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DECISION NO. 2019-RSA-001(a)

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

BETWEEN:	Trevor Inglis	**APPELLANT**
AND:	Real Estate Council of British Columbia	**RESPONDENT**
AND:	Superintendent of Real Estate	**THIRD PARTY**
BEFORE:	Michelle Good, FST Panel Chair	
DATE:	Heard by way of written submissions closing September 19, 2019	
APPEARING:	For the Appellant: Wesley McMillan, Counsel For the Respondent: Sean K. Boyle, Counsel For the Third Party: Joni Worton, Counsel	

APPEAL OVERVIEW

[1] On April 18 and 19, 2018, a Discipline Committee (the "Committee") of the Real Estate Council of British Columbia (the "RECBC", "Council" or "Respondent") convened a hearing to determine if Trevor William Maxwell Inglis (the "Appellant") had committed professional misconduct within the meaning of section 35 of the *Real Estate Services Act*, SBC 2004, c 42 (the "RESA").

[2] In its Liability Decision, the Committee found that the Appellant committed professional misconduct by:

a. engaging in deceptive dealing by fabricating or altering an offer on a property listed by him for sale and asserting that it was an offer on the property in issue; and,

b. making a false statement to the Council.

[3] The Committee also found that the Appellant committed conduct unbecoming a licensee by threatening retaliation against his co-listing agent for making a complaint against him to the Council.

[4] Subsequent to the Committee's Liability Decision, a penalty hearing was conducted by way of written submissions which concluded March 15, 2019.

[5] In its Penalty Decision, the Committee ordered the following:

a. the Appellant's real estate license would be suspended for nine months;

b. the Appellant would be prohibited from acting as an unlicensed assistant during the suspension period;

c. the Appellant would pay a fine of $7,500.00, payable within two months of the decision;

d. the Appellant would be required to undertake further education and training in Ethics and Respectful Communication in the Workplace; and,

e. the Appellant would be responsible for paying $39,022.87 in enforcement expenses.

[6] The Appellant appeals both the Liability and Penalty Decisions to the Financial Services Tribunal (the "FST" or the "Tribunal"). In his Notice of Appeal, the Appellant asks that the Tribunal:

a. Reverse the decision of the Council that Mr. Inglis engaged in deceptive dealing and made a false statement to the Council or, in the alternative to:

b. Vary the decision of the Council and impose a reprimand with no fine and no enforcement expenses, or such other as may be deemed appropriate or in the alternative to:

c. Remit the matter back to the Council for reconsideration of penalty in respect of conduct unbecoming. Further, or in the alternative, vary the decision of the Council to strike the prohibition on Mr. Inglis acting as an unlicensed assistant.

[7] Pursuant to section 54(2) of the RESA, the Council is a party to this appeal. Under section 54(3) of the RESA, the Superintendent of Real Estate (the "Superintendent") is also a party. The Council opposes the appeal and seeks a dismissal of the appeal and an order for costs. The Superintendent also opposes the appeal and adopts the submissions of the Council.

[8] Section 242.2(11) of the *Financial Institutions Act,* RSBC 1996, c 141 (the "FIA") applies to this appeal and provides that the FST may confirm, reverse, or vary a decision or send the matter back for reconsideration, with or without directions, to the body whose decision is under appeal.

BACKGROUND

[9] The Appellant is a licensee under the Act. In 2013 the Appellant co-listed a property with another licensee, PV, in North Vancouver, BC (the "Property"). The Appellant delivered an offer to purchase the Property to PV on October 10, 2013. The offer was made in the name of Huang (the "Huang Offer"). The offer listed the buyer's agent as AW.

[10] It was discovered that AW denied writing the offer and the matter was reported to the Council which subsequently undertook an investigation into the matter.

[11] The Appellant, upon being advised of the investigation by the Council, left a voice mail message with PV in which he threatened retaliation against PV and further stated that the offer had been handed to him at an open house.

[12] Following the investigation by the Council, an Amended Notice of Discipline Hearing dated December 8, 2017, was issued to the Appellant citing the allegations against him as follows:

a. That Mr. Inglis committed professional misconduct by:

    i. engaging in deceptive dealing by fabricating or altering a document (the Huang Offer) which he then asserted was an offer to purchase the Property;

    ii. engaging in deceptive dealing by making a false statement to his co-listing agent when he advised her that an offer on the Property (the Huang Offer) had been handed to him on October 6, 2013, at an open house at the Property; and

    iii. making a false statement to the Council in his response to the allegations made against him when he denied that the "penmanship" in the Huang Offer was his.

b. That Mr. Inglis committed conduct unbecoming a licensee when he:

    i. stated to his co-listing agent that an offer to purchase was presented in person on October 6, 2013, in the course of an open house on the property; and,

    ii. threatened retaliation against his co-listing agent in a telephone message left for her on February 20, 2014

[13] The Committee found against the Appellant on each of the above noted allegations with the exception of items 1(b) and 2(a). These allegations were dismissed by the Committee as it found that the false statement in question was not made "in relation to a person providing real estate services as a licensee" and as such did not meet the test for deceptive dealing or professional misconduct as articulated in the Act.

ISSUES

[14] The Appellant submits that the Committee made a number of errors which I have reframed as the issues I will consider on this appeal:

a) Did the Committee misstate the standard of proof?
b) Did the Committee misapprehend the evidence?
c) Did the Committee reverse the onus?
d) Did the Committee make inconsistent findings of fact?

e) Did the Committee err by finding that altering the offer was deceptive dealing?
f) Did the Committee interpret and apply the RESA correctly in arriving at its penalty decision?
g) Did the Committee consider irrelevant factors when determining the appropriate penalty?
h) Did the Committee impose unreasonable enforcement expenses?

STANDARD OF REVIEW

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

[16] Section 58(1) of the *Administrative Tribunals Act*, SBC 2004 c 45 (the "ATA") 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.

[17] Further, the Tribunal will not necessarily apply the standard of review that is exercised in matters under judicial review (*Westergaard v British Columbia (Registrar of Mortgage Brokers)*, 2011 BCCA 344 ("*Westergaard*")).

[18] *Hensel v Registrar of Mortgages*, 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).

[19] In *Kadioglu v Real Estate Council of British Columbia*, 2015-RSA-003(b) ("*Kadioglu*") 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.

[20] 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*, 2017-RSA-002(b) ("*Schoen*"). Paragraph 34 is instructive, wherein the Tribunal stated that the standard "may vary based on the particular context of each case". According to *Schoen*, the Tribunal will give more deference to decisions that are more fact-intensive and less law-focused.

[21] I agree with and adopt the following standards of review articulated and refined in *Westergaard, Hensel, Kadioglu, 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.

[22] Neither the Appellant nor the Respondent submit any disagreement with respect to the appropriate standard of review.

Standard of Review on Penalty

[23] In FST Decision No. 2017-FIA-002(a)-008(a) (*Bridge Tolls*), Chair Strocel discussed the applicable standard of review applicable to penalty determinations as follows (at paragraph 77):

> [I]t 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.

[24] I agree that the FST, a specialist Tribunal, should intervene in a penalty decision if it determines an underlying decision-maker has made an error in principle; in such cases it is the job of the FST to thoroughly engage in analysis of the question of what amounts to a reasonable penalty, not simply apply a high-level deference to the original decision-maker.

[25] 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. While the Tribunal must be cautious about not simply replacing the original decision-maker'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.

DISCUSSION AND ANALYSIS

a. Did the Committee misstate the standard of proof?

[26] Whether or not the Committee applied the correct standard of proof is a question of law, and therefore I will apply the standard of correctness when reviewing this issue.

[27] The Appellant argues that the Committee applied a lower standard of proof than what the caselaw supports as the appropriate standard in professional disciplinary hearings. The Appellant quotes the Committee as stating at paragraph 56 of the Liability Decision that "the onus upon the Council is to prove the allegations against Mr. Inglis on a balance of probabilities based on evidence that is clear, convincing and cogent."

[28] The Appellant further quotes the Committee as stating at paragraph 76 of the Liability Decision that "In this case, the standard of proof is proof on a balance of probabilities." The Appellant submits that this iteration of the standard of proof is an indication that the Committee is applying a lower standard than what is indicated as the appropriate standard in professional misconduct cases.

[29] The Appellant cites *Nguyen v. Chartered Professional Accountants of British Columbia*, 2018 BCSC 620 ("*Nguyen*") as affirming the appropriate standard of proof articulated in *Jory v. College of Physicians and Surgeons of British Columbia*, [1985] BCJ No. 320 (SCC) ("*Jory*"). The Appellant argues the standard of proof in professional disciplinary hearings is higher than a bare balance of probabilities (*Nguyen* at para 58):

> The standard of proof required in cases such as this is high. It is not the criminal standard of proof beyond a reasonable doubt. But it is something more than a bare balance of probabilities. The authorities establish that the case against a professional person on a disciplinary hearing must be proved by a fair and reasonable preponderance of credible evidence… The evidence must be sufficiently cogent to make it safe to uphold the findings with all the consequences for the professional person's career and status in the community[.]

[30] As such, the Appellant argues that it was incorrect for the Committee to apply the standard of a bare balance of probabilities.

[31] The Respondent replies that the Committee applied the correct standard of proof and points to paragraph 56 of the Liability Decision wherein the Committee stated the appropriate standard of proof as being on "a balance of probabilities based on evidence that is clear, convincing and cogent."

[32] I note that the Committee reviewed the findings in Jory and further the findings of the Supreme Court of Canada in *F.H. v. McDougall*, 2008 SCC 53 ("*McDougall*"), a far more recent case than *Jory*, wherein the Court clearly held that there can be only one standard of proof in a civil proceeding and that is the balance of probabilities.

[33] In *McDougall* Justice Rothstein provided context to the Court's acknowledgement of the balance of probabilities as the appropriate standard in civil cases (at paras 40, 44 and 46) that:

> [40] Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof.
>
> …
>
> [44] …In my view, the only practical way in which to reach a factual conclusion in a civil case is to decide whether it is more likely than not that the event occurred
>
> …

> [46] Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. [emphasis added].

[34] I agree with the Court in *McDougall*, that there is only one standard of proof in civil cases, including professional discipline cases. Evidence in professional discipline cases must be clear, convincing and cogent in order to satisfy the balance of probabilities test, but, as noted by Justice Rothstein, this does not change the standard of proof.

[35] After considering the jurisprudence, the Committee explicitly stated that it had considered both *Jory* and *McDougall* in arriving at its conclusion that "the onus on the Council is to prove the allegations against Mr. Inglis on a balance of probabilities based on evidence that is clear, convincing and cogent."

[36] I am satisfied that the Committee was mindful of the seriousness of the allegations and potential consequences of this case, examined the evidence in that context, and was satisfied that the evidence was sufficiently clear, convincing and cogent to meet the civil standard of proof – that it was more likely than not that the allegations against the Appellant occurred.

[37] The Committee clearly stated that the standard it would apply was the civil standard based on evidence that is clear, convincing and cogent. This is consistent with the jurisprudence out of the Supreme Court of Canada. The fact that the standard was later articulated in the decision simply as the balance of probabilities does not mean the Committee strayed from the standard it set for itself earlier in the Liability Decision.

[38] It is therefore my decision that the Committee did not misstate or apply the wrong standard of proof in the matter before them. The Committee made no error in this regard and this ground of appeal must fail.

b. Did the Committee misapprehend the evidence?

[39] This issue raises specific questions of fact which are reviewable on the standard of reasonableness.

[40] The Appellant argues that the Committee misapprehended the evidence by making findings of fact with no supporting evidence, failing to consider material evidence, and making adverse credibility findings without explanation. The Appellant argues that these errors occurred with respect to the expert evidence of DP, the handwriting expert, and with respect to the testimony of AW and the Appellant himself.

The evidence of DP

[41] In coming to its eventual decision, the Committee relied on the evidence of a handwriting expert, DP. The Appellant argues that the Committee, when drawing conclusions from DP's report, did not deal with "fundamental shortcomings" in it and thus misapprehended DP's evidence.

[42] The Committee articulated the factors DP included in his report as problematic features in completing the analysis of the handwriting on the Huang

Offer. The Committee also noted that notwithstanding these shortcomings, which DP articulated himself in the report, the expert was able to formulate a conclusion that the Huang Offer was probably written by Mr. Inglis. The Committee also pointed out that in cross-examination, DP was never asked by Counsel for the Appellant whether the shortcomings of his report altered his opinions.

[43] The Appellant submits that the instructions to the expert were to consider all the handwriting on the Huang Offer as unknown. It is further submitted that after the report was finished and disclosed to him, Counsel for the Appellant corresponded with the RECBC providing Mr. Inglis' admission that his handwriting did in fact appear on the Huang Offer, contrary to his previous assertion that it did not.

[44] The Appellant argues that although Mr. Inglis first asserted that the handwriting was not his, a subsequent admission that some of the handwriting was his obliged the RECBC to tender a new report with revised assumptions.

[45] The Appellant argues that the admission by Mr. Inglis that some of the handwriting on the Huang Offer was his had the effect of altering the assumptions on which the expert conclusion relied on by reducing the amount of questioned writing available for comparison.

[46] The Respondent replies that the Committee was correct in its decision that it could rely on DP's opinion evidence and raises that at the hearing before the Committee, DP was cross-examined on his report. Further, the Respondent notes that DP was never questioned as to whether or not what the Appellant now describes as changed assumptions, would have altered his conclusion.

[47] DP found that it was "probable" that the Huang Offer was written by the Appellant. The Committee recounted DP's evidence that by "probable" he was expressing the opinion that he was 80-85% certain that the Huang Offer was written by the Appellant.

[48] Further, the Committee reproduced the features that DP considered and reported as problematic in arriving at his conclusion, demonstrating that contrary to the Appellant's complaint that the Committee did not "deal with the fundamental shortcomings in the report", the Committee was in fact alive to the challenges DP encountered in arriving at his opinion with respect to the handwriting on the Huang Offer. Included in those features was a statement by DP that he would have preferred having more handwriting specimens to consider. Nonetheless, despite the shortcomings, DP was able to arrive at an opinion with 80-85% certainty.

[49] The Committee noted at paragraph 84 that the only reliable evidence regarding the handwriting on the Huang Offer presented at the hearing was that of DP. It noted that DP took various shortcomings into consideration, including the size of the writing sample, and that he arrived at his conclusion despite those shortcomings.

[50] The only other evidence that was before the Committee with respect to the ownership of the handwriting was the evidence of the Appellant. The Committee found that Mr. Inglis' evidence lacked credibility in that he first stated he did not

write the offer and then, after the conclusion of the report, that it was indeed his handwriting on the offer, Mr. Inglis stated that he did alter the Huang Offer.

[51] Further, as the Committee pointed out at paragraph 84, the degree of certainty that DP had in his conclusion was not questioned on cross-examination by the Appellant.

[52] The Respondent also submits that the Appellant did not ask DP on cross-examination if his conclusion would have been different had he known at the time of preparing the report that the Appellant's handwriting did in fact appear on the Huang Offer.

[53] The Appellant asserts that DP's opinion evidence was rendered inconclusive by the Appellant's after-the-fact admission. I cannot agree. It was entirely open to the Appellant to specifically question DP on cross-examination as to whether his opinion would have been different had he known that the Appellant's handwriting did appear on the Huang Offer. This question was never put to DP. DP's answers to this line of questioning would have provided further evidence to the Committee with respect to its consideration of the report. However, the Appellant did not question DP in this regard. Accordingly, it is not open to him to argue on appeal in favour of a conclusion that may or may not have been reached had he done so. The questions about the effect of the Appellant's subsequent admission (that some of the handwriting on the Huang Offer was his) on DP's opinion should have been asked and answered in the first instance.

[54] Further, it would have been open to the Appellant to submit opinion evidence of his own regarding both the handwriting and the impact of the reduced sample issue now raised on appeal. No such evidence was tendered.

[55] One final point raised by the Appellant with respect to DP's report has to do with the issue of reliance on expert evidence. Both at the hearing and now on appeal, relying on authority found in *R. v. Bath*, 2011 BCSC 1726 ("*Bath*"), the Appellant argues "it is not appropriate for a trier of fact to accept and rely on opinion evidence it cannot independently assess". Respectfully, in my view, *Bath* is clearly distinguishable from the situation in the present appeal.

[56] First, a significant basis for giving limited weight to the expert opinion in *Bath*, as articulated by that Court, was that the findings of the expert in that case were articulated by the expert as "non-conclusive" with respect to the ownership of the handwriting. That is not the case in this matter. DP's findings were not non-conclusive. Rather he concluded that it was "probable" that the handwriting was that of the Appellant with probable being defined as being with an 80-85% certainty. The analysis in *Bath* was with respect to what weight should be given to a non-conclusive finding, not with respect to what weight should be given to a "probable" finding.

[57] Second, the Court in *Bath* was charged with rendering a decision based on the criminal standard of proof; that beyond a reasonable doubt the handwriting belonged to that of the accused. In this matter, the Committee was charged with rendering a decision on the civil standard; whether it was more likely than not that the handwriting was that of the Appellant.

[58] Finally, another distinction between this case and matter before the Court in *Bath* is that the expert in *Bath* "did not explain what features or factors of the samples led him to reach his various opinions" (*Bath* at para 345), which made it difficult for the Court to assess. This is not the case in the matter before the Committee. DP meticulously documented the basis for his decisions and the factors considered in addition to articulating the factors that reduced his certainty to the 80-85% probable category. The findings in *Bath* thus are irrelevant and I give them no weight in my decision.

[59] For all of the foregoing reasons, I find that the Committee did not err in accepting and relying on the DP report and this ground of appeal must fail.

The Evidence of AW

[60] The name of AW and information regarding his realty firm were handwritten onto the Huang Offer. The Appellant admitted that it was he who wrote in AW's information on the form.

[61] AW testified that he did not recall attending the open house where the Appellant claimed to have found an offer written by him. He further testified that he did not recall having a client by the name of Huang and that the first time that he heard of the Huang Offer was when he was contacted by the listing agent after concerns were raised about the Huang Offer.

[62] PV, the Appellant's co-listing agent, testified that it was she who contacted AW about the Huang Offer, although her evidence was that she did not mention the name 'Huang' and simply asked if AW had submitted an offer on the property.

[63] At the hearing, counsel for the Appellant argued that based on the inconsistency between the evidence of PV and AW, the Committee could have drawn an inference that it could have been Mr. Inglis who contacted AW. Yet on appeal, Counsel for the Appellant submits that there was no inconsistency between the evidence of PV and AW which creates a logical inconsistency in his assertion that the Committee should have relied on an inconsistency between the evidence of PV and AW to draw an inference that the Appellant could have called AW.

[64] I note that the Committee did not actually make a finding that it preferred the evidence of PV over that of AW. It simply noted that there was an inconsistency in the evidence. As stated at paragraph 38 of the Liability Decision, the Committee found that "the only finding of fact that can be made based on the evidence of AW is that he was not the realtor who wrote the Huang Offer."

[65] Furthermore, at paragraph 37 of the Liability Decision, the Committee noted that there was no evidence tendered by Mr. Inglis at the hearing that he in fact had contacted AW about the offer or at any time.

[66] The Appellant frames this aspect of his argument by stating that because he could not confirm with certainty that he contacted AW, the Committee declined to make a finding that he had done so. In fact, there simply was no evidentiary foundation for a finding from the Committee that the Appellant had contacted AW and it was not open for the Committee to speculate.

[67] The Committee noted at paragraph 35 of the Liability Decision that Mr. Inglis had testified that he had no recollection of calling AW. Further, the Committee's analysis was that had the Appellant contacted AW he would have known that AW did not write the offer. Thus, it would be logically inconsistent to infer that Mr. Inglis had called AW at a time in the chronology of events that Mr. Inglis was asserting that he believed AW had written the offer.

[68] I find that the Committee made no error with respect to the evidence of AW and this ground of appeal must fail.

The evidence of Trevor Inglis

[69] While the Appellant concedes that there were inconsistencies in his evidence, he also argues that the Committee erred by failing to undertake the necessary analysis to find that he lacked credibility. In the Appellant's view, the Committee "determined only that that his evidence was unreliable, and used that as a proxy for credibility." In other words, the Appellant argues that the Committee conflated credibility and reliability.

[70] The Respondent submits in reply a number of factors the Committee took into consideration in making a finding that the Appellant lacked credibility and argues that "it is not erroneous to infer lack of credibility from a witness who consistently provides unreliable evidence."

[71] The Respondent does concede that unreliability and implausible evidence does not always create an adequate foundation for a finding that a witness lacks credibility but argues that where material aspects of a witness's story change, this can be an important factor in determining credibility.

[72] The Appellant argues that the factors set out in *Bradshaw v. Stenner*, 2010 BCSC 1398 ("*Bradshaw*"), were not applied by the Committee in its analysis of the Appellant's credibility. Those factors are articulated by Justice Dillon in *Bradshaw* as follows (at para 186):

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides… The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally …. Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time. [emphasis added]

[73] I note that paragraphs 59 through 68 of the Liability Decision demonstrate a thorough analysis by the Committee of the problematic aspects of the Appellant's evidence. Virtually every factor the court in *Bradshaw* articulates as a consideration

in the assessment of credibility is addressed and found to exist in the negative with respect to the Appellant's evidence.

[74] In particular, at paragraph 68 of the Liability Decision the Committee stated that "the inconsistencies and contradictions in the evidence of Mr. Inglis are related to material facts in the allegations against him…These material contradictions lead to the conclusion that Mr. Inglis is not a reliable witness. As a result, his testimony is not credible."

[75] I note that unreliability can be with respect to different factors. For example, a witness's evidence may be found to be unreliable for a deficit of memory about the event or from not having observed an event central to the case. This is not the type of unreliability the Committee is referring to in the instant case. In this case the Committee is clearly saying that the Appellant's repeated contradictions of his own evidence as well as his implausible explanations for those contradictions, such as attributing his statements to others, as well as the fact that he had a clear motive for fabricating the Huang Offer, all pertain to material issues at the heart of this case. This is what rendered the Appellant as being without credibility in the eyes of the Committee.

[76] I cannot agree with the Appellant's argument that the Committee failed to undertake the analysis necessary to determine credibility. I therefore find that the Committee made no error, and its finding that Mr. Inglis was not credible was reasonable in all the circumstances. Therefore, this ground of appeal must fail.

c. Did the Committee reverse the onus?

[77] This issue raises a question of law, and therefore I will review the issue using a standard of correctness.

[78] As I have already dismissed the Appellant's argument that the DP report was unreliable, I will not address the portion of the Appellant's argument that pertains to reversal of onus regarding the DP report, as that argument is premised on the notion that DP's report was unreliable.

[79] The Appellant further argues that the Committee reversed the onus by requiring Mr. Inglis to corroborate evidence tendered by Council. The Appellant cites paragraph 37 of the Liability Decision as supporting this proposition. He says that by declining to make a finding that the Appellant had contacted AW about the Huang Offer, in the context of the Appellant having admitted he could not recall having done so, the Committee reversed the onus.

[80] It is clear to me that the Committee did not require Mr. Inglis to corroborate the Council's evidence. Counsel for the Appellant made submissions at the hearing that the contradiction between PV and AW's evidence as it pertains to who telephoned AW with respect to the Huang Offer allows for the possibility that it was Mr. Inglis who contacted AW.

[81] During the course of the hearing, AW gave evidence that it was the male listing agent who contacted him about the Huang Offer. PV gave evidence that it was she who contacted AW. Mr. Inglis gave evidence that he had no recollection of contacting AW.

[82] The fact that the Appellant gave evidence that he had no recollection of contacting AW was considered by the Committee as it pertains to how plausible it would be, on all the evidence, that he had contacted AW regarding the Huang Offer. At paragraph 35, the Committee responded to the Appellant's evidence that he had no recollection of contacting AW by noting that if in fact he had contacted AW, "he would have discovered that AW was not the realtor who presented the offer." It logically follows from this that had the Appellant contacted AW and discovered that he had not submitted the Huang Offer, the subsequent events that precipitated the investigation would not have occurred. The Committee did not require the Appellant to corroborate the Council's evidence. Rather, it found in all the circumstances, including in consideration of the Appellant's evidence, that it was implausible that Mr. Inglis contacted AW.

[83] I therefore find that the Appellant has not made out that the Committee reversed the onus as alleged and this ground of appeal must fail.

d. Did the Committee make inconsistent findings of fact?

[84] This issue raises questions of fact which are reviewable on the reasonableness standard.

[85] The Appellant also presents arguments under this head alleging that the Committee made inconsistent findings when it found that the Appellant both altered and fabricated the Huang Offer.

[86] The Committee articulates its reasoning in this regard starting at paragraph 84 of its Liability Decision as follows:

> [84] The only reliable evidence related to the authorship of the Huang Offer presented at the hearing was that of [DP]. [DP] considered the shortcomings of his analysis in his report and he readily acknowledged those shortcomings in cross-examination. DP's evidence that he is 80% to 85% certain of his conclusion that Mr. Inglis wrote the Huang offer was not challenged.
>
> [85] In the context of this case, in which the handwriting expert is 80% to 85% certain that Mr. Inglis wrote the Huang Offer and Mr. Inglis' denial that he fabricated the Huang Offer is not credible, the Committee concludes that there is clear and cogent evidence that the Huang Offer was written by Mr. Inglis. Therefore, the Committee finds that the Huang Offer was fabricated by Trevor Inglis.
>
> [86] Even if the conclusions of [DP] are not accorded any weight, Mr. Inglis has admitted that he altered the Huang offer. Therefore, the Committee also concludes that Mr. Inglis altered the Huang offer by inserting the information of the realtor, AW.

[87] The Committee clearly accepted the evidence of DP that it was 80%-85% probable that Mr. Inglis had fabricated the Huang offer and made a finding of fact that Mr. Inglis indeed fabricated the Huang Offer.

[88] The Appellant argues that the Committee could not also find that Mr. Inglis altered the Huang Offer as making such a finding "undermines the prior conclusion that the offer was fabricated."

[89] The Respondent argues in reply that it is not inconsistent for the Committee to have found that Mr. Inglis both altered and fabricated the Huang Offer.

[90] I note that Mr. Inglis gave evidence that he found a partially completed offer at a showing of the Property and that he subsequently altered the Huang Offer by whiting out the name of his own firm and replacing it with the AW's firm information.

[91] Mr. Inglis denies fabricating the Huang Offer. However, the Committee found his evidence lacked credibility and was unreliable in that regard.

[92] DP concluded that the handwriting on the Huang Offer was that of Mr. Inglis. The handwriting referred to is the handwriting that was on the Huang Offer when Mr. Inglis claims to have found it, partially completed, as well as the handwriting where Mr. Inglis' information was whited out and replaced with that of AW.

[93] So, the Committee rejected Mr. Inglis' evidence that he did not fabricate the offer and accepted the findings of DP that the writing in the formulation of the offer was that of Mr. Inglis and made a finding of fact that indeed, Mr. Inglis fabricated the Huang Offer.

[94] Accepting Mr. Inglis's admission that he had whited out his firm's information and wrote over it with that of AW and his firm the Committee was able to make a finding of fact that Mr. Inglis had altered the Huang Offer.

[95] There is no contradiction as argued by the Appellant. The Huang Offer that Mr. Inglis claims to have found at the open house was written in the handwriting of Mr. Inglis according to the expert report of DP. Thus, the Huang Offer was first fabricated by Mr. Inglis. Then when asked to produce the offer by his co-listing agent, he altered the Huang Offer to remove his information and replace it with that of AW. One action does not undermine the finding that the other action also occurred.

[96] For the above reasons, I find that the Committee's finding that Mr. Inglis had both written the offer and then subsequently altered it was reasonable.

e. Did the Committee err by finding that altering the offer was deceptive dealing?

[97] Consideration of this issue involves analysis of a legal definition and how the Committee applied the facts of the case to the legal definition. Therefore, the issue is best described as a question of mixed fact and law, and I will review it using the standard of reasonableness.

[98] The Appellant argues that in order for the Committee to have found that the alteration of the Huang Offer by Mr. Inglis constituted misrepresentation, the "Committee's reasoning had to proceed from the premise that Mr. Inglis had found the incomplete offer on the counter in the circumstances he testified to." The Appellant further states that "if the Huang Offer was found by Mr. Inglis, it is not reasonable to conclude that he altered it to create the impression that an offer had been received"

[99] The Appellant appears to completely ignore the fact that on the strength of DP's expert report, the Committee found that Mr. Inglis did indeed write the Huang Offer and rejected his testimony that he found an incomplete offer at the property.

[100] Deceptive dealing is a defined term found in section 1 of the RESA as follows:

> "deceptive dealing" in relation to a person providing real estate services as a licensee, means any of the following:
>
> a) an intentional misrepresentation, by word or conduct, or in any other manner, of a material fact in relation to real estate services, or in relation to a trade in real estate to which the real estate services relate, or an intentional omission to disclose such a material fact;
>
> b) a course of conduct or business that is intended to deceive a principal about the nature of the real estate services, or about the nature of a trade in real estate to which the real estate services relate;
>
> c) an artifice, agreement, device or scheme to obtain money to obtain money, profit or property by illegal means.
>
> d) a promise or representation about the future that is beyond reasonable expectation and not made in good faith.

[101] The Appellant argues that it was illogical for the Committee to conclude that Mr. Inglis did not believe that AW wrote the offer, "because the chain of reasoning followed to arrive at this conclusion is premised on the Committee's stated at paragraph 91 that Mr. Inglis fabricated or altered the Huang Offer in order to create the impression that an offer had been received on the Property."

[102] With respect, this argument represents a complete obfuscation of the Committee's reasoning. The Committee did not base their finding of intentional misrepresentation as described by the Appellant. Rather, the Committee first made a finding of fact based on the evidence of DP that Mr. Inglis wrote the offer. Then, they found that he also altered the offer when he applied white-out and inserted AW's information on the Huang Offer. The Committee was perfectly clear in its reasoning that that act of altering the Huang Offer did not amount to intentional misrepresentation. It was only when Mr. Inglis sent the offer to his co-listing agent to create an impression that there was an offer on the house that his actions constituted intentional misrepresentation. This is articulated in the Liability Decision as follows (at para 94):

> Therefore, the Committee finds that Mr. Inglis intentionally misrepresented the facts when he delivered the Huang Offer to PV to create the impression that he had received a legitimate offer from a third party.

[103] I reject the Appellant's argument entirely on this point. It fails to take into consideration that prior to making the above finding, the Committee had already decided that Mr. Inglis had written the Huang Offer. Therefore, it would be impossible for him to simply "discover it" at the end of the open house as the Appellant suggests.

[104] I find that the Committee was reasonable in its finding that Mr. Inglis intentionally misrepresented the facts to PV when he sent her the fabricated and altered Huang Offer, and thus this argument fails on appeal.

Penalty Decision

[105] With respect to penalty, the Committee ordered that the Appellant's license be suspended for a period of nine months; that he be prohibited from acting as an unlicensed assistant during the suspension period; that he pay a fine of $7500.00; that he undertake and successfully complete courses in Ethics and Respectful Communication in the Workplace at his own expense; and that he pay enforcement expenses in the amount of $39,022.87.

[106] The Appellant submits that the Committee cannot determine an appropriate penalty without concluding that he either fabricated or altered the Huang Offer. I will give no consideration to this argument given that I have already found that it was reasonable, in all the circumstances and based on the evidence before it, for the Committee to find that Mr. Inglis both fabricated and altered the Huang Offer.

f. Did the Committee interpret and apply the RESA correctly in arriving at its penalty decision?

[107] The Appellant submits that the Committee exceeded its jurisdiction in prohibiting the Appellant from working as an unlicensed assistant. In my view, this is a of matter of statutory interpretation. As such, this issue is best characterized as a question of law and attracts the correctness standard. Normally the reasonableness standard applies to penalty decisions as noted above. However, this is a question of law arising in the context of the penalty decision and as such attracts the correctness standard.

[108] The Respondent correctly points out that during the underlying hearing the Appellant conceded that this prohibition was an appropriate penalty.

[109] In the underlying hearing, the Appellant submitted that "Mr. Inglis agrees that an order should include the provisions set out a paragraphs 8(a) – 8(c) of the Council's submissions." Paragraph 8(a) of the Council's submissions on penalty in the underlining hearing states: "The order should include that Mr. Inglis: (a) be prohibited from acting as an unlicensed assistant during the license suspension period."

[110] At the heart of the Appellant's argument on this issue is the view that through the RESA, the Council has the authority to regulate individuals who provide "real estate services", but its authority does not extend to prohibiting or restricting a licensee from working as an unlicensed assistant.

[111] The Respondent argues that the Appellant is estopped from raising the matter on appeal given that his original submissions on penalty accepted this as an appropriate penalty.

[112] I find it unusual and problematic that the Appellant explicitly signaled agreement with this aspect of the proposed penalty in the first instance and is now reversing that position on appeal. This verges on misleading the Committee with an

obvious impact on how the Committee framed its reasons. However, the principle of estoppel is not, in my view, dispositive of the matter raised.

[113] The Committee is required by the *RESA* to fashion an appropriate penalty once wrong-doing, as defined by the *RESA*, has been found to have occurred. In particular, section 43(2)(e) provides that the Committee "*must*, by order, do one or more of the following":

> (e) Require the licensee to cease or to carry out any specified activity related to the licensee's real estate business. (emphasis added)

[114] While the term "real estate services" is defined by the *RESA*, "real estate business" is not. In my view, this is because a real estate business is not limited to the scope of that which is defined as real estate services. Operating the business has other requirements besides those provided by licensees. Had the drafters intended to limit the scope of remedies available to a disciplinary committee, they would have drafted this section within the context of the limitation the words 'real estate services' provide. But, they did not. Further, the use of the word "any" as related to "specific activity" supports an interpretation that a disciplinary committee has a broad discretion when it comes to ordering a licensee cease or carry out "any specific activity". Therefore, the Committee is entitled to make orders with respect to matters that relate to the licensee's real estate business and is not limited to "real estate services" per se. This is, and must be, a broad discretion.

[115] Further, it is not unheard of for a discipline committee to include in a penalty order that the licensee not work as an unlicensed assistant during the time their license is suspended.

[116] I note in particular that in *Goodwin (Re)*, 2018 CanLII 11327 (BC REC), a penalty was imposed that included a restriction from working as an unlicensed assistant during the license suspension period. In that case, this aspect of the penalty was articulated as follows at para 23:

> The Respondent seeking to mislead the Council calls for a meaningful suspension, and the prohibition on the Respondent acting as an unlicensed assistant during that time ensures that the suspension stays meaningful.

[117] In other words, this aspect of the penalty was imposed to ensure that the licensee would not use work as an unlicensed assistant to undermine the terms of the suspension imposed.

[118] The Respondent notes that the said prohibition must be considered in light of the fact that the Appellant was doing business with his nephew and that it was his practice to send emails to clients under his nephew's name through his nephew's email account. This presents a clear risk that the Appellant could evade the full effect of the suspension by providing real estate services with his nephew acting as proxy.

[119] In the context of the present case, Mr. Inglis engaged in both professional misconduct and deceptive dealing. Additionally, the Committee noted that there was another disciplinary matter involving Mr. Inglis which involved him wrongly advising seller's agents that buyers had not received offers on a property, and

negotiating a price reduction on that basis. That matter was resolved by consent order in 2015. The existence of this additional disciplinary matter understandably generates a reasonable concern about Mr. Inglis's intention to abide by the terms of his suspension.

[120] The Committee did not provide a rationale for the aspect of the penalty relating to the prohibition on Mr. Inglis acting as an unlicensed assistant; however, in my view, this is because the Appellant made submissions opposite to these in the first instance. The Appellant did not oppose this aspect of the penalty and agreed it was appropriate in the underlying proceeding. Had the Appellant registered his opposition to this prohibition in the first instance, it would have inclined the Committee to more explicitly articulate its reasons for it.

[121] However, it is my view that as in *Goodwin*, the purpose of the prohibition against working as an unlicensed assistant was intended to ensure that Mr. Inglis would not undermine the imposed suspension by engaging in real estate services while working as an unlicensed assistant.

[122] Section 43(2)(e) was drafted to be read broadly in the context of the purposes of the *RESA*, in particular, to protect the public and enforce the principles of general and specific deterrence by ensuring that licensees cannot find ways to circumvent the penalty rendering it meaningless.

[123] I therefore find that the intent of section 42(3)(e) is to confer a broad discretion on a penalty committee. If this were not the case, limitations would have been written into the section. As such, I find that including this particular prohibition does not offend the *RESA* as argued by the Appellant, and therefore this ground of appeal fails.

g. Did the Committee consider irrelevant factors when determining the appropriate penalty?

[124] This issue attracts a reasonableness standard of review.

[125] The Appellant argues that the Committee erred in stating that the issue of public perception and public confidence in the disciplinary process should provide overarching importance in the penalty decision. In particular, the appellant argues that "public perception and public confidence are not, or ought not to be, stand-alone bases for any particular sanction in any particular case."

[126] In its deliberations with respect to which principles and considerations would guide the Penalty Decision, the Committee considered academic articles, jurisprudence, and the RECBC Sanction Guidelines (the "Guidelines"). The Committee held that the Guidelines serve several purposes "all within the overarching goal of protecting the public".

[127] The Sanction Guidelines clearly articulate the purposes of the Sanction Guidelines. Section 1.2.1 of the "purposes" section of the Guidelines sets out that:

> The Council administers the [RESA] and the regulations, administers rules and bylaws, and upholds and protects the public interest in relation to the conduct and integrity of its licensees.

[128] Further, section 2.1.1 of the Sanction Guidelines sets out that "[s]anctions serve multiple purposes, all of which further *an overarching goal of protecting the public*" (emphasis added).

[129] Thus, infused in the very purpose of the Sanction Guidelines is the mandate to uphold and protect the public interest.

[130] The Appellant appears to characterize the Committee's statement about the "overarching goal of protecting the public" as evidence that the Committee used this consideration as a standalone basis for the Committee's assessment of penalty in the present case. The Appellant is incorrect in this characterization. Upholding and protecting the public interest is not in itself a basis for a particular penalty decision, rather it is the underlying principle that must be considered in all penalty decisions as the primary purpose of sanctions. In my view, the Committee clearly considered this paradigm in assessing the penalty it did. With respect to jurisprudence, the Committee considered well-established case law outlining the purposes behind professional regulatory bodies, and the principles that guide discipline committees in cases involving professional misconduct. It is clear to me from the Penalty Decision that the Committee made appropriate inquiries into approaches and principles in determining penalty and did not err in articulating the issue of upholding and protecting the public interest in the disciplinary process as an overarching principle.

[131] The Committee arrived at its positions with respect to public perception and public confidence after careful consideration of the jurisprudence and the Guidelines, not from a desire to "throw the book" at the Appellant as is argued. The Committee articulated the importance of public perception and public confidence in its review of factors to consider in the context of professional misconduct as set out in *Edward Dent (Re)*, 2016 LSBC 5 (CanLII).

[132] In that decision, a Disciplinary Panel of the Law Society considered the 13 factors set out in *Law Society of BC v. Ogilvie*, 1999 LSBC 17. The Panel then condensed these 13 factors to the four general categories of analysis, reproduced below:

- Nature, gravity and consequences of conduct
- Character and professional conduct record of the respondent
- Acknowledgement of the misconduct and remedial action
- Public confidence in the legal proceeding including public confidence in the disciplinary process.

[133] In structuring its analysis of the appropriate penalty to order against the Appellant, the Committee undertook detailed analysis considering each of the above four factors.

[134] Further, I disagree with the Appellant's assertion that the Committee's characterization of public perception and public confidence as an overarching principle indicates that the "overarching concern of the Committee was satisfying the public that it can and will dole out harsh punishments." This assertion is simply not supportable. The Committee considered multiple cases relating to similar

offences in determining an appropriate penalty and was transparent in its assessment of multiple factors in relation to a fitting penalty.

[135] The Appellant further argues that the Committee did not properly address harm to the public and considered public harm in the circumstances of this case in a hypothetical context. I disagree. It is clear to me that the Committee considered negative impacts on the public's confidence in and perception of the disciplinary process as harmful to the public. Likewise, the Committee conceded that there was no direct harm to the public in this case but emphasized that there was great potential for harm to the public when a licensee creates a forged offer of purchase

[136] To which factors the Committee gives weight in arriving at an appropriate penalty is entirely within its discretion, so long as the Committee's analysis is supported by the evidence and is not undertaken in an arbitrary fashion. Furthermore, the Committee is not obliged to articulate each and every consideration it has made in arriving at a penalty. The Guidelines are not binding on the Committee and do not fetter their discretion to formulate a penalty that best suits the misconduct of the licensee.

[137] I find the Committee was detailed and transparent in its consideration of the factors that informed its Penalty Decision, I find no error in the Committee's approach to determining penalty, and I find that the penalty was in keeping with penalty decisions rendered in comparable cases.

h. Were the Enforcement Expenses unreasonable?

[138] This issue raises a question about the exercise of discretion by the Committee in deciding to assess expenses against the Appellant, and the reasonableness standard is what I will apply in my review of this issue.

[139] With respect to enforcement expenses, the Appellant argues that ordering enforcement expenses is permissive but not mandatory. Further, he argues that the amounts set out in the regulations are maximums, not default amounts. The Appellant cites one case in which the enforcement expenses were reduced, but other than that offers no argument as to why I should find that the amount ordered for enforcement expenses is unreasonable in the present case.

[140] The Committee heard submissions from both parties with respect to the enforcement expenses and reductions were made to the total amount in recognition of the penalty being decided by a two-member panel and in recognition of the fact that one of the allegations was not made out. With no basis offered as to why I should consider the Committee's decision with respect to enforcement expenses excessive, I can find no reason or basis to alter the Committee's decision.

DECISION

[141] In accordance with the above reasons, I find that the appeal of the Liability and Penalty Decisions fails on all counts, and I confirm both the Liability and Penalty Decisions.

COSTS

[142] The Council seeks an order for costs but has not provided full submissions for consideration. As it is the Council that seeks costs, I invite the Council to provide submissions on costs by **June 19, 2020** following which the Superintendent and the Appellant may provide response submissions by **June 26, 2020**. Any final reply submissions must be provided by **July 03, 2020**.

"Michelle Good"

Michelle Good,
Panel Chair, Financial Services Tribunal

June 09, 2020