



Financial Services Tribunal

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DECISION NO. FST-RSA-20-A002(a)

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

BETWEEN:	Superintendent of Real Estate	APPELLANT
AND:	Real Estate Council of British Columbia	RESPONDENT
AND:	Joseph John Liberatore	THIRD PARTY
BEFORE:	A Panel of the Financial Services Tribunal Jane A. G. Purdie, Q.C. Panel Chair	
DATE:	Conducted by way of written submissions concluding on June 20, 2020	
APPEARING:	For the Appellant: Peter Duncan and Zachary Froese, Counsel For the Respondent: Greg Cavouras, Counsel For the Third Party: Self-Represented	

OVERVIEW

[1] On December 9, 2019, in accordance with section 41 of the *Real Estate Services Act*, SBC 2004, c 42 (the "RESA"), a panel of the Real Estate Council of BC ("RECBC") Discipline Committee, approved a consent order proposal concerning the Third Party, Joseph John Liberatore.

[2] The decision to approve the consent order proposal was subject to appeal by the Superintendent under section 54 of the RESA. The decision was also subject to appeal by the licensee; however, a term of the consent order proposal was that Mr. Liberatore waive his right to appeal the matter to the FST.

[3] On January 7, 2020, the Superintendent delivered a notice of appeal under section 54(1) of the RESA. This initiated the FST appeal process.

[4] On February 11, 2020, the FST received the appeal record which was prepared and submitted by the Respondent RECBC. The FST granted the Superintendent extensions it requested to the deadline for its submissions. One of

the reasons cited for the extensions was that the Superintendent and the RECBC were in discussions and were hopeful that a resolution would be reached.

[5] According to the RECBC, on May 27, 2020, the RECBC and the Superintendent finalized a written agreement to resolve this appeal. The RECBC states that the agreement included a term that the Superintendent would withdraw this appeal. I am informed that Mr. Liberatore was notified that the resolution agreement was final and was provided with a copy of it.

[6] On May 27, 2020, the Superintendent wrote to the FST advising that the Superintendent had "reached a resolution with [RECBC], and therefore write to withdraw our appeal of this matter".

ISSUE ON WITHDRAWAL OF APPEAL

[7] Unlike some tribunals which are mandated to dismiss a withdrawn appeal under section 17(1) of the *Administrative Tribunals Act*, SBC 2004, c 45 (the "ATA"), the FST is specifically excluded from the application of that section by section 242.1(7)(d)(i) of the *Financial Institutions Act*, RSBC 1996, c 141 (the "FIA").

[8] Under Section 242.2(10)(e.1) of the FIA, if an appellant withdraws an appeal or the parties advise the tribunal that they have reached a settlement of an appeal, the FST *may* order that the appeal or part of it be dismissed.

[9] Section 242.2(10)(e.1) of the FIA states:

If an appellant withdraws all or part of an appeal or the parties advise the member hearing the appeal that they have reached a settlement of all or part of an appeal, the member may order that the appeal or part of it is dismissed[.]

[10] Prior to making a determination regarding the Appellant's request to withdraw its appeal, and as a matter of procedural fairness, I requested submissions from all parties on the question of whether and why the FST should exercise its discretion to dismiss the appeal in the present circumstances.

[11] The Superintendent and the RECBC, being the party appealing and the original-decision maker, made submissions regarding the withdrawal of the appeal. Based on the FST rules, Mr. Liberatore is a Third Party, being "any other person whose interests will be directly affected by the proceeding". Mr. Liberatore did not provide the FST with any submissions.

[12] The question to be answered is whether it is appropriate for the FST to exercise its discretion to dismiss this appeal in the present circumstances.

DISCUSSION AND ANALYSIS

[13] The RECBC submits that section 242.2(10)(e.1) of the FIA creates discretion for the FST to order dismissal in certain cases. The RECBC further submits that in accordance with the recent decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, discretionary

decisions must be reasonable and “based on internally coherent reasoning and be justified in light of the legal and factual constraints that bear on the decision.”

Should the FST dismiss the appeal under section 31(1) of the ATA?

[14] The Superintendent submits that this appeal should not be summarily dismissed pursuant to section 31(1) of the ATA, as none of the circumstances specifically enumerated in that section apply to this appeal. The Superintendent further submits that if the FST intends to rely on this section for summary dismissal that it should be provided with a full opportunity to respond.

[15] The RECBC makes no submissions about a possible summary dismissal but echoes the Superintendent’s submission that the parties should have the opportunity to respond should this section be relied upon by the FST.

[16] No party has made any submission that the appeal be dismissed based on any of the enumerated circumstances of section 31 of the ATA. I decline to exercise my discretion to dismiss an appeal on the basis of specified circumstances which have neither been raised by any party nor upon which any party is relying.

Should the FST dismiss the appeal under section 242.2(10)(e.1) of the FIA?

[17] The FST is given discretion to dismiss an appeal under this section if either of two events have occurred:

- i. If an appellant withdraws all or part of an appeal, or
- ii. If the parties advise the member hearing the appeal that they have reached a settlement of all or part of an appeal.

[18] In this appeal, both events have occurred. The FST must act in the public interest, in good faith and without favouring or prejudicing any party.

[19] Only the Superintendent and Mr. Liberatore, had a right to appeal the decision at issue under section 54 of the RESA. The Superintendent appealed. Mr. Liberatore did not. The Superintendent has applied to withdraw its appeal and neither the RECBC nor Mr. Liberatore have objected.

[20] The RECBC submits that allowing the withdrawal will not result in undue prejudice to any party. The RECBC points out that the Superintendent is the party seeking withdrawal and will therefore not be prejudiced. Further, the RECBC submits that it is supporting the request for dismissal of the appeal and will not be prejudiced. The RECBC says that Mr. Liberatore benefits from the dismissal of the appeal as dismissal removes the possibility of an increased penalty being assessed against him.

[21] The RECBC acknowledges that dismissal closes the possibility of any party collecting costs of the appeal but advises that it is not seeking costs in this matter. As pointed out by the Superintendent, there will be little to no prejudice to the Respondent and Third Party in allowing a withdrawal and dismissal of this appeal. The appeal process is still in the early stages and the parties have not yet needed

to expend significant time, effort, or money in responding to any submissions from the Superintendent.

[22] Both the Superintendent and the RECBC submit that they will suffer prejudice if the appeal is *not* withdrawn and dismissed, as they have expended time, effort, and money to reach a mutually agreeable resolution of this appeal.

[23] The Superintendent argues that the FST should dismiss this appeal because Mr. Liberatore already waived his right to appeal to the FST; thus the Superintendent is the “only entity that has not waived the right to appeal the consent order, and the Superintendent wishes to withdraw the appeal”.

[24] The FST does not operate as an investigative, prosecutorial, or disciplinary body, but as an independent, adjudicative tribunal making objective decisions on appeals presented to it for determination. Where there is no party requiring or requesting the intervention of the FST, it is not in the public interest for the FST to inject itself in a matter where all parties have had an opportunity to take action and have chosen to settle a matter among themselves without such intervention.

[25] As no party submitted that a dismissal would be prejudicial to it and I have determined that no party would suffer any prejudice, I do not find any reason for not allowing the appeal to be withdrawn.

[26] The only possible rationale for refusing to allow the appeal to be withdrawn would be based on an overriding public policy interest, but I do not find any such interest exists in the present circumstances.

[27] Protecting the public interest is a principal consideration in many of this Tribunal’s decisions, and I find in this matter that the public will best be served by promoting certainty and finality to these proceedings.

[28] The parties to this appeal have resolved their issues by agreement and in this instance I find no reason to interfere in their settlement.

[29] Both events contemplated by section 242(1)(e.1) of the FIA are in play. The Appellant has withdrawn all of its appeal, and the parties have advised me that they have reached a settlement of all of the appeal.

[30] I wish to express my thanks to the parties for their helpful submissions and find no reason not to exercise my discretion to dismiss the appeal.

ORDER

[31] I hereby dismiss the appeal without costs to any party.

“Jane Purdie”

Jane A. G. Purdie, Q.C.
Member, Financial Services Tribunal

July 08, 2020