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FINANCIAL SERVICES TRIBUNAL

DECISION NO. 2015-RSA-002(d)

In the matter of an appeal pursuant to section 54 of the *Real Estate Services Act* S.B.C. 2004, c. 42 to the Financial Services Tribunal under section 242.2 of the *Financial Institutions Act*, R.S.B.C. 1996, c. 141

BETWEEN:	James Sydney Parsons	**APPELLANT**
AND:	Real Estate Council of British Columbia Superintendent of Real Estate	**RESPONDENTS**
BEFORE:	Patrick F. Lewis, Vice-Chair	
DATE:	Conducted by way of written submissions concluding on September 14, 2015	

APPEAL DECISION

OVERVIEW

[1] The Appellant, James Sydney Parsons ("the Appellant" or "Mr. Parsons"), appeals to the Financial Services Tribunal ("FST") from two decisions of the Real Estate Council of British Columbia ("Council"). The first was given on December 12, 2014, and was to the effect that Mr. Parsons had committed numerous professional transgressions ("the Liability Decision"). The second was rendered on April 27, 2015, and imposed upon Mr. Parsons various penalties ("the Penalty Decision").

[2] Council opposes the appeal. The second named Respondent, the Superintendent of Real Estate, has not participated in the appeal other than to register its agreement with the submission of Council, and to state that it does not seek costs. Accordingly, there being only one active respondent on the appeal, when I refer to Council in its capacity as a party to the appeal, I will call it "the Respondent". In referring to it as the decision-maker below, I will continue to use the contraction "Council".

[3] The Appellant is a licensee under the *Real Estate Services Act*, S.B.C. 2004, c. 42 ("*RESA*") and is an experienced realtor practicing in the Victoria area. By the Penalty Decision, his licence was cancelled without an ability to apply for relicensing for five years. That decision however was stayed pending this appeal, as provided by section 55(2) of *RESA*.

[4] The problems trace back to late 2006 and early 2007, when the Appellant acted as agent for a client I will refer to as "the Complainant", who purchased a Victoria condominium ("the Cloverdale Property") for $180,000 through that representation. As it happened, the building suffered from water ingress and within about six months following the purchase the Complainant was levied a proportionate remediation cost of $59,596.86, which her mother paid on the strength of a second mortgage as the Complainant was without funds to pay it. The Complainant was looking for a new home on the heels of a marital breakdown and was financially restricted to a purchase of about $200,000. She was suffering from serious mental distress and, following a suicide attempt, had been hospitalized at a psychiatric ward within Royal Jubilee Hospital known as the Eric Martin Pavilion ("EMP"). That was early on in her relationship with the Appellant and, indeed, the hospitalization occurred within about a day after the Complainant, through the Appellant, had made an offer to purchase a different condominium ("the West Saanich Property"), which offer was accepted but then collapsed as the lender refused to advance funds in view of remediation required on the property.

[5] The Complainant was fully resident at EMP for two weeks from December 23, 2006, following which, after a one day hiatus, she attended at the facility during the daytime for one week, then reducing to weekly group therapy sessions on Fridays. The Complainant's second offer to purchase, being on the Cloverdale Property, was made in February 2007 at a time when, I infer, she was only attending EMP for those Friday meetings.

[6] The Appellant had his daughter pick up a deposit cheque from the Complainant, and a key factual controversy before Council was whether that occurred in late December 2006 in connection with the West Saanich offer or on about February 22, 2007, in support of the Cloverdale offer. Whenever that deposit cheque was obtained and provided to the Appellant, he testified that he was then aware of the Complainant's status as patient at EMP. The answer to this factual dispute over timing bore on the period during which the Appellant could be taken to know of the Complainant's instability and vulnerability.

[7] Council found that the Appellant's daughter met with the Complainant at EMP in late December 2006 for the purpose of obtaining a deposit cheque for the West Saanich offer, and therefore that the Appellant was aware from that time, and throughout the later dealings leading to the Cloverdale purchase, that the Complainant was suffering from significant mental distress.

[8] The Cloverdale offer by the Complainant, like the West Saanich offer that preceded it, contained no inspection condition. It was subject to the receipt and satisfactory review of various documents relating to the property ("the Strata Documents"), but with a deadline for waiver or acceptance of that condition only three days from the time of the acceptance of the offer, and one day beyond the deadline for provision of the Strata Documents by the seller. A fact Council found and considered particularly egregious was that the Appellant received and read (some or all of) the Strata Documents but did not prior to the Complainant's removal of subjects either relay them to her or advise her of their content, despite

clear indications within them of water ingress issues and serious discussion over consequent financial levies to owners.

[9] The Appellant initially held the listing for the Cloverdale Property until he referred it to his son, a new realtor who had not previously listed a property, and Council found that the Appellant intentionally withheld these facts from the Complainant. It similarly found that the Appellant intentionally withheld from his client the information that the seller of the Cloverdale Property had made an offer to purchase another property, subject to his own sale.

[10] The hearing before the discipline committee of Council spanned September 4 and 5, 2014. Mr. Parsons was unrepresented throughout the proceeding. The Complainant and her daughter testified, as did Mr. Parsons, who also tendered letters from each of his daughter (who had picked up the deposit cheque) and his son (the listing realtor). Three volumes of documents were in evidence and submissions in the initial, liability phase of the proceeding were made orally at the conclusion of the evidence. As stated, the Liability Decision was made on December 12, 2014. A date was then scheduled for oral submissions on penalty but, owing to Mr. Parsons' illness at that time, it was adjourned and Council then directed that submissions on penalty be made in writing, to which neither party objected. Following written submissions, and as stated above, the Penalty Decision was pronounced on April 27, 2015. While still unrepresented Mr. Parsons filed a Notice of Appeal from these decisions, subsequently retaining counsel to pursue the appeal.

[11] I will now set out fully Council's determinations as expressed at the end of its 29 page Liability Decision:

> **"In reference to the paragraphs setting out the allegations in the Notice of Discipline Hearing, the Discipline Hearing Committee decided that James Sidney Parsons committed professional misconduct within the meaning of section 35(1) of the *Real Estate Services Act* in that he:**
>
> **1(ii) contrary to section 3-3(1)(a) of the Council Rules, failed to act in the best interests of the Complainant and contrary to section 3-4 of the Council Rules, failed to act honestly and with reasonable care and skill by failing to make either sufficient or any inquiries about the Complainant's ability to conduct business in a prudent manner and with due regard for her own interest when Mr. Parsons knew or ought to have known that the Complainant's ability to do so was in question due to her status as an inpatient at the psychiatric hospital;**
>
> **2(iii) contrary to section 35(1)(c) of the Act engaged in deceptive dealing or section 35(1)(d) of the Act, demonstrated incompetence in performing a duty for which a licence is required or both by withholding the following facts from the Complainant when he knew or ought to have known that the facts were of material importance to the Complainant's decisions both to use his services as a representative and to purchase the Cloverdale Property:**

(a) The Seller had made an offer on a different property on Cloverdale Avenue which had been accepted but was subject to the sale of the Cloverdale Property; and

(b) Mr. Parsons had referred the listing for the Cloverdale Property to his son who, at all material times, was representing the Seller.

2(iv) contrary to section 3-3(1)(f) of the Council Rules, failed to disclose to [the Complainant] all known material information respecting the real estate services, and the real estate and the trade in real estate to which the services related by failing to disclose:

(a) The information referred to in section 2(iii) a, and b above; and

(b) The existence of an engineer's report ("Engineer's Report") addressing the ingress of water at the Cloverdale Property.

2(v) contrary to section 3-3(1)(d) of the Council Rules, failed to advise [the Complainant] to obtain independent professional advice about the Engineer's Report;

2(vi) contrary to section 3-3(1)(a) of the Council Rules, failed to act in the best interests of [the Complainant] and contrary to section 3-4 of the Council Rules, failed to act honestly and with reasonable care and skill by:

(a) Preparing an offer for the Cloverdale Property which failed to include a "subject to" clause expressly providing for [the Complainant] to obtain a property inspection;

(b) Preparing an offer for the Cloverdale Property which failed to provide [the Complainant] with a sufficient opportunity to undertake basic due diligence by obtaining and reviewing documents including the minutes of the strata council, engineers' reports, and building inspection reports;

(c) Withholding from [the Complainant] material information about the condition of the Cloverdale Property and the conflict of interest arising from the commercial relationship between Mr. Parsons' son and the Seller;

(d) Assisting the Complainant to proceed with a wholly unsuitable offer to purchase the Cloverdale Property and, more particularly, by doing so when Mr. Parsons knew or ought to have known that [the Complainant] was in a highly vulnerable condition;

(e) Failing to make either sufficient or any inquiries about [the Complainant's] ability to conduct business in a prudent manner and with due regard for her own interests when Mr. Parsons knew or ought to have known that [the Complainant's] ability in this regard was in question;

> **(f) Failing to advise [the Complainant] to obtain independent professional advice in connection with the purchase of the Cloverdale Property when Mr. Parsons knew or ought to have known that such advice was required given the condition of the Cloverdale Property, his son's commercial relationship with the seller and [the Complainant's] highly vulnerable condition;**
>
> **2(v) [sic should be (vii)] contrary to section 3-3(1)(h) of the Council Rules, failed to use reasonable efforts to discover relevant facts respecting the Cloverdale Property by failing to make any or sufficient inquiries about the condition of the Cloverdale Property given the existence of the Engineer's Report and the content of the minutes of the Strata Council;**
>
> **2(vi) [sic should be (viii)] contrary to section 5-13(2) of the Council Rules, failed to disclose the existence of a water ingress problem at the Cloverdale Property, that ingress being a material latent defect as that term is defined in section 5-13(1) of the Council Rules;**
>
> **2(viii) [sic should be (ix)] contrary to section 3-3(1)(i) of the Council Rules, failed to take reasonable steps to avoid any conflict of interest or, if a conflict of interest already existed, contrary to section 3-3(1)(j) of the Council Rules, failed to disclose the conflict of interest promptly and fully to [the Complainant] and then failed to refer [the Complainant] to another representative or to recommend to [the Complainant] that she obtain independent professional advice before using or continuing to use Mr. Parsons as a representative in connection with the purchase of Cloverdale Property or both."**
>
> **3. Mr. Parsons, contrary to sections 35(2)(b) and section 35(2)(c) of the Act, committed conduct unbecoming by engaging in conduct that would undermine public confidence in the real estate industry and bring the real estate industry into disrepute when he failed, in a systematic manner and while in a conflict of interest, to represent the interests of [the Complainant] adequately or at all and he knew or ought to have known that [the Complainant] was in a highly vulnerable state due to her personal circumstances and mental status and, further, he knew that [the Complainant] had been a patient in a psychiatric hospital at times material to Mr. Parsons' representation of [the Complainant].**

[12] The only allegation in the Notice of Discipline Hearing not resulting in an adverse finding against the Appellant was that found at paragraph 1(i) thereof to the effect that he had failed to adequately supervise his daughter, said to be an unlicensed employee, in relation to her dealings with the Complainant. That allegation was dismissed, essentially because the Appellant's daughter was found to have done no more than act as a courier for him.

[13] When submissions on penalty were provided, that from Mr. Parsons focussed on the notion that he had done nothing wrong rather than on the appropriate

sanction to flow from the Liability Decision. The nine page Penalty Decision concluded with the following disposition:

> **"Having regard to all the circumstances, the Committee therefore orders that:**
>
> 1. **Mr. Parsons' licence is cancelled, effective immediately;**
>
> 2. **Mr. Parsons may not apply for relicensing for five (5) years and until the discipline penalty and enforcement expenses set out below are paid;**
>
> 3. **Mr. Parsons must pay a disciplinary penalty to the Council in the amount of $10,000.00;**
>
> 4. **If Mr. Parsons applies for relicensing, he must at his own expense, register for and successfully complete the Real Estate Trading Services remedial education course, in addition to any other educational requirements required of him upon re-licensing; and**
>
> 5. **Mr. Parsons must pay enforcement expenses in the amount of $22,487.85, being the full amount submitted by the Council as set out in Appendix A to the submissions of Council of February 5, 2015."**

[14] Below, I will address the scope of this appeal, the applicable standard of review, and the substantive submissions of the parties.

SCOPE OF THE APPEAL

[15] This issue is not as straightforward here as would typically be expected.

[16] Counsel for the Appellant brought two motions in this appeal for interlocutory relief. The first was for an extension of time to file an appeal submission, leading to two Orders I made granting further time for that purpose, and the second was for an Order permitting amendments to the Notice of Appeal in the form of 15 new grounds of appeal, which application I refused as I could discern no potential merit in any of the proposed grounds as they were described. In the course of deciding that second application, I found it necessary to identify the grounds that had been included in the Notice of Appeal already filed by Mr. Parsons, and I observed that there were two and possibly three such grounds:

(a) Council erred in accepting the evidence adduced on behalf of the Complainant over that of the evidence of the Appellant;

(b) Council erred in finding that the Appellant had dealt inappropriately with the Complainant, whether or not he was aware she had a mental health issue; and

(c) possibly, the penalty levied against the Appellant was unfair.

[17] In initially rendering my decision on the amendment application on July 14, 2015—I say "initially", as I gave a brief decision out of time sensitivity, followed by fuller reasons on July 17, 2015—I stated that I would leave it to counsel to make

submissions as they saw fit on the question of whether fairness of penalty was adequately referenced in the Notice of Appeal such that it could be pursued in argument. I also indicated that it was open to the Appellant to pursue other appeal arguments, if any, falling within the Notice of Appeal, and to the Respondents to take whatever position they saw fit in that respect: the parties were not bound by my views then expressed on the scope of the Notice of Appeal, which was simply a topic I felt needed addressing in order to place the amendment requests in context.

[18] The Appellant's main submission on appeal later expressed three grounds of appeal, as follows:

> **"3. The Committee's Merits Decision must be set aside on the following grounds:**
>
> **a. The Committee erred by preferring the evidence of the Complainant over the evidence of the Appellant when such preference was unreasonable;**
>
> **b. The Committee erred in finding that the Complainant had a disability or some typed [sic] of impediment restricting her ability to comprehend basic facts of her real estate purchase and the Appellant was or ought to have been aware of such disability or impediment and as a result of such awareness, the Appellant was to be held to a higher standard of conduct in the absence of evidence of the Complainant's disability or impediment, how the Appellant ought to have been aware of the Complainant's disability or what that higher standard to which he was held actually is.**
>
> **4. With regard to the Committee's Penalty Decision, an Order with Respect to Penalty, the Appellant states that the penalty was unreasonable in the circumstances, excessive, unfair and disproportionate to the findings mad [sic] by the Committee on December 12, 2014."**

[19] The first of those three grounds is clearly within the frame of the Notice of Appeal: it was the Appellant's principal contention there that Council had erred in preferring the evidence of the Complainant to that given by him. The issue arising here is whether the second and third of those appeal grounds have a sufficient origin in the Notice of Appeal. The Appellant has simply advanced the related arguments on this appeal without mention of their permissibility. The Respondent maintains that a number of the submissions falling under the second of those broad submissions, particularly alleging procedural unfairness of one kind or another, are not properly within this appeal, either because they reflect proposed amendments to the Notice of Appeal that I refused to allow, indeed to the point of now constituting, the Respondent says, an abuse of process, or because they are simply not reflected in the Notice of Appeal filed. The Respondent further submits that the third ground contained in Mr. Parsons' appeal submission is outside the bounds of the appeal as the Notice of Appeal made no complaint about the severity of the penalty imposed; rather, the Respondent says, the only complaint there

about penalty was that there should have been none at all because Mr. Parsons had done nothing wrong.

[20] I agree with the Respondent that three of the submissions advanced by the Appellant under the second broad ground reproduced above are beyond the proper bounds of this appeal, for these reasons:

(a) his complaint of a lack of evidence of standards applying to a realtor, whether generally or in relation to a client's medical issue, was the subject of a requested amendment to the Notice of Appeal which was refused. Nonetheless, that argument, by some description, runs through most of this portion of Mr. Parsons' submission on appeal, and in my view inappropriately;

(b) his allegation of lack of procedural fairness arising from that same argument is impermissible for the same reason; and

(c) his argument that there is no evidence that the offer made on the property was wholly unsuitable to the Complainant was also the subject of one of the refused amendment requests, and therefore cannot be pursued.

[21] All three of those arguments are beyond the four corners of the Notice of Appeal, even if generously construed. I will, accordingly, not deal with them below. I will add, however, that I have nonetheless fully considered these submissions by the Appellant, as I have the submissions of the Respondent in respect of them, and in the case of all three of those assertions I prefer the position taken by the Respondent. I would therefore have rejected these arguments even had I considered them to fall within the proper appeal scope.

[22] The arguments advanced by the Appellant under his second broad ground that are maintainable are these:

(a) Council erred in finding that the Complainant suffered from a disability or medical problem restricting her ability to comprehend the basic facts of her real estate purchase;

(b) Council erred in finding that the Appellant was or ought to have been aware of such disability or impediment and that, as a result of such awareness, he was to be held to a higher standard of conduct;

(c) the finding that the Appellant did not obtain and review the Strata Documents contradicted the finding that the Appellant withheld those documents from the Complainant, is unreasonable and must be set aside; and

(d) the finding that the Appellant committed conduct unbecoming a licensee is unreasonable and must be set aside as most if not all of the

> underlying findings of fact are based on the Complainant's unreasonable and unlikely evidence.

[23] The foregoing is my paraphrase of several submissions the Appellant advances under his second ground. The reason they may be pursued is that they are all linked to some content in the Notice of Appeal, in which Mr. Parsons generally touted his credibility over that of the Complainant and asserted that she knew what she was signing in entering into the Cloverdale transaction.

[24] That leaves for consideration the challenge to the fairness of the penalty imposed. As stated, the Respondent argues that the issue is *ultra vires* the appeal as the Notice of Appeal did not advance it. Alternatively, the Respondent in detailed submissions says that the Penalty Decision should on substantive analysis be entirely upheld.

[25] The Notice of Appeal filed April 28, 2015, consists of what I infer to be Mr. Parsons' handwritten insertions in the required form and an attached letter from him of February 16, 2015. In the form itself, he stated that he should be absolved of all guilt, it was just the Complainant's word against his, and her story was ridiculous. He also wrote that he had about one hour to file the Notice of Appeal so was under pressure, apparently to explain why he was merely attaching his February 16, 2015 letter in order to describe his appeal grounds. That letter, as the record below demonstrates, was one that he sent to Council as a submission during the penalty phase of the case. It says almost nothing however about penalty, being concerned rather with the claimed injustice of the Complainant's evidence being preferred to that of Mr. Parsons'; much of the document is taken up with Mr. Parsons' offer to take a lie detector test. The letter does make one reference to cancellation of his licence, as follows:

> **"I also know you are not going to follow my advice about requiring a lie detector test. You would never require a realtor to take one because you would be uncomfortable asking them to take a lie detector test. However you are only too comfortable cancelling a realtor's licence".**

The Notice of Appeal form also makes mention of the cancellation of Mr. Parsons' licence, in the description of the Order being appealed.

[26] On my reading, those are the only references Mr. Parsons makes in his Notice of Appeal to the issue of penalty. On February 16, 2015, when the letter was apparently composed, Mr. Parsons was not complaining about a delivered penalty, as none was delivered until more than two months later. I presume, however, that he understood that cancellation of his licence was being proposed or was possible, leading to the comment I have just excerpted. Although that was an anticipatory complaint, it was in effect repeated when the Notice of Appeal was filed by its attachment thereto, by which time of course licence cancellation had indeed been pronounced.

[27] The reason I stated in my July 14, 2015 decision that a challenged penalty may possibly constitute a third ground within the Notice of Appeal is that the above

simple statement by Mr. Parsons did convey his view that a cancellation of his licence would not be fair. The Respondent on this appeal appears to acknowledge this, but submits that the comment is made only in the context of Mr. Parsons' insistence that he had done nothing wrong and should not be penalized at all, rather than in the vein of the penalty's having being excessive relative to the misconduct findings. I think the Respondent's characterization is fair.

[28] Nonetheless, after careful consideration, I have decided to permit the complaint about penalty to be pursued and considered on this appeal. My reasons are as follows:

(a) a Notice of Appeal, particularly in an administrative regime intended to be less formal than the Court process and often featuring unrepresented parties, should be liberally construed: *Bennett Environmental Inc. v. Cury* [2004] N.B.J. No. 224, at para. 42. Apart from making eminently good sense, such an approach is consistent in my view with the legislative and procedural setting of appeals to the FST, which features informal language around the expression of appeal grounds. Section 22(2)(c) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (made applicable to the FST by section 242.1(7) of the *Financial Institutions Act*, R.S.B.C. 1996, c. 141) requires that a Notice of Appeal to a tribunal: "state why the decision should be changed". Similarly, the prescribed form of appeals to the FST uses simple, non-legalistic language, saying only the following on the need to express something approximating grounds of appeal:

> **"Please explain why you believe the decision is wrong and/or the process below was unfair. State the reasons why the decision should be changed …"**

It is apparent enough from the Notice of Appeal that Mr. Parsons was appealing the decision to cancel his licence and, guided by the liberal construction I think must be brought to the matter, I believe I can safely infer a position that the penalty imposed was excessive and unfair, even in light of the liability findings;

(b) by the combined effect of section 11(1) of the *Administrative Tribunals Act* and section 242.1(7) of the *Financial Institutions Act*, the FST has the power to control its own processes. Such power of course must be used fairly and reasonably (and, as section 11 of the *Administrative Tribunals Act* carries on to say, extends to the making of rules to facilitate just and timely resolution of appeals). I consider it fair and reasonable here to allow the Appellant to challenge the Penalty Decision independently of his challenge to the Liability Decision, with these factors in mind:

(i) the record need not be expanded to accommodate the argument. The Respondent has submitted that, because Mr. Parsons below did not focus a submission on a challenge to sanction, facts that

he may have offered up in that connection are not in the record, and accordingly it is not appropriate to entertain such a challenge on appeal. The submission the Appellant makes regarding penalty, however, does not refer to any new facts (other than perhaps his precise age), and in any event to my mind does not hinge on any new facts. Perhaps more could have been said below about penalty on Mr. Parsons' behalf, but his failure to engage on the issue might simply have meant that other such facts would not now be available to him. The point is academic given that new facts do not feature in the Appellant's submission respecting penalty;

(ii) the submission is advanced in the Appellant's main argument, and has been responded to substantively by the Respondent, which cannot be said to be prejudiced (in the normal sense of that legal concept) if the issue is considered;

(iii) the fairness of the penalty imposed upon the Appellant is arguable (in contrast, for example, to the grounds advanced on the earlier amendment application), and the notion that such a penalty as rendered below might be challenged is not frivolous; and

(iv) adjudication of the appeal will not be delayed as a result of consideration of this argument.

[29] In my view, the interests of justice accordingly dictate that the challenge to the Penalty Decision be permitted for consideration.

[30] In light of my conclusion on the point, I do not find it necessary to contemplate whether the Notice of Appeal could be corrected pursuant to section 22(4) of the *Administrative Tribunals Act* in order to include a clear challenge to penalty. That may have otherwise been a possibility, though is one on which I would have invited submissions before further consideration.

[31] In summary regarding the scope of the appeal, the following grounds are therefore in play:

First Appeal Ground

- Council erred in accepting the evidence adduced on behalf of the Complainant over that of the evidence of the Appellant;

Arguments Under the Second Appeal Ground

- Council erred in finding that the Complainant suffered from a disability or medical problem restricting her ability to comprehend the basic facts of her real estate purchase;

- Council erred in finding that the Appellant was or ought to have been aware of such disability or impediment and that, as a result of such awareness, he was to be held to a higher standard of conduct;

- the finding that the Appellant did not obtain and review the Strata Documents contradicted the finding that the Appellant withheld those documents from the Complainant, is unreasonable and must be set aside;

- the finding that the Appellant committed conduct unbecoming a licensee is unreasonable and must be set aside as most if not all of the underlying findings of fact are based on the Complainant's unreasonable and unlikely evidence;

- Council erred in finding that the Appellant had dealt inappropriately with the Complainant, whether or not he was aware she had a mental health issue; and

Third Appeal Ground

- the penalty levied against the Appellant was unfair.

[32] I extract those different positions from the Notice of Appeal and Mr. Parsons' appeal submission, while recognizing that there is overlap between some of them.

STANDARD OF REVIEW

[33] This marks the single point of intersection between the parties' positions on appeal: they are in agreement that a reasonableness standard applies to all of the appeal grounds advanced.

[34] In a concise submission on the point, the Appellant states that all grounds he raises concern either fact or mixed fact and law, and that appropriate deference must therefore be paid to Council's decisions, the FST being entitled to interfere with them only if they are considered unreasonable.

[35] In support of application here of a reasonableness standard, the Respondent refers to the Supreme Court of Canada's decision in *Doré v. Barreau of Quebéc*, 2012 SCC 12 at para. 44, quoting with approval the earlier decision of that Court in *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, as follows:

> **"Although there is a statutory appeal from decisions of the Discipline Committee, the expertise of the Committee, the purpose of its enabling statute, and the nature of the question in dispute all suggest a more deferential standard of review than correctness. These factors suggest that the legislator intended that the Discipline Committee of the self-regulating Law Society should be a specialized body with the primary responsibility to promote the objectives of the Act by overseeing professional discipline and, where necessary, selecting appropriate sanctions. In looking at all the factors as discussed in the foregoing**

> **analysis, I conclude that the appropriate standard is reasonableness simpliciter. Thus, on the question of the appropriate sanction for professional misconduct, the Court of Appeal should not substitute its own view of the "correct" answer but may intervene only if the decision is shown to be unreasonable. [Emphasis in original.]"**

[36] Payment of deference to a decision on penalty is consistent with this tribunal's decisions in *Atwal v. Real Estate Council of British Columbia*, Decision No. 2010-RSA-001(a), (at paras. 24 to 26), and *Jalloh v. Insurance Council of British Columbia*, Decision No. 2012-FIA-002(a), at para. 24. The Respondent refers to another decision of the FST, *Kulkarni v. Insurance Council of British Columbia*, Decision No. 2014-FIA-001(a) and the passage reviewed there from the earlier FST decision in *Superintendent of Real Estate v. Real Estate Council and Ashworth*, FST 05-012; 05-015, January 31, 2007 (at para. 17), and submits that, while there was discussion in those cases of the review standard being less stringent when applied to determination of sanction than as relates to findings of fact, such a distinction should not be taken up. I note that in both *Kulkarni* and *Ashworth* a reasonableness standard was ultimately applied to the question of sanction.

[37] Is there any basis in law for holding that a reviewing tribunal has somewhat more room to intervene in a penalty decision than in, for example, the assessment of whether a witness before it was a truthteller, even though both questions are to be judged on a reasonableness standard? The Respondent answers this question negatively, referring to authority for the proposition that reasonableness is a single rather than a floating standard. I will not make a general pronouncement on the point here, partly because the opposite side of the issue (if there is one) has not been assumed by the Appellant, and partly because I do not find it necessary to do so in deciding this appeal. I am satisfied here that consideration simply of what was reasonable in the circumstances is sufficient to answer all arguments advanced on this appeal.

[38] While not all reviews of decisions of specialized tribunals should proceed on a measure of reasonableness, it is certainly the case, and consistent with past decisions of the FST, that matters decided within the expertise of the first instance tribunal shall generally attract that measure. The same will hold for findings of fact arising from live evidence that the tribunal has been uniquely able to assess, in contrast to a body like the FST that generally, and as in this case, is presented only with written material. I agree with the parties to this appeal that all of the appeal submissions put forward concern matters within the expertise of Council or arise from its weighing of evidence given at the hearing before it. The question then to be applied on this appeal to all challenges to Council's determinations is whether they were within the bounds of reasonableness.

ARGUMENTS ON APPEAL

[39] I will review the Appellant's submissions in turn.

First Ground of Appeal: Council's preference for the evidence of the Complainant over that of Mr. Parsons

[40] In its Liability Decision, Council made this preference very plain:

> **"The Committee carefully considered the testimony and credibility of the witnesses, and found that both [the Complainant] and her daughter… were credible witnesses, whose testimony was tested on cross examination. In key areas, which will be discussed further below, their testimony was corroborated by other documentation put before the Committee.**
>
> **In addition, the Committee found that generally where there was a discrepancy in the evidence between [the Complainant], and Mr. Parsons, the Committee preferred and accepted the evidence of [the Complainant] over that of Mr. Parsons. In key areas as discussed more specifically below, Mr. Parsons' testimony could simply not be reconciled with the documentary evidence."**

[41] Council then proceeded to set out what it characterized as its key findings of fact. The first of those was that Mr. Parsons knew in late December 2006 that the Complainant had been admitted as an inpatient at EMP, as his daughter at that time and place had picked up a deposit cheque from her in connection with an offer to buy the West Saanich Property. In so concluding, Council rejected Mr. Parsons' evidence, and a written statement he submitted from his daughter, to the effect that this event did not occur until February 22, 2007, and after a binding agreement for the purchase of the Cloverdale Property had already been formed. In support of its finding, Council referred to hospital records indicating that the Complainant was discharged from hospital on January 12, 2007, and to a bank draft dated December 29, 2006.

[42] The second key factual finding was that the Strata Documents were not provided to the Complainant until after the Cloverdale purchase completed on March 29, 2007. In that regard, Council accepted the evidence of the Complainant, and of her adolescent daughter who testified that in April 2007 she came across an envelope containing the Strata Documents at the door to the new home. The factual point was completed by the evidence of the Complainant, who said that this delivery represented her first and only receipt of the Strata Documents.

[43] Finally as to key findings, Council found that Mr. Parsons did not explain the Strata Documents to the Complainant, which it regarded as "particularly egregious" as Mr. Parsons had reviewed them and been aware of their content prior to the subject removal date. The Strata Documents included an engineering report detailing significant water ingress problems and costing options necessary to address life safety concerns. Mr. Parsons testified that he had read that report and was aware of the costing options. The Strata Documents also included minutes of strata council meetings clearly indicating a need for building envelope repairs and discussing a special assessment against the owners, to be taken up at an annual

general meeting to be followed by a special general meeting. Council found that the Complainant was on a tight budget, had specifically advised Mr. Parsons early on that she did not want to buy a "leaky condo", and that if she had been aware of the Strata Documents she would not have purchased the Cloverdale Property.

[44] On appeal, Mr. Parsons argues that the Complainant's evidence was "unreasonable, impossible and unlikely". He particularly challenges the following:

(a) the finding that Mr. Parsons knew in late December 2006 of the Complainant's admission into EMP;

(b) the evidence of the Complainant (a high school teacher) that she did not know what the word "remediate" meant. In this connection, the Appellant is referring to a portion of the transcript in which he was cross-examining the Complainant, apparently regarding the use of the word "remediation" in documentation related to the West Saanich Property;

(c) the finding that he intentionally withheld from the Complainant that his son was the listing agent on the Cloverdale Property;

(d) the finding that he intentionally withheld from the Complainant that the seller of the Cloverdale Property had made an offer to buy another property that had been accepted, subject to his sale; and

(e) the conclusion that Mr. Parsons had failed to disclose to the Complainant relevant, contractually mandated documents (ie, the Strata Documents, as I have defined them).

[45] The question is whether there is any factual determination by Council across that span of submissions that I consider to have been unreasonable. My analysis of each of those five points under the Appellant's first appeal ground is as follows.

(a) Whether the Appellant Learned the Complainant was in the EMP in December 2006 or February 2007

[46] The Appellant does not say anything on this appeal of the significance of this temporal distinction. From the material I have read forming part of the proceeding below, however, I can infer the position that a deposit would not be increased (or, in some cases, paid) until subjects were removed, and if the Appellant learned that the Complainant was at EMP only contemporaneously with receipt of the deposit cheque regarding the Cloverdale agreement in February 2007, presumably the die was cast on that agreement, and despite his newfound knowledge of the Complainant's condition there was no opportunity for extrication from the deal.

[47] In any case, I find no basis for the Appellant's minimally developed submission that Council's factual finding on the point was unreasonable. To the contrary, I note the following:

(a) the Complainant testified that after obtaining the deposit cheque on December 29, 2006 (during a two hour leave from EMP) for the West Saanich offer, within a day or two she telephoned Mr. Parsons and he sent his daughter to EMP to pick up the cheque and deliver a document pertaining to a mortgage. Council heard this evidence and had every right to accept it;

(b) while the Appellant's daughter provided a written statement that she had picked up the cheque on February 22, 2007, the Appellant admitted in evidence that his daughter had asked him on what date she had done so and he had supplied that date to her, before she provided the statement;

(c) the hospital records and the Complainant's evidence showed that she was discharged from EMP on January 7, 2007, and thereafter only attended group therapy sessions on Fridays. The February 22, 2007 date urged by the Appellant was in fact a Thursday; and

(d) in the Appellant's March 13, 2013 response to an inquiry letter from Council, he stated that *he* (as distinct from his daughter) met with the Complainant on February 22, 2007, for the purpose of signing an addendum to remove subjects in connection with the offer on the Cloverdale Property (the Complainant, for her part, testified that she did indeed meet with Mr. Parsons on February 22, 2007, at his apartment [not at the hospital] and for the purpose of providing him with a deposit cheque for the Cloverdale purchase).

[48] I consider the Appellant's challenge to the factual finding regarding when he learned the Complainant was at EMP to be groundless.

(b) Lack of Understanding of the Word "Remediate"

[49] As to the second issue, concerning the word "remediate", I agree with the Respondent that this is merely a reference to evidence of the Complainant that was not the subject of a factual finding at all. That being so, its significance on this appeal is doubtful. Regardless, I do not share the Appellant's view that it is inherently improbable the Complainant would be unaware of the meaning of the word remediate or remediation, regardless of her status as a teacher. For a person not involved in a discipline such as construction or law, these may well be unfamiliar terms. The Appellant's argument that this evidence of the Complainant renders all of her testimony "highly suspect", with the result that wherever it conflicts with his evidence the latter is to be preferred, is simply hyperbolic.

(c) No Disclosure that the Appellant's Son was the Listing Realtor

[50] Again, Council found that the Appellant had wilfully withheld from the Complainant that he had referred the listing for the Cloverdale Property to his son, who became the listing realtor. In his Notice of Appeal, the Appellant states that he is "95% sure" that he told the Complainant his son was the listing realtor. In

his appeal submission, however, he makes no reference to having given evidence of that kind and, based on my review of the transcript, it does not appear that he did so. The closest reference I have noted is Mr. Parsons' statement concerning an MLS listing which did refer to his son's name. On that point, the Complainant said that the MLS listing she saw bore the name of a Darren Chamish, apparently the younger Mr. Parsons' managing broker. The MLS document in evidence is one showing the name of Mr. Parsons' son, and about that the Respondent simply says on appeal that such documents can be changed over time.

[51] Significantly, however, the Complainant gave direct evidence that she was not told by Mr. Parsons that the listing for the property had originally been his and that he had referred it to his son. As far as I have seen, that was the only evidence on the matter. If the Appellant's only real point here hinges on the MLS description in evidence, as it appears to do, it is an especially weak one as that document cannot possibly overcome the Complainant's direct evidence of non-disclosure. The MLS listing even on its face would not necessarily convey to the Complainant (assuming she read it) that the person bearing the same surname as her agent was a relative of his, or indeed his son.

[52] I see no basis for disturbing Council's finding that the Appellant failed to disclose these facts to his client. Nor would I disturb its finding that he intentionally withheld this information from her. The Appellant argues that there was no evidence of such intent but, while not being able to penetrate Mr. Parsons' mind, after hearing the whole of the evidence and assessing Mr. Parsons' credibility and demeanor, Council certainly had the ability to draw a conclusion as to why he failed to make these disclosures. That Mr. Parsons earlier held the listing for the very property his client was offering to purchase, and that he referred the listing to his son, would have been obvious topics for plain discussion between him and the Complainant, well beyond, for example, a passing mention. Given the Complainant's evidence, in effect, that there was not even a passing mention of the subject, Council was entitled to make a finding adverse to Mr. Parsons as to why he had not initiated such a discussion. Whether it was to avoid the appearance of a conflict of interest, or the potential raising of a concern in the Complainant that might inhibit the making or progression of her offer to purchase, it was the view of Council that by his non-disclosure Mr. Parsons was trying to help his son. I see no basis at all for interfering in the finding by this first instance tribunal that this information was intentionally withheld.

(d) Non-disclosure of Seller's Offer on Another Property

[53] The second issue of intentional non-disclosure concerned whether the Appellant told the Complainant that the seller of the Cloverdale Property had an accepted offer to purchase another property, subject to his own sale. As in the case of the origin of the listing and the Appellant's son being the listing realtor, Council found here that the Appellant had engaged in deceptive dealing by withholding these facts from the Complainant. This question on appeal is less straightforward than that concerning the Appellant's son.

[54] This allegation of non-disclosure is made in the Notice of Discipline Hearing, but there was very scant mention below of the seller's having contracted to buy another property. The transcript indicates that no reference to it was made in either the opening or closing submissions made by counsel to the tribunal, and no evidence on the issue was led by counsel from the Complainant. As far as I can gather from the transcript, the topic was mentioned only twice in evidence, once during Mr. Parsons' cross-examination of the Complainant, and once in counsel's cross-examination of Mr. Parsons. The Complainant's evidence on the point in cross-examination was as follows:

> **"Q Yeah, okay. So I suggested that we come in at the 180 and I told you that this seller, it wasn't like the one we had on West Saanich where we could take 10 days to do the bylaws, financial statements and minutes, that this one here we had to have a short fuse. *We had to do it quick because the seller had an offer on another property.* Do you recall that?**
>
> **A What I recall is I had to move quickly. It did have a short fuse because there was another offer on the table.**
>
> **Q *That's what I just said* …" (emphasis added)**

[55] This was the relevant exchange during cross-examination of Mr. Parsons:

> **"Q But you thought it was a low-ball offer, Mr. Parsons. That was what you told her, that it was a low-ball offer, and that if she wanted it to be accepted, it needed to be on a short timeframe to accommodate Mr. Ruggele's (sic) other deal, correct?**
>
> **A Correct".**

[56] No mention has been made on this appeal of any documentary evidence directly showing that ***in fact*** the seller of the Cloverdale Property did have an accepted offer on another property. It does not appear, for example, that such an offer document was placed into evidence. The only document I have noted to touch on the point is a March 13, 2013 letter from Mr. Parsons to Council, wherein he states that he had told the Complainant that the seller of the Cloverdale Property had an offer on another property and that her "lowball offer was more likely to be accepted if we had the subjects off by February 23/2013, three days later. That is why there was such a short fuse on the contract".

[57] I understand the foregoing to be the entirety of the evidence on the issue. In light of that very minimal factual foundation, I am not satisfied it was reasonable to conclude even that the Appellant failed to disclose these facts concerning the Cloverdale seller to the Complainant, much less that he acted deceptively in not doing so. He agreed with the suggestion, put squarely to him in cross-examination, that he had in fact told the Complainant about the seller's other offer. For her part, the Complainant does not actually reject his suggestion in cross-examination that he did so—the point was not pressed to where such a rejection could be discerned—but rather merely relates her memory of a different

reason for the "short fuse", being a competing offer to purchase the Cloverdale Property.

[58] Council wrote little on this subject in the Liability Decision. After referring to what I infer was the statement in the letter from Mr. Parsons that the seller had an offer on another property, it said simply this:

> **"However, on cross examination, [the Complainant] disagreed with Mr. Parson's (sic) that he told her that she had to move quickly because the seller had an offer on another property. [The Complainant] testified that she was told there was another offer on the table, and the Cloverdale Property would not be available. The committee accepted [the Complainant's] testimony in this regard".**

[59] I am somewhat troubled by the lack of any clear evidence (that is, something beyond the Appellant's hearsay in correspondence to Council) that the seller truly did have an offer on another property—if he did not, there was nothing for the Appellant to disclose and the issue does not arise—but beyond this I cannot escape the view that the only direct evidence regarding the disclosure of this apparent fact came from Mr. Parsons, and it is to the effect that the information was indeed disclosed to his client.

[60] This allegation of non-disclosure does not appear to have been pressed by counsel below at all. On appeal, the Respondent really only bases its submission on the briefly expressed finding by Council that I have just excerpted. In my view, that finding was not reasonable as it cannot be fairly reconciled with the evidence, even allowing that Council had the particular advantage of hearing that evidence.

[61] I would, accordingly, set aside the findings and determinations regarding disclosure of the seller's having made an agreement to purchase another property, subject to his sale of the Cloverdale Property. Referring back to the formal parts of the Liability Decision excerpted at paragraph 11 above, I would remove the references to that subject in paragraphs 2(iii) and 2(iv)(a).

(e) Disclosure of the Strata Documents

[62] Finally as concerns the attack on Council's preference for the evidence of the Complainant over that of Mr. Parsons, the Appellant says the finding that he failed to disclose the Strata Documents was unreasonable, as it relied solely upon the evidence of the Complainant. In fact, the latter proposition is not correct: as I have stated, the Complainant's daughter gave corroborative evidence to the effect that in April 2007, well after completion of the purchase of the Cloverdale Property, she found a package at the door to the home which, when she looked inside, she saw to include strata-related documents. The Complainant's evidence was that this was the first occasion upon which she had received the Strata Documents, and further that she had not previously been told by Mr. Parsons of a water ingress problem afflicting the building. Council cannot be said to have acted unreasonably in deciding to accept that evidence. The mere fact that the Complainant removed subjects without having seen the Strata Documents certainly does not render that

evidence inherently improbable, as the Appellant seems to imply in his submission. I see no basis for interfering with Council's finding on this score.

[63] In summary, I reject all of the Appellant's submissions regarding Council's preference for the Complainant's evidence, except as concerns the issue of the disclosure of the seller's agreement to buy another property, in which area I would set aside Council's findings as indicated.

Second Ground of Appeal: the findings that the Complainant had a disability and that the Appellant was or ought to have been aware of it

[64] Again, there is overlap between some of the grounds of appeal discussed in argument. In respect of the Liability Decision, and beyond the various facets of the first ground of appeal just reviewed, I consider the following points to remain:

(i) there was no evidence to support a conclusion that the Complainant's ability to comprehend the basic facts of the agreement was impaired by her condition;

(ii) there was no evidence to support the view that Mr. Parsons knew or should have known of such impairment;

(iii) the finding that Mr. Parsons did not obtain and review the Strata Documents directly contradicts the finding that he withheld them from the Complainant, and is unreasonable; and

(iv) the conclusion that Mr. Parsons had committed conduct unbecoming a licensee, contrary to the relevant sections of *RESA*, is unreasonable and must be set aside, in light of the unreasonable and unlikely evidence of the Complainant.

[65] I do not consider lengthy answers to these submissions necessary. I will discuss them in sequence.

(a) Whether the Complainant was medically compromised

[66] There is no question based on the Complainant's testimony and the documentary evidence that she was hospitalized at EMP on December 23, 2006, following a suicide attempt in the aftermath of a breakdown of her marriage. The Complainant was fully resident at EMP for two weeks and, thereafter, attended for a further week during the day, followed by weekly visits for group therapy. In cross-examination the Complainant candidly told Mr. Parsons that she was competent when signing one or more transaction documents, but competency was not the issue, and Council did not find her to have been incompetent. Rather, it regarded her to be highly vulnerable. Other evidence suggesting her vulnerability included her financial constraints, her lack of experience in purchasing property, and the trust she says she placed in Mr. Parsons. I have considered the Appellant's argument here but having done so immediately reject it. There is no

basis for interfering in the findings that the Complainant's ability was compromised by her condition and that she was indeed highly vulnerable.

(b) Whether Mr. Parsons was aware the Complainant was medically compromised

[67] There is similarly no merit in this challenge by the Appellant. As reviewed above, Council found that Mr. Parsons knew from late December 2006 that the Complainant was at EMP, and he also knew that her marriage had recently come apart. Those facts sufficiently ground Council's conclusion that the Appellant was aware of the Complainant's serious medical condition, which is what led inevitably to the conclusion that he should have made inquiries as to her ability to conduct business in a prudent manner and with due regard for her interests (I note that there was no evidence any such inquiries were made).

(c) Findings concerning Strata Documents internally contradictory

[68] The Appellant submits that, on the one hand, Council found that he did not obtain and review the Strata Documents but, on the other hand, that he intentionally withheld them from the Complainant, and that Council cannot have it both ways.

[69] This submission flows from, I am sure, inadvertent error. The reference given by the Appellant does not support the statement that Council found he had not obtained and reviewed the Strata Documents. In fact, at paragraph 2(e)(ii) on page 22 of the Liability Decision, which is that reference, Council found that Mr. Parsons read the Strata Documents before his client's removal of subjects, but had not afforded her the opportunity to review them.

(d) Conclusion of Conduct Unbecoming Unsupported by Evidence

[70] It is said here that most, if not all, of the findings of fact underlying the determination of conduct unbecoming either unreasonably rely on the Complainant's evidence or Council's breach of procedural fairness. As I have explained, I consider the latter submission to be outside the scope of this appeal, and, as to the attack on findings arising from the Complainant's evidence, I see no basis for the assertion, which is once again laconically expressed in the Appellant's submission. I have explained at some length above why I cannot give heed to the Appellant's various challenges to the findings respecting the Complainant's credibility.

Third Ground of Appeal: Reasonableness of Penalty

[71] Penalty was imposed by Council pursuant to sections 43 and 44 of *RESA*.

[72] Once a discipline committee determines that a licensee has committed professional misconduct or conduct unbecoming, it has the ability (among other steps) to cancel the licence; impose restrictions or conditions upon it; require the licensee to complete studies or training as specified; prohibit the licensee from

applying for a licence for a specified period of time or until specified conditions are fulfilled; require the licensee to pay enforcement expenses under section 44; and to require the licensee to pay a discipline penalty not to exceed (in the case of an individual) $10,000.

[73] As I stated earlier, the full sanction against the Appellant in this case under the Penalty Decision was as follows:

> **"1. Mr. Parsons' licence is cancelled, effective immediately;**
>
> **2. Mr. Parsons may not apply for relicensing for five (5) years and until the discipline penalty and enforcement expenses set out below are paid;**
>
> **3. Mr. Parsons must pay a disciplinary penalty to the Council in the amount of $10,000.00;**
>
> **4. If Mr. Parsons applies for relicensing, he must at his own expense, register for and successfully complete the Real Estate Trading Services remedial education course, in addition to any other educational requirements required of him upon re-licensing; and**
>
> **5. Mr. Parsons must pay enforcement expenses in the amount of $22,487.85, being the full amount submitted by the Council as set out in Appendix A to the submissions of Council of February 5, 2015."**

[74] The Appellant argues that the Penalty Decision is unreasonable, "not commensurate to the actual findings of fact" and disproportionate in comparison to previous penalties cited by Council. He characterizes the penalty terms as "wildly beyond what is reasonable in these circumstances", and the monetary penalties in particular as quasi-criminal fines without "the due process afforded even the most common criminal". The Appellant asks that the Penalty Decision be set aside and that a new hearing on penalty be ordered.

[75] In deciding on penalty, Council took into account:

(a) the serious and numerous transgressions by the Appellant;

(b) Mr. Parsons' discipline history. In particular, on April 24, 2012, the Real Estate Council pronounced a Consent Order wherein Mr. Parsons admitted that he had created a "replacement contract", signing his clients' names and inserting their initials upon it. Evidently, a previous version of the agreement that had been signed and initialled by his clients was not easily legible after having been faxed by them to Mr. Parsons, and a term they had written into the agreement for their benefit was inadvertently omitted by Mr. Parsons when he decided to prepare, sign and initial the replacement version. Mr. Parsons also admitted that he had represented to his clients that they, themselves, had altered a completed agreement by writing that term in (and therefore could not rely upon it), when he knew or ought to have

known this representation was untrue, misleading or both. He was suspended for 30 days;

(c) the Appellant's failure to pay restitution to the Complainant, in relation to the special assessment levy of $59,597.86 (I note that there was reference in evidence to settlement of a civil action brought by the Complainant against Mr. Parsons, though apparently for reasons of confidentiality the terms of the settlement were not disclosed); and

(d) the Appellant's long experience as a licensee at the time of the underlying events.

[76] As to the objectives to be met in levying a sanction, Council referred to public safety, deterrence, punishment and rehabilitation.

[77] The Respondent submits on appeal that the penalty imposed is consistent with past authorities and is justified on the facts. Regarding authorities, it relies particularly on *Dominador Edra,* March 29, 1995, Commercial Appeals Commission and *Munjinder Singh Gill*, November 16, 2000, a Consent Order of the Real Estate Council, which were both emphasized by Council in the Penalty Decision. The Respondent refers on appeal, as it did below, to a total of nine prior decisions, reflecting a broad penalty range from a low of a 30 day suspension to a high of a licence cancellation and a five year ineligibility period before another licence could be sought. The latter decision was made in *Munjinder Singh Gill*.

[78] The Appellant refers to Council's particular reliance upon the *Edra* decision and also that of *Amarjit Singh Gill*, July 21, 2008, Consent Order of the Real Estate Council, whereas in fact it was the *Edra* and *Munjinder Singh Gill* decisions upon which Council focussed. In any case, the Appellant goes on to analyze the circumstances in *Edra* and *Amarjit Singh Gill*, stressing that the deliberate and wrongful acts featured there contrast with the present facts, which involved no malice or motive to profit on his part.

[79] Munjinder Singh Gill by Consent Order was found to have committed 11 separate offences concerning his own personal property dealings, including the misappropriation of deposit monies from buyers, the failure to account for deposits within a reasonable time period, the failure to disclose to buyers that necessary building permits and approvals had not been obtained from the City of Vancouver, and the making of sale agreements despite neither he nor his company then having any interest in the properties being sold. Evidently, Mr. Gill, a licensee, had attempted to buy four lots in a certain development but, before completing on the purchases, entered into agreements to sell units in an intended development of the lots, taking deposit monies before he had secured title, and failing to return them when his ownership was not subsequently secured and the entire scheme collapsed. As the resolution of the discipline proceeding was by consent there is little in the way of reasoning for the sanction settled upon, but it is apparent enough that it was a very serious matter involving dishonesty and self-interest on the part of the licensee.

[80] In *Edra*, the Commercial Appeals Commission, being the predecessor of the FST, upheld a decision following a discipline hearing calling for a cancellation of licence and a three year ineligibility period before application for relicensing could occur. There appear to have been 10 separate professional contraventions and the Commission referred to the misconduct as being "severe", its counsel having submitted that the licensee's actions were "fraught with fraud from beginning to end". The licensee was a sub-agent for a vendor who assigned a real estate contract to another party without disclosing to the vendor that the assignee was paying a further amount of $30,000. Among the myriad offences was the addition by the licensee of a clause in the assignees' agreement without their knowledge and the drawing up of a purchase and sale contract without the knowledge and signatures of the purchasers (whether signatures were forged or somehow misrepresented is not revealed in the appeal decision, but something of that kind is implied). The licensee admitted his misconduct, surrendering his licence on the first day of hearing, but claimed hardship as a result of its cancellation and the three year waiting period. He did apparently take the position that the third party purchasers were aware of and authorized each aspect of the transaction, though this was not accepted by either Council or by the Commission on appeal.

[81] *Sudarshan Rana*, January 11, 2002, Commercial Appeals Commission, was another instance of cancellation of a real estate licence and a determination that a new licence could not be sought for three years. The decision of the Real Estate Council had been to cancel and impose a waiting period of one year, but on the Superintendent's appeal that period was lengthened. The licensee in that case was over 65 years of age and in his application for a British Columbia licence he failed to disclose that he had been refused a renewed licence in Ontario following a suspension arising from deliberate misrepresentation of material facts. Following his licensing in British Columbia, and when acting as a dual agent on a conveyance, he failed to advise the seller that the property was being "flipped" by the buyer to the licensee himself for a higher price. There were several other transgressions around that transaction, including his knowing misrepresentation of fact to a lender while in pursuit of financing. The Commission referred to the licensee's profound lack of insight and to the high risk of recurrence of such conduct.

[82] The *Amarjit Singh Gill* decision, discussed in the Appellant's submission, was a consent resolution between licensee and the Real Estate Council that resulted in a six month suspension. Several contraventions had occurred, centred on a failure to disclose to sellers of a property that the agent's wife was the principal of the corporate buyer. Mr. Gill also facilitated an assignment of the contract without advising the assignee that the deposit monies would wind up in a bank account owned by Mr. Gill and his wife. Compounding his misbehaviour, he then misled Council in the ensuing investigation, advising that another party was in fact the principal of the corporate purchaser/assignor, but without disclosing that the other party was his daughter, while arranging for a transfer of corporate shares to the daughter on the strength of backdated documentation.

[83] I have carefully considered the above authorities as well as all others submitted by the Respondent. The Appellant does not refer to any other authorities and, so far as the case law is concerned, simply seeks to contrast the facts in *Edra* and *Amarjit Singh Gill* with those in this case.

[84] The Respondent refers without opposition from the Appellant to the following factors bearing on appropriate penalty:

- the safety of the public;
- the deterrent effect of a sentence;
- punishment of the offender;
- reformation and rehabilitation of the offender;
- the offender's attitude since the offence was committed;
- the age and experience of the offender;
- whether the misconduct is the offender's first offence;
- whether the offender has pled guilty to the charge of professional misconduct; and
- whether the offender has made restitution.

[85] Distilled to basic elements, the Appellant was found in this case to have failed to safeguard the interests of his highly vulnerable and financially straitened client, and to have actively withheld information from her with the intent of assisting his realtor son, leading to her purchase of a property on which within several months a sum roughly equating to one third of the purchase price had to be paid in remediation cost, thereby causing the client's mother to obtain second mortgage financing to enable that payment. Council appeared to regard Mr. Parsons' failure to review the Strata Documents with his client before the removal of a condition intended precisely to accommodate such a review, and his associated failure to advise her of the concerning content of those documents, as his most serious transgression. I share that view.

[86] On appeal, Mr. Parsons points out that he is 71 years of age (a fact that may not have been in evidence below, but is surely not controversial) and argues that the penalty imposed upon him effectively ends his career. From certain documents in evidence, I have seen that his career commenced in 1995.

[87] I have noted that counsel for the Respondent submitted in the penalty phase of the proceeding below that there should be a very lengthy suspension, understandably without being more specific on the point. Whether counsel was intending there to distinguish a suspension from a cancellation with an ineligibility period is not clear, and I would not want to express a view on that. As to Mr.

Parsons' position below and as I stated earlier, he really made no argument on sanction, as his written submission in the penalty phase was in fact directed to liability considerations.

[88] Weighing a penalty to be imposed against those ordered in earlier decisions is not a precise exercise, nor intended to be. Factual distinctions are inevitable and it is trite to say that each case must be judged on its own merits, with guidance taken from precedent to the extent adaptable and while distinguishing circumstances as needed.

[89] Despite his ongoing denials, the Appellant has committed very serious misconduct here, with terribly adverse consequences for a client whose circumstances ironically called for particular care and consideration. While his previous disciplinary breach was of a different kind, it also featured serious misdeeds and the resulting admissions and suspension should have chastened him into careful, ongoing compliance with professional standards.

[90] Nonetheless, on careful review of the evidence in this case, the submissions made and the authorities cited, I cannot conclude that all aspects of the penalty imposed on the Appellant were reasonable. I will discuss the main aspects of that penalty as follows.

(a) Cancellation of Licence

[91] Licence cancellation is the most severe form of punishment available to Council under section 43 of *RESA*. It should, therefore, only be reserved for cases of serious misconduct. I deliberately refrain from using a phrase like "the most serious misconduct", as I would not think that a fair interpretation of the provision. I see a qualitative difference between licence cancellation under *RESA* and permanent expulsion of a person from his or her profession under certain other self-regulatory regimes, such as, for example, disbarment of a lawyer or removal of a physician from the register. Such expulsions as those have permanent effect and thereby amount to capital punishment that is only warranted for capital offences, so to speak. Under *RESA*, however, there is an ability to both cancel a licence and expressly contemplate the re-admission of the individual on application for a fresh licence after a certain lapse of time. The cases cited on this appeal, some of which I have discussed above, show that something of a practice is in place for precisely such hybrid orders, and which practice has been at least tacitly endorsed in appellate decisions. A scan of these authorities also shows that licence cancellation has not historically been restricted only to the most serious forms of realtor misconduct, with gradations of these contraventions being accounted for in the length of the ineligibility period ordered to accompany the cancellation. Ineligibility period aside, licence cancellation should still not occur unless the misconduct is indeed of a serious character, but it need not be at or near the extreme right of the severity scale, given the ability to moderate the cancellation by permission to apply for relicensing again at a defined time in future.

[92] Against those considerations, I have weighed all of the information presented to me on this appeal, including the depth of the Appellant's misconduct,

its effect on his client, and the relevant disciplinary history, and I do not find the licence cancellation in this case to have been unreasonable.

(b) Five Year Ineligibility Period

[93] Without minimizing the Appellant's conduct or its effects upon his client, I am mindful that he did not misappropriate money and that his conduct was not akin to a fraud. His most alarming failure was not advising the Complainant of the Strata Documents or their content before she bound herself to the Cloverdale purchase, though it must be noted that Council did not find that this information was intentionally withheld; while the distinction will surely make no difference in the Complainant's life, in considering penalty against the Appellant it is of some relevance that this non-disclosure may, for instance, have been a matter of carelessness or incompetence rather than dishonesty. There was a finding of intentional withholding of the information that the listing originated with Mr. Parsons before a referral to his son, and that is a significant factor going to sanction. That is the extent of the intentional non-disclosure, as I am setting aside Council's findings in that area regarding the seller's apparently having contracted to purchase another property. I refer first to these factors in order to home in on the breadth of the deceptive behaviour in this case.

[94] Beyond that, of course, is the other very serious matter of simply failing to protect the interests of a client undergoing crisis.

[95] Taking all of those features of the case into account, and even while staying astute to the Appellant's discipline history, I cannot conclude that a five year ineligibility period was reasonable against the jurisprudence as it has evolved. I see, for instance, material differences between the gravity of misconduct in *Munjinder Singh Gill* and in this case. While direct factual analogies are challenging, I also regard the facts in *Edra* and *Rana*, both of which led to licence cancellation and a three year ineligibility period, to be slightly more alarming than those in this case, even considering aggravating factors here such as the financial impact upon the Complainant, the Appellant's recent history of a contravention involving dishonesty, and his startling lack of insight that he has done anything wrong. On balance, and applying a measure of reasonableness, I would vary the ineligibility period for the Appellant's ability to seek another licence from five years to thirty months.

(c) $10,000 Discipline Penalty

[96] As is apparent from section 43(2)(i)(ii) of *RESA*, a $10,000 discipline penalty is the maximum that may be levied against a non-broker, individual licensee such as the Appellant. That was the discipline penalty imposed upon Munjinder Singh Gill, together with licence cancellation and a five year ineligibility period. In *Edra* and *Rana*, no monetary discipline penalty was imposed. In *Amarjit Singh Gill* a

discipline penalty of $5,000 was ordered, in addition to the six month licence suspension.[1]

[97] In my view, a $10,000 discipline penalty in this case is beyond what is reasonable. Despite the seriousness of the Appellant's misconduct, in taking the relevant case law into account, I do not see that the highest discipline penalty allowable is appropriate. Again applying a standard of reasonableness, I think it appropriate to vary the discipline penalty amount from $10,000 to $5,000.

(d) Enforcement Expenses

[98] The Appellant also complains of the enforcement expenses of $22,487.85 that he was ordered to pay. I agree with the Respondent that imposition of such an obligation is not in the nature of punishment but rather is an administrative matter (though the significance of that distinction may be lost on the person ordered to make the payment). Section 44(1) of *RESA* provides that a discipline committee ***may*** require the licensee to pay the expenses, or part of the expenses, incurred by the real estate council in relation to either or both of the investigation and the discipline hearing to which the Order relates. Section 44(2) states that any such amount ordered must not exceed the applicable limit prescribed by regulation in relation to the type of expenses to which it relates, and may include remuneration expenses in relation to employees, officers or agents of the real estate council, or members of the discipline committee, engaged in the investigation or discipline hearing. There is no reference there to counsel specifically, though counsel is an agent and legal fees might therefore be justifiable for inclusion on that basis. I mention that because $16,350 of the $22,487.85 in total enforcement expenses in this case reflected legal fees incurred prior to, during and following the discipline hearing.

[99] I have been referred to only one authority dealing with enforcement expenses, *Fenelon v. Insurance Council of British Columbia,* FST 08-045, which as the name suggests deals with insurance legislation rather than *RESA*. The only authorities under *RESA* of which I have been advised that order the payment of enforcement expenses are three of the nine decisions the Respondent relied on below concerning sanction – *Amarjit Singh Gill*, *Munjinder Singh Gill,* and *Chang (Charlie) Wancha*, November 21, 2007, Consent Order of the Real Estate Council, all of which were Consent Orders and none of which ordered payment of such expenses in an amount greater than $1,000.[2] I appreciate of course that expenses will be much less where Consent Orders are reached.

[100] In approaching the issue in this case, I take the following points into account:

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[1] While not cited by counsel, I am aware from my own recent decision that a consent order in *Real Estate Council of B.C. and Richard Valouche*, 2015-RSA-001 featured a $10,000 discipline penalty. That case is distinguishable on that score, however, because there was no suspension or cancellation of licence, Council deciding, rather, to deliver the strongest form of sanction in the form of that monetary order.

[2] In *Valouche, supra*, $1,250 in enforcement expenses was ordered to be paid.

(a) the language in section 44(1) of *RESA* is permissive, meaning that Council has a discretion whether or not to order payment of enforcement expenses in cases of misconduct or conduct unbecoming;

(b) if such a payment is ordered, it may be for all or for only a part of the enforcement expenses incurred;

(c) I have not been advised of any authority in which payment of substantial enforcement expenses has been ordered; and

(d) no argument has been addressed to me on whether it is appropriate to include, as is proposed in this case, recovery of fees paid to counsel, or whether all such fees should be attributed to the unsuccessful licensee (I note that in the Court system, it is highly unusual for any Order for full payment of legal fees to be made).

[101] The enforcement expenses are set out in an appendix to the written submission on penalty of counsel for the Respondent below. The total expenses shown are in the amount ultimately ordered to be paid by Mr. Parsons, being $22,487.85. While I would not lightly interfere in the exercise of Council's statutorily conferred discretion concerning such expenses, with the factors I have described in mind, including presumably a lack of prior authority from which support for the order can be drawn, I cannot conclude that laying that full obligation at the Appellant's door is reasonable. I would vary the Order for enforcement expenses payable from $22,487.85 to $7,500.

DISPOSITION OF APPEAL

[102] Pursuant to section 242.2(11) of the *Financial Institutions Act*, made applicable to this appeal by section 54(4) of *RESA*, the member hearing an appeal may confirm, reverse or vary a decision under appeal, or may send the matter back for reconsideration, with or without directions, to the person or body whose decision is under appeal.

[103] Pursuant to that authority, and in summary of the reasoning set out above, I dispose of the appeal as follows:

(a) the appeal from the Liability Decision is dismissed, save and except that paragraph 2(iii)(a) on page 26 thereof shall be removed, as shall be the reference to that paragraph in the succeeding 2(iv)(a). Those findings relate to the subject of the Cloverdale Property owner's apparently having an accepted offer on another property; and

(b) The Penalty Decision is varied to provide as follows:

(i) Mr. Parsons' licence is cancelled, effective immediately;

(ii) Mr. Parsons may not apply for relicensing for thirty (30) months and until the discipline penalty and enforcement expenses set out below are paid;

(iii) Mr. Parsons must pay a discipline penalty to the Council in the amount of $5,000;

(iv) if Mr. Parsons applies for relicensing, he must do so at his own expense, register for and successfully complete the Real Estate Trading Services remedial education course, in addition to any other educational requirements upon relicensing; and

(v) Mr. Parsons must pay enforcement expenses in the amount of $7,500.

COSTS

[104] Firstly, in the Reasons I provided on July 17, 2015, for dismissing the Appellant's application to amend his Notice of Appeal, I noted that Council sought costs and if the Appellant wished to provide a submission regarding that request for costs, he may do so by July 24, 2015. He did not do so, and accordingly Council is entitled to its costs of that application. I hereby fix them in the amount of $1,000, to be paid forthwith by the Appellant to Council.

[105] Secondly, in relation to the main appeal, success has been divided. Additionally, I think there is force in the Respondent's costs submission regarding the Appellant's having advanced arguments outside of the appeal scope and in some cases inconsistently with my decision to refuse amendments requested to the Notice of Appeal. On balance, my present inclination is that no costs should be awarded for the main appeal. If, however, either party wishes to try to dissuade me from that tentative view, they may make a written submission on the point by November 27, 2015, to which the other party will have a right of reply by December 4, 2015. In the event both parties make such an initial submission, a right of reply will exist on both sides to the extent of dealing with any points not already addressed.

"Patrick Lewis"

Patrick F. Lewis
Vice-Chair
Financial Services Tribunal

November 13, 2015