



Financial Services Tribunal

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DECISION NO. 2018-RSA-004(b)

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

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 Michelle Good, Panel Chair	
DATE:	Conducted by way of written submissions concluding October 11, 2019	
APPEARING:	For the Appellant: For the Respondent Real Estate Council: For the Respondent Superintendent:	Self-Represented David T. McKnight Joni Worton

Decision on Costs of the Appeal

Overview

[1] On September 20, 2019 I issued my decision in this appeal, giving the parties the opportunity to make further submissions with respect to the matter of costs.

[2] The Appellant objects to any order of costs against her and seeks an order for costs in the amount of \$64,417.86, consisting of the following amounts:

Second appeal filing fee:	\$850.00
Second hearing cost:	\$29,967.15
First appeal legal cost:	\$28,914.96
First Hearing legal cost:	\$1,270.00
Translation Cost:	\$3,415.25

[3] The Real Estate Council of British Columbia (the "Council") seeks an order for costs and opposes any order for costs against it in favour of the Appellant.

[4] The Superintendent of Real Estate asks that no costs be awarded for or against it due to its limited participation in the appeal.

Authority to Award Costs

[5] Pursuant to section 47 of the *Administrative Tribunals Act*, SBC 2004 c 45 (the "ATA"), and section 242.1(7)(g) of the *Financial Institutions Act*, RSBC 1996 c 141 (the "FIA"), the Financial Services Tribunal (the "FST") is authorized to issue orders for payment of the costs of another party.

[6] The FST's Practice Directives and Guidelines (the "*Guidelines*") set out factors I may consider with respect to making costs orders. These are as follow:

- 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.

[7] However, these guidelines are not binding on the Tribunal and the Tribunal is not obliged to make an order for costs.

[8] Sections 12(2) and 13(2) of the ATA provide that a Tribunal like the FST is not bound by its practice directives. This was considered by the FST in *Brewers' Distributor Ltd., v. Superintendent of Pensions*, Decision No., 2010-PBA-001(c), ("*Brewers*"), wherein the tribunal stated at paragraph 13 that:

[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.

[9] Likewise, in *Kadioglu v. Real Estate Council*, 2015-RSA-003(c) ("*Kadioglu*"), the Tribunal stated, referring to *Brewers*, it is in the decision-maker's discretion as to whether or not costs should be awarded. I agree with that conclusion.

[10] Cumulatively, the *Guidelines*, and the manner in which they are elaborated on in *Brewers* and *Kadioglu*, combine to establish that the FST will only order costs in exceptional circumstances.

Discussion

The Council's Application

[11] I note that in its submissions the Council refers to the *Guidelines* as the "Test" for the award of costs by the FST. As noted above, these are guidelines which the Tribunal may apply according to its own discretion. This is not litigation. I am not bound to tally up how many of the considerations in the *Guidelines* are met in this case and exercise my discretion according to whether or not a majority of these considerations are present. To suggest that the *Guidelines* are a "Test" is to suggest that I am bound by them and further bound to make an order. As noted above, this is not the case.

[12] In addition to not being bound by the considerations that are included in the *Guidelines*, I am not limited to the considerations included in the *Guidelines* in the exercise of my discretion.

[13] Primary in my considerations in the present case is the principle of access to justice. Matters such as these, brought before the Council and the FST, have a direct impact on the ability of an individual to practice in their profession and thus are very serious to the individual who is being censured. Not all are in a position to retain legal counsel. While it would ease matters significantly if in each instance before the FST the Appellant was represented by counsel, the fact that they are not must not militate against their freedom to make their case before the tribunal.

[14] Unrepresented individuals must not be penalized for not understanding basic principles of law. To penalize individuals in this manner could result in a chilling effect. Costs orders against unrepresented appellants could deter others from asserting their appeal rights.

[15] Admittedly, in the present appeal, the manner in which the Appellant presented her case was difficult in some respects. However, given the context of this case I am not convinced that the difficulties arising from the unorthodox manner in which the Appellant brought her case arises from a vexatious or otherwise improper intent.

[16] In consideration of the fact that it was indeed found that the Appellant was denied procedural fairness in her first hearing before the Council's Discipline Committee, the length of time it has taken to resolve this matter does not fall entirely at the feet of the Appellant.

[17] Further, I note that the Appellant was in fact successful in several preliminary matters including her application to ensure the record was complete which saw the addition of several missing pages to the record. Her application was also successful in having added to the record cost submissions which contained evidence that was before the decision-maker.

[18] The Council in its submissions diminishes the fact that it did not disclose these documents by arguing that the said materials were found to be irrelevant anyway. Certainly, given its high level of experience in these cases, the Council is aware that it is not entitled to withhold any item that is rightfully a part of the record, regardless of what its own assessment of its weight or relevance may be.

[19] I do not disagree with the Council's submissions that there were many procedural errors on the part of the Appellant. Again, I attribute this to the fact that the Appellant is not a lawyer and was not represented by a lawyer. Procedural rules can be daunting and confusing to unrepresented parties and I am not of the view that an unrepresented Appellant should be penalized for the lack of a legal education or legal representation.

[20] Likewise, the Council suggests that the reduced enforcement costs should be construed as a benefit to the Appellant. This must be seen for what it is; a correction of the Disciplinary Committee's finding that maximum enforcement costs were warranted in this case.

[21] It is true, the case made by the Appellant was neither smooth, concise nor nuanced. However, it is clear to me that the Appellant believed she was entitled to raise her arguments in the way she did and the aspects that amounted to re-arguing her case were not vexatious, just erroneous.

The Appellant's Application

[22] With respect to the Appellant's arguments that she should be entitled to costs associated with the first hearing and the first appeal, I find that these arguments misconstrue the jurisdiction of the FST to award costs. Even if the FST did have discretion to award costs associated with prior matters, this would be an inappropriate case in which to exercise such discretion as the Appellant was only partially successful, and she has not shown that any of the criteria for the award of costs was met by the conduct of either Respondent in this case.

[23] I also note that in her costs submissions the Appellant overrates her degree of success in the Appeal.

[24] Further, I agree with the Council that some of the Appellant's arguments on the appeal created some delay; for example, her allegations of malfeasance against the complainant and her insistence that the hearing transcripts were inaccurate. Both of these matters were raised by the Appellant without any evidentiary basis beyond her own suspicions, and these and other matters, such as the new evidence motion, did in fact create some delay and some additional expense to the Council. However, I do not see these delays or expenses as extraordinary in the instance of a self-represented Appellant.

[25] The Appellant clearly did not understand what new evidence is and that appeals are not an opportunity to reargue the original case. While I can understand the Appellant's reluctance to incur additional expense by hiring a lawyer to bring

this matter forward to the FST, the entire appeal, less the proportionality argument, may have been avoided had she sought a legal opinion on the strength of her appeal and acted on that.

Summary

[26] Regardless of the manner in which the Appellant pursued her appeal to the FST, the success of her proportionality argument is not to be diminished. Even-handedness and proportionality in rendering enforcement orders is an important aspect of fairness and just outcomes which Discipline Committees must be careful to consider fully.

[27] Therefore, I reject the Council's submission entirely that there is no basis to find that there was mixed success on this appeal. The Appellant saw some success in preliminary motions and in the important question regarding proportionality of the enforcement order.

[28] Further, I do not find that the Appellant was frivolous, vexatious or otherwise improper in the exercise of her appeal rights.

[29] Similarly, I do not find the Appellant has shown that any extraordinary circumstances exist in regard to the Respondents' conduct of the appeal which would entitle the Appellant to a costs award in her favour.

Decision

[30] In light of the foregoing, I am satisfied that this is not an appropriate case in which to exercise my discretion to award costs to any party and I decline to do so. Accordingly, the Appellant's and the Respondent's applications for costs are denied.

"Michelle Good"

Michelle Good
Panel Chair
Financial Services Tribunal

November 13, 2019