decision was based solely on the evidence before the Committee and the application of the test articulated in *Ocean City*.

[74] There is no basis to support the Appellant's argument that the Committee made its determination regarding Liability on the basis of Consent Orders.

[75] I therefore find that this ground of appeal must fail.

### *g. Did the Committee deny the Appellant the right to natural justice?*

[76] The fundamental principles of procedural fairness require that certain opportunities be afforded a person by the tribunal they appear before. These include the person's right to know the case that is being brought against her or him, the right to meaningfully respond to that case, the right to have one's case heard impartially, and the right to know the reasons for a tribunal's decision.

[77] Decisions of regulatory bodies such as the Council sometimes have the onerous effect of limiting or terminating an individual's ability to practice in his or her chosen profession. Given this, a high level of procedural fairness attaches in these cases.

[78] The Appellant was afforded an oral hearing and given the opportunity to present whatever evidence she felt necessary to make out her case. Further, the Appellant clearly knew the case that was being brought against her, as it was articulated in the Council's notice of hearing and document disclosure.

[79] The Appellant was represented by Counsel, and was given full opportunity to respond to the case that was brought against her. The Liability and Penalty decisions indicate that the Committee considered and weighed all the evidence that was brought before it.

[80] Finally, the Committee's rationale for arriving at its decision is clearly and fully articulated in the decisions.

[81] The Appellant claims there were discrepancies in certain of the transcripts and states that the Committee failed to address the alleged lack of "transcript authenticity". In her reply submissions the Appellant more squarely states the failure to order the production of the transcript tapes of the original hearing is a denial of procedural fairness.

[82] The matter of ordering the production of the original transcript was raised again as a preliminary application before this Tribunal. After taking submissions from the parties, the Chair dismissed the Appellant's application on the basis that the transcripts of the Underlying Hearing of the matter are irrelevant in this Appeal.

[83] In all instances, I find that the Appellant has failed to demonstrate that the Committee denied her procedural fairness in the hearing of this matter or in the decision it rendered.

[84] I find that the Committee conducted itself fairly and the appeal of the Liability Decision fails on all counts.

## Penalty Decision

[85] In correspondence to the FST dated January 24, 2019 the Respondent submits that the Appellant's reply is improper in that it is not limited in its reply to the Respondent's submissions.

[86] I would agree that in some respects the Appellant's reply does raise new issues as opposed to strictly replying to the submissions of the Respondents. However, the Respondents are not prejudiced as they did have the opportunity to reply to the Appellant's submissions. Further, the Appellant is unrepresented in this Appeal and in the interest of giving her every opportunity to make her case and in the interest of fairness, the reply is accepted as submitted and I dismiss the objection.

[87] On the question of the appeal of the Penalty Decision, the Appellant does not specifically state in her Amended Notice of Appeal what errors she believes were made by the Committee in determining the penalty and costs awarded against her. She states very minimally that her success in this appeal must result in a reimbursement of costs and expenses ordered against her. She does, however, raise alleged errors in her reply submissions.

***h. Were the penalties assessed against the Appellant reasonable considering the principle of proportionality?***

[88] In her reply submissions the Appellant states that the award of costs against her did not meet the criteria set by the Financial Services Tribunal in *Yang v. Real Estate Council of BC FST Decision 2017-RSA-001(b).* I find the submission of this as authority highly unusual given that the order for costs was made by the Committee not by the FST and as such, the FST criteria would not apply. The Council has its own criteria as outlined in its Sanctions Guidelines.

[89] Further, the Appellant argues that a lower penalty is warranted given that there was no serious misconduct in this case, that isolated and less severe misconduct should attract a lesser penalty amount, and the penalty is disproportionate in comparison to other penalty decisions.

[90] The Appellant argues that it was improper for the Committee to employ the use of the Sanction Guidelines given that they did not exist at the time of the infraction. This argument has some merit.

[91] The Council quoted the Sanction Guidelines extensively in its submissions; however, there is nothing in the findings of the Committee that suggest it did in fact rely on the Sanction Guidelines. However, if in fact the Committee did rely on the Sanction Guidelines, I agree with the Respondent's submission that those guidelines are informed by and consistent with well-established authority and the Committee would have arrived at the same decision regardless of whether it considered the Sanction Guidelines or not.

[65] A number of factors are appropriately considered in determining a penalty. These factors in the context of professional misconduct are found in *Edward Dent (Re)*, 2016 LSBC 5 (CanLII), 2016 LSBC 05. There, the panel considered the 13 *Ogilvie* factors set out in *Law Society of BC v. Ogilvie*, 1999 LSBC 17, [1999] LSDD No. 45. The panel then condensed these 13 factors to four general categories of analysis, reproduced below:

- Nature, gravity and consequences of conduct
- Character and professional conduct of the respondent

- Acknowledgement of the misconduct and remedial action
- Public confidence in the legal proceeding including public confidence in the disciplinary proceeding.

[92] Although in its Penalty Decision, the Committee does not enumerate this list, it is clear from the Decision that these factors were taken into consideration and guided the Committee in making its determination regarding penalty.

[93] The Committee found the Appellant's failure to disclose material information to her client as a serious concern. The Committee accepted the submissions of the Council that the misconduct was serious; that her short history as a realtor mitigated against any finding that her clean disciplinary record should weigh in her favor; and, the Appellant refused to acknowledge her misconduct.

[94] Of particular concern to the Committee was the fact that at the time of the hearing, five years on, the Appellant still failed to acknowledge her misconduct and failed to grasp the gravity and consequences of her conduct.

[95] At the time of the hearing, the Committee rejected the Council's submission that the penalty should be $7500. The Appellant argued that the proposed penalty is not proportional when one considers that a penalty of $7500 was rendered in the *Behroyan* decision. It would appear that the Committee accepted the Appellant's argument, at least in part, in that it ordered a penalty $2500 less than what the Council was requesting.

[96] The Appellant argues that the higher penalty ordered in cases such as *Behroyan* that involve improper enrichment of the realtor or other illegalities mandates a lower penalty in cases where such factors don't arise.

[97] The Appellant submitted four cases in support of a lower penalty. Notably, each of the cases cited by the Appellant are Consent Orders. It is understandable that penalty orders may be lower in cases where Licensees admit their wrongdoing.

[98] In the case at hand, despite being faced with all the evidence that leads to a finding of serious professional misconduct, the Appellant refused to accept responsibility and showed a profound lack of insight into where she went wrong. This was a matter of grave concern to the committee.

[99] The Committee considered the cases submitted by the Appellant but found them not applicable to this case. At paragraph 29 of the Penalty Decision, the Committee states:

> Although the Licensee referred to lesser fines being supported by less serious misconduct, the Committee concludes that Ms. Deng does not truly appreciate that she has acted inappropriately. Her conduct brings into question for the public both the loyalties and the competence of real estate professionals.

[100] I agree that the penalty levied against the Appellant is higher than in the cases presented by herself and the Respondents. However, the Committee considered the authorities submitted by the Appellant and is clear on why it rejects the ranges in those decisions in this case. The Committee's reasons are clearly based in protection of the public and deterrence which are among the factors they must consider in rendering their decisions.

[101] Which factors the Committee gives weight to is entirely within its discretion so long as it is supported by the evidence and not undertaken in an arbitrary fashion. In this case, the Committee was transparent that the primary factor in arriving at the penalty amount was the ongoing and profound lack of insight displayed by the Appellant and her refusal to accept or acknowledge her error. This was a major consideration in the Committee's decision and one that was made with a proper consideration of deterrence at the forefront.

[102] The Committee articulated clearly the factors it took into consideration in arriving at its decision regarding penalty. The Committee carefully noted the submissions of the Parties and provided extensive reasons for its decision regarding penalty.

[103] With regard to supervision, the Committee noted that the Appellant had not reported the matter in question to her then supervisor. This provided further basis for its decision to order that she be required to work under supervision for a period of time.

[104] For all of the above reasons, this ground of appeal fails.

### *i. Were the enforcement expenses assessed against the Appellant reasonable?*

[105] With respect to penalty orders, the *RESA* provides 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:
>
> …
>
> (h)require the licensee to pay amounts in accordance with section 44 (1) and (2) *[recovery of enforcement expenses]*;

[106] The *RESA* also provides legislative authority for the leveling of penalties at Section 44:

> 44 (1)A discipline committee may, by an order under section 43 (2) (h) *[recovery of enforcement expenses]*, require the licensee to pay the expenses, or part of the expenses, incurred by the real estate council in relation to either or both of the investigation and the discipline hearing to which the order relates.
>
> (2)Amounts ordered as referred to in subsection (1)
>
> (a)must not exceed the applicable limit prescribed by regulation in relation to the type of expenses to which they relate, and
>
> (b)may include the remuneration expenses incurred in relation to employees, officers or agents of the real estate council, or members of the discipline committee, engaged in the investigation or discipline hearing.

[107] With respect to enforcement expenses, section 4.2 of the *Real Estate Services Regulation*, BC Reg. 506/2004, articulates what enforcement expenses are recoverable by the Council. That section is articulated below:

> Enforcement expenses recoverable by the real estate council
>
> 4.2 The maximum amounts that a discipline committee may order a licensee or former licensee to pay under section 43 (2) (h) of the Act are as follows:
>
> (a) for investigation expenses, $100 per hour for each investigator;
>
> (b) in addition to amounts under paragraph (a), for an audit carried out during an investigation leading to a hearing,
>
> (i)$150 per hour for an auditor regularly employed by the real estate council, and
>
> (ii)in any other case, $400 per hour;
>
> (c) for reasonably necessary legal services,
>
> (i)$150 per hour for a lawyer regularly employed by the real estate council, and
>
> (ii)in any other case, $400 per hour;
>
> (d) for disbursements properly incurred in connection with the provision of legal services to the real estate council or the discipline committee, the actual amount of the disbursements;
>
> (e) for each full or partial day of hearing, administrative expenses of
>
> (i)$1 000 for a hearing before a discipline committee of one member,
>
> (ii)$1 500 for a hearing before a discipline committee of 3 members, and
>
> (iii)$2 000 for a hearing before a discipline committee of 4 or more members;
>
> (f) for each day or partial day that a witness, other than an expert witness, attends a hearing at the request of the real estate council or a discipline committee, $50;
>
> (g) for an expert witness who attends a hearing at the request of the real estate council or a discipline committee, $400 per hour;
>
> (h) the reasonable travel and living expenses for a witness or expert witness who attends a hearing at the request of the real estate council or a discipline committee;
>
> (i) for other expenses, reasonably incurred, arising out of a hearing or an investigation leading up to a hearing, the actual amount incurred.

[108] Unlike its analysis of the appropriate penalty, the Committee's analysis regarding the assessment of enforcement expenses was very brief, consisting of the following comments (Penalty Decision at para 30):

> … Finally, the Council was successful and the Committee sees no basis for depriving the Council of enforcement expenses. The Committee's jurisdiction to address enforcement expenses for a re-hearing does not depend on any order of the Financial Services Tribunal. The enforcement expenses were necessitated by the Licensee's misconduct, but they do not relate to the first hearing, which eliminates any issue of the expenses relating to invalidated proceedings.

[109] The Committee accepted the Council's enforcement expenses schedule and ordered that the entire amount be assessed against the Appellant. The justification for ordering the entire amount appears to have been that the Council "was successful"; presumably meaning that the Council was successful in proving the Appellant had committed professional misconduct.

[110] In response to the Appellant's argument that she should not be assessed enforcement expenses arising due to "the Council's own misconduct; and she should not have to pay for outside counsel only retained because of the Council's failures on the first hearing"[3], the Committee held that enforcement expenses did not relate to the first hearing, but that they related to the Appellant's own misconduct. It is my view that this is an unreasonable finding which failed to take into account the entire context of the case.

[111] Although the second hearing was a hearing *de novo*, the fact remains that the reason a second hearing was required was because of the errors of the Council in denying the Appellant procedural fairness in the first hearing. As a result of this denial of fairness, attributable solely to the Council, the Appellant was required to undergo a second complete hearing process; no doubt at significant emotional and at least some additional financial cost. Although any enforcement expenses assessed against the Appellant as a result of the first hearing would have been quashed as a result of the first Tribunal decision in this matter, the Committee did not meaningfully address the Appellant's argument concerning whether she should bear the cost of the second hearing, and in particular, the cost of Council hiring outside Counsel to prosecute the case against her.

[112] The decision to assess enforcement expenses under section 44 of the RESA is discretionary; a discipline committee "may" require a Licensee to pay "the expenses, or part of the expenses" of Council, but is not mandated to do so. Further, the amounts claimable under the Regulation are "maximum" amounts, indicating that lesser amounts may be assessed. Discretionary decisions of this kind must be exercised reasonably, and meaningful analysis of the decision to make such awards should be provided.

[113] In the present case, the Committee provided no such analysis, and it unreasonably concluded that the Appellant's arguments considering the unfairness of assessing full costs of the second hearing against her had no merit. As such, I find that the Committee's Order regarding enforcement expenses is unreasonable and cannot stand.

*Remedy*

[114] The Tribunal's remedial authority is set out in section 242.2(11) of the FIA as follows:

> (11) The member hearing the appeal may confirm, reverse or vary a decision under appeal, or may send the matter back for reconsideration, with or without directions, to the person or body whose decision is under appeal.

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[3] Penalty Decision at para 14.

[115] In accordance with my below reasons, and in order to provide some finality to this protracted matter, I have determined that the most appropriate remedy in the present case is for the Tribunal to vary the Order of the Council relating to enforcement expenses.

[116] The necessity for a second hearing and thus added expenses cannot in any way be attributed to the Appellant. She was denied procedural fairness at the first hearing and thus the necessity of a second hearing rests at the feet of the Council. Given this, I find that the enforcement order is disproportionate and punitive in effect. I further find that it is not within reasonably expected outcomes.

[117] Having said that, the Appellant was found by the Committee to have committed professional misconduct, and this Tribunal has upheld that finding on appeal. The Appellant was not required to pay the enforcement expenses assessed as a result of the first hearing, as that decision was quashed. Further, the decision of the Council to hire outside legal counsel, which may have resulted in higher enforcement expenses being incurred, was not unreasonable in the context of a rehearing due to breaches of procedural fairness.

[118] In my view, the most reasonable way to assess enforcement expenses in the present case is to split them down the middle in recognition of the fact that the second hearing was required because of the errors in procedural fairness made by the Council in the first hearing, and in recognition of the fact that the Council is entitled to assess some enforcement expenses as a result of having to prove its case against the Appellant for professional misconduct . As such, I order that the Penalty Decision of the Council be varied such that the Appellant is required to pay enforcement expenses in the amount of $25,142.76.

## DECISION

[119] In accordance with the above reasons, I find that the appeal of the Liability Decision fails on all counts and I order that the Liability Decision is upheld. However, I find that the appeal of the Penalty Decision is successful insofar as the order for enforcement expenses is concerned, and I order that the Penalty Decision is varied such that the enforcement expenses the Appellant is required to pay are lowered to $25,142.76.

## COSTS

[120] The Appellant has requested costs payable to her in the form of reimbursement of her expenses related to bringing her case forward to the Committee at the Underlying Hearing. She is also asking for costs if successful on this appeal. The Council also asks for costs in its submissions.

[121] As success in this appeal has been mixed, and as both parties have requested costs, I would request written submissions for both parties on the matter

of costs to be submitted no later than **October 04 2019,** with a right of Reply at the option of any party to be submitted no later than **October 11, 2019**.

"Michelle Good"

Michelle Good
Panel Chair
Financial Services Tribunal

September 20, 2019