

**FST Judicial Review Update: FST Appeal Case 06:033: Mr. Peter
Lawrence Buchanan**

This FST decision was **quashed and sent back to the Tribunal by BC Supreme Court Justice, the Honourable Mr. Justice Curtis, in his decision dated December 10, 2007.**

For more information, please see the Active Appeals, Decisions and Judicial Reviews on the FST's website at www.fic.gov.bc.ca/fst or search for the decision by name on the BC Supreme Court's website at <http://www.courts.gov.bc.ca/sc/sc-jdbwk.asp>

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

BETWEEN:

PETER LAWRENCE BUCHANAN

APPELLANT

AND:

THE REAL ESTATE COUNCIL OF BRITISH COLUMBIA
(the "Council")

RESPONDENT

BEFORE: ROBERT J. HOBART PRESIDING MEMBER

APPEARANCES: GERHARD A. PYPER FOR THE APPELLANT
 FRITS VERHOEVEN FOR THE RESPONDANT
 RICHARD FERNYHOUGH FOR THE SUPERINTENDENT OF
 REAL ESTATE

DATE OF LAST
SUBMISSION: MAY 18, 2007

DATE OF DECISION: MAY 22, 2007

INTRODUCTION

On November 2, 2006, the Discipline Hearing Committee of the Real Estate Council ("Council") released its decision in the matter of Mr. Peter Lawrence Buchanan and Mr. Ernest James Mansley. The decision reached by the Council was the result of two days of hearings including September 19th and September 20th, 2006. The Discipline Hearing Committee members were Ms. A. Petrone (Chair), Mr. A Ghouri and Mr. M. Cowe.

The Hearing was the result of a complaint filed with the Council by Lubomira Cermakova and Jaroslav Cermak against Mr. Buchanan regarding the sale of a strata property located at 1908 Purcell Way, North Vancouver, British Columbia. A brief summary of major events regarding this sale is as follows.

- The sellers meet with Mr. Buchanan one or two weeks prior to March 31, 2005.
- The sellers sign a listing agreement with Mr. Buchanan dated March 31, 2005 offering the property for sale at \$399,500. Mr. Buchanan was not present during the signing as he was on vacation. He was represented by Mr. Tim Ayers, a licensed colleague of Mr. Buchanan.
- The sellers complete a property disclosure statement dated March 30, 2005. Mr. Buchanan is not present when the property disclosure statement is completed and signed by the sellers. Mr. Tim Ayers was present during the signing of this statement. The property disclosure statement indicates that monthly maintenance fees for the strata unit are \$188 and that there is a special levy of \$93 per month. These amounts turn out to be incorrect. However, there is no evidence that there is any attempt to deceive by the sellers. The error appears to be an honest mistake.
- An offer for the property for \$393,000 is received on April 4, 2005. Mr. Buchanan advises the sellers that they are responsible for the special levy of approximately \$5,000 (the monthly payment times the number of months that the special levy will be in place). This will reduce the proceeds from the sale for the sellers and they make a counter offer of \$400,000. The counter offer is not accepted.
- An offer for the property for \$393,000 is received on April 19, 2005 from the same purchaser. The sellers accept the offer and accept that they are responsible for the special levy. An addendum to the contract of purchase and sale includes a handwritten term which states "specifically, the current special levy to be credited to the buyer by the seller in excess of \$5,000". This was added to the contract by Mr. Buchanan. The closing date for the contract is May 10, 2005 with an adjustment date of May 12, 2005.
- Mr. Buchanan requests the sellers to provide the minutes of Strata Corporation meetings and the Form B Certificate required under the *Strata Property Act*. The sellers comply with this request but the precise date on which Mr. Buchanan received these documents is not entirely

clear. It is clear, however, that they were received by Mr. Buchanan at least several days before the closing date. The minutes of the Strata Corporation meeting of October 13, 2004 indicate that the resolutions for a special levy were defeated. Rather the Strata Corporation passed a resolution to increase monthly maintenance fees to fund its renovations. The Form B Certificate indicates that there is no special levy in place and that the monthly strata fees are \$288.20.

- The sellers meet with a notary on or around May 12, 2005 for the purpose of completing the sale. The notary informs the sellers that the Form B Certificate indicates that there is no special levy. This is confirmed with a representative of the Strata Corporation through a telephone call made from the notary's office. This is the first time the sellers become aware that there is no special levy. They telephone Mr. Buchanan and he indicates that he is not prepared to go back to the purchaser to discuss this issue. He does not suggest that the sellers seek legal advice on this issue.
- The sale takes place as per the terms of the offer dated April 19, 2005. An amount of \$5,500 is credited to the purchaser regarding the special levy.

The complainants argue that Mr. Buchanan acted in less than a professional manner in that he failed to verify certain facts with respect to the monthly maintenance fees payable and the existence of a special levy. They further allege that they were required to credit back to the buyer an amount of \$5,500 for a special levy which did not, in fact, exist.

Mr. Buchanan argues that he relied on the facts that were provided to him by the sellers. He further argues that the transaction was completed as agreed to by both the purchaser and the sellers in the contract that was signed by both.

It is noteworthy that the Hearing into this matter was originally scheduled for May 17th and 18th 2006 but was postponed at the request of Mr. Buchanan. It is also noteworthy that during the Hearing itself, Mr. Buchanan requested a further postponement on two occasions.

First, Mr. Buchanan requested a postponement on the grounds that the complainants would use information gathered from the Hearing in support of civil action that the complainants had brought against him. The Discipline Hearing Committee rejected this request. The Chair of the Committee indicated that the general policy of the Council was not to place matters in abeyance when there were collateral civil proceedings. Moreover, the Chair expressed concern that granting the request could be prejudicial to the Council's process given that the request was made in the middle of the cross-examination of a major witness.

Mr. Buchanan also requested a postponement of the Hearing on the grounds that he was unable to obtain certain evidence that was important for his defense. This evidence consisted of the Notice for the October 13, 2004 special general meeting of the Strata Corporation, the Notice for the December 14, 2004 annual general meeting of the Strata Corporation and two pages of meeting minutes that were missing from annual general meeting of the Strata Corporation. The remaining pages of the minutes were included as an exhibit for purposes of the Hearing. During the course of the Hearing, the

Council was able to obtain each of these documents. Rather than postpone the Hearing, the Discipline Hearing Committee was prepared to allow Mr. Buchanan 15 minutes to review the documents and give any evidence as to how the documents would affect the allegations that had been made. Mr. Buchanan declined this offer.

FINDINGS AND DECISION OF THE DISCIPLINE HEARING COMMITTEE

The Discipline Hearing Committee examined a number of issues with respect to Mr. Buchanan as outlined in the Notice of Hearing.

- (a) Whether Mr. Buchanan failed to determine:
- i. The amount of the monthly maintenance fees payable by the owners of the strata lot;
 - ii. Whether there was a special levy imposed by the strata corporation in respect of the strata lot, and, if so, the amount of the special levy.

The Discipline Hearing Committee did not accept Mr. Buchanan's assertion that he had no responsibility to ensure the facts provided by the sellers were accurate. The Licensee Practice Manual (5th Edition) 2003 indicates that licensees should obtain and check all information with respect to properties involved in transactions. For this reason the Discipline Hearing Committee found that Mr. Buchanan failed to make a proper determination with respect to both the monthly maintenance fees and the special levy. As a result, the Discipline Hearing Committee decided that Mr. Buchanan was negligent within the meaning of section 9.12 of Regulation 75/61 under the former *Real Estate Act*.

(b) Whether Mr. Buchanan failed to prepare a Contract of Purchase and Sale clearly setting out the respective responsibilities of the buyer and of the sellers with respect to the price to be paid for the property and, in particular, any adjustment in the price relating to monthly strata fees or special levies.

The Discipline Hearing Committee found that the clause "the current special levy to be credited to the buyer by the seller in excess of \$5,000" was vague, inaccurate and could have rendered the contract unenforceable, particularly when there was no special levy. As a result, the Discipline Hearing Committee decided that Mr. Buchanan was incompetent within the meaning of 9.12 of regulation 75/61 under the former *Real Estate Act*.

(c) Whether Mr. Buchanan inserted the following clause in an addendum to the Contract of Purchase and Sale specifically, "the current special levy to be credited to the buyer by the seller in excess of \$5,000" when there was no such special levy.

The Discipline Hearing Committee dismissed this allegation in light of the finding with respect to paragraph (b) of the Notice of Hearing.

(d) Whether Mr. Buchanan failed to accurately advise the sellers as to their obligations concerning payment for the monthly maintenance fees for the strata lot.

The Discipline Hearing Committee dismissed this allegation in light of the finding with respect to paragraph (e) of the Notice of Hearing.

(e) Whether Mr. Buchanan failed to advise the sellers that there was no special levy on the property.

The Discipline Hearing Committee found that Mr. Buchanan had an obligation to inform his clients after he discovered that the facts contained in Form B differed from the facts upon which the parties had proceeded. As a result, the Discipline Hearing Committee decided that Mr. Buchanan was incompetent within the meaning of 9.12 of regulation 75/61 under the former *Real Estate Act*.

(f) Whether Mr. Buchanan advised the sellers that they were obligated under the terms of the Contract of Purchase and Sale to credit the buyer for a special levy in the amount of \$5,500.

The Discipline Hearing Committee found that Mr. Buchanan was incompetent within the meaning of 9.12 of regulation 75/61 under the former *Real Estate Act* when he advised the vendors that they were obligated to pay the special levy when he had not ascertained the true state of affairs which was that there was no special levy.

(g) Whether Mr. Buchanan failed to advise the sellers to obtain legal advice concerning their obligations, if any, to credit the buyer for an amount in relation to the special levy referred to in the Contract of Purchase and Sale Addendum.

The Discipline Hearing Committee found that Mr. Buchanan was negligent within the meaning of section 9.12 of Regulation 75/61 under the former *Real Estate Act* in that he failed to advise the sellers to obtain legal advice with respect to whether they were legally obligated to pay the special levy in full or in some portion and with respect to the conflict between what the clients believed to be the state of affairs and what the strata meeting minutes and the Form B Certificate revealed. The Committee also felt that Mr. Buchanan did not appear to understand that the responsibility for the special levy could be subject to negotiation between the parties to a transaction.

The Discipline Hearing Committee ordered the following sanctions and remedial measures with respect to Mr. Buchanan.

1. Mr. Buchanan is suspended for a period of thirty (30) days.
2. Mr. Buchanan, as a condition of continued licensing, is required to successfully complete the disciplinary education assignments applicable to Chapter 10 (The Law of Contracts) and Chapter 11 (Contracts for Real Estate Transactions) as provided by the Real Estate Division of the Sauder School of Business at the University of British Columbia.
3. Mr. Buchanan, as a condition of continued licensing, is required to enroll and attend the following CPE courses:
 - What Realtors Need to know about Agency;
 - Condo 101: Strata Law for Realtors;

- Condo 202: Advanced Strata Law for Realtors;
- Professionalism It Pays! Be Safe or Be Sued.

4. Mr. Buchanan is required to work under the supervision of his managing broker with reports from the managing broker to the Council every sixty days for a period of one year including updates on his educational activities and anything of an adverse nature relating to Mr. Buchanan.

5. Mr. Buchanan, as a condition of continued licensing, is required to pay enforcement expenses in the amount of \$4,006.60 to the Council within 60 days of the decision.

EVENTS AND SUBMISSIONS OF THE APPEAL

Original Notice of Appeal

A Notice of Appeal of the Council's decision was filed by Mr. Buchanan and received by the Financial Services Tribunal ("FST") on December 7, 2006. The grounds for the appeal were that:

- The decision (on penalty) is not consistent with the advice of the legal counsel to the Council;
- No consideration was given to the fact that the Appellant has successfully completed upwards of two hundred transactions of which 40% consisted of strata homes without incident since the date of the alleged infractions; and
- No consideration was given to the fact that the Appellant has consistently upgraded his educational requirements including several of the courses required by the decision.

The Notice of Appeal also indicated that Mr. Buchanan had recently become aware of certain information that suggested that the Chair of the Discipline Hearing Committee might have a bias against discount commission brokers. Mr. Buchanan is a discount commission broker. He alleges that this bias resulted in the Chair not factually representing the record, resulted in a harsh and disproportionate decision and prejudiced his opportunity to be heard. The information in question appears to be an email to Mr. Buchanan from an undisclosed person dated November 12, 2006. This email was not submitted as part of the Notice of Appeal.

The remedy sought by Mr. Buchanan was for the FST to eliminate the suspension period and the requirement that Mr. Buchanan be monitored by his manager.

The Notice of Appeal was not received within the 30 day limit as set out in Section 24 of the *Administrative Tribunals Act*. However, Section 24 allows the FST to extend the time for filing an appeal if "special circumstances" exist. In a written decision dated December 18, 2006, the FST determined that special circumstances did, in fact, exist and allowed the appeal to proceed.

The Record

I was assigned as the FST member to consider the appeal on December 18, 2006.

The record was forwarded to Mr. Buchanan on January 3, 2007. However, the record did not contain the oral evidence of the Hearing. In a letter dated January 4, 2007 Mr. Buchanan expressed concern that he did not receive the transcripts of the oral evidence. He indicated that he would be unable to support his claim of misrepresentation of the record and bias by the Chair of the Discipline Hearing Committee without access to the transcripts of the oral evidence.

On January 5, 2007 Mr. Buchanan was advised that the transcripts were part of the record and would be forwarded to him when they were received from the Council. The transcripts were received by the FST on January 9, 2007 and forwarded to Mr. Buchanan.

Amended Notice of Appeal

During the Hearing, Mr. Buchanan was not represented by legal counsel. The original Notice of Appeal was also filed without the benefit of legal counsel. Subsequent to the filing of the original Notice of Appeal, Mr. Buchanan retained counsel.

Counsel for Mr. Buchanan filed an Amended Notice of Appeal on January 30, 2007. The amended grounds for the appeal were as follows.

- The Chairperson alternatively, the Hearing Committee erred in finding that there was no special levy payable without any evidence to support that notion.
- The Chairperson alternatively, the Hearing Committee relied on the Form B Certificate without hearing evidence of the author of the Certificate. The Chairperson, alternatively, the Hearing Committee made a palpable and overriding error in this respect.
- The Chairperson alternatively, the Hearing Committee erred in finding the Appellant guilty of negligence within the meaning of section 9.12 of Regulation 75/61 under the former *Real Estate Act* and further erred to find the Appellant incompetent within the meaning of Section 9.12 of Regulation 75/61 of the former *Real Estate Act*.
- The decision of the Chairperson alternatively, the Hearing Committee is inherently flawed alternatively, void in that it appeared *ex facie* the decision that only the Chairperson rendered the decision. The remaining members of the Hearing Committee namely, M. J. Cowe and A. R. Ghouri failed to indicate whether they agree or disagree with the decision of the Chairperson.
- The Chairperson, Ms. Anne Petrone, who presided over the hearing, has an underlining bias against the Appellant who is a member of Discount Commission Realtors. The bias of the Chairperson, Anne Petrone renders her decision dated November 2, 2006 void.

Counsel for Mr. Buchanan sought the following remedy from the FST:

- dismiss the complaints;
- alternatively, find that the decision of the Chairperson, alternatively the Hearing Committee is void;
- dismiss the penalties including the suspension pronounced against the Appellant; and,
- award costs.

Appellant's Submission

The Appellant's submission was received by the FST on the same date as the Amended Notice of Appeal, January 31, 2007. In the submission, the Appellant presented arguments on three issues.

The first of these is that there is a reasonable apprehension that the Chair of the Discipline Hearing Committee, Ms. Anne Petrone, is biased against discount realtors such as the Appellant. The evidence used to support this allegation is an email from an undisclosed source dated November 12, 2006. The email claims that Ms. Petrone was teaching a post licensing course at the end of March 2006. The email alleges that during the class she asked if there were any discount brokers in attendance. When no response was received, the email alleges that "*she then said something to the effect that good because you would only be selling your own listings. We all know its 7 and 3*". It is submitted that this indicates bias by Ms. Petrone against discount realtors. Numerous precedents are presented to indicate that natural justice is thwarted if there is a reasonable apprehension of bias against a regulatory decision maker.

The second issue is that the Chair of the Discipline Hearing Committee made the decision in the Buchanan case rather than the Discipline Hearing Committee. The evidence used to support this allegation is that the Decision of the Hearing Committee was signed by the Chair but not by the other members.

The third issue is that the Discipline Hearing Committee made an error in finding the Appellant guilty of negligence and incompetence in the absence of sufficient evidence as to whether a special levy was in place. It was argued that it was not sufficient for the Discipline Hearing Committee to rely on the Form B Certificate. The author of the Form B Certificate should have been required to give evidence.

The remedies sought were as follows:

- The Decision of the Chairperson and/or the Hearing Committee ought to be quashed alternatively dismissed;
- Alternatively, the decision of the Chairperson alternatively, the Hearing Committee, is void in the absence of the indication of whether the other two hearing members adopted the decision;

- Costs be awarded to the Appellant.

Objection to Evidence in the Appellant's Submission

On February 20, 2007 the FST received a submission from counsel for the Superintendent of Real Estate ("Superintendent") indicating that the argument raised by the Appellant regarding the bias of the Chair of the Discipline Hearing Committee was entirely based on the email dated November 12, 2006. This email was not contained in the record provided to the FST by the Council.

Counsel for the Superintendent goes on to state that although counsel for Mr. Buchanan suggests that the December 18, 2006 decision of the FST allowed the introduction of new evidence, the fact of the matter is that the December 18, 2006 decision dealt only with the issue of late filing. Furthermore, it is argued that if there had been an application to have the email introduced as new evidence, a strong objection would have been raised by the Superintendent because it is inconceivable that an email from an unidentified person about an event that occurred over seven months ago could form the sole basis for a bias argument.

Counsel for the Council in a submission dated February 21, 2007 provided support for the arguments raised by counsel for the Superintendent. No response was received from counsel for Mr. Buchanan.

Respondent's Application to Submit New Evidence

On February 23, 2007 an application pursuant to Section 242.2 (8) (b) of the *Financial Institutions Act* to submit new evidence was received from counsel for the Council.

The new evidence consisted of certain sections from a Council document dated July 2006 and entitled "Code of Conduct & Internal Management Policies and Guidelines."

Counsel for the Council indicated that the new evidence was substantial and material to the appeal decision. Although the evidence was in existence at the time of the Decision of the Discipline Hearing Committee it was not considered relevant. However, it has become relevant because of the arguments made by the Appellant that the Decision of the Hearing Committee is flawed and should be set aside because it was signed by the Chair, rather than all members of the Committee.

A letter of support for the application was received from the counsel for the Superintendent. No response or objection was received from counsel for Mr. Buchanan.

FST Ruling on New Evidence

In a letter dated March 5, 2007, I released a ruling on the submission of new evidence. With respect to the November 12, 2006 email that was used to allege bias against the Chair of the Discipline Hearing Committee, I ruled that the evidence was inadmissible because no application had been made for its inclusion.

With respect to the Application by the Council to submit relevant sections of the Council document dated July 2006 and entitled "Code of Conduct & Internal Management Policies and Guidelines", I ruled that I was prepared to accept this evidence as it was my opinion that the evidence was relevant to the appeal. I also noted that the appellant did not provide a submission or an objection on the application.

Submission of the Respondent

The Respondent's submission was received by the FST on March 16, 2007.

The submission notes that there has been an "error of inadvertence" in the Decision of the Discipline Hearing Committee dated November 2, 2006.

Effective January 1, 2005 the *Real Estate Act* was replaced by the *Real Estate Services Act*. For matters taking place prior to January 1, 2005 the Council proceeds under the authority of the *Real Estate Act* and for matters taking place after January 1, 2005 the Council proceeds under the authority of the *Real Estate Services Act*. The Buchanan matter took place over the period March to May of 2005 and as a result the authority of the *Real Estate Services Act* is relevant.

It is noted that the Notice of Discipline Hearing indicates that the Hearing will be conducted pursuant to Sections 40 to 42 of the *Real Estate Services Act* to determine "*whether the licensees have committed professional misconduct pursuant to Section 35(1)(a) and/or (d) of the Act, or have contravened Rule 3-1 (managing broker responsibilities) or Rule 3-2 (associate broker and representative responsibilities)....*"

However, the decision of the Discipline Hearing Committee refers to findings of negligence and incompetence under Section 9.12 of Regulation 75/61 under the former *Real Estate Act*. Due to the timing of the events in the Buchanan matter, the correct reference and applicable provision is Section 35(1) of the *Real Estate Services Act*.

The Respondent argues that the Decision of the Discipline Hearing Committee was, in fact, a decision of the entire committee rather than a decision of the Chair as alleged by the Appellant. The evidence used to support this argument is the Council's "Code of Conduct & Internal Management Policies and Guidelines" which indicates that a hearing decision is to be made by all members of the hearing committee and signed by the Chair.

The Respondent also argues that the Form B Certificate and the Minutes of the Strata Meeting of October 13, 2004, which are included as part of the record, can only support one conclusion and that is that there was no special levy.

No arguments were presented relating to the allegation of bias against the Chair of the Discipline Hearing Committee on the grounds that the March 5, 2007 FST decision refused to admit the email dated November 12, 2006 as new evidence. This email was the sole basis for the allegation of bias.

The remedies sought were as follows:

- The appeal be dismissed;
- The findings of negligence and incompetence within the meaning of Section 9.12 of Regulation 75/61 under the former *Real Estate Act* be varied, to be a finding of professional misconduct under Section 35 of the *Real Estate Services Act*;
- In the alternative to the preceding, that the findings of negligence under Section 9.12 of Regulation 75/61 under the former *Real Estate Act* be set aside and that the findings of incompetence be varied to a finding of professional misconduct through incompetence under the *Real Estate Services Act*;
- An order for costs in favor of the Real Estate Council pursuant to Section 47 of the *Administrative Tribunals Act*.

Reply of the Appellant

The FST received the Appellant's reply on April 2, 2007. The submission appears to argue that the FST does not have the jurisdiction to vary the original decision of the Discipline Hearing Committee and to substitute a finding of professional misconduct as a result of incompetence, pursuant to Section 35(1) of the *Real Estate Services Act*.

It is also argued that the procedures of the Council as outlined in the Council's "Code of Conduct & Internal Management Policies and Guidelines" do not take precedence over the *Real Estate Services Act*. The *Real Estate Services Act* is very clear that the "discipline committee" not the Chair of the "discipline committee" is empowered to make determinations of misconduct under the *Act*.

On March 9, 2007, Mr. Buchanan filed a complaint against Ms. Anne Petrone with the British Columbia Real Estate Association ("BCREA") and the Real Estate Council. The complaint alleged professional misconduct by Ms. Petrone in that she made defaming comments against discount brokers while teaching a post licensing course in Kelowna. The evidence in support of this complaint consisted of the November 12, 2006 email that has been described previously in this decision under the caption "Events and Submissions of the Appeal: Appellant's Submission".

Mr. Buchanan requested both the Council and the BCREA to investigate this complaint. In a letter dated March 20, 2007 to the BCREA, counsel for the Council explained that Mr. Buchanan was currently the subject of Council disciplinary proceedings and asked if the investigation of the BCREA could be delayed until the conclusion of the proceedings. In a letter dated March 21, 2007 the BCREA complied with this request.

Counsel for Mr. Buchanan has taken great exception to the actions of Counsel for the Council and has included arguments with respect to these actions along with other arguments in support of his original allegation of bias.

The remedies sought by counsel for Mr. Buchanan are as follows:

- The decision of the Chair of Council (i.e. decision signed by Chair rather than all members of the Discipline Hearing Committee) does not comply with Section 43 of the *Real Estate Services Act* and ought to be quashed or dismissed;
- Alternatively, the decision of the FST be suspended until the complaint filed against the Chair has been investigated and adjudicated;
- If the FST finds the case of the Appellant be dismissed, the Appellant be awarded costs;
- In the alternative, the Appellant requests that the Appeal be allowed with costs, based on the conduct of the counsel for Council as well as the conduct of the BCREA with respect to their willingness to suspend the complaint investigation against the Chair of the Discipline Hearing Committee.

Further Submissions Regarding Bias by the Council and the Superintendent

In a submission dated April 10, 2007, counsel for the Superintendent submits that counsel for Mr. Buchanan has attempted to introduce new evidence in his reply and based on the new evidence has attempted to introduce new arguments in the form of allegations of “inappropriate” behavior by the counsel for the Council to support the overall allegation of bias. The submission requests that the FST grant a reasonable time to respond to the allegations and to provide arguments that the FST consider requiring Mr. Buchanan to pay part of the costs and expenses of the FST as a result of conduct which is characterized as improper, vexatious and abusive.

Counsel for the Council also provided a submission in a letter dated April 10, 2007. The submission is similar to that of counsel for the Superintendent in that it contends that counsel for Mr. Buchanan has attempted to introduce new evidence. Therefore, it is argued that the evidence relating to the complaints filed by Mr. Buchanan with the BCREA and the Council and any responses to these complaints should not be considered by the FST.

Counsel for the Council acknowledges that counsel for Mr. Buchanan has made serious allegations of professional misconduct against him. He indicates that the FST does not have jurisdiction over misconduct of legal counsel and as a result any submissions related to the issue of professional misconduct should be struck out.

Response Regarding Bias by the Appellant

A submission from counsel for Buchanan was received by the FST on April 16, 2007. It is again argued in this submission that it was inappropriate for counsel for the Council to attempt to interfere with the complaint investigation process of the BCREA. It is further argued that counsel for the Superintendent has acted inappropriately by “embracing and condoning” the inappropriate conduct of counsel for the Council. Finally, it is suggested that these actions have tainted the entire process regarding the adjudication of the Buchanan matter.

The remedy sought includes:

- allowing the introduction of further evidence regarding the complaint against the Chair of the Discipline Hearing Committee and subsequent conduct of counsel for the Council and counsel for the Superintendent; and,
- suspending the Appeal until the complaint against the Chair can be investigated and adjudicated.

Ruling of the FST on Bias

A ruling on the issues surrounding the April 16, 2007 submission from counsel for Mr. Buchanan was issued in a letter dated April 18, 2007. The application by the appellant to submit new evidence was denied in the absence of any indication of what the new evidence would consist of and any clear indication as to why the new evidence was relevant. The application to suspend the FST appeal process was also denied on the grounds that the appellant gave no evidence that an investigation into the actions of the Chair of the Discipline Hearing Committee is actually taking place and no indication as to why such an investigation would be relevant to this appeal.

The April 18, 2007 letter also reiterated that the November 12, 2006 email to Mr. Buchanan from an undisclosed person had not been admitted into evidence as indicated in the decision of the FST dated March 5, 2006 and any arguments and submissions based on this email would not be considered during the course of this appeal.

Request by the FST for Submissions Regarding Penalty

I have noted that in the original Notice of Appeal filed by Mr. Buchanan the first ground for appeal was that the decision of Discipline Hearing Committee with respect to penalty was not consistent with the advice of counsel to the Council. It has been further noted that in the nine precedent cases outlined in the Decision of the Discipline Hearing Committee the maximum penalty that had been imposed was a suspension of 21 days. This had been imposed for three of the cases. The Discipline Hearing Committee imposed a suspension of 30 days on Mr. Buchanan but did not provide an explanation as to how this length of suspension was determined.

No submissions or arguments had been received from counsel for Mr. Buchanan as to whether this period of suspension was appropriate. Because this suspension period was raised as an important issue in the original Notice of Appeal, I thought it was necessary to obtain more information regarding the possibility of an incongruity between the period of suspension decided for Mr. Buchanan and the period of suspension decided for others in similar circumstances.

Therefore, I requested submissions regarding penalty from all parties in my letter of April 18, 2007.

Submission on Penalty by the Superintendent

Counsel for the Superintendent provided a submission on penalty dated April

18, 2007. It was argued that the FST does not have jurisdiction to consider this issue. Although the issue of penalty was raised in the original Notice of Appeal, there were no arguments submitted on the issue of penalty. As a result, it must be concluded that this ground for appeal has been abandoned by the Appellant.

It is also pointed out that “*In the Matter of the Financial Institutions Act and Jagdit Cheema*” (FST 05-019) that the FST member stated that “I accept the Respondents’ position that the Tribunal does not have the authority to dispose of an appeal on grounds which have not been pursued by an appellant.”

Submissions on Penalty by the Respondent

The Council made two submissions on penalty. The first submission dated April 19, 2007 presented much the same arguments as did counsel for the Superintendent. It was argued that the submissions of the Appellant made no reference to penalty. Although it is acknowledged that the original Notice of Appeal raised the issue of penalty, it is argued that it is inappropriate to consider the issue of penalty at such a late date in the appeal process from a procedural point of view given that the issue of penalty was not raised in the Amended Notice of Appeal, the Appellant’s submissions or the Respondent’s submissions.

The second submission dated May 4, 2006 was filed by counsel for the Council “without prejudice to (the Council’s) position that the matter of penalty is not an issue on this appeal and out of an abundance of caution.”

The submission argues that considerable discretion must be afforded a professional body such as the Council in deciding the issue of penalty primarily because the professional body hearing any case will be in a better position to assess the evidence. A number of precedents are cited including *Cheema v. Insurance Council of British Columbia* (FST 05-019), *Superintendent of Financial Institutions v. Insurance Council of British Columbia, Special Risk Insurance Brokers Ltd. and Willie* (FST 06-026) and *Superintendent of Real Estate v. Real Estate Council of British Columbia and Kenneth Scott Spong* (FST 05-007).

It is then argued that the difference of 9 days between the 30 day suspension levied on Mr. Buchanan and the 21 day suspensions levied in other cases reported in the Decision of the Discipline Hearing Committee is within the reasonable range of latitude that should be afforded to the Council.

The submission also reports on three other disciplinary decisions taken by the Council involving improper conduct in the real estate industry:

- Shari Lesley Baird in a Consent Order of Council dated March 8, 2006 was suspended for 30 days, required to take courses and required to pay enforcement expenses of \$500.00 for incompetence within the meaning of Section 9.12 of Regulation 75/61 under the *Real Estate Act*. The actions leading to the suspension included the failure to provide the Form B Certificate to the buyer, failure to provide the buyer strata council minutes, failure to provide the strata bylaws and failure to make the

contract subject to inspection.

- Margaret Ann Reibin in a Consent Order of Council dated November 30, 2006 was suspended for 30 days, required to take courses and required to pay enforcement expenses of \$500.00 for professional misconduct within the meaning of Section 35(1)(d) of the *Real Estate Services Act*. The actions leading to the suspension included the failure to ensure that the seller's acceptance of a contract of purchase was made subject to the sellers not being obligated with respect to a previously accepted offer of purchase, failure to advise the sellers to seek independent legal advice and failure to ensure that the second buyer was aware that the seller's offer was a back-up offer.
- Ashok Kumir Kukreja in a Consent Order of Council dated December 1, 2006 was suspended for 30 days, required to take courses and required to pay enforcement expenses of \$500 for contravening Sections 27(1), 27(4), 35(1)(a) and 35(1) (d) of the *Real Estate Services Act* and a number of sections of the Council Rules for failing to disclose of the agency representation offered to his client, failing to pay the deposit to his brokerage, failing to promptly deliver the contract of purchase and sale to his brokerage and failing to advise the buyer to seek legal advice.

It is further argued in the submission that because each of these cases was decided by consent order it indicates an acceptance of responsibility by the licensee, thus justifying a lesser penalty. The Appellant, on the other hand, has denied any error or wrongdoing.

Submission on Penalty by the Appellant

A submission on penalty from counsel for Mr. Buchanan was received on April 25, 2007. The submission characterizes the penalty levied against Mr. Buchanan as unreasonable, shocking, demonstrably unfit, discriminatory, motivated by bias and infringing on the Appellant's human rights. Except for the observation that the penalty levied against Mr. Buchanan was in excess of the penalties imposed in similar cases that were outlined in the Decision of the Discipline Hearing Committee, no evidence is provided to support these characterizations.

Submissions on Section 35 of the *Real Estate Services Act*

Two further submissions were received regarding the "error of advertence" described previously in this decision under the caption "Events and Submissions of the Appeal: Submission of the Respondent". These submissions were from counsel for the Superintendent (April 23, 2007) and counsel for the Council (May 4, 2007).

Both submissions argued that the incorrect reference in the Decision of the Discipline Hearing Committee was an error of inadvertence. The submission of the Superintendent indicates that this error can be easily remedied by the FST inviting the Council to issue a Corrigendum to its Decision to clarify its intention.

Counsel for the Council agrees that the issuance of a Corrigendum to the

original decision would provide an acceptable solution. In the alternative, the two suggested solutions proposed in the Submission of the Respondent would also be acceptable.

Submission on Bias of the FST

On May 14, 2007 a further submission was received from counsel for Mr. Buchanan despite the fact that notice had been served on all parties to the Appeal that no submissions would be accepted after May 11, 2007.

The submission alleges bias by myself with the evidence used to support this allegation being my letter of April 18, 2007. In that letter, I reiterated that the email dated November 12, 2006 had not been admitted into evidence. I further stated that in any event it was my opinion that the email had limited evidentiary value and provided reasons for my opinion. Counsel for Mr. Buchanan appears to suggest that my disagreement with him over the evidentiary value of this email constitutes bias on my behalf. He requests that I recuse myself as “an adjudicator pertaining to the Appeal to circumvent a formal application for your recusal.”

The submission that was received from counsel for Mr. Buchanan was marked personal and confidential. However, in the interests of transparency it was provided to all parties to the appeal.

Counsel for the Council responded to this submission by noting that the March 5, 2007 decision of the FST declined to admit the email in question as evidence. Therefore, any events and actions relating to this email are irrelevant to this appeal. This indicates that the allegations of bias and inappropriate conduct against the Chair of the Discipline Hearing Committee, counsel for the Council, counsel for the Superintendent and the presiding member of the FST are inadmissible as the sole source of all these allegations is the email of November 12, 2006.

Counsel for the Superintendent has also responded to the submission. He notes that it is highly improper for a party to an appeal to attempt to communicate privately with a member hearing the appeal. Furthermore, it is argued that to threaten an FST member with a “formal application of recusal” unless he recuses himself is highly objectionable and worthy of censure.

ISSUES AND ANALYSIS

The Notice of Appeal and the Amended Notice of Appeal raised a number of issues for consideration. Each will be considered in turn.

Bias of the Committee Chair and Others

Council for Mr. Buchanan has alleged that there is a reasonable apprehension that the Chair of the Discipline Hearing Committee was biased against discount realtors. Mr. Buchanan is a discount realtor.

To support this allegation, counsel for Mr. Buchanan has provided evidence in the form of an email to Mr. Buchanan from an undisclosed person dated November 12, 2006. As previously indicated in this Decision, this email was not part of the original record and no application to submit it as new evidence

under Section 242.2 (8) (b) of the *Financial Institutions Act* was ever received by the FST. Therefore, it was not considered during this Appeal.

In any event, this email has very limited value from an evidentiary perspective. It is from an undisclosed source and appears to refer to an "off the cuff" comment which is alleged to have been made by Ms. Anne Petrone in late March 2006, approximately six months prior to the hearing which dealt with the allegations against Mr. Buchanan. In my opinion it does not provide sufficient evidence to establish an apprehension of bias.

In the original Notice of Hearing it was alleged by Mr. Buchanan that the bias of Chair of the Discipline Hearing Committee resulted in the Chair not factually representing the record and prejudiced Mr. Buchanan's opportunity to be heard. Although I was expecting to receive submissions or examples in support of these allegations, none were received. Moreover, an examination of the transcript reveals that the Discipline Hearing Committee accommodated the reasonable requests of Mr. Buchanan. At his request, there was a postponement of the original hearing dates. When he argued that he was unable to obtain certain evidence, the evidence was obtained by the Council and provided to Mr. Buchanan. He was also provided with the opportunity for a short recess during the Hearing to review the evidence. Mr. Buchanan declined to accept this offer.

Therefore, it is my opinion that there is no evidence to suggest that the Chair of the Discipline Hearing Committee had a bias toward Mr. Buchanan during the conduct of this disciplinary hearing.

Counsel for Mr. Buchanan has also taken exception to the actions of counsel for the Council and counsel for the Superintendent and presented his concerns under the caption of bias. The FST is not the forum to adjudicate on matters of conduct in the legal profession. If counsel for Mr. Buchanan continues to have concerns over the conduct of these individuals he should express his concerns to the appropriate forum.

Finally, counsel for Mr. Buchanan has alleged that I am biased. The basis for this allegation is my disagreement with him over the evidentiary value of the email dated November 12, 2006. It is my opinion that this allegation is completely without foundation. Moreover, it has no bearing on the case since the email in question is not part of the record.

The Decision of the Discipline Hearing Committee was not Signed by all Members

Counsel for Mr. Buchanan has noted that the Decision of the Discipline Hearing Committee dated November 2, 2006 was signed by the Chair of the Committee but not signed by the other members of the committee namely, Mr. M.J. Cowe and Mr. A.R. Ghouri. From this it is inferred that the decision of the Discipline Hearing Committee was made solely by the Chair of the Committee with no input from the other members. Counsel for Mr. Buchanan further argues that Section 43 of the *Real Estate Services Act* states that it is the discipline committee rather than the chair of the committee that is required to make determinations under the *Act*. In this case, he argues that it was the Chair of the discipline committee that made the determination.

Counsel for the Council argues that administrative tribunals have the power to set their own rules of operation. In this regard, the Council has established its rules of operations and documented these rules in the Council's Code of Conduct & Internal Management Policies and Guidelines. These Guidelines state in part:

"A Member of a Hearing committee will carefully consider the reasons of colleagues where there is a difference in their proposed determination of the matter being heard. However, a Member should not abandon strongly held views on an issue of substance, either for the sake of unanimity or in the exchange for agreement on any other point.

In circumstances where a Member of a Hearing committee is unable, after discussion and careful consideration, to agree with the proposed decision of a majority of the Hearing committee, the member may prepare, in a timely fashion, a reasoned dissent.

When completed, a copy of the draft hearing report is to be sent to each member of the Hearing committee for review. The administrative support staff will then contact the Hearing committee to arrange a telephone conference call to determine if any changes are required and then proceed to finalize the report for signature by the Chair of the Hearing Committee."

Counsel for the Council indicates that the Guidelines were followed in this case. The Guidelines require that all members participate in the decision making, but that the hearing report is to be signed by the Chair of the committee. A member who disagrees with the decision is to express this disagreement through a reasoned dissent. In the case of Mr. Buchanan there was no dissent. Therefore, Section 43 of the *Real Estate Services Act* has been followed in that the determinations made in this case were made by the discipline committee.

I concur with the arguments put forward by counsel for the Council. The Council has established clear procedures for the conduct of hearings and the procedures indicate that the decision of the Discipline Hearing Committee is to be signed by its Chair. Nevertheless, the procedures are very clear that all members are to be involved in making a determination. The procedures also outline a process where dissent to a decision can be accommodated.

There is no evidence to indicate that the procedures were not followed in this case. In addition, a review of hearing transcript reveals that all members of the Discipline Hearing Committee actively participated during the conduct of the hearing.

Was there a Special Levy

Counsel for Mr. Buchanan submits that the Form B Certificate provided insufficient evidence for the Discipline Hearing Committee to conclude that there had been no special levy assessed.

Counsel for the Council argues that there was ample evidence to support the conclusion that there was no special levy. Not only does the Form B Certificate indicate that there was no special levy, but the Minutes of the Special General Meeting of the Strata show that the resolutions regarding

special levies were defeated and that the resolution to increase monthly strata fees and the annual budget was passed.

It is further noted that Mr. Buchanan has never raised the argument in the Hearing or elsewhere that the reason he did not advise the sellers and the purchaser of the discrepancies between the Form B Certificate and the information contained in the Property Disclosure Statement was because he was of the view, during the relevant period, that there were inaccuracies in the Form B Certificate. If, in fact, he had reached the conclusion that the Form B Certificate was inaccurate, it was his duty to seek further information before the transaction closed.

It is my view that the evidence clearly supports the conclusion that there was no special levy in existence. There was no need for the Discipline Hearing Committee to call the author of the Form B Certificate to give further evidence.

Penalty and Remedial Measures

In the original Notice of Hearing, the Appellant argued that the penalty decisions imposed by the Discipline Hearing Committee were not consistent with the advice provided by its legal counsel, that no consideration was given to the fact that the Appellant had consistently upgraded his educational requirements and that no consideration was given to the fact that he had engaged in numerous transactions since the transaction in question without incident. The remedy sought by Mr. Buchanan was for the FST to eliminate the suspension period and the requirement that Mr. Buchanan be monitored by his managing broker.

It is unfortunate that these issues were not followed up by counsel for Mr. Buchanan through submissions.

Nevertheless, a review of the Hearing transcript provides some information of importance. During the Hearing, Mr. Buchanan was required to respond to a number of questions posed by counsel for the Council and by each of the three members of the Discipline Hearing Committee (see pages 168 to 266 of the Transcript of Proceedings). Mr. Buchanan's responses to these questions demonstrated that he did not have a particularly good understanding of a number of issues and concepts including fiduciary duty, the obligations of agency and the legal framework pertaining to strata properties.

In this context, the decision of the Discipline Hearing Committee to require Mr. Buchanan to attend several relevant courses appears very reasonable. In addition, the decision of the Discipline Hearing Committee to require Mr. Buchanan to work under the supervision of his managing broker appears very reasonable as a measure to protect the public.

There are, however, some concerns regarding the length of the suspension imposed on Mr. Buchanan and I am pleased that the submission of counsel for the Council dated May 4, 2006 attempted to clarify the matter.

In that submission, counsel for the Council argued that considerable discretion must be afforded the Council in deciding the issue of penalty. I fully agree with this argument and note that FST member Hall stated in

Cheema v. Insurance Council of British Columbia (FST 05-019):

“Thus, the Tribunal should be reluctant to interfere where the professional body has turned its mind to the relevant factors, unless a particular penalty falls outside an acceptable range and no extenuating circumstances are apparent.”

In the Decision of the Discipline Hearing Committee nine cases for comparison were presented. The maximum suspension imposed in these cases was 21 days. The 21 day suspension was imposed in three of the cases. The suspension for Mr. Buchanan was 30 days. I disagree with the contention by counsel for the Council that a 30 day suspension compared to a 21 day suspension is within the acceptable range. A 30 day suspension is, in fact, greater than 40% more onerous than a 21 day suspension.

It is therefore my view that the penalty imposed on Mr. Buchanan in the decision of the Discipline Hearing Committee did fall outside the acceptable range relative to the nine cases documented in the decision. Moreover, no extenuating circumstances were provided in the Decision.

Counsel for the Council has provided the results of three additional cases to assist in evaluating the 30 day suspension imposed on Mr. Buchanan. The cases involving Ms. Baird and Ms. Reiben appear similar to the Buchanan case in that both cases involved a failure of real estate licensees to protect the legitimate interests of their clients. Both cases resulted in a 30 day suspension as well as a requirement to attend courses. Given the latitude that should be afforded to the Council on the determination of penalty and the absence of any convincing arguments from counsel for Mr. Buchanan, I am willing to accept that a 30 day suspension for Mr. Buchanan is reasonable.

The “Error of Inadvertence”

It is clear that the references to the *Real Estate Act* in the Decision of Discipline Hearing Committee are in error. It is equally clear that the error is one of inadvertence especially in light of the fact that the Notice of Hearing indicated that the Hearing was to be conducted pursuant to Sections 40 to 42 of the *Real Estate Services Act* to determine “*whether the licensees have committed professional misconduct pursuant to Section 35(1) (a) and/or (d) of the Act.....*”

It is my opinion that the remedy proposed by counsel for the Superintendent is the most suitable remedy under the circumstances. Therefore, I request the Council to issue a Corrigendum to its Decision of November 2, 2006.

Delays in the Implementation of Council’s Decision

Mr. Buchanan has consistently requested delays in the adjudication of this case. He was successful in his request to have the Council postpone the Hearing from May 2006 to September 2006. He made two requests at the Hearing to have it further postponed. These requests were not granted by the Discipline Hearing Committee. In response to Mr. Buchanan’s request that the Hearing be adjourned because he was unable to obtain certain information, the Council obtained the information and provided it to Mr. Buchanan. The Discipline Hearing Committee also proposed a short

adjournment to allow Mr. Buchanan the time to assess the information. He refused this offer. It is noteworthy that no submissions were made during this Appeal with respect to this information.

Mr. Buchanan filed his appeal on December 7, 2006 or five days after the 30 day time limit had expired. He indicated that this was done because he had "recently" obtained evidence that the Chair of the Discipline Hearing Committee was biased. This "recent" evidence was not submitted but turned out to be an email dated November 12, 2006.

Mr. Buchanan filed a defamation complaint against Ms. Anne Petrone with the Council and the BCREA on March 9, 2007. He then attempted to delay the outcome of the Appeal process by arguing that the appeal should be held in abeyance until the defamation complaint had been investigated and adjudicated.

Counsel for Mr. Buchanan has attempted to further delay the outcome of this Appeal by threatening to submit a formal application to recuse me from the appeal on the basis that I disagree with him regarding the evidentiary value of an email that did not form part of the record or part of the Appeal.

Finally, it is noted that the submissions by counsel for Mr. Buchanan contained little in the way of argument regarding the substance of the case. The argument related to whether there was, in fact, a special levy was confined to the issue of whether the Discipline Hearing Committee should have called the author of the Form B certificate to give evidence.

In addition, counsel for Mr. Buchanan did not make a submission on penalty until requested by the FST. The submission from counsel for Mr. Buchanan on penalty contained nothing in the form of usable evidence.

Section 47 of the *Administrative Tribunals Act* provides the authority for the FST to order a party or an intervener to pay a "portion" of the costs of another party or intervener in connection with an appeal application. In considering the exercise of its discretion under this section, the FST considers whether a party's conduct has been improper, vexatious, frivolous or abusive.

It is my opinion that the appeal application of Mr. Buchanan has been improper in that its intended purpose has been to delay the imposition of the penalties and remedial measures imposed by the Council against Mr. Buchanan.

Therefore, I am inviting the Council and Superintendent of Real Estate to make submissions regarding costs within 14 days of the date of this decision. The submissions should clearly outline the nature and magnitude of the costs resulting from this appeal and the appropriate "portion" of the costs that should be paid by Mr. Buchanan. Mr. Buchanan will be provided an opportunity to respond to these submissions before an award is granted by the FST.

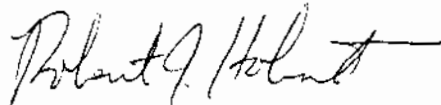
CONCLUSION

The following is the decision of the FST with respect to the appeal of Mr. Buchanan:

- The appeal is dismissed;
- The Council is to issue a Corrigendum to its Decision of November 2, 2006 to remove an error of inadvertence;
- Further submissions are to be received within 14 days of the date of this decision with respect to costs.

DATED AT SURREY, BRITISH COLUMBIA, THE 22nd DAY OF MAY, 2007 FOR THE FINANCIAL SERVICES TRIBUNAL

ROBERT J. HOBART



PRESIDING MEMBER

