FST 05-012
and 05-015

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF
THE *REAL ESTATE SERVICES ACT* S.B.C. 2004, c. 42
And THE *REAL ESTATE ACT* R.S.B.C., 1996, c. 397, as amended S.B.C. 2004, C.42
And IN THE MATTER OF AN APPEAL TO THE FINANCIAL SERVICES TRIBUNAL PURSUANT TO THE *FINANCIAL INSTITUTIONS ACT*, R.S.B.C., 1996, C. 141

BETWEEN:

THE SUPERINTENDENT OF REAL ESTATE

APPELLANT

AND:

REAL ESTATE COUNCIL OF BRITISH COLUMBIA,
CHRYSTALE ASHWORTH and MASTER KEY REALTY LTD.

RESPONDENTS

BETWEEN:

CHRYSTALE ASHWORTH and
MASTER KEY REALTY LTD.

APPELLANTS

AND:

REAL ESTATE COUNCIL OF BRITISH COLUMBIA
and THE SUPERINTENDENT OF REAL ESTATE

RESPONDENTS

APPEAL DECISION

BEFORE:	JOHN E.D. SAVAGE	PRESIDING MEMBER
APPEARING:	RICHARD FERNYHOUGH	FOR THE SUPERINTENDANT OF REAL ESTATE
	BRIAN K. EVANS	FOR THE COUNCIL
	KIRK I. TOUSAW	FOR CHRYSTALE ASHWORTH AND MASTER KEY

I. INTRODUCTION

[1] After a lengthy hearing a Disciplinary Hearing Committee ("DHC") of the Real Estate Council of BC (the "Council") in its decision dated August 5, 2005 found that Chrystale Ashworth ("Ashworth") and Master Key Realty Ltd. ("Master Key") breached various provisions of the *Real Estate Act*, R.S.B.C. 1996, Chap. 397 and the *Real Estate Regulation*, B.C. Reg. 75/61.

[2] In Appeal No. FST-012, the Superintendent of Real Estate (the "Superintendent") filed an appeal against the penalty imposed in the Council's decision. Ashworth and Master Key in Appeal No. FST 05-015 appeal against some, but not all, of the Council's determinations and penalties. Specifically, Ashworth and Master Key appeal against the Council's determination that (1) Ashworth misappropriated funds, (2) Ashworth knew she was not entitled to those funds, (3) Ashworth's managing brokers licence should be suspended for one year, and (4) Ashworth should pay the costs of the Council conducting the investigation and appeal.

[3] In a Preliminary Decision dated December 16, 2005 Member Hall determined that (1) the appeal should proceed by way of written submissions, (2) Appeal No. FST 05-012 and Appeal No. FST 05-015 should be combined and heard at the same time, (3) a stay of the Council's Decision dated August 5, 2005, be revoked and (4) an Application for a Temporary Stay of Ashworth's own appeal be denied. The Preliminary Decision of Member Hall speaks for itself and I will not elaborate further on those issues here.

[4] Since Ashworth's appeal on two of the findings of the Council is material to the question of the appropriate penalty it is logical to deal with those grounds of appeal first, to then deal with the question of penalty, and finally the question of costs.

[5] Briefly, the issue as it relates to the misappropriated funds concerns a trust transfer of $2,230.14 from the Master Key trust account into the Master Key general account on July 26, 2004. This sum represented December 2003 rents held by Master Key on behalf of their former clients, Garry and Dorothy Dean ("the Deans"), and accumulated interest. The property management agreement between Master Key and the Deans was terminated in December, 2003. Ashworth, the sole propriety of Master Key, caused Master Key to make the transfer. Ashworth gave various reasons for making the transfer which are discussed below.

[6] While this brief summary describes the narrow issue as outlined in the appeal, the issues between the Real Estate Council and Ashworth are much larger than this, and are fully recited in the 32 page decision of the Disciplinary Hearing Committee dated August 5, 2005. As the question of the appropriate penalty is related to the entire conduct it is appropriate to include the findings of the DHC here. The adverse findings are summarized as follows:

1. The brokerage, Master Key Realty Ltd. breached section 9.16 of Regulation 75/61 under the *Real Estate Act* in that it failed to have a managing broker in regular attendance at the

brokerage's office and in active charge of the business of the brokerage being conducted in such office both in regard to the transactions which resulted in the complaints and in the general course of business of the brokerage.

2. The managing broker, Chrystale Ashworth, was negligent within the meaning of section 9.12 of Regulation 75/61 under the *Real Estate Act* in that she failed to provide the landlords with a copy of the lease agreements in respect of the three properties in accordance with section 37(1) of the *Real Estate Act*.

3. The managing broker, Chrystale Ashworth, was incompetent within the meaning of section 9.12 of Regulation 75/61 under the *Real Estate Act* in that she:

   (a) Failed to promote and protect the interests of her client, the landlords, in respect of the property at 137 – 27358 32nd Avenue, Aldergrove, B.C. by failing to offer competent property management services in that she failed to provide proper notice to the tenant at the end of his tenancy that it was the landlord's intention to retain the security deposit in accordance with the provisions of the *Residential Tenancy Act*;

   (b) Disregarded an award of an arbitrator under the *Residential Tenancy Act* dated October 6, 2003 to pay to the tenant, Raymond Willey, his security deposit and filing fees;

   (c) Failed to promote and protect the interests of her clients, the landlords, in respect of the property at 303 – 20237 54th Avenue, Langley, B.C. by failing to offer competent property management services in that she failed to provide proper notice to the tenants at the end of their tenancy that it was the landlord's intention to retain their security deposit in accordance with the provisions of the *Residential Tenancy Act*;

   (d) Failed to promote and protect the interests of her clients, the landlords, in respect of the property at 207 – 20237 54th Avenue, Langley, B.C. by failing to offer competent property management services in that she failed to provide proper notice to the tenants at the end of their tenancy that it was the landlord's intention to retain the security deposit in accordance with the provisions of the *Residential Tenancy Act*;

   (e) Disregarded an award of an arbitrator under the Residential Tenancy Act dated October 5, 2001 as amended February 20, 2002 to pay to the tenants, Brenda and Robbie Van Samang, their security deposit and filing fees;

   (f) Failed to be in active charge of the property management business of the brokerage and in regular attendance at the office of the brokerage.

4. Chrystale Ashworth, as managing broker for Master Key Realty Ltd., misappropriated funds in the sum of $2,176.36 which she had received in her capacity as a licensee on behalf of her clients, the Deans, contrary to section 31(1)(a) of the *Real Estate Act*.

[7] The parties filed lengthy written submissions from their respective counsel in both appeals together with books of authorities and transcript references and transcript extracts. A transcript of the hearing in 9 volumes was before me together with books of documents including all of the exhibits filed in the appeal. Further submissions were received in response to an invitation from Member Hall. In preparing these reasons I reviewed all of this material.

II. ASHWORTH'S APPEAL ON THE COUNCIL FINDINGS

[8] At the time, section 17 of the Real Estate Act, RSBC 1996, Chap. 397 read as follows:

> 17. No money may be drawn from a trust account, except the following:
> (a) money paid to or on behalf of a client from funds which have been deposited in a trust account to the client's credit;
> (b) money required for payment to the agent for or on account of services rendered to or disbursements made on behalf of a client from money belonging to the client;
> (b.1) money paid into the consolidated revenue fund under section 17.2.
> (c) money paid into the trust account by mistake;
> (d) money paid under section 59;
> (e) interest paid to the foundation under section 23(2).
> R.S.B.C. 1979, c. 356, s. 16; 1985, c. 16, s. 2; 1998, c. 42, s. 44.

[9] Under section 31(1)(a) the council may inquire into whether a licensee has misappropriated or wrongfully converted trust account monies:

> 31. (1) Whether a complaint is made or not, the council may inquire and, when directed by the superintendent, must inquire whether a licensee has done any of the following:
> (a) misappropriated or wrongfully converted money or other property entrusted to or received by the licensee in his, her or its capacity as a licensee;
> (b) committed a breach of this Act or the regulations or failed to comply with an order of the superintendent;
> (c) misconducted himself, herself or itself as a licensee.

[10] A hearing was held and it was found that there had been a misappropriation of funds by Ashworth.

[11] In Ashworth's submission the grounds of appeal are described thus:

> N. Ashworth maintains that the Council's decision was erroneous and, in total, based on a mischaracterization of the evidence adduced at the hearing. For the purposes of this appeal, however, and without admitting the validity of the other aspects of the Council's decision, Ashworth appeals only from the:
>
> a. The Council's determination that Ashworth misappropriated funds in order to utilize those funds for general office expenses of Master Key.
> b. The Council's determination that Ashworth "knew that she was not entitled to the funds".

[12] Elsewhere counsel for Ashworth characterizes the issue thus:

> 18. Whether, in the absence of direct evidence of any intentional wrongdoing in the record and with no direct evidence of dishonesty or fraudulent conduct, the Respondent Real Estate Council could reasonably conclude that Ashworth "misappropriated" funds contrary to section 31(1)(a) of the Act.
>
> ...
>
> 43. Ashworth submits that when no direct evidence of intentional wrongdoing exists on the record, it is improper for the Council to make inferences on the basis of perceived credibility because credibility is simply not at issue in the absence of conflicting evidence.

[13] The findings of the DHC are found at pages 19-21 of their decision. The finding that is challenged here is that Ashworth misappropriated finds while acting in her capacity as a managing broker.

[14] Ashworth's appeal makes essentially three related submissions to these findings: (1) there is no direct evidence of intentional wrongdoing on the record, (2) that there was an honest belief based on legal advice that she was entitled to utilize the monies, and (3) the record does not demonstrate a dishonest or fraudulent intent.

[15] The Superintendent and Real Estate Council in response say that there is ample evidence, circumstantial and otherwise, to support the findings of the DHC on these points.

III. DEFERENCE TO BE ACCORDED THE FINDINGS OF THE DHC

[16] Appeals to the Financial Services Tribunal are governed by the *Financial Institutions Act*, RSBC 1996, Chap. 141. Appeals to the Tribunal are appeals on the record, although there is authority to receive new evidence in appropriate circumstances.

[17] With respect to analyzing the degree of deference to be accorded decisions such as those of the DHC, the Tribunal has considered the pragmatic and functional approach noted in decisions such as *Law Society of New Brunswick v. Ryan* , [2003] 1 S.C.R. 247 at para. 20, 223 D.L.R. (4th) 577, 48 Admin. L.R. (3d) 33, 2003 S.C.C. 20 and *Bentall Retail Services v. Assessor of Area No. 9 – Vancouver* 2006 BCSC 424.

[18] The pragmatic and functional approach generally affords decisions of inferior tribunals no deference on pure questions of law, where the standard is correctness, but affords greater deference to the decisions of inferior tribunals on mixed questions of fact and law and the highest degree of deference to pure findings of fact on matters within the expertise of a specialist tribunal. Application of the pragmatic and functional approach would tend to give the DHC considerable deference on pure questions of fact relating to matters within their areas of expertise.

[19] With respect to the appropriate standard of review, this Tribunal has considered the pragmatic and functional approach in *The Superintendent of Real Estate v. Real Estate Council of British Columbia & Kenneth Scott Sprong,* FST 05-007 (January 13, 2006):

> The Council relies at some length on the applicable statutory framework to support its position regarding the appropriate standard of review. It advocates the pragmatic and functional approach, and says the patently unreasonable standard should be applied; alternatively, the Council argues for the test of reasonableness *simpliciter.* The factors identified by the Council include the "strongly judicial flavour" of the initial proceeding before the Hearing Committee; the nature of the appeal (i.e. "on the record"); and the Tribunal's narrower powers under the *Financial Institutions Act* as compared to provisions of the *Court of Appeal Act.* The Council

> argues that, even under the reasonableness test, the courts afford a high degree of deference to the original decision maker: see, most recently, *Rainer Zenner* v. *Prince Edward Island College of Optometrists,* 2005 SCC 77 (at para. 43), and decisions cited therein.

[20] While not applying the pragmatic and functional approach, the Tribunal, as it was entitled to do, found aspects of the approach useful in analyzing the standard of review it should apply to the matters before it:

> These and other factors persuade me that the earlier Tribunal decisions are heading in the right direction. The decisions reject the pragmatic and functional approach, but aptly recognize the degree of scrutiny will depend on the nature of an appeal. For instance, where an appeal challenges findings of fact, there should be a greater degree of deference as the original body will have seen and heard all of the witnesses, have been in a better position to assess credibility, and so on: see *Danh Vanh Nguyen and Express Mortgages Ltd., supra,* at p. 9. The deference may well extend to the point of what is sometimes described as requiring a "palpable and overriding error". On the other hand, where an appeal turns on a pure question of law, there should be little (if any) deference, particularly if one accepts the proposition that the purpose of appeal is to ensure the ultimate decision emerging from the administrative decision-making process is correct: see *Pavicic, supra,* at p. 8; and *Plimmer, supra,* at para. 59.

[21] I accept that, in reviewing these questions, I should apply the standard of reasonableness as enunciated by this Tribunal but also by the Courts in considering the statutory review of other professional organizations, such as that enunciated by Mr. Justice Masuhara in *Familamiri v. The Association of Professional Engineers and Geoscientists of British Columbia,* 2004 BCSC 660.

IV. THE DECISION BELOW

[22] As I read the decision below, the DHC found against Ashworth on matters where her evidence conflicted with the evidence of other witnesses (page 25). It also found explanations that she gave lacking in credibility (page 19). This and the evidence regarding the transactions in her account (page 19-20) led to their conclusion that there was an intentional misappropriation of funds in a brokerage trust account. These are, for the most part, factual matters.

[23] Although I have quoted from the reasons of the DHC at some length, it is useful to review the reasoning of the DHC in detail considering whether it erred. As I read the decision of the DHC, it considered a series of explanations given by Ashworth regarding the trust account funds. It measured those explanations against the other evidence before it. It found the evidence of Ashworth not credible after going through that exercise.

A. The Initial Explanation

[24] The first explanation of Ashworth concerned why the trust account funds were not forwarded to her clients. The explanation given was that the funds in her account were held back to cover the liabilities arising from security deposit awards made in

other proceedings. These security deposit awards were made against Ashworth's clients and in some cases Master Key. The DHC had the following observations:

> Ms. Ashworth's evidence was that initially she retained the funds to cover any potential outstanding liability and the Discipline Hearing Committee found that this was understood by all parties to be liabilities arising from the inclusion of Master Key as a party to the *Residential Tenancy Act* proceedings taken by the Van Samangs and Mr. Willey. While Ms. Ashworth suggested in her evidence that the phrase liability was used broadly to include any monies owed by the Deans to Ms. Ashworth, a review of the emails and correspondence at the time of the termination of the property management agreement suggest that the issue was defined by Ms. Ashworth to be whether or not she ought to pay the outstanding *Residential Tenancy Act* awards from the funds that she held in trust on behalf of the Deans.

[25] The DHC found that this explanation was supported by the following evidence:

> This view of the evidence is supported by the letter written by Mr. Berger to Ms. Ashworth on March 31, 2004 (Exhibit 1, Tab 11). There was no suggestion in this letter that Ms. Ashworth's retention of the December rents was anything more than a concern on her part that the brokerage would be held liable to pay the Residential Tenancy awards and if she remitted the monies to the Deans there would be no trust monies to address these liabilities.

B. Use of Funds to Pay General Office Expenses

[26] The DHC found that these monies, however, were never used to pay the Residential Tenancy awards. The funds were withdrawn from trust and applied towards general office expenses. In this regard the DHC accepted the evidence of Mr. Bean:

> The evidence of Mr. Bean was that prior to the transfer of these funds the brokerage's general account balance was $24.85. After the transfer, three general office disbursements were made and on July 31, 2004, five days after the transfer, the balance of the general account was $20.45. It is clear that the brokerage needed funds to cover general office expenses and the Deans' money was used for this purpose.

[27] In his argument before me, counsel for Ashworth asserts that the DHC wrongly concluded that funds were transferred in order that Master Key use them to pay general office expenses. The report of auditor Bean, Ex. 20, notes the following:

> *...My further examination of the July 2004 property management trust and general operating accounts bank statement revealed that instead of paying out the security deposits to the former tenants Ms. Ashworth transferred $2,230.14 (the December 2003 net rent amount of $2,176.36 and accumulated interest earned on the property management trust account of $2,176.36 and accumulated interest earned on the property management trust account of $53.78) to the general operating account on July 26, 2004.**
>
> ...
>
> **Prior to the tranasfer of $2,230.14 the agent's general account balance was $24.85. After three disbursements were made (that appeared to be general operating expenses) the balance of the general account was $20.45 at July 31, 2004.*

[28] Counsel asserts that "Ashworth would have deposited additional funds into the general business account from other sources to cover those business expenses had she not honestly believed she was entitled to transfer the December Rents". I have carefully examined the record and can find no such evidence.

C. The Counsel's Advice Explanation

[29] The DHC then considered another explanation given by Ashworth regarding the use of the funds. The explanation given by Ashworth is reported by the DHC as follows:

> Ms. Ashworth justified her transfer of these funds on the grounds that she had been advised by her lawyer, Mr. Eades, that pursuant to the terms of her contract with the Deans she was entitled to the funds for all of the work she had done in relation to the Residential Tenancy matters and the legal matters for which she had not billed the Deans.

[30] With respect to the explanation that Ashworth acted on legal advice, Exhibits 40 and 41 are letters to Ashworth from Robert E. Eades. Those letters were prepared during the course of the proceedings, after the hearing had commenced. The letters do not describe the facts presented to Eades and on which he gave advice, nor do they indicate when he was consulted, and whether he was informed about the nature of the time charged.

[31] The time charged by Ashworth is shown in Ex. 3 and is detailed in Ex. 44. During cross-examination Ashworth acknowledged that she did not advise Eades that she either charged for or was contemplating charging for visits to her physician. Nor did she testify that she had requested advice on whether she could charge for the time she spent on addressing her regulatory body investigation of her conduct arising from her former client's complaints.

[32] Ashworth's testimony, in part, relating to these matters was as follows (Transcript, Volume 9, page 779-783):

> Q. And you went through – I just – there's a number of items where you're dealing with different people that you've charged for. Because this – the first part occurred in November and December 2003, or the first four entries do, why weren't those included with your December account?
> A. I don't know. I can only guess that. I can't – all the legal things together, but I don't know.
> Q. And if you look at item 2, preparing April 1, 2004 letter to REC, so Real Estate Council, 40 hours, now that's on page 2. So you're billing your client $25.00 an hour for responding to your own regulator who oversees your conduct in the marketplace. Is that fair?
> A. Which page are we referring to?
> Q. I'm at page 2 –
> A. Page 2 –
> Q. – of the statement Exhibit 44. And you're charging your client –
> A. About in the middle of the page?

Q. All right. Now we are talking about a little over three months after the agreement has been terminated, you're charging her 40 hours for preparing letter to the Council.
A. Yes.
Q. In fact you've got a visit to Dr. Shelly Ross for three hours that you charged Ms. Dean for. Can you explain that?
A. I'm assuming it was more than one visit although it could have been that she was delayed or late and that I had charged travel time.
Q. I suggest to you that Mr. Eades didn't say to you that you can charge for going to your doctor or charge for responding to a regulator. He was reading your agreement with your client and saying within the terms of that agreement you can charge for, correct?
A. I can't answer that nor can you, nor can you make an assumption what somebody else was thinking.
Q. Okay. Did he tell you that? Did he tell you, "Go ahead, you can bill for your doctor?"
A. I did not ask him specifically about billing for my doctor. He told me I could bill for anything that was related to the legal matters.
Q. You'll recall that you asked that very lawyer, Mr. Eades, your lawyer, to request a retainer and that Ms. Dean said no. Correct?
A. No. Mr. Eades suggested to me, and I think he states that in his letter, that I should request a retainer from Mr. and Mrs. Dean. Is that not how—
Q. And they refused the retainer, correct?
A. Yes.
Q. Now, doesn't it seem a little illogical to you to pay your lawyer, with whom they have concerns, $2,500 to collect what looks to be perhaps $1,500?
A. I don't understand your question.
Q. Well, it's preposterous, is it not, that Mr. Eades would ask your clients and not then his clients, to pay him $2,500 to attempt to recover security deposits which total approximately $1,500.
A. It wasn't to attempt to recover security deposits. Again you're making an assumption.
Q. Okay, perhaps you could explain it because I'm at a loss then.
A. The $2,500 was a request for a retainer so that he could handle the legal matters related to the property management to represent myself in the legal matters.
Q. Oh, you're suggesting it was to pay $2,500 so that he could help you with the Board and Council matters? Is that what –
A. Yes, that's what the request for the retainer was for.
Q. Okay, I'm sorry, I read that wrong then. So you're asking -- you're aware at that time, you had an altercation with Ms. Dean in your driveway. You're asking her to pay your lawyer $2,500 to help you out. That's ludicrous, isn't it?

A. That's a provision of the property management agreement was that they cover the legal costs and hold me harmless.
Q. But you had consulted with her and you knew that her whole concern was "I don't want you involved in my properties anymore. I don't want you doing anything for me. I want my money back," and she never got it. Correct?
A. Yes.
Q. And I'm just reading your lawyer's letter. Remember this is your lawyer that you had gone to for a period. Second paragraph, last sentence:

"After discussing the facts...
this is Exhibit 40,
"After discussing the facts, I advised you to pay the fees due to you for handling the legal matters related to the file."

So you're suggesting the legal matters are Council, the Board, anything else you may have. Is that what you're saying?
A. Yes.
Q. And you're saying that's what was contemplated when you and the Deans entered into the property management agreement, they would pay for all things after determination, including defending you, correct? Is that what you're saying?
A. Anything stemming from the tenancy, yes.

[33] Frequently during the course of the proceedings Ashworth advised that she was in communication with other counsel concerning her conduct of her own defence. Ashworth was in a position during the proceedings to call Eades as a witness to clarify the advice she received but chose not to do so. The DHC considered Ms. Ashworth's evidence that she had acted on the advice of legal counsel:

> Ms. Ashworth testified that she had transferred the trust funds on the basis of the advice of three lawyers. She offered the letter from Mr. Eades in support of this transfer. There is no evidence before this Discipline Hearing Committee that Mr. Eades reviewed the breakdown Ms. Ashworth created to justify the transfer of the trust funds or that upon a review of that document his advice would have been that she had a legal entitlement to bill the Deans for the items that she billed them for. It is not clear what Ms. Ashworth told Mr. Eades or when she obtained that advice. It is also not clear whether she had already transferred the funds when she saw Mr. Eades or whether she transferred the funds after she saw Mr. Eades. Ms. Ashworth did not call Mr. Eades to give evidence in this regard.

[34] In summary, the DHC found that Ashworth's evidence that she acted on the advice of legal counsel was deficient in a number of respects, all of which were within the power of Ashworth to remedy, but which were not remedied.

[35] The failure to call a witness to testify to a material matter is significant and a fact from which an adverse inference might be drawn: see Cohen, J. *Cranewood Financial Corp. v. Narisawa*, [2001] B.C.J. No. 1566; 2001 BCSC 1126 and cases cited therein, *McTavish v. MacGillivray*, [1997] B.C.J. No. 1719. In my opinion it is appropriate to draw an adverse inference in this case as was done by the DHC.

D. The Statement

[36] The DHC also considered the statement produced by Ashworth which she claimed documented the transfer. This statement was produced, for the first time, during cross-examination. She suggested that the statement justified transfer of these funds to herself:

> The statement she presented during the hearing which broke down the matters for which she was billing Ms. Dean (Ex. 44) had not been produced to the Council prior to the commencement of the hearing and in fact was only produced as a result of questions by the Council's lawyer in cross-examination. Further, the Discipline Hearing Committee noted that Mr. Bean in his evidence stated that he had not been provided with either the Dean statement (Ex. 3) or the breakdown (Ex. 44) when he performed the Office Inspection on September 22, 2004. Ms. Ashworth could not recall the date upon which the breakdown was created. Ms. Dean's evidence was that she had not received any accounting for the trust funds, and had not received any document justifying a transfer of the funds from trust.

[37] The DHC considered this explanation in the context of evidence from Ms. Dean that she had not received any accounting for the trust funds and had not received any document justifying a transfer of the funds from trust. The explanation of Ashworth was not convincing:

> Ms. Ashworth testified that she had sent the breakdown to the Deans but could not provide a date upon or any covering letter which would have accompanied the statement. She stated that because of the break-in she could not be certain as to the address to which she sent the document although she acknowledged that the Deans had not changed their address in the previous year and a half.

[38] As noted by the Respondent Council, Dean testified she never received a copy of the July account, never received any accounting for the trust funds, the account is not dated, no cover letter was produced indicating the account was delivered, the account was not produced to Bean when doing his inspection, Ashworth could not recall when the account was sent, and she was uncertain to what address the account had been sent.

E. The "Services" Charged

[39] The DHC also considered the explanation given by Ashworth concerning what services she had performed for the Deans for which she might be entitled to bill. It did not accept the explanation she gave in the context of the services for which she said she charged.

[40] In this connection, the background is significant. The Deans have terminated their contract with Ashworth and Master Key. In its reasons the DHC referred to some of the evidence regarding events in December 2003 and termination of the property management agreement between the Deans and Ashworth and Master Key:

> Ms. Dean described flying to Vancouver from Pennsylvania at the end of December 2003 specifically to meet with Ms. Ashworth. She went to Ms. Ashworth's office on two or three occasions and knocked on the door. There was no response. On December 30, 2003 she waited in the driveway of Master Key. During that time she called the office on her cell phone a number of times but did not leave a message, as she did not believe Ms. Ashworth would call her back. Finally on December 31, 2003 after the second or third attempt to reach Ms. Ashworth, she noticed that there was a car in the driveway and she knocked on the front door. Ms. Ashworth did not answer, but Ms. Dean, being convinced that Ms. Ashworth was there, sat in her car on a side street and waited until Ms. Ashworth left the premise. She approached Ms. Ashworth and they had a confrontation in front of Ms. Ashworth's office relating to Ms. Ashworth's refusal to communicate with her or return the money or personal articles that she required as a result of the termination of the property management contract.

[41] After terminating the agreement, the Deans made complaints to professional bodies concerning the conduct of Ms. Ashworth. Those complaints and others ultimately resulted in these proceedings. As noted by the DHC:

> While Ms. Ashworth was entitled to be compensated for any *Residential Tenancy Act* matter or legal proceeding under the contract at $25 per hour, expenses relating to professional matters which arise from questions of Ms. Ashworth's competence in performing the services required under the contract after the termination of her contract could not have been intended to be compensable expenses under this clause in the contract. The matters for which Ms. Ashworth purported to bill the Deans related to events that took place after the property management contract had been terminated and to matters arising from the various complaints to Ms. Ashworth's professional bodies about her conduct. The statement included forty (40) hours to compose one letter to the Real Estate Council in relation to these complaints and six (6) hours to attend to her doctor. She billed the Deans for a total of sixty-four (64) hours in relation to matters arising from the complaints to the Real Estate Council and sixteen (16) hours concerning the complaints to the Fraser Valley Real Estate Board. The hours in this statement conveniently add up to approximately the amount Ms. Ashworth held in trust....

[42] With respect to the account that was tendered, Ex. 3 is a short statement. With regard to expenses, it includes an entry for GST and a single entry "Master Key Realty Ltd. Dealing with legal matters related to file 95 hours @ $25.00 per hour $2,375.00".

[43] A breakdown of the account was also produced by Ashworth. The breakdown became Ex. 44. As noted by the DHC, most of what the work included are matters related to Ashworth's responding to the Real Estate Council over complaints of her own conduct, including a single entry for forty hours for a letter, and six hours for visits to a physician.

[44] Ex. 44 was not received by the Deans, there is no cover letter indicating it was sent to the Deans, in fact there is no independent evidence regarding when Ex. 44 was prepared and Ms. Ashworth could not provide a date for its preparation. While the account purported to cover the period from December, 2003, through July, 2004, the breakdown of the account included activities in November of 2003 that should have included in another account rendered for the period ending December 2003.

F. Credibility

[45] I would note that the credibility of evidence from an interested party does not depend on there being no directly conflicting evidence. An adjudicator need not accept the uncontradicted evidence of a party or witness: *Re Munshi Singh* (1914), 20 B.C.R. 243, *Berney v. Bishop of Norwich* (1887), 36 L.J. Ecc. 10 (P.C.), *R. v. Nozaki*, [1926] 4 D.L.R. 955, *Raymond v. Township of Bosanquet* (1919) 50 D.L.R. 560 although the testimony of a single witness, if believed, can found a civil or criminal judgment: *Radford v. MacDonald* (1891) 18 O.A.R. 167, *Vanderbyl v. I.C.B.C.*, No. C906820 Vancouver Registry, May 3, 1993.

[46] I accept that uncontradicted evidence cannot be rejected capriciously. There must be some reason for rejecting it. In considering the credibility of the explanations of Ashworth, the DHC was required to place that evidence in the context of the other evidence before it. In doing so, it effectively applied the *dicta* of O'Halloran, J.A., in *Faryna v. Chorny* [1952] 2 D.L.R. 354 at p. 357:

> Counsel for the appellant further argued that since Shostak remained uncontradicted by evidence when he testified that he did not know the common Ukrainian word for confinement and that he did not know that the woman referred to in the letter referred to Nancy Faryna his evidence ought to be accepted, and in that event he submitted there was in law no publication of the libel. But the validity of evidence does not depend in the final analysis on the circumstance that it remains uncontradicted, or the circumstance that the Judge may have remarked favourably or unfavourably on the evidence or the demeanour of a witness; these things are elements in testing the evidence but they are subject to whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time; and cf. *Brethour v. Law Society of B.C.*, [1951] 2 D.L.R. 138 at pp. 141-2.
>
> If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, and cf. *Raymond v. Bosanquet* (1919), 50 D.L.R. 560 at p. 566, 59 S.C.R. 452 at p. 460, 17 O.W.N. 295. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.
>
> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and those conditions....

[47] As I understand the reasons of the DHC it tested the explanations given by Ashworth against the preponderance of probabilities which a practical and informed person would recognize as reasonable in the circumstances. It found them wanting.

[48] In summary, the DHC did not accept the evidence of Ashworth that a terminated property management agreement entitled her to charge for time she spent responding to the Real Estate Council's investigation of a complaint, and deduct those charges against funds that she held of the former client that had lodged that very complaint to the Council. Nor did it accept her position that she could also charge for time spent going to visit her physician, or that the letters she produced from a lawyer considered or opined on the appropriateness of such expenditures.

[49] In my respectful opinion, considering all of the evidence including the stress of the break-in, and that of the investigatory proceeding, the DHC did not err in its conclusion. Whether the standard of review regarding the finding of the DHC is reasonableness or even correctness, I would not interfere with that finding as I agree with it and find that the evidence supports it.

V. PENALTY

[50] Following its various findings which include findings other than the findings appealed by Ashworth, the DHC imposed a multifaceted penalty. The penalty it imposed was as follows:

A. That Master Key (Ashworth's alter ego) be reprimanded;
B. That Ashworth's managing brokers' license be suspended for a period of 1 year;
C. That Ashworth be required to complete Chapter 2 prior to re-licensing as a managing broker;
D. That Ashworth pay the costs of $13,728.90 plus service costs incurred by the Council as a condition of re-licensure as managing broker;
E. That Ashworth be prohibited from providing property management services without further education;
F. That Ashworth be eligible to be re-licensed as a representative or associate broker.

[51] Ashworth appeals two aspects of this penalty.

[52] Ashworth appeals the suspension of her managing broker's license, arguing that it should be replaced with a six month suspension and imposition of a condition prohibiting her from engaging in property management services for a period of five years. This would be a more "targeted" penalty. She also appeals the award of costs. She says she was denied a proper opportunity to address costs, and suggests that the entire hearing would have been unnecessary but for the conduct of the Council.

[53] The Real Estate Council of British Columbia seeks to support the penalty imposed by the DHC. It says that the penalty falls within the range of what is appropriate and has been imposed in similar circumstances. It takes issue with Ashworth's position on costs, and say that, with a minor adjustment, the DHC award on costs should stand.

[54] In Appeal No. FST 05-012 the Superintendent of Real Estate argues that Ashworth's penalty should be substantially increased. It submits that Ashworth should not be considered for registration as an associate broker for a period of three years and not considered as appropriate as a managing broker for a period of five years. It further submits that Master Key's license should be cancelled and that Master Key should be ineligible for registration for a period of five years. It also argues that the penalty against Master Key should be the same as the penalty against Ashworth. It further argues that Ashworth should be required to pay the expenses of the real estate council and that the apparently conditional order, that those costs be paid as a condition or re-licensing as a managing broker, was inappropriate if not made without authority.

[55] With respect to the imposition of penalties there are at least four considerations, (1) the safety of the public, (2) the deterrent effect of a sentence, (3) punishment of the offender, and (4) reformation of the offender. The primary purpose of legislation governing professionals, however, is the protection of the public: Casey, James, *The Regulation of Professionals in Canada* (Carswell, 2001), *Wong v. Real Estate Council of British Columbia* CAC-0010, July 25, 2003 (Hall), *McKee v. College of Psychologists (British Columbia)*, [1994] 9 W.W.R. 374 (B.C.C.A.).

[56] I accept that, in reviewing the question of penalty, I should apply the standard of reasonableness as enunciated by this Tribunal but also by the Courts in considering the statutory review of other professional organizations, such as enunciated by Mr. Justice Masuhara in *Familamiri v. The Association of Professional Engineers and Geoscientists of British Columbia,* 2004 BCSC 660.

[57] A number of factors may be considered in protecting the public interest, such as deterrence to the member in engaging in further misconduct, general deterrence to other members of the profession, punishment and rehabilitation of the offender, denunciation of the conduct, and the need to maintain public confidence in the profession's ability to supervise the conduct of its members.

[58] Mitigating factors include the offender's attitude since the offence or infraction was committed, the age and experience of the offender, whether the conduct is a first offence, whether there is acceptance of responsibility, whether restitution has been made, and other circumstances indicative that a lesser penalty is appropriate.

[59] The penalty imposed should not be disparate with regard to penalties imposed in other cases: *Wong v. Real Estate Council of British Columbia* 2004 BCAA 120. While some deference should be afforded the decisions of the Professional body as

indicated by decisions such as *Re Superintendent of Financial Institutions and Insurance Council of British Columbia and Richard Jones*, FST06-020 I note that consideration of penalty is something done after the fact-finding has been completed regarding the conduct of the professional. Nonetheless, I accept that in reviewing penalty, I should not interfere with it, if it is reasonable.

VI. MASTER KEY & ASHWORTH

[60] The Superintendent of Real Estate argues that the penalty against Ashworth and against Master Key should be similar. In this case the office of Master Key was in the residence of Ashworth. Ashworth was the directing mind of Master Key. Ashworth was the only employee of Master Key when the matters in issue arose. According to the submissions of counsel, Ashworth is as of the date of the submissions the only employee of Master Key.

[61] As counsel for the Council indicates, the range of penalties for brokerages, when wrongdoing involves trust funds, varies from a reprimand to suspensions and cancellation: *Re Wendy Margot Cook & Real Estate Council of B.C.*, October 15, 1997, *Re Wendy Margot Cook & Real Estate Council of B.C.*, CAC-9718, April 1, 1998, *Re Ronald David Hall et. al.*, October 2, 1991, *Re Ronald David Hall & Real Estate Council of B.C.*, CAC-9113, November 28, 1991, *Ronald David Hall v. Real Estate Council of British Columbia*, B.C.C.A., No. CA05018, *Re Marchi & Real Estate Council*, October 16, 1995, *Re Paragon Properties Inc. and Alfred Albert Marchi* CAC-9512, May 24, 1996, *Re Margaret Philomen Penner & Everett Realty Ltd.*, February 18, 1988, *Re George Edward Denning*, CAC-9518, October 11, 1996.

[62] In these circumstances, however, I agree with the submissions of the Superintendent of Real Estate that it is an artificial distinction to not attribute the actions of Ashworth to Master Key and incorrect not to impose, where appropriate, similar penalties on the alter ego corporation as was done in *Re Karim, Bongiovanni, and International Business Brokers (1996) Ltd. & Real Estate Council of British Columbia*, February 26, 2002.

[63] It is therefore appropriate here that the period of suspension of Ashworth as a managing broker and Master Key as a brokerage be commensurate.

VII. PERIOD OF BROKERAGE SUSPENSION

[64] There are varying submissions on the range of penalty appropriate for the suspension or cancellation of Ashworth's brokerage licence. The DHC suspended the licence for a period of one year, with a condition on lifting the suspension that the hearing costs be paid and that Ashworth undergo further education. The

Superintendent argues that Ashworth should lose both of her licenses for periods of three and five years.

[65] The most serious findings against Ashworth concern the misappropriation of trust funds although there are other serious findings regarding competence and the alteration of documents that are of very significant concern.

[66] I agree with the Superintendent that this is a most serious matter and in the context of disciplinary proceedings by the Law Society of BC has resulted in disbarment: *Re "A" Law Society of British Columbia* (1962), 36 D.L.R. (2nd) 77, *Law Society of British Columbia v. Peters*, [2002] L.S.D.D. No. 10; *Law Society of British Columbia v. Kierans*, [1999] L.S.D.D. No. 34.

[67] In the context of the *Real Estate Act*, misappropriation of funds has resulted in suspensions or cancellations ranging from six months to five years or more: *Re Barfoot & Real Estate Council of British Columbia*, October 16, 2003, *Re McClean, et. al. & Real Estate Council of British Columbia*, August 11, 1997, *Re Khosla & Real Estate Council of British Columbia*, [2002] B.C.C.O., No. 11.

[68] In considering the appropriateness of the penalty imposed by the Council I am entitled to consider not only the seriousness of the allegations alleged, but also the previous conduct of the licensee, whether funds have been repaid, and any other mitigating circumstances that might have arisen, such as Ashworth's undiagnosed medical condition.

[69] In my opinion, the most serious conduct arose after the break-in at the licensee's place of business as well as during a period of time where the licensee had an undiagnosed medical condition that according to her physician impacted her decision making. I am also cognizant that prior to these occurrences the licensee had an unblemished record as an agent and broker, although she is not lacking in experience or sophistication. Ashworth must accept responsibility for her actions, and has yet to fully do so.

[70] In addition to these factors, however, are very serious matters which are not contested here. In the conduct of the proceedings below Ashworth intentionally forwarded to the Council documents she had altered. The purpose of the alteration, as found by the Council, and not disputed here, was "so that the Council would not be aware that she had tried to influence the withdrawal of the tenant's complaints". These actions were planned and deliberate and were done in connection with two different complainants. The Council in its consideration of penalty did not discuss or review this latter matter which, arising as it did during the course of the Council's investigatory process, must be considered particularly apposite. Nor did it properly weigh, in my opinion, the consequences of the findings that it made with regard to the misappropriation of funds, the various explanations that Ashworth gave and that it rejected, and her lack of credibility.

[71] The documents that Ashworth altered were releases signed by tenants that complained to the Council concerning the treatment of their security deposits. Two tenants that had entered into lease agreements with the Deans paid security deposits to Master Key. On their departure as tenants a dispute arose concerning the treatment of those deposits which ultimately resulted in arbitrators awards in their favour. They had received awards by Arbitrators under the *Residential Tenancy Act*. Ashworth advised her clients to ignore these awards. The proceedings are fully described in the reasons of the DHC and need not be further described here, but do not reflect well on Ashworth. Ashworth ultimately paid those awards and presented the tenants with releases that included a provision that the tenant withdraw their complaints to the Real Estate Council and the Fraser Valley Real Estate Board. Two tenants, Willey and Briscoe, refused to withdraw their complaints and crossed out the offending clause before signing the documents.

[72] In the course of the Real Estate Council investigation Ashworth presented releases to the Council from these two tenants, Willey and Briscoe. At the hearing before the Real Estate Council the tenants were presented with the releases Ashworth had provided to the Council. The releases did not contain the crossed out clauses.

[73] It was apparent that Ashworth had altered the documents she presented to the Council by removing or 'whiting out' the crossed out clauses. In Briscoe's case "the last phrase has been removed from the document and his signature appeared to be touched up so that the removal of that line is not obvious" (page 12 Decision, see Briscoe Settlement Exhibits 23, 25 and Willey Settlement Exhibits 18, 19). In my opinion the penalty considered by the DHC did not consider these aggravating matters. Asworth's explanation for this conduct was rejected by the Council in finding that it was done with the intention to mislead.

VIII. LICENSEE AS REPRESENTATIVE OR ASSOCIATE

[74] The Superintendent argues that the provision of the Disciplinary Hearing Committee that Ashworth be immediately eligible to be licensed as a representative or associate broker be set aside and that a three year period of suspension or licence cancellation be imposed in addition to a five year suspension of the broker and brokerage license. While I might agree with the Superintendent were the matter one of first impression, the penalty must also be placed in the context of what has occurred in other disciplinary proceedings.

[75] The Superintendent in seeking an increased penalty relies on a number of authorities. In *Karim v. Real Estate Council of British Columbia*, [2002] B.C.C.O. No. 9, the Real Estate Council imposed a three year cancellation of a salespersons licence with ineligibility to apply for registration for three years. Despite overturning some negligence findings the Commission on appeal upheld the cancellation and ineligibility. The amount misappropriated was $9,975.

[76] In the course of its reasons in *Karim* the Commission noted that the conduct was "most grave", that the appellant did not express any "genuine remorse" and that the finding of credibility reflected adversely on his "personal integrity when dealing with the public in the future". Ashworth seeks to distinguish this case on the basis that in *Karim* one was dealing with a "clearly intentional act" however the findings of the Council in this case are ones that in my view show that Ashworth both misappropriated the funds and acted in a way to intentionally deceive the Council concerning her conduct. Moreover, she provided explanations that sought to excuse her conduct but those were not credible in the eyes of the Council.

[77] The Superintendent also refers to a decision of the Real Estate Council in *In the Matter of the Real Estate Act and Dimor*, August 11, 1997. In that case the Council ordered that Dimor's licence be cancelled and he not be reconsidered for licencing for five years. The misappropriation in *Dimor* involved the sum of $2,000. Ashworth distinguishes this case on the basis that the licensee lied about the trust account, did not appear at the hearing or make any defence. In such circumstances it can be assumed that there were no mitigating factors, but in general the absence of one party reduces the assistance the decision might have, although the conduct has some parallels to the present case.

[78] Another case referred to but not relied on by the Superintendent is *In the Matter of the Real Estate Act and Barfoot*, October 16, 2003. In that case a licence suspension of one year was imposed. Barfoot was remorseful and contrite and the conduct was found to be an isolated event such that public protection was not a major concern. Ashworth characterizes this as continuing misconduct over a five year span involving intentional and knowing wrongdoing where Barfoot concealed his conduct from his broker. Barfoot, however, admitted to all of the wrongdoing found by the Council which stemmed from his involvement in property management without a license. In this case Ashworth did not admit to wrongdoing and sought to conceal matters from the Council.

[79] Ashworth refers to the decision of the Council in *Margaret Philomen Penner*, February 18, 1988. That case involved an unlicensed property management company. There was a trust shortage of $36,000 but that was reduced to $12,000 at the time of the hearing. A six month suspension was imposed with conditions of licensing. The decision is short and simply makes findings and imposes a penalty without any supporting reasons or reference to previous decisions. It is not a reasoned decision and cannot be usefully compared to the situation here.

[80] Another case reference by Ashworth is the decision of the Council and then the Commercial Appeals Commission in *Re Marchi & Real Estate Council*, October 16, 1995, *Re Paragon Properties Inc. and Alfred Albert Marchi* CAC-9512, May 24, 1996. In that case the Council found there was misappropriation and ordered some re-education and suspended the licence of Marchi for a period of three years, but after the nominee licence was suspended for 180 days Marchi was eligible for

licensing as a salesperson. On appeal the Commission eliminated the suspension period as a salesperson and reduced the nominee suspension to eighteen months.

[81] With respect to the *Marchi* decision, I agree with the Superintendent that the Council and Commission appear to have been of the view that the conduct in issue did not reflect adversely on the character of Marchi. In Marchi there was a "climate of righteous indignation". That was because Marchi had done substantial work in a land assembly for which he thought he should be paid, at least on a *quantum meruit* basis. Albeit wrongly, the Council accepted that Marchi "believed that there was a legitimate basis for being paid out of the remaining funds held in trust". While the Council accepted that Marchi had this belief, the belief "did not establish any lawful authority to withdraw those funds".

[82] In *Marchi* the Commission held that unless there was an agreement with the client to pay, or an authorization by the client to use the trust monies to pay the agent, the agent could not rely on section 16(b) of the *Real Estate Act* to assert a claim in *quantum meruit*. Notwithstanding this finding, the Commission clearly accepted Marchi's evidence that he believed he was entitled to the funds. In the case before me Ashworth's deducting from trust funds charges for her time in attending a physician and for the hours she spent responding to her former client's complaints did not give rise to a similar finding. Indeed, Ashworth's evidence on this point was not accepted by the DHC.

[83] Ashworth also refers to the case of *Wendy Margot Cook*, April 1, 1998 CAC-9718 a decision of the Commercial Appeals Commission. While this case involved the improper withdrawal of trust funds, the findings against Cook are only that she was negligent. Cook at the time was recovering from injuries sustained in an automobile accident. The Council found that she delegated all accounting functions to another agent and "was not in active charge of the business", hence her negligence: *Wendy Margot Cook*, October 15, 1997, File #87-96. The Council cancelled the licence and found that there should be no further application for re-licensing as a nominee for a period of 5 years but that she should be eligible for licensing as a real estate salesperson upon application. On Appeal to the Commission the penalty was modified to provide that Cook could apply to be licensed as an agent but confirmed the ineligibility to be licensed as a nominee for five years. In my opinion the case is not helpful or comparable to the present case as the finding was only that Cook was negligent.

[84] In *Geraldine Rose Ablitt*, Consent Order, March 11, 2004, a nominee admitted to being to being negligent in the handling of trust funds. The nominee license was suspended for a period of 14 days although she was made immediately eligible for re-licensure as an agent. In this case the finding was again in negligence and not misappropriation and is therefore not comparable to the present case.

[85] In *Simeon Driscoll & Edward Bruce Conover*, June 5, 1995 CAC-9418, the Commercial appeals division upheld a suspension of Conover's license for a period

of 120 days. There was a collapsed transaction and by virtue of the initial trust conditions the purchaser continued to have a claim against the deposit and the deposit continued to be a stake. Conover considered that the money belonged to the vendor and he therefore had a claim for commission against it.

[86] The Commission found that Conover had adjudicated the dispute and ignored the competing claim of the purchaser, thereby mishandling the trust funds and misconducting himself within the meaning of section 20(1)(c) of the *Real Estate Act*. The Commission upheld the 120 day suspension. I agree with the Superintendent that there was no finding in *Conover* that he knew he was not entitled to the funds in question. As noted by the Real Estate Council, there was no misappropriation finding in this case which distinguishes it from the present case.

[87] In the circumstances, I cannot agree that findings of misappropriation, in circumstances such as these, have given rise to anything less than periods of suspension of both licenses. Moreover, in my opinion there is the aggravating factor that Ashworth was prepared to alter and submit altered documents to the Council in order to mislead them in their investigation, and Ashworth's whole course of conduct in dealing with the complaints of her clients and their tenants. The "explanations" Ashworth gave concerning her conduct were found not to be credible and the Council quite rightly rejected them. Nor has Ashworth expressed remorse.

[88] A finding of misappropriation is not either a "technical" or minor breach of the *Real Estate Act*: *Ronald David Hall v. Real Estate Council of British Columbia*, CA015018, Vancouver Registry, B.C.C.A. Nor, might I add, is the intentional alteration of documents done to mislead a professional regulatory tribunal during disciplinary proceedings a technical or minor matter, reflecting as it does, on both the character of the licensee and the attitude of the licensee to their own regulatory body. In these circumstances, in my opinion, a period of suspension of both licenses is the only reasonable conclusion.

[89] While it is tempting to refer this matter back to the DHC, in my opinion the parties would not be served by multiplying proceedings in this matter. While legislation establishing the Real Estate Council, and other such organizations, created such bodies with a view to them applying their own special expertise to the issues before them, that special expertise extends less to the consideration of penalty in circumstances such as these than to the findings of what constitutes negligence or inappropriate conduct. Moreover, the authority of this Tribunal when determining an appeal is to confirm, reverse or vary a decision under appeal.

[90] In the circumstances, I order that Ashworth's and Masterkey's brokerage licenses are suspended for a period of three years and that Ashworth is not eligible to be licensed as a representative or an associate broker for a period of 16 months. Ashworth and Masterkey are to be given credit towards those suspensions for any period of time during which they have not been engaged in real estate practice.

IX. AMOUNT AND ENTITLEMENT TO COSTS

[91] The DHC found that Ashworth and Master Key were jointly and severally liable for costs in the amount of $13,728.90 plus "service costs". The rationale for imposing costs in professional disciplinary proceedings was described in *Hoff v. Pharmaceutical Assn. (Alberta)* (1994), 18 Alta. L.R. (3d) 387, [1994] A.J. No. 218 (Q.L.) (Q.B.) at ¶25, as follows:

> The imposition of an obligation on the [professional found guilty of professional misconduct] to pay the [Association's] costs of the proceedings is substantial - something in excess of $22,000.00 - and the appellant asks that this sum be cancelled or reduced. Of this amount legal fees account for about one-half. The respondent's out of pocket expenses for transcripts, travelling costs, etc. make up the balance. As a member of the pharmacy profession the appellant enjoys many privileges. One of them is being part of a self-governing profession. Proceedings like this must be conducted by the respondent association as part of its public mandate to assure to the public competent and ethical pharmacists. Its costs in so doing may properly be borne by the member whose conduct is at issue and has been found wanting. Appellant's request for cancellation or reduction is accordingly refused.

[92] This statement has been recently approved in British Columbia in *Familamiri v. The Association of Professional Engineers and Geoscientists of British Columbia,* 2004 BCSC 660.

[93] With respect to costs Ashworth argues that she should not be charged with costs at all because of what transpired during pre-settlement hearing negotiations and delays which are the responsibility of the Council. My review of the transcripts, evidence and submissions does not support that contention.

[94] In considering the issue of costs one must start with the proposition that Ashworth was entitled to mount a vigorous defense. Notwithstanding that, I agree with the submission of Counsel for the Real Estate Council and Counsel for the Superintendent that the record does not show that responsibility for hearing delays resided with the Council or that Ashworth was prepared to make admissions concerning the breaches found by the DHC such that the hearing need not proceed. Ashworth frequently requested and received adjournments or indulgences to allow the later cross-examination of witnesses, such as with witness Willey (Transcript, Vol. 1, page 94), and although she said she was prepared to accept facts concerning the events about which he and other witnesses testified, she sought in her own evidence and in her cross-examination of those witnesses to controvert their evidence (Transcript, Vol. 1, page 88).

[95] As I read the transcript, Ashworth requested and received adjournments to better able her to present her case and cross-examine witnesses or reduce issues in the hearing (Transcript, Vol. 1, pages 172-182) although at times when offered an adjournment she chose to proceed to cross-examine, such as with Witness Dean

(Transcript, Vol. 1, page 190). Ashworth argued various motions for adjournment, even where witnesses were available and long anticipated, made an application to dismiss the proceeding which included various unproven allegations, made a motion to have the hearing panel recuse itself, etc. (Transcripts Vol. 1, 3, 4, 5, 6 & 7). Significant time was spent dealing with documents that Ashworth had wrongfully altered (Transcript Vol. 7, Ex. 16, 17, 18, 19, 23, 24, 25).

[96] With respect to the submission that Ashworth was prepared to make admissions, at the outset of the hearing, that would have substantially reduced hearing time, Ashworth advised the Council in introducing her case that "it appears that the information provided by myself to the council has been completely ignored" and that "The reply and supporting documents clearly and irrevocably vindicate myself and Master Key Realty Ltd. of any wrongdoing" (Transcript, Vol. 1 page 12). The reply document was introduced as an Exhibit at the commencement on Ashworth's testimony, Ex. 39. The reply does not admit facts but controverts them.

[97] This position was maintained through the hearing and re-iterated in making final submissions when she stated "My summation as far as verdict goes is very simple. There is no wrongdoing" (Transcript, Vol. 9, page 861). That position was reiterated "I don't feel that there has been wrongdoing on my part" (Transcript, Vol. 9, page 866) with some emphasis "And I would also be putting you on notice that I will be filing a complaint with the Law Society against Mr. Evans and I will also be investigating other avenues to be compensated for my losses in this whole situation" (Transcript, Vol. 9, page 866). In this proceeding Ashworth has appealed only two aspects of the decision of the Disciplinary Council that found these allegations and others were proven.

[98] With respect to costs, as noted by the Council, only 8 of 9 hearing days were charged, travel expenses of witnesses were not included, relatively nominal preparation time for counsel was provided for, charges regarding Ashworth calling counsel to testify were not included, extra costs regarding the re-attendance of witnesses were not charged, and transcript costs were not charged.

[99] As noted by the Council, with one exception, there was no real divided success since only lesser, arguably included charges, were dismissed. The Council is prepared to waive its service costs. In the circumstances, the order for costs is varied to provide that Ashworth and Master Key are jointly and severally liable for costs in the amount of $13,728.90.

[100] I would also vary the award regarding the payment of costs. Arguably, the original order provided only that Master Key and Ashworth were jointly and severally liable for costs which were payable within one year from the date of the decision "as a condition of" Ashworth re-licensing as a managing broker.

[101] I agree with the position of the Superintendent that if it were intended that the costs were only payable as a condition of re-licensing, that this be varied to provide that

the costs are payable in any event and that payment in full is a condition of re-licensing.

X. SUMMARY

[102] In the circumstances, the appeal of Ashworth is dismissed. The appeal of the Superintendent is allowed in part. The period of suspension of Ashworth's brokerage license and that of Master Key is set at three years. The finding that Ashworth is immediately eligible to be licensed as a representative or associate broker is set aside and period of suspension of 16 months is substituted. Master Key Realty Ltd. and Chrystale Ashworth are jointly and severally liable for the costs in the amount of $13,728.90. These costs are payable within one year from the date of this decision. While these costs are payable in any event, payment of these costs are a condition of Ashworth's re-licensing, after the suspensions noted above. The other orders of the DHC concerning the education requirements are confirmed.

XI. COSTS OF THESE APPEALS

[103] With respect to these appeals, I have considered the question of costs. Ashworth was wholly unsuccessful in her appeal. The Respondent Council is entitled to its costs against Ashworth which I fix at $2,000. The Superintendent sought costs against the Council on the issue of penalty. The Superintendent has been largely successful and is entitled to its costs against the Council which I fix at $2,000.

John E. D. Savage
Member Financial Services Tribunal
January 31, 2007