

**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

RESPONDENT

COSTS DECISION

BEFORE: ROBERT J. HOBART PRESIDING MEMBER

APPEARING: JOHANNES SCHENK FOR THE APPELLANT

FRITS VERHOEVEN FOR THE RESPONDENT

RICHARD FERNYHOUGH FOR THE
SUPERINTENDENT OF
REAL ESTATE

BACKGROUND

In a decision dated May 22, 2007, I indicated that it was my opinion that the appeal application of Mr. Buchanan was improper in that its intended purpose was to delay the imposition of the penalties and remedial measures imposed by the Real Estate Council of British Columbia (“Council”) against Mr. Buchanan. The reasons for my opinion are outlined in the decision of May 22, 2007.

Section 47 of the *Administrative Tribunals Act* provides the authority for the Financial Services Tribunal (“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.

Therefore, I invited the Council and the Superintendent of Real Estate (“Superintendent”) to make submissions regarding costs and provided Mr. Buchanan with an opportunity to respond.

SUMMARY OF ARGUMENTS REGARDING COSTS

A. The Superintendent of Real Estate

The submission from counsel for the Superintendent was received on May 30, 2007. The submission indicates that the Superintendent is not seeking costs related to work conducted on the issue of penalty or on the issue of the “error of inadvertence” by the Council. However, the Superintendent is seeking costs for legal work conducted related Mr. Buchanan’s allegations of bias against counsel for the Council, against counsel for the Superintendent and against the presiding member of the FST. The costs for the time spent by counsel for the Superintendent on these issues total \$2,724.20.

The submission also argued that Mr. Buchanan should be required to pay actual costs and expenses of the FST to deter future improper conduct similar to that exhibited by Mr. Buchanan in relation to this appeal.

B. The Real Estate Council

The submission from Council was received by the FST on June 5, 2007. The submission alleges that the Appellant engaged in conduct that was improper, vexatious, frivolous or abusive and provides a number of examples:

- Commencement of an appeal for the improper purpose of delaying the imposition of penalties and remedial measures;

- Persisting in unfounded allegations of bias on the part of the Chair of the Discipline Hearing Committee of Council on the basis of a single email from an unidentified source;
- Alleging bias on the part of legal counsel for the Council, legal counsel for the Superintendent and the presiding member of the FST - all without foundation;
- Alleging professional misconduct against legal counsel for the Council;
- Sending a “private and confidential” letter to the presiding member of the FST requesting that the presiding member recuse himself “to circumvent a formal application for ...recusal”; and,
- On two occasions, inserting into binders of authorities, evidence that was not part of the record and making submissions on the evidence without acknowledging that the evidence was not part of the record.

On the basis of this conduct, it is submitted that the principles applicable to special costs in the Supreme Court may be considered by the FST in setting the amount of costs payable in this instance. Special costs may be awarded as a deterrent or as a penalty on the offending person.

Given that Counsel for Mr Buchanan has alleged bias against the Chair of the Discipline Hearing Committee of Council, legal counsel for the Council, legal counsel for the Superintendent and the presiding member of the FST, a very useful case is cited in *Walker v. College of Dental Surgeons of British Columbia*. In that case, Prowse J.A. found that it was obvious that the allegations of bias were unfounded and stated that:

“Given the seriousness of these allegations and the fact that the plaintiff persisted in pursuing them even though he knew or should have known that there was no reasonable basis on which to pursue these claims, I have concluded that the plaintiff did conduct himself in a reprehensible manner deserving of the reproof or rebuke of the court.”

Similarly, in the case of *Interstate Investments Ltd. v. Pacific International Securities*, special costs were awarded with Koenigsberg J. stating “it is, in my view, improper practice to suggest even indirectly that a professional colleague has acted improperly, without strong evidence, carefully tested, that such allegation is merited.” In this case, counsel for Mr. Buchanan made direct allegations of improper conduct against counsel for the Council without strong evidence.

Counsel for the Council does not agree with the submission of the Superintendent that costs related to work conducted with respect to penalty submissions should not be sought from Mr. Buchanan but does agree that costs relating the “issue of inadvertence” should not be sought from him. After exclusion of these costs it is estimated that costs of the Council in relation to the appeal total \$7,633.10 and include:

- Legal services: 35 hours @ \$150 per hour.....\$5,250.00
- Transcripts.....\$1,865.00
- Copies of Exhibits.....\$ 517.00

C. Mr. Buchanan

Subsequent to the Appeal Mr. Buchanan retained new legal counsel. The new legal counsel filed a submission dated June 20, 2007. In that submission it was indicated that it was the intent of Mr. Buchanan to file a judicial review with respect to this case and seek a stay of all proceedings pending the outcome of the judicial review. The question was posed as to whether a consideration of costs should be delayed until the outcome of the judicial review.

Nevertheless, new counsel for Mr. Buchanan did make several arguments against the awarding of costs. First, it was suggested that any previous adjournment request that was granted to Mr. Buchanan was freely agreed to and thus should not be held against him in the form of costs.

Second, counsel argues that just because an argument is considered to be spurious or ill conceived does not make the argument evidence of an attempt to delay proceedings. The FST has the power to deal with such arguments by not accepting them in the decision making process.

Finally, it is pointed out that the respondent parties are asking for special costs. Special costs are reserved for reprehensible conduct and on allegations that are obviously unfounded, reckless or made with malice. It is argued that Mr. Buchanan's conduct has not been reprehensible and not deserving of an award of costs.

DECISION

New counsel for Mr. Buchanan has presented some valid arguments against awarding costs in that the adjournments granted to Mr. Buchanan were agreed to and that weak or ill conceived arguments do not provide sufficient evidence of an attempt to delay proceedings.

I cannot agree in a delay in deciding costs. Moreover, I cannot agree that Mr. Buchanan's conduct should not be considered reprehensible. In my communication dated March 5, 2007, I indicated that the email used to allege bias against the Chair of the Discipline Hearing Committee would not be accepted as evidence by the FST in adjudicating this appeal. Despite this communication, counsel for Mr. Buchanan continued to use the email and expand its use in support of the appeal. It was this email that eventually formed the basis of allegations of bias against counsel for the Council, counsel for the Superintendent and the presiding member of the FST. It also formed the basis for allegations of professional misconduct against counsel for the Council. In my view, the continued use of this email in this matter and the unfounded allegations that resulted constitutes reprehensible, vexatious and abusive behaviour.

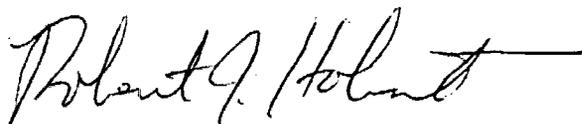
Both the Council and the Superintendent have made cost submissions which are less than the total costs incurred with respect to this matter. I am, however, further reducing the

costs. With respect to the Council, I am awarding costs against Mr. Buchanan in favour of the Council of \$4,000 by excluding the costs of the transcripts and the costs of copying exhibits. These costs would have been incurred in the absence of any inappropriate behaviour by Mr. Buchanan. In addition, I am making a reduction in legal services costs due to the fact that I believe the submissions on penalty were a key element of the appeal process.

With respect the Superintendent, I am awarding costs against Mr. Buchanan of \$2,500 in favour of the Superintendent.

I am not awarding any costs to the FST.

DATED IN SURREY, BRITISH COLUMBIA, THE 27TH DAY OF JUNE, 2007
FOR THE FINANCIAL SERVICES TRIBUNAL



ROBERT J. HOBART
PRESIDING MEMBER

