

FINANCIAL SERVICES TRIBUNAL

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

BETWEEN:

DONALD LAWRENCE TYMCHUK

NEW WAY REALTY INC.

APPELLANTS

AND:

THE REAL ESTATE COUNCIL OF BRITISH COLUMBIA

RESPONDENT

PRELIMINARY DECISION

BEFORE ROBERT J. HOBART **PRESIDING MEMBER**

**DATE OF LAST
SUBMISSION:** MAY 15, 2006

APPEARING: DONALD L. TYMCHUK **FOR THE APPELANT**

JESSICA S. GOSSEN **FOR THE RESPONDANT**

RICHARD FERNYHOUGH **FOR THE SUPERINTENDENT
OF REAL ESTATE**

INTRODUCTION

On March 1, 2006, the Discipline Hearing Committee of the Real Estate Council ("Council") released its decision in the matter of Mr. Donald Tymchuk and New Way Realty Inc. ("New Way Realty"). The decision reached by Council was the result of four days of hearings including June 22, 2005, June 23, 2005, January 4, 2006 and January 5, 2006.

The Discipline Hearing Committee found that New Way Realty was in contravention of several sections of the *Real Estate Act*, *Real Estate Services Act* and regulations pertaining to the failure to keep proper transaction record sheets, failure to put client funds into trust accounts in a timely manner and failure to keep proper books and records.

The Discipline Hearing Committee also found that Mr. Tymchuk, as the managing broker of New Way Realty, was incompetent within the meaning of section 9.12 of Regulation 75/61 of the *Real Estate Act*, misconducted himself pursuant to section 31(1) (c) of the *Real Estate Act* and committed professional misconduct pursuant to section 35(1) (a) of the *Real Estate Services Act*. In particular, the Discipline Hearing Committee found that Mr. Tymchuk failed to keep proper books and records, failed to ensure that all money held on behalf of property management clients were put into trust, permitted Olive Jeanette Gorringer to hold herself out as a managing broker without being the holder of a proper license, withdrew funds from the trust account contrary to section 17 of the *Real Estate Act*, failed to be in active charge of the brokerage business, failed to deposit client funds into the trust account on a timely basis and failed to respond adequately and promptly to requests for information from Council.

The Discipline Hearing Committee of Council ordered the following in terms of sanctions and remedial measures:

1. An independent accountant, other than the current accountant, is to provide a written opinion to Council of the brokerage's compliance with the trust accounting and other requirements of the *Real Estate Services Act* as at January 1, 2006 within three months of the date of the decision (June 1, 2006). The cost of the engagement is to be paid by New Way Realty.
 - a. If the opinion indicates that the books and records comply with the provisions of the *Real Estate Services Act*, a reprimand will be issued to New Way Realty;
 - b. If the opinion is not received by Council the license of New Way Realty will be cancelled; or,
 - c. If the opinion indicates non compliance to the *Real Estate Services Act*, the Discipline Hearing Committee will make a determination as to the license of New Way Realty;

2. New Way Realty is to provide Council with proper monthly reconciliations of its trust account and general account for a period of twelve months commencing November 2005. The reconciliation is to be provided within one month of the month in question.
3. Mr. Tymchuk's managing brokers license is to be cancelled 30 days from the date of the decision (April 1, 2006) and as a condition of re-licensing as a managing broker that he successfully complete the Broker's Licensing Course and Examination and enroll in and attend the Accelerated Residential Trading Services Applied Practice Course. He is, however, eligible to be licensed as a representative provided he has complied with all of the other terms of the decision of the Disciplinary Hearing Committee.
4. As a condition of continuing licensing as a representative, Mr. Tymchuk is to enroll in and attend the CPE Course on Agency within 6 months of this decision (September 1, 2006) and the Legal Update Course within 12 months of the decision (March 1, 2007).
5. New Way Realty and Mr. Tymchuk is to be fined a sum of \$10,000 jointly and severally to be paid within 60 days of the date of the decision (April 30, 2006).
6. New Way Realty and Mr. Tymchuk is to be assessed enforcement expenses jointly and severally to be paid within 60 days of the date of the decision (April 30, 2006).

An appeal of Council's decision was initially filed by Mr. Tymchuk on March 31, 2006. However, the filing application did not include a sufficient fee amount to proceed with the appeal. This amount was received by the Financial Services Tribunal on April 19, 2006.

I was assigned to consider the Appeal on April 19, 2006 and all persons were informed that the appeals of Mr. Tymchuk and New Way Realty would be combined into one appeal. No objection was received regarding this course of action.

As per Section 242.2 (7) of the *Financial Institutions Act* Council was requested to provide the record on April 19, 2006. This record was due to be received on May 3, 2006. However, Council did not have a copy of the Hearing transcript in their possession. As a result Council was unable to file the record until May 12, 2006. The record was forwarded to New Way Realty and Mr. Tymchuk on May 12, 2006. As per the Practice Guidelines of the Financial Services Tribunal, Mr. Tymchuk and New Way Realty have 30 days to file a submission. This submission is, thus, due on June 11, 2006.

Section 55 of the *Real Estate Services Act* states:

- (1) An order
 - (a) of a discipline committee under section 45 [orders in urgent circumstances] or 46 [orders to freeze property], or
 - (b) of the superintendent under Division 3 [Authority of Superintendent] of this Part

is not stayed by the filing of a notice of appeal under section 54 [appeals] and may not be stayed under section 242.2 (10) (a) (i) [tribunal member hearing appeal may stay order] of the *Financial Institutions Act*.

- (2) An appealable decision, other than one referred to in subsection (1), is stayed by the filing of a notice of appeal under section 54 [appeals], but the stay may be lifted under section 242.2 (10) (a) (ii) [tribunal member hearing appeal may lift stay] of the *Financial Institutions Act*.

Section 242.2 (10) (a) (ii) of the *Financial Institutions Act* states:

- (10) In respect of an appeal,
 - (a) on application, the member hearing the appeal may
 - (ii) lift a stay of a decision under appeal for any length of time, with or without conditions.

Council filed an application to lift the stay with respect to the decisions of the Disciplinary Hearing Committee dated March 1, 2006 on May 3, 2006. A submission in support of Council's application was received from the Superintendent of Real Estate on May 5, 2006. A response from Mr. Tymchuk and New Way Realty was received on May 10, 2006. A final response from Council was received on May 15, 2006.

This decision addresses Council's application to lift the stay. It is based on the information contained in Mr. Tymchuk's Notice of Appeal, the decision of the Discipline Hearing Committee of Council and the various submissions received pertaining to the lifting of the stay.

SUMMARY OF SUBMISSIONS

Council, in their submission, has indicated that the question of whether the stay should be lifted should be determined by a three stage test established by the Supreme Court of Canada in *Shpak v. Institute of Chartered Accountants of B.C (2002)* B.C.J. No. 17041. The three stages in the test can be summarized as follows:

1. Whether there is a serious question to be tried;
2. Whether the appellant would suffer irreparable harm if the stay was lifted; and,
3. Whether the potential harm to the public interest if the stay is granted outweighs the potential harm to the appellant if the stay is lifted.

With respect to the first test, Council has argued that Mr. Tymchuk's notice of appeal has not raised any serious issues. The Notice of Appeal filed by Mr. Tymchuk outlined five grounds for appeal.

1. Mr. Tymchuk and New Way Realty argue that holding thousands of dollars of their own funds in the trust account was of benefit to the public and therefore the appellants should not be penalized. Council has noted that the Discipline Hearing Committee of Council, in fact, dismissed this allegation against the appellants on the grounds that there are no provisions in the *Real Estate Services Act* that require the immediate withdrawal of earned remuneration from the trust account.
2. Mr. Tymchuk and New Way Realty argue that they were given improper advice by Council with respect to the required responsibility regarding the property management business being conducted by one of the salespersons of New Way Realty. Council argues that there is little or no evidence in support of this argument and that, in any event, it is the responsibility of the managing broker to be aware of his obligations under the *Real Estate Services Act*. It is noted that Mr. Tymchuk was not the individual who sought the advice from Council. It was Ms. Gorringer who sought the advice from Council and there was no follow up by Mr. Tymchuk.
3. There is a conspiracy against New Way Realty within the real estate industry. Council is a party to this conspiracy to fix fees in the industry. Council indicates that there is no evidence of this and that this ground for appeal is vexatious and scandalous. Mr. Tymchuk's response indicates that he is now of the view that the conspiracy issue is not a matter that should be addressed by Council.
4. The appearance of a conspiracy to fix real estate fees is contrary to the provisions of competition law. As per the arguments of the preceding paragraph 3, this is not relevant to the issue at hand.
5. Acceptable accounting reports have been consistently filed with Council. Council argues that the reports submitted by New Way Realty contained a number of exceptions which formed part of the basis of the hearing. Mr. Tymchuk has argued that his auditor has answered questions and provided additional reports to Council and again should be asked for comments. Council responded that Mr. Tymchuk has failed to respond to Council's concerns promptly and in some cases provided no response at all.

With respect to the second test, Mr. Tymchuk argues that there would be serious implications for the professional reputation and competence of the long term auditor of New Way Realty should another auditor be required to undertake an independent review of the company's records. No arguments were raised with respect to any irreparable harm that would be suffered by the appellants.

With respect to the third test, Council indicates that there will be potential harm to the public if the stay is not lifted. Council argues that Mr. Tymchuk has failed to cooperate in providing information with respect to the allegation that there has been a mishandling of cash deposits. Because trust deposits involve the handling of money from members of the public there is potential harm to the public should these funds not be treated in the appropriate manner. Mr. Tymchuk denies that there has been a failure to cooperate with Council in respect of the depositing of cash.

ANALYSIS

It is my opinion that the proper handing of client funds and the trust deposit requirements of the *Real Estate Services Act* are of fundamental importance in the context of the public interest. Failure to comply with these provisions to the full extent of the law constitutes a significant risk to public funds that are placed with real estate brokerages. It is also noteworthy that no evidence has been presented by the appellants that there would be irreparable harm to Mr. Tymchuk or New Way Realty as a result of the implementation of Council's disciplinary decisions.

While I make no final judgment until I have read the submissions, on the face of it, Mr. Tymchuk's stated grounds for appeal are, at best, not compelling. The first ground for appeal – excess funds in the trust account – is irrelevant to the extent that Council ruled in favor of Mr. Tymchuk with respect to this allegation.

The second ground for appeal – improper advice from Council with respect to the property management business – is of limited importance with respect to the principal focus of the disciplinary hearing. Moreover, it was not Mr. Tymchuk that sought the advice. Rather, Mr. Tymchuk has indicated that it was Ms. Gorringer who sought the advice from Council. Mr. Tymchuk, although he was managing broker of New Way Realty, did not accept the direct responsibility for making a determination of the correct procedures regarding the provision of property management services.

The third and fourth grounds for appeal – price fixing in the real estate industry – are irrelevant and not in the jurisdiction of Council. I find any arguments or innuendo that Council is purposely using its regulatory powers to help perpetrate a price fixing conspiracy in the real estate industry to be without foundation.

Finally, with respect to the fifth ground for appeal – there is no basis for an allegation of failure to keep proper books and records - I am of the opinion that there has been uncertainty regarding the records of New Way Realty for an extended period of time. I

am also of the opinion that there has been a lack of cooperation from Mr. Tymchuk regarding the provision of the information required by Council.

The Decision of the Disciplinary Committee of Council dated March 1, 2006 reports many instances of letters, meetings and telephone calls between Council and Mr. Tymchuk regarding the provision of financial information commencing in November 2004. The Decision also reports that Council staff was persistent with follow up steps to obtain this information, but that it was not provided by Mr. Tymchuk. At the close of the hearing, the Disciplinary Committee of Council concluded that *"the Hearing Committee still was not left with any reasonable level of assurance that the manner with which real estate transaction deposits were dealt with in the thirty files that were reviewed came close to the standard that Council expects of its licensees."* Therefore, despite Mr. Tymchuk's objections, the evidence indicates that there is much uncertainty regarding the accounts of New Way Realty and that there has been a lack of cooperation from Mr. Tymchuk.

Moreover, there seemed to be numerous delays in the Hearing itself, mainly as a result of requests by Mr. Tymchuk. Testimony indicates that the Hearing was to commence on May 9, 2005 but was adjourned on Mr. Tymchuk's request. The Hearing did commence on June 22, 2005 but was adjourned on June 23, 2005 because Mr. Tymchuk decided he would like to engage legal counsel. The hearing was rescheduled for August 3 and 4, but was adjourned because Mr. Tymchuk's legal counsel was not available. It was rescheduled for October 9, 2005 but adjourned because one of the Disciplinary Hearing panel members was not available. It was again rescheduled for December 20, 2005 but adjourned until January 4, 2006 at the request of Mr. Tymchuk.

DECISION OF FINANCIAL SERVICES TRIBUNAL

The Disciplinary Committee made six decisions with respect to this case.

1. An independent accountant other than the current accountant is to provide a written opinion to Council of the brokerage's compliance with the trust accounting and other requirements of the *Real Estate Services Act* as at January 1, 2006 within three months of the date of the decision. The cost of the engagement is to be paid by New Way Realty. It is my opinion that there is potential harm to the public due to the uncertainties with respect to whether funds received by New Way Realty from the public are being placed in the trust account in a timely manner. Therefore, I am lifting the stay on this decision effective June 6, 2006. Therefore, the accountant's opinion must be filed by September 6, 2006.
2. New Way Realty is to provide Council with proper monthly reconciliations of its trust account and general account for a period of twelve months commencing November 2005 within one month after the end of the month in question. Similar to the previous decision, I am of the view that there is potential harm to the public due to uncertainties with respect to the state of the trust accounts being held by New Way Realty. Therefore, I am lifting the stay on this decision effective June 6, 2006.

3. Mr. Tymchuk's managing broker's license is to be cancelled 30 days from the date of the decision and as a condition of re-licensing as a managing broker he must successfully complete the Broker's Licensing Course and Examination and enroll in and attend the Accelerated Residential Trading Services Applied Practice Course. He is, however, eligible to be licensed as a representative provided he has complied with all of the other terms of the decision of the Disciplinary Hearing Committee. The Hearing Decision of Council outlined numerous instances of a lack of cooperation by Mr. Tymchuk in that he missed information reporting deadlines with respect to the financial accounts of New Way Realty. Although Mr. Tymchuk denies this allegation, he has not provided any evidence in support of his denial. His actions are not the actions of a reputable managing broker. Because of this, I am of the view that there is potential harm to the public of having Mr. Tymchuk continue to be licensed as a managing broker. Therefore, I am lifting the stay on this decision effective June 6, 2006. Therefore, the managing broker's license cancellation is effective July 6, 2006.
4. As a condition of continuing licensing as a representative Mr. Tymchuk is required to enroll in and attend the CPE Course on Agency within 6 months of the decision and the Legal Update Course within 12 months of the decision. I am of the opinion that there is little potential harm to the public if there is a delay in these requirements. Therefore, I am not lifting the stay with respect to this decision.
5. New Way Realty and Mr. Tymchuk are fined a sum of \$10,000 jointly and severally to be paid within 60 days of the date of the decision. I am of the opinion that there will be no harm to the public caused by a delay in the payment of the fine assessed by Council. I am not lifting the stay with respect to this decision.
6. New Way Realty and Mr. Tymchuk are assessed enforcement expenses jointly and severally to be paid within 60 days of the date of the decision. I am of the opinion that there will be no harm to the public caused by a delay in the payment of assessment costs to Council. I am not lifting the stay with respect to this decision.

DATED AT VANCOUVER, BRITISH COLUMBIA, THE 6TH DAY OF JUNE, 2006.

FOR THE FINANCIAL SERVICES TRIBUNAL



ROBERT J. HOBART
PRESIDING MEMBER