

FST-08-044

FINANCIAL SERVICES TRIBUNAL
IN THE MATTER OF THE REAL ESTATE SERVICES ACT
S.B.C. 2004, c. 42

BETWEEN:

PETER DALIP ALEXANDER

APPELLANT

AND:

THE REAL ESTATE COUNCIL OF BRITISH COLUMBIA

RESPONDENT

APPEAL DECISION

BEFORE: DALE R. DOAN, Presiding Member

APPEARANCES: Gilligan-Hackett & Company, for the Respondent
Patrick Gilligan-Hackett, for the Respondent
Appellant – Self Represented

APPEAL DECISION

This Appeal (the “Appeal”) to the Financial Services Tribunal (“FST”) involves an individual who was licensed as a managing broker pursuant to the *Real Estate Services Act* who entered into a written contract with a rental property management company that provided for nominal consideration to the managing broker in return for his agreement to act as managing broker for the said company. The individual then ignored all of his duties and responsibilities as a managing broker as set out in the *Real Estate Services Act*, the Regulations of the *Real Estate Services Act* and the Rules and Bylaws applicable to managing brokers as supervised by the Real Estate Council of British Columbia (“Council”). Following notice to Council indicating harm or potential harm having been experienced by an owner of property managed by the property management company, Council investigated that matter and, thereafter, the managing broker activities of the Appellant. In the course of these investigations, it became clear to Council that it had reason to be concerned with the level of compliance with *the Real Estate Services Act*, the Regulations, Council Rules and Bylaws by the Appellant.

A Notice of a Hearing before Council to be conducted pursuant to Section 42 of the *Real Estate Services Act* was provided to the Appellant. This Notice stated that Council would consider whether the Appellant had committed professional misconduct within the meaning of Section 35(1) and/or Section 35(2) of the *Real Estate Services Act*. The Appellant received this Notice and was aware of the Hearing date but chose not to appear or participate in the Hearing process. Following the receipt of evidence by the Discipline Hearing Committee of Council, a decision was rendered on July 18, 2008 (the “Decision”) that held that the Appellant had committed professional misconduct. The Decision imposed no suspension on the Appellant as he was no longer licensed as at the date of the Hearing before the Discipline Hearing Committee, but ordered that the Appellant undertake educational assignments prior to any future applications for licensing. Further, the Appellant was ordered to pay enforcement expenses related to the Hearing before the Discipline Hearing Committee.

ISSUE

This Appeal arises from a Notice of Appeal to the FST by the Appellant dated August 5, 2008 and received by the FST administrative offices on August 8, 2008. It is an Appeal of the Decision. The issue on Appeal centers on the Appellant’s assertion that regardless of the statutory and regulatory requirements imposing duties and responsibilities on licensed managing brokers, the Appellant should not be found to have committed professional misconduct where those duties and responsibilities have intentionally not been complied with by the Appellant in circumstances where he was acting effectively as a “nominee” managing broker for nominal consideration and without any intent or desire to put himself in the position of being capable of fulfilling the said duties and responsibilities.

THE RECORD

The Record in this Appeal consists of the Decision, transcript of the Hearing before the Discipline Hearing Committee of Council, Exhibit 1, The Book of Documents, and Exhibits 2 and 3 presented to the Discipline Hearing Committee.

The Appellant has submitted additional documents with his submissions on the Appeal. The Respondent, Council, has objected to the admission of further evidence in this Appeal. In light of the decision below, it will not be necessary to rule on the matter of additional evidence.

DECISION ON APPEAL

To rule in favour of the Appellant in this Appeal would be to create an absurdity. In effect, the Appellant is asking the FST to give its approval to conduct by a licensed managing broker that is flagrantly contrary to the legislation, regulations and rules governing managing brokers. Further, it would be asking the FST to approve bogus arrangements whereby owners of property may be expected to be harmed by wrongful, fraudulent or even criminal activities that are masked by an appearance of legitimacy due to the managing broker's licensed status.

It is fortunate in this case that the event giving rise to the investigations of Council and the potential harm to the owner of the real property that was being managed by the property management company that had hired the Appellant was rectified. All funds were recovered. This incident is an illustration only of one type of harm that could settle upon an innocent owner of property requiring competent management where a bogus management is established, such as in this case, and thereafter inappropriate or even illegal activities take place.

The duties of a managing broker are clearly established, as stated above, by legislation and rules. Section 6(2) of the *Real Estate Services Act* provides:

“ 6(2) A managing broker licensed in relation to a brokerage acts for the brokerage for all purposes under this Act, and is responsible for

- (a) the exercise of the rights conferred on the brokerage by its license,
- (b) the performance of the duties imposed on the brokerage by its license, and
- (c) the control and conduct of the brokerage's real estate business, including supervision of the associate brokers and representatives who are licensed in relation to the brokerage.

Section 3.1 of Council's Rules provides:

“3.1 (1) Supervision – a managing broker must

- (a) be actively engaged in the management of their related brokerage,
- (b) ensure that the business of the brokerage is carried out competently and in accordance with the Act, Regulations, Rules and Bylaws, and
- (c) ensure that there is an adequate level of supervision for related associate brokers and representatives and for employees and others who perform duties on behalf of the brokerage.

I accept the definition of “active control” as described in *Robert Lennard Pedden v. Real Estate Council of British Columbia* (April 18, 2001 Commercial Appeals Commission CAC – 00009) at

page 9, a decision involving the definition of “active charge” under the predecessor legislation to the *Real Estate Services Act*:

“The commission has previously defined “active charge” as being “present, involved, in control and having the power and information to make final decisions in a timely way” (Nanaimo Realty). The nominee who is an active charge may delegate duties but not abdicate control.....”

The Record in this Appeal supports the findings of Council through its Discipline Hearing Committee and that the Appellant did not meet the statutory requirements for a managing broker. The facts, substantially reiterated by the Appellant himself in his submissions, establish that the Appellant attended the office of the brokerage only occasionally, did not meet or in fact know most of the employees of the brokerage, did not supervise the employees of the brokerage in terms of their property management portfolios or services, had no direct involvement in the investigation of the incident giving the rise to the investigations of Council in the first place, did not participate in the financial matters of the brokerage or review of their books and records, played no role in responding to an audit performed by Council following the incident in question, did not have keys to the brokerage’s offices, nor an office, did not sign cheques or have signing authority on the brokerage’s trust accounts, did not have any direct responsibility for rental buildings and at no time sought active involvement in the office. Yet, he signed the annual financial statements required by the licensing authorities. Further, he accepted remuneration pursuant to his contract with the brokerage.

In passing, it should be noted that the contract with the brokerage did provide for the brokerage contracting with the Appellant for the Appellant’s services as managing broker as defined in the *Real Estate Services Act*. Further, it provided that the Appellant “will perform all tasks assigned to him by Pacifica, acting reasonably, to fulfill his role as managing broker, including but not limited to, signing Pacifica’s Annual Report and Pacifica’s other filings with the Real Estate Council of British Columbia.” The evidence establishes that neither the Appellant nor the brokerage company intended the Appellant to do anything other than sign formal documents.

The Submissions of the Appellant clearly establish the wrongdoing. The Record, and in particular the Decision, provided findings of fact that support the Decision. The standard of review in this Appeal is that of reasonableness, a standard which has been accepted by the FST in its Decision *Real Estate Council of British Columbia v. Bancroft* (FST –08-041) as well as by the Supreme Court of Canada in *Dunsmuir v. New Brunswick* (2008) 69 Admin LR (4th) 1. Nothing in the Record or in the Submissions of the Appellant indicate the Council acted unreasonably in terms of the Decision. In fact, Council reached the only decision possible given the evidence before it. It is illogical and unreasonable for the Appellant to take the position that he was a knowing participant in a scheme that thwarts the legislation, regulations and rules that governs his profession but is not responsible for the consequences of that participation because he turned a blind eye to the scheme, did not make any attempts to put himself in a position where he could comply with his duties and responsibilities, and accepted payment, however nominal, for his participation in the scheme. The public requires protection from such misconduct.

The Decision of Council shall stand together with the Orders of Council as provided in the Decision which includes the requirement that the Appellant pay the enforcement expenses of Council in the sum of \$3,864.00, which the FST orders shall be paid within 60 days of the date of this Appeal Decision or as a condition of licensing in any capacity as determined by Council.

In view of the fact that this Appeal has, in my view, no merit whatsoever, it is further ordered that the Appellant pay \$1,000.00 costs in this Appeal. In view of the financial hardship alleged by the Appellant, it is ordered that this additional costs award be paid by way of installments of \$100.00 each calendar quarter until paid in full, commencing with the first payment effective January 1, 2009.

Prior to concluding, the Respondent has brought to the attention of the FST that Council noted that the Discipline Hearing Committee referred in its reasons to Section 2-8 of the Rules of Council (which intended to refer to Sections 2-18 of the said Rules) but in any event should have referred to Section 40(3)(b) of the *Real Estate Services Act*. The Respondent has applied for a variance of the Decision to substitute reference to Section 40(3)(b) of the *Real Estate Services Act* for the erroneous reference to Section 2-8 of the Rules, and having received no objection from the Appellant with respect to the same, the FST orders that variation of the Decision accordingly.

Respectfully submitted this 21st day of October, 2008



Dale R. Doan LLB
Member Financial Services Tribunal

