FST 05-013/FST 05-014

FINANCIAL SERVICES TRIBUNAL

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

BETWEEN:

SANDRA JEAN STINSON

KEITH GRANT NELSON

APPELLANTS

AND:

THE REAL ESTATE COUNCIL OF BRITISH COLUMBIA

RESPONDENT

APPEAL DECISION

A. BACKGROUND

This appeal is the result of actions taken in the sale of a property to Mr. William Hanson by 623024 B.C. Ltd. Mr. Dwayne Nikkels is the sole shareholder of that company and was the decision maker with respect to the sale of the property. The property in question was a newly constructed residential property with an address of 388 Point Ideal Road, Lake Cowichan, British Columbia. The transaction was completed in October 2003.

The real estate licensees involved in the transaction were Sandra Jean Stinson and Keith Grant Nelson, who were both licensed with Countrywide Village Realty Ltd. of Lake Cowichan, British Columbia. Because both salespersons were licensed with the same agency, the salespersons were in a situation of limited dual agency.

Mr. Hanson filed a complaint with the Real Estate Council of British Columbia ("the Council") on March 17, 2004. As a result of this complaint, the Council originally issued a Notice of Hearing on November 5, 2004. This Notice was amended with an Amended Notice of Hearing issued on April 22, 2005.

The Amended Notice of Hearing outlined eleven allegations of misconduct, negligence or incompetence against both licensees pursuant to Section 31(1)(c) of the Real Estate Act and/or Regulation 9.12. The specific allegations are outlined in the amended Notice.

The Real Estate Act rather than the Real Estate Services Act was the authority for this case as the former rather than the latter was in force during October 2003.

A Hearing was held on June 14, 15 and 16, 2005 and the decision of the Council that resulted from the Hearing was dated August 2, 2005.

The Council dismissed 8 of the eleven allegations against licensees Stinson and Nelson. However, the Council found that:

1. Both licensees were negligent in that they "failed to ensure a contract was put into effect that clearly set out the rights and responsibilities of the parties, including the parties' rights and responsibilities upon default" (allegation (a));

2. Both licensees were negligent in that they "failed to advise the parties and each of them to seek independent legal advice and the time to obtain such advice prior to the execution of the contract, prior to the execution of addenda amending the terms, and prior to the agreement to release the $5,000 deposit directly to the seller" (allegation (c)); and,

3. Both licensees were negligent in that they "failed to clarify when the items disclosed in the September 7, 2003 addendum would be completed and the ramifications of non-compliance" (allegation (h)).

It should be noted that negligence is not defined in the Real Estate Act or regulations. However, the Court of Appeal has suggested that the term "negligence" as used in the Real Estate Act means "carelessness". The Standards of Business Practice Guidelines (see Tab 1 Volume II of Respondent's Authorities) suggest that the accepted and normal standards of real estate practice are taken into account when determining negligence. The Standards go on to say that licensees must remember that they are being paid commissions for their expertise and that they must consistently work at a high standard, including obtaining and checking all information, to earn their remuneration. In other words, the Standards suggest that licensees cannot act as passive paper shufflers, but rather must play an active role in protecting the interests of their clients. Failure to do so constitutes carelessness or negligence.

As a result of the Council's findings with respect to negligence, it imposed penalties and remedial measures on the licensees. These are outlined in Section G of this Decision.

Both Ms. Stinson and Mr. Nelson have appealed the decision of the Council. The Notice of Appeal for Mr. Nelson was received by the Financial Services Tribunal ("Tribunal") on September 1, 2005. I was assigned as the Tribunal member to consider the appeal on September 2, 2005.

After the submission of a deficient Notice of Appeal filed by Ms. Stinson, a revised Notice of Appeal dated September 19, 2005 was accepted by the Tribunal. I was assigned as the Tribunal member to consider the appeal on September 26, 2005.

For obvious reasons it was felt that the same Tribunal member should be assigned to these two appeals. The Tribunal did not receive any expressions of concern regarding this course of action.

The record for this case was received from the Council on September 23, 2005 and consisted of :

- The Decision of the Council dated August 2, 2005;
- The Book of Documents that was used at the Hearing of the Council;
- The Book of Exhibits pursuant to the Hearing of the Council; and,
- The transcripts from the Hearing of the Council.

After the granting of several delays to both appellants, the appeal submission of Ms. Stinson was received by the Tribunal on November 24, 2005. The appeal submission of Mr. Nelson was received by the Tribunal on November 25, 2005.

A response from the Council was received by the Tribunal on December 12, 2005 and a submission from the Superintendent of Real Estate was received on December 16, 2005.

Final reply submissions on behalf of both Ms. Stinson and Mr. Nelson were received by the Tribunal on January 9, 2006.

There has also been new evidence submitted during the appeal process and I have accepted all the new evidence filed on the grounds that the new evidence does answer certain questions and was of some assistance with respect to this appeal decision.

B. PROCESS

I have reviewed and relied on all the documents outlined in the preceding paragraphs. In addition, I have taken the position that the appropriate standard of review for this appeal is the standard of reasonableness. This is consistent with the standard that has been adopted in a number of previous decisions taken by the Tribunal.

C. TWO IMPORTANT ISSUES

There are two issues of significant importance with respect to the transaction in question. The first of these was that this was a situation of limited dual agency due to the fact that Countrywide Village Realty acted as the agent for both the buyer and the seller of the property. The limited dual agency statement signed by both the buyer and the seller indicates that "the agent and **its salespersons** will be the agent for both the buyer and the seller." Ms. Stinson and Mr. Nelson were the salespersons involved in this transaction. Despite the fact that Ms. Stinson worked more closely with the buyer and Mr. Nelson worked more closely with the seller, it is clear from the limited dual agency statement that both Ms. Stinson and Mr. Nelson were agents for both the buyer and the seller and had agency obligations to each.

The evidence suggests that Ms. Stinson and Mr. Nelson did not fully appreciate the implications of working under a limited dual agency situation.

The second issue of importance is that the property in question was a newly constructed property. The Licensee Practice Manual 1999 has devoted a section to this subject (see Exhibit 3). The introduction to this section states the following:

"Licensees should be aware that there are special considerations when dealing with partially constructed or newly constructed properties. Whereas some of these issues are discussed in the section below, a licensee who is not experienced in this area should seek a nominee/manager's guidance. Failure to do so could result in a finding of negligence within the meaning of the Real Estate Act."

This section of the Licensee Practice Manual indicates that "it is difficult, if not impossible, to include an agreement to build a house or renovate a house on a standard form of Contract of Purchase and Sale" and covers a number of topics including defects/repairs, warranties, walk-throughs/deficiency lists, builder's lien holdbacks and the certificate of occupancy. Suggestions are made as to appropriate clauses that should be added to contracts with respect to these issues.

The Licensee Practice Manual also indicates that because of the special considerations associated with the sale of new construction, licenses should recommend that both parties obtain independent legal advice.

The evidence suggests that neither Ms. Stinson nor Mr. Nelson have a wealth of experience in the sale of new construction (see testimony of Mr. Richard Bonnell, page 124 of transcript). Nor was there any evidence to suggest that Mr. Stinson or Mr. Nelson consulted in detail with the nominee regarding new construction or reviewed the relevant sections of the Licensee Practice Manual with respect to new construction at the time the transaction was taking place.

D. ALLEGATION A: DEFICIENCY OF CONTRACT

The Council found that both licensees were negligent in that they "failed to ensure a contract was put into effect that clearly set out the rights and responsibilities of the parties, including the parties' rights and responsibilities upon default" (allegation (a)).

When viewed in the context of the new construction section of the Licensee Practice Manual, it is clear that the contract that was put in place for this transaction was inadequate.

- There was no clause related to the builder's lien holdback as suggested by the Licensee Practice Manual, although it is recognized that the lawyer for Mr. Hanson did provide for the holdback in the statement of adjustments. It is further recognized that this omission in itself is not sufficient to show negligence due to the fact that the Council dismissed the specific allegation regarding the

builder's lien holdback (see page 20 of the Council Hearing Decision dated August 2, 2005).

- There were no specific clauses related to warranties as suggested by the Licensee Practice Manual. Had the clauses suggested on pages 56 and 59 of the Licensee Practice Manual been incorporated into the contract, the problems associated with the home warranty would have become obvious prior to the completion of the transaction. The Property Disclosure Statement does indicate that the premises were covered by home warranty insurance but neither licensee did an independent check on the validity or limitations of the coverage.

- The deficiency list that was incorporated into the contract on September 7, 2003 does not appear to be of sufficient detail as that recommended in the Licensee Practice Manual. The testimony of Ms. Stinson also suggests that the deficiency list could have been more thorough (see page 526 of the transcript); and

- There is no "arbitration clause" incorporated into the contract with respect to the settlement of potential disputes regarding deficiencies as suggested by the Licensee Practice Manual. Mr. Nelson agreed that an arbitration clause would have been beneficial (see page 480 of the transcript).

The Property Disclosure Statement forms part of the contract. Although it is the responsibility of the seller to complete the property disclosure statement, licensees have a responsibility to take reasonable steps to ensure the information disclosed by the seller is accurate. In the case of this property, it was indicated that the seller was not aware of any additions or alterations made to the property in the last sixty days. The seller indicates that this was inaccurate (see page 308 of the transcript). The inaccuracy was obvious because the property was under construction. Had either of the licensees done a thorough review of the disclosure statement, this inaccuracy would have been uncovered.

Finally, there is the issue of the gas fireplaces. The feature sheet describing the property which was prepared by the agent indicated that the property had a list price of $359,000 and included two gas fireplaces. The seller, Mr. Nikkels, accepted an offer of $300,000 but has testified that as a result of the price reduction, the two gas fireplaces were to be excluded. The buyer, Mr. Hanson, testified that he is of the view that the two gas fireplaces were to be included in the transaction. Ms. Stinson is also of the view that the two gas fireplaces were to be included in the transaction (see page 551 of the transcript). Mr. Nelson, on the other hand, is of the view that the gas fireplaces were to be excluded (see page 469 of the transcript).

The contract makes no mention of gas fireplaces and as a result is inconsistent with the feature sheet. Nevertheless, the contract template does have an exclusion section (section 7) which was left blank. It would appear that this section of the contract template provides the appropriate clause to exclude items that appear on the listing sheet. The fact that it was left blank and the fact that the two licensees in addition to the buyer and seller

are in disagreement about whether the fireplaces are to be included or excluded suggests that the contract was deficient.

The amended contract dated September 7, 2003 indicates a completion and possession date of September 25, 2003. The completion date was subsequently adjusted to October 3, 2003 to allow the seller to discharge the mortgage on the property. It is also noteworthy that the seller could not have completed the transaction on September 25 because he could not have supplied an occupancy permit as required by the contract. The occupancy permit was issued on September 30, 2003.

The Council found that the contract should have specified the terms and conditions under which Mr. Hanson was to have possession of the property prior to the completion date. However, it is acknowledged that the two licensees were not directly involved in moving back the completion date of the sale as these negotiations were conducted between the lawyer acting for Mr. Hanson and the notary acting for Mr. Nikkels. Nor were the licensees involved in the decision to allow Mr. Nikkels to reside at the property after the possession date.

However, the licensees were aware that as of September 26, 2003, there was still considerable work to be done with respect to the completion of the property including some of the items specified in the contract amendment dated September 7, 2003. They were also aware that Mr. Nikkels was continuing to reside at the property after the possession date. It is clear that such a situation was very unusual.

At this point the transaction had yet to complete. In order to protect the interests of the buyer and seller, prudent licensees would have contacted both the buyer and seller, conducted a walk through, come to an agreement regarding all deficiencies, specified a timetable to remedy deficiencies, specified a dispute resolution procedure and specified as to when Mr. Nikkels would vacate the property. Prudent licensees would have incorporated the results of these actions into a final addendum to the contract before the completion date.

Despite the fact that the licensees did not directly participate in the negotiations that resulted in a delay in the completion date and despite the fact that the Council did not feel that failure to incorporate the suggested contractual provision with respect to the Builder's Lien Act did not in itself constitute negligence, it is my opinion that there is sufficient evidence to reasonably support the Council's finding that the licensees failed to ensure that the contract adequately set out the rights and responsibilities of both parties with respect to a number of important issues.

E. ALLEGATION C: LEGAL ADVICE

The Council found that the licensees were negligent in failing to advise the parties to seek independent legal advice in a number of situations.

Page 54 of the Licensee Practice Manual (Exhibit 1, Tab 20) states:

"In a situation where the seller will be building or renovating prior to completion, or where the transaction includes a contract to build a house, a real estate licensee should recommend both parties obtain independent legal advice, so that they can fully understand their respective rights and obligations under the agreement."

In addition, Page 55 of the Licensee Practice Manual states that deficiency lists should be reviewed by the buyer's lawyer or notary.

With respect to the issue of deposits, a reminder to licensees was issued by the Council during August 2000 (Exhibit 1, Tab 21). This reminder quoted a portion of a decision by the Commercial Appeals Commission which states:

"...a reasonably prudent and careful licensee acting impartially for both parties would not advise a purchaser to hand a deposit over directly to a seller without obtaining independent legal advice, in order to ensure that the purchaser's interests were protected. The Licensee Practice Manual not only advises that the buyer be warned to obtain independent legal advice before giving a deposit to a seller, but recommends that the licensee confirm such advice in writing".

Although the Licensee Practice Manual is very clear that a recommendation for independent legal advice should be given in all cases of new construction, it is recognized that the Council indicated that it did not expect the "licensees to advise the parties to obtain independent legal advice prior to the execution of the contract on July 28, 2003" (see Page 19 of Council Decision dated August 2, 2005). This finding, however, does not suggest that the licensees should not have recommended that legal advice be sought after July 28, 2003 or as amendments were being made. In particular, the Council found that the licensees were negligent in failing to advise each of the parties to seek independent legal advice prior to the addenda to the Contract of Purchase and Sale dated August 11, 2003 relating the $5,000 deposit and the addenda of September 7, 2003 relating to the deficiency list and the $5,000 holdback.

The evidence suggests that the licensees did not suggest legal advice at these times.

Arguments have been put forward as to why the licensees were not required to suggest legal advice:

- The contract of July 28, 2003 has a one line clause which states: "Both parties to receive GST advice". It has been argued that this statement indicates that the licensees suggested to both the buyer and seller to obtain legal advice from the outset. I disagree with this argument as the clause is vague and does not even suggest that legal advice should be obtained. It is quite conceivable that GST advice would be obtained from an accountant familiar with tax law.
- It is argued that it is not necessary for a licensee to remind the client to obtain legal advice on more than one occasion. That is, if legal advice is recommended for issue A, it does not need to be repeated for issue B or issue C. I disagree. There may be numerous changes with respect to a Contract of Purchase and

Sale. Some of the changes may be minor and not require legal advice. Some of the changes may have more far reaching implications where legal advice might be beneficial. The real estate licensee has far more knowledge than the client as to which situations could benefit from legal advice and should advise the client accordingly.

- It was argued that the licensees had reason to believe that Mr. Hanson was receiving legal advice from the outset of the contract and therefore it was not necessary to recommend legal advice on specific issues. The evidence indicates that legal advice was not provided to Mr. Hanson with respect to the terms and conditions of the Contract of Purchase and Sale dated July 28, 2003, the Addendum dated August 11, 2003 or the Addendum dated September 7, 2003. Nevertheless, even if the licensees were under the impression that legal counsel was in place, they should have provided suggestions with respect to the appropriate issues on which to seek legal advice.

It is very clear that the Council regards the requirement to recommend legal advice before providing a deposit to a seller as very important as noted in the preceding quotation from the August 2000 reminder issued by the Council. Furthermore, the requirement is even more important in a limited dual agency situation because limited dual agency diminishes the licensee's ability to represent the buyer and seller with any degree of independence. Finally, in this case, Mr. Nelson and Ms. Stinson appeared to disagree as to whether Mr. Hanson should make such a deposit, with Ms. Stinson suggesting that she was very much opposed (see page 577 of the transcript). Such a disagreement coupled with the situation of limited dual agency indicates that a recommendation for Mr. Hanson to seek legal advice would have been very appropriate.

Moreover, the evidence suggests that legal advice was not recommended for either the buyer or seller with respect to the deficiency list and remedies for failure to correct the deficiency list contrary to the advice outlined in the Licensee Practice Manual.

Finally, as noted previously, the licensees were aware that as of September 26, 2003, there was still considerable work to be done with respect to the completion of the property including some of the items specified in the contract amendment dated September 7. 2003. They were also aware that Mr. Nikkels was continuing to reside at the property. In the previous section, it was indicated that the licensees should have taken steps to attempt to amend the contract for the protection of both the buyer and the seller. Given the uniqueness of the situation, they should have also recommended that both the buyer and seller seek legal advice.

Therefore, it is my opinion that the evidence, particularly the evidence related to the $5,000 deposit to the seller, reasonably supports the Council's finding of negligence with respect to the failure of the licensees to recommend that legal advice be sought.

F. ALLEGATION H: REMEDY OF DEFICIENCIES AND NON-COMPLIANCE

The addendum dated September 7, 2003 contains a list of four deficiencies that were to be completed as part of the contract; including the installation of a sliding door, the replacement of siding, the completion of the kitchen and the completion of closet doors. It does not include dates as to when these were to be completed. It does, however, contain a clause that the buyer's lawyer will retain a holdback of $5,000 until everything was completed as agreed. There is no clause in the contract to indicate what constitutes agreement that everything is completed.

Testimony suggests that there was a general agreement that the deficiencies covered in the September 7, 2003 addendum would not be remedied by the completion date of September 25, 2003 as specified in the addendum. In fact, Mr. Nikkels testified that he was of the view that agreement had been reached that the replacement of siding would not be done until the spring of 2004 (see page 322 of the transcript). In addition, Mr. Nikkels testified that as of September 7, 2003 he could not guarantee the availability of a specific contractor (Mr. Don Davis) to undertake the necessary work on the kitchen by the completion date (see page 337 of the transcript). Mr. Hanson's actions of allowing Mr. Nikkels to continue to reside at the property after the completion date suggest that he was also of the view that the deficiencies would not be fully remedied by the completion date. However, Mr. Hanson did have the expectation that steady progress would be made.

The current ambiguity with respect to deficiencies would have certainly been avoided had some tentative dates been specified for the remedy of deficiencies. This could perhaps have been more effectively accomplished on or after September 26, 2003. Moreover, the failure to specify what constituted an acceptable remedy of the deficiencies has put Mr. Nikkels at risk as to when, if ever, he is to receive the $5,000 holdback.

Therefore, I am of the view that the Council's finding of negligence with respect to this allegation is reasonable.

G. PENALTIES

The following penalties and remedial measures were imposed on Ms. Stinson and Mr. Nelson:

1. Ms. Stinson and Mr. Nelson each be suspended for twenty-one (21) days;

2. Ms. Stinson and Mr. Nelson, as a condition of continued licensing, each be required to successfully complete Chapter 10 (the Law of Contract) and Chapter 12 (the Law of Agency) of the Real Estate Trading Services Licensing Course;

3. Ms. Stinson and Mr. Nelson, as a condition of continued licensing, each be required to enroll and attend the first available "Legal Update" course; and,

4. Ms. Stinson and Mr. Nelson, as a condition of continued licensing, each pay enforcement expenses in the amount of $1,500 within 60 days of August 2, 2005.

The Council also strongly recommended that Ms. Stinson and Mr. Nelson read the Council's current Licensee Practice Manual, 5th Edition very thoroughly.

The remedial measures imposed by the Council have not been challenged. The length of the suspension has been challenged as being too harsh.

It is recognized that the Council found that the licensees were guilty of negligence and not the more serious action of misconduct. From a broader perspective, the evidence suggests that this negligence was the result of:

- A failure by the licensees to fully understand the nature of limited dual agency coupled with a failure of the licensees to adequately communicate with each other on a number of occasions with two examples being the fireplace confusion and the disagreement over the deposit;
- A failure by the licensees to understand the special requirements associated with new construction despite the fact that there appears to be excellent written material readily available to assist licensees in this regard; and,
- A failure by the licensees to actively protect the interests of the clients as required by the Standards of Business Practice Guidelines. The licensees accepted the warranty information from the seller without attempting anything in the way of verification. Despite the unique and potentially troublesome situation that existed after possession but before completion, the licensees did not attempt to actively intervene to protect the interests of either the buyer or the seller.

It is somewhat difficult to determine the appropriate length of suspension in this case. The Council has put forward five Council decisions which have involved negligence.

- Ronald Louis Patrick Antalek – who acted as a listing agent on behalf of a seller and failed to ascertain that the seller was not the owner of the property, failed to advise the buyer of the nature of the seller's interest to acquire the property from the registered owner and represented to the buyer that the seller could build a residential house on the property when he knew or ought to have known that this was not true. Mr. Antalek received a 10 day suspension as a result of a Consent Order.
- Danette Lynn Ball – who acted as the buyer's agent in the transaction described in the preceding paragraph. It was found that she failed to take reasonable steps to discover facts pertaining to the property and failed to confirm particulars of the seller's ability to provide a warranty as represented in the contract. Ms. Ball received a 10 day suspension as a result of a Consent Order.
- Simeon Driscoll – who acted as the salesperson for the selling agent and had the buyers remove their subject to financing too early. As a result the lender would not advance. Mr. Driscoll received a 14 day suspension. The Commercial Appeals Commission upheld the Council's decision.
- William Lloyd Loeppky – who acted for the sellers of a property. The Commercial Appeals Commission upheld two of the four Council findings of

negligence against Mr. Loeppky. In particular, the Commercial Appeals Commission found that Mr. Loeppky was negligent because he did not have a reasonable basis to assert the water quality of the property was suitable. Mr. Loeppky was also found negligent for representing the property as being 2.00 acres on the listing sheet when he had no basis for making such a precise representation to the buyers.

- Wai-Lun William Wat – who acted as a dual agent. Mr. Wat was found negligent because he failed to ascertain whether the property had any defects and whether these defects had been properly repaired and failed to protect the buyers by failing to provide the buyers adequate time to comprehend the "subject to inspection" removal amendment prior to execution by the buyer. Mr. Wat was also found to be incompetent for failure to protect the interests of the buyer by not inserting a "subject to" clause in the contract relating to inspection of the property. Mr. Wat was suspended for 21 days.

I believe that the Wat case is the closest case to the one at hand in that it involves an inadequate contract plus a failure to undertake necessary verification. Both elements are present in the case at hand, including more serious contractual deficiencies, plus the finding that the licensees failed to recommend the obtaining of legal advice when appropriate.

Therefore, I feel that the twenty one day suspension imposed by the Council in this case to be reasonable under the circumstances.

Council has submitted that this appeal be dismissed with costs in favor of the respondent. I do not believe costs should be awarded in this appeal and no order is made.

DATED AT VANCOUVER, BRITISH COLUMBIA, this 15th day of February, 2006.

FOR THE FINANCIAL SERVICES TRIBUNAL

ROBERT J. HOBART
PRESIDING MEMBER