BRITISH COLUMBIA

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DECISION NO. FST-RSA-20-A005(a)

In the matter of an appeal under section 54 of the *Real Estate Services Act*, SBC 2004, c 42

BETWEEN:	Jacob Giesbrecht Siemens	**APPELLANT**
AND:	Real Estate Council of British Columbia	**RESPONDENT**
AND:	Superintendent of Real Estate	**THIRD PARTY**
BEFORE:	A Panel of the Financial Services Tribunal Jane A. G. Purdie, Q.C., Panel Chair	
DATE:	Conducted by way of written submissions concluding on February 01, 2021	
APPEARING:	For the Appellant: Self-represented For the Respondent: David T. McKnight, Counsel For the Third Party: Joni Worton, Counsel	

OVERVIEW

[1] In accordance with section 42 of the *Real Estate Services Act*, SBC 2004, c 42 (the "RESA"), a panel of the Real Estate Council of BC ("RECBC", "Council" or the "Respondent") Discipline Committee (the "Committee"), determined that Jacob Giesbrecht Siemens (the "Appellant") committed professional misconduct within the meaning of section 35(1)(a) of the RESA and specifically contravened Rule 3-3(1)(b) of the RECBC Rules.

[2] The Committee found that the Appellant was a managing broker and, in that role, suggested to a licensee with less than a year's experience, that the licensee could lend money to a client. The Committee found:

(a) that this loan gave rise to a conflict of interest,

(b) that the Appellant failed to advise the licensee to take reasonable and appropriate steps to avoid the conflict of interest,

(c) that the Appellant failed to advise the licensee to disclose the conflict of interest to the licensee's client and recommend that the client get independent legal advice about the matter, and

(d) that the Appellant failed to advise the licensee to properly document the loan prior to advancement of the funds.

[3] The Committee issued its Decision Regarding Liability on October 2, 2019, and its Decision Regarding Sanction on June 1, 2020.

[4] In the Sanction Decision, the Committee ordered:

a. The Appellant pay a penalty of $5,000 within 60 days;

b. The Appellant successfully complete the Broker's Remedial Education Course within 6 months;

c. The Appellant pay enforcement expenses of $26,000 within 6 months;

d. If the Appellant fails to comply with any of the foregoing orders, the Committee may suspend or cancel the Appellant's license without further notice.

[5] The Financial Services Tribunal ("FST" or "Tribunal") hears appeals from enforcement decisions made by regulatory bodies of certain regulated occupations including the RECBC.

[6] The Appellant appeals to the FST from both the Liability and Sanction decisions. In his Notice of Appeal the Appellant asks the Tribunal to:

a. set aside the decision of the RECBC and order a new hearing;

b. alternately, reduce the penalty to be in line with *Roberts (RE),* 2013 CanLII 14176 RECBC;

c. return the Appellant's $850 appeal filing fee.

[7] By section 54(2) of the RESA, the RECBC is a party to this appeal. Under section 54(3) of the RESA, the Superintendent of Real Estate (the "Superintendent") is also a party. The RECBC opposes the appeal, seeks a dismissal of the appeal and an order for costs. The Superintendent also opposes the appeal and adopts the submissions of the Council.

[8] Section 242.2(11) of the *Financial Institutions Act*, RSBC 1996, c 141 (the "FIA") applies to this appeal, and provides that the FST may confirm, reverse, or vary a decision or send the matter back for reconsideration, with or without directions, to the person or body whose decision is under appeal.

BACKGROUND

[9] In 2014, the Appellant, with more than 30 years of experience, was the managing broker of a real estate brokerage. One of the licensees of the agency (the "Licensee"), in his first year of licensing, acted for a client (the "Client") in buying property on which the Client intended to build a carriage house, garage and kennel. When the costs of construction exceeded the Client's resources, the Client approached the Licensee to list the property and partly built home for sale. The Appellant and Licensee attended at the property and the Appellant and the Licensee determined that the value of the property would be significantly increased if the construction were completed.

[10] During their discussion of several financing options to assist the Client, the Appellant also suggested to the Licensee that the Licensee could lend money to the Client to complete the construction. The Appellant did not provide any direction to the

Licensee regarding the mandatory requirements to disclose a potential conflict of interest created by a loan offer, to document the nature of the loan and/or to instruct the Client to seek independent legal advice in relation to such a loan offer. The only caution the Appellant provided to the Licensee was to secure his loan by way of a second mortgage on the property.

[11] Ultimately, the Licensee did lend money to the Client. No final loan documentation was executed, the moneys were not repaid and eventually the Licensee sued to recover his money. As a result of a complaint filed by the Client against the Licensee in 2016, the entire situation came to the attention of the RECBC. Ultimately the property in question was sold for full list price.

[12] The Licensee, in his own discipline matter, entered into a Consent Order admitting that he had committed professional misconduct under the RESA by failing to recognize the conflict of interest in making the loan to the Client, failing to deal with the conflict of interest or potential conflict of interest in accordance with the Rules and failing to document the terms of the Loan.

[13] The Appellant, as managing broker, was found to have committed professional misconduct in that he:

> (1) suggested to the Licensee that he provide a loan (the "Loan") to his client which Loan was to be secured by a mortgage against the Client's property so that the Client could continue with construction on the property, placing the Licensee in a conflict of interest;
>
> (2) failed to properly advise the Licensee that the Loan could place the Licensee in a potential conflict of interest, and failed to properly advise the Licensee to take reasonable and appropriate steps to avoid any conflict of interest, or to disclose the conflict of interest; and
>
> (3) failed to tell the Licensee to advise the Client to seek independent legal advice about the Loan, the promissory note, and the second mortgage that was to be registered against the property, and failed to ensure that the Licensee documented the terms of the Loan before the Client proceeded with the Loan.

ISSUES

[14] The Appellant's submissions comprised a half page of reasons for appeal in his Notice of Appeal, and five pages of submissions titled "Points of Concern and Issues being Appealed", and two pages of reply submissions. Distilled from these submissions and in consideration of the RECBC's submissions I have set out below the questions to be answered in this appeal:

a. Did the Committee misapprehend the evidence?
b. Did the Committee misstate the standard of proof?
c. Did the Respondent unduly delay bringing the discipline?
d. Did the Committee err by restricting questioning during the hearing?
e. Did the Committee misstate the standard of care of a managing broker?

f. Should the Respondent have proceeded in the absence of a complaint from the public?

g. Did the Committee err in finding the Appellant committed professional misconduct by failing to ensure the Licensee documented the loan?

h. Did the Committee err in holding that the RECBC was not bound to refer the Appellant's consent order proposal to a consent order review committee?

i. Was the penalty ordered by the Committee reasonable?

j. Did the Committee impose unreasonable enforcement expenses?

STANDARD OF REVIEW

[15] A panel of the FST is not obliged to follow decisions by other members of the Tribunal as a matter of precedent but it is incumbent on panel members to strive for consistency. Using a similar standard of review will support such consistency.

[16] In the decision *Inglis v Real Estate Council of BC and the Superintendent of Real Estate*, Decision No. 2019-RSA-001(a), Panel Chair Good canvassed the many decisions made by the FST regarding Standards of Review. Ms. Good set out the application of the relevant standards of review on appeals since the decision in *Kadioglu v Real Estate Council of BC and the Superintendent of Real Estate*, Decision No. 2015-RSA-003(b), where Panel Chair Baker (as she then was) delineated her understanding of the relevant standards of review on appeals to the FST. Since *Kadioglu* there has been general adoption of those standards.

[17] The Appellant did not provide any specific submission as to the standard of review.

[18] The Respondent submits that the FST applies the *Kadioglu* standards of review. The Respondent further submits that the issues raised in this appeal "concern questions of fact, mixed fact and law and discretion" and, as such, should be assessed on the reasonableness standard.

[19] The Respondent then goes on to discuss the application of the reasonableness standard as set out in the decisions in *Kia v Registrar of Mortgage Brokers*, Decision No. 2017-MBA-002(b) ("*Kia*"), *Schoen v Real Estate Council of British Columbia and Superintendent of Real Estate*, Decision No. 2017-RSA-002(b) ("*Schoen*"), and *Financial Institutions Commission v Insurance Council of BC*, Decision No. 2017-FIA-002(a)-008(a) ("*Bridge Tolls*"). The Respondent further references *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*"), for the proposition that in order to be reasonable a decision must fall within a range of possible, acceptable outcomes, and must be reached in a justified, transparent and intelligible manner.

[20] Having considered the *Inglis* case amongst the other cases raised by the Respondent, I adopt the standards of review set out in *Kadioglu* to the issues raised in this appeal which are:

a. correctness for questions of law,

b. reasonableness for questions of fact, discretion and penalty, and

c. fairness, for procedural fairness questions.

[21] I will apply these standards using guidance from the decisions in *Kia*, *Schoen*, *Bridge Tolls* and *Vavilov*.

ANALYSIS

a) Did the Committee misapprehend the evidence?

[22] The Committee found that the Appellant had suggested to the Licensee that the Licensee provide a loan to the Client and that the provision of the loan did in fact place the Licensee in an actual or potential conflict of interest with the Client. The Committee further found that the Appellant failed to advise the Licensee to have the Client obtain independent legal advice to ensure that the Client was protected from the potential or actual conflict of interest.

[23] The Appellant submits that evidence of his making such a suggestion is merely a claim by the Committee, and that it was not clear from whence the suggestion for a loan arose. He further submits that "confusion as to how the events occurred and who suggested what and when after that amount of time passing is evident in the testimony given by [the Licensee]… his statements and his memory were in conflict".

[24] The Respondent suggests that the Appellant's submissions are an attempt to reargue the case and submits that "it is not open to the Tribunal to set aside the Committee's findings of fact, which are well-supported by the evidentiary record and are transparent and intelligible"

[25] In *Kadioglu,* the case of *Hensel v Registrar of Mortgage Brokers*, Decision No. 2016-MBA-001(a)("*Hensel*") is quoted with respect to the analysis of findings of fact (*Kadioglu* at para 29 citing *Hensel* at para 17):

> [17] In recognition of these principles, the Tribunal has developed its own appellate "standard of review" jurisprudence. It has held that the case for deference to a first instance regulator is most compelling where the first instance regulator has made findings of fact. Since the Tribunal, unlike the Commercial Appeals Commission it replaced, is required to hear appeals on the record rather than conduct hearings de novo, the Tribunal's decisions properly accord deference where an appeal takes issue with evidentiary findings and related assessments. The rationale for this deference is the same rationale appellate courts use in granting deference to factual findings of trial judges. As noted by this Tribunal in *Nguyen v. Registrar of Mortgage Brokers*, July 20, 2005, p. 9. "Deference must be given to the findings of fact and the assessments of credibility made by the Registrar who actually experienced the hearing procedure, heard the witnesses, saw the documentary evidence and, combined with his experience and knowledge given his position as Registrar of Mortgage Brokers, was in the best position to make the findings of fact found in his decision".

[26] I have reviewed the Transcript and the Appeal Record. The Appellant would like me to infer conclusions from the testimony which are clearly not in the Transcript. His suggestion that the passage of time has changed memory is also refuted by his own written response to the complaint, received by RECBC in 2016, when he stated that:

> I suggested to [the Licensee] that if perhaps if he was in the financial position that he could lend them the required to finish the home, thereby making it easier to sell the property. I advised him to secure the loan against the title on the property to ensure that he would be repaid when the home sold, if he choose to help them out if they had no other options.

[27] The Appellant cross-examined the Licensee, who was called as a witness for the RECBC. He was unsuccessful in having the Licensee deny that the Appellant had suggested the idea of a loan nor did he obtain confirmation from the Licensee that the Appellant had, at any time, indicated that he recognized the loan would put the Licensee in an actual or potential conflict of interest.

[28] There is nothing in the Appeal Record which would cause me to interfere with the findings of fact of the Committee with respect to the actions or inactions of the Appellant. The Committee did not misapprehend the evidence and its determinations were reasonable.

b) Did the Committee misstate the standard of proof?

[29] The Appellant submits that it was up to legal counsel for the Committee to prove guilt beyond a reasonable doubt, without providing any authority for this proposition.

[30] The Respondent does not specifically respond to the Appellant's assertion that the Committee used the wrong standard of proof.

[31] The Committee stated that the burden of proof was on the Council to demonstrate that the Appellant committed professional misconduct and that the standard of proof was the balance of probabilities. In citing *F.H. v McDougall*, 2008 SCC 53 ("*McDougall*"), the Committee adopted the decision of Mr. Justice Rothstein that the Committee had to be satisfied, based on the evidence that was sufficiently clear, convincing, and cogent, that the occurrence of an event was more likely than not. *McDougall* made it clear that the only common law standard of proof in civil cases is that of "balance of probabilities".

[32] The standard of review for a legal question is correctness. The Committee acknowledged its duty to make findings, if any, of professional misconduct on the balance of probabilities and with clear, convincing, and cogent evidence.

[33] In *McDougall*, Mr. Justice Rothstein stated (at para 40) "[o]f course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof."

[34] I reject the Appellant's submission that the Committee had to use the criminal standard of proof rather than the civil standard of proof as articulated in *McDougall.* The civil standard of proof is the balance of probabilities and that is the standard of proof used by the Committee here and the correct standard of proof.

c) Did the Committee unduly delay initiating the discipline?

[35] The Appellant raised in his submissions that time limitations should be taken into consideration like the "two year maximum" for criminal court matters. The Appellant

then goes on to state that most civil proceedings have a two-year statute of limitations.

[36] The Appellant's timeline was:

a. the events giving rise to the offence occurred in 2014,

b. the Client submitted a complaint in 2016, and

c. the Appellant was ultimately served with the Notice of Discipline Hearing in April 2019.

[37] The Respondent submits that this issue was not raised at the hearing nor was there an inordinate delay from the time the Committee received the Client's complaint to the date of hearing. It does not respond to the Appellant's suggestion that time limitations should mirror those of criminal courts.

[38] The Respondent submits that the British Columbia *Limitation Act,* SBC 2012, c 13 (the "*Limitation Act*") applies only to matters defined as court proceedings and claims, neither of which definition is applicable here.

[39] The issue of delay in the context of this appeal raises two questions which attract different standards of review. First, the question of whether any statutory or common law time limitations apply to this appeal. This is a question of law which attracts a correctness standard of review. Second, the question of delay, generally, raises a question of procedural fairness, to which the fairness standard applies.

Criminal time limits

[40] With respect to the criminal court time limitation, these time limits have arisen from section 11(b) of the *Canadian Charter of Rights and Freedoms*. This section provides that "Any person charged with an offence has the right (b) to be tried within a reasonable time". The Supreme Court of Canada in *R. v Jordan,* 2016 SCC 27, determined that a reasonable time would be 18 months from the time a charge is laid until the trial is completed in provincial courts and 30 months in superior courts. The Court further held that where the delay is found to be unreasonable the appropriate remedy is a stay of proceedings.

[41] While not specifically arguing a *Charter* remedy, the Appellant, by referring to the criminal time limits, appears to be arguing that the disciplinary decisions against him should be set aside as they violate his *Charter* rights.

[42] First, I pause to note that in my view, this question of whether a *Charter* remedy could follow from a breach of the Appellant's alleged right to be "tried within a reasonable time" may be answered by the fact that the Appellant was not charged with an offence as set out in section 11. However, I do not find it necessary to base my decision on this point. It is clear from the statutory scheme governing the operation of the FST that this Tribunal does not have the jurisdiction to consider constitutional questions such as this.

[43] The FST is established under section 242.1 of the FIA, and section 242.1(7)(e) of the FIA sets out that section 44 of the *Administrative Tribunals Act* SBC 2004, c 45

(the "ATA") applies to appeals conducted by this Tribunal. Section 44 of the ATA states that the FST does not have jurisdiction over constitutional questions.

[44] The term "constitutional questions" is defined in section 1 of the ATA to mean "any question that requires notice to be given under section 8 of the *Constitutional Question Act*". Section 8(2) of the *Constitutional Question Act*, RSBC 1996, c 68 (the "CQA"), states the following:

> (2) If in a cause, matter or other proceeding
>
> (a) the constitutional validity or constitutional applicability of any law is challenged, or
>
> (b) an application is made for a constitutional remedy,
>
> the law must not be held to be invalid or inapplicable and the remedy must not be granted until after notice of the challenge or application has been served on the Attorney General of Canada and the Attorney General of British Columbia in accordance with this section.

[45] The term "constitutional remedy" is further defined in section 8(1) of the CQA as meaning "a remedy under section 24(1) of the *Canadian Charter of Rights and Freedoms* other than a remedy consisting of the exclusion of evidence or consequential on such exclusion". The Applicant is not seeking a remedy consisting of the exclusion of evidence or consequential on such exclusion.

[46] The definitions above clearly preclude the FST from considering any question where a constitutional remedy is being requested, such as setting aside a decision for a breach of section 11(b) of the *Charter*. I find that the Tribunal does not have jurisdiction to entertain the remedy sought by the Appellant based on criminal court time limitations.

Civil time limits

[47] Section 120 of the *RESA* does specifically set out a limitation period, but only for laying an information for an offence under Part 8, Division 1- Offences, the consequences of which could be a maximum of 2 years imprisonment and fines of up to $2.5 million dollars. There is no such statutory limitation period set out in the RESA Part 4, Division 2- Discipline Proceedings section, governing discipline matters, but neither are the consequences of discipline orders as severe.

[48] The Respondent asserts that the *Limitation Act* only applies to court proceedings and claims, and a discipline hearing is neither a court proceeding nor does it involve a claim.

[49] The *Limitation Act* deals with "limitation periods", which are defined as: "in relation to a claim, means the period after which a court proceeding must not be brought with respect to the claim". The definition of claim is "a claim to remedy an injury, loss or damage that occurred as a result of an act or omission". This appeal involves neither a claim nor a court proceeding and the *Limitation Act* does not apply.

[50] The RECBC is correct that there is neither a statutory time limitation on the bringing of a discipline matter under Part 4 of the RESA, nor on the time between events giving rise to discipline and an eventual hearing.

Delay generally

[51] Having made the above findings regarding statutory limitation periods, I note that in the context of administrative law, the matter of delay can give rise to a breach of procedural fairness regardless of statutory limitations. However, in order to be successful in a claim of undue delay the Appellant must demonstrate prejudice of such a kind and degree as to significantly impair the right to a fair hearing. There must be evidence that the delay affected the Appellant's ability to respond to the allegations.

[52] The Respondent cites *Schoen*, where Panel Chair Strocel addressed the issue of delay in administrative proceedings and held that (at paras 49 and 50):

> [49] In the administrative law context, inordinate delay can lead to procedural unfairness in cases where "significant prejudice" has resulted either in the form of a party's inability to answer the case against him or her, or in the form of the delay being so inordinate as to amount to an abuse of process. [Footnote Omitted] I find no such prejudice exists in the present case, and, furthermore, much of the delay the Appellant complains of was caused directly or indirectly by his own actions.
>
> …
>
> [50] The Appellant has not shown that he was unable to answer the case against him as a result of the delay, nor has he shown that is one of the "extremely rare" cases in which delay has rendered the proceedings an abuse of process.

[53] I agree with Chair Strocel's analysis above and find that in the present case, while complaining about delay, the Appellant has not shown that he was unable to answer the case against him. As early as 2016 in response to the original complaint about the Licensee's actions, the Appellant admitted to the facts alleged in this complaint.

[54] I do not find that there was inordinate delay that has rendered the proceedings an abuse of process. The Appellant was not prejudiced by the length of time between the events giving rise to the discipline and the ultimate decision being rendered.

d) Did the Committee err by restricting the Appellant's questioning during the hearing?

[55] At the hearing, the Licensee was called as a witness and the Appellant had the opportunity to cross examine the Licensee. The Appellant questioned the Licensee about the law of contract during the hearing and the Committee ruled, after an objection from prosecuting counsel, that the Appellant was not allowed to continue to question the Licensee on his knowledge of contract law.

[56] The Appellant submits that if the Committee had not restricted his right to question the witness on the law of contract he would not have been found guilty of the offences. He goes on to argue that this prejudiced his case and further that the existence of a contract between the Licensee and the Client and the timing of the advancement of loan funds were germane to the finding of fault.

[57] The purposes of cross-examination of a witness are to allow the Appellant to challenge the witness's credibility and to obtain evidence to assist in proving his case.

[58] The Respondent points out that the Appellant's question of the Licensee required him to give an opinion on contract law, which the Committee disallowed after objection by the Respondent's counsel.

[59] This is a matter of procedural fairness and the standard of review is fairness.

[60] While administrative tribunals do not have to follow the rules of evidence and can give wide latitude to questioning, this particular question neither went to challenge the witness's credibility, nor did it go to obtaining evidence to assist the Appellant's case. The witness was not an expert in law or contract law and was not qualified to give an opinion on the law.

[61] I do not find that the disallowance of the question breached the Committee's duty of procedural fairness to the Appellant.

e) Did the Committee err in proceeding in the absence of a specific complaint against the Appellant?

[62] The Appellant submits that no complaint was filed specifically against him, and the complaint made against the Licensee for whom the Appellant was managing broker was not about the loan giving rise to the conflict of interest.

[63] The Respondent submits that, though unclear as to how this would constitute a ground of appeal, as this issue was not raised at the hearing it objects to its introduction on appeal and submits that it did not form part of the Committee's decision. The Respondent further submits that the RECBC's mandate to investigate misconduct is not limited to matters addressed in a complaint.

[64] As pointed out by the Respondent, section 37(1) of RESA provides that "On its own initiative or on receipt of a complaint, the real estate council may conduct an investigation to determine whether a licensee may have committed professional misconduct or conduct unbecoming a licensee."

[65] In this case, the Committee's investigation was initiated by a different complaint against the Licensee by the same Client in the same transaction and it was this investigation that appears to have initiated the discipline hearing involving the Appellant in his role as managing broker of the Licensee.

[66] This is a question of law and the standard of review is that of correctness.

[67] The law clearly allows the Council to initiate its own investigation and does not restrict the initiation of its investigations to complaints received.

[68] This issue was not argued at the original hearing and even if it had been argued there is no merit in the argument that no specific complaint was made against the Appellant. The Appellant's argument fails on this ground.

f) Did the Committee misstate the standard of care of a managing broker?

[69] The Appellant submits that a managing broker works for the licensee, not the other way around, and that this gives the managing broker little or no authority to oversee the activities of the licensee. He also argues that the Committee should not

have relied on articles in the Report from Council (October/November 2015) "*Quick Fix-or Quicksand?"* and "*Disclosure Dilemmas"* (the "Report"), which was published some time after the occurrence of the events in question, to impose responsibility on him as a managing broker.

[70] The Respondent submits that no objections were made to the introduction of the Report at the hearing, and, moreover, there is no reference to it in the Liability Decision by the Committee.

[71] The issue of what standard of care was applicable to the Appellant as managing broker in the context of this case is one involving mixed fact and law. As such, the standard of review is that of reasonableness.

[72] I agree with the basic premise of the Appellant's argument that the standard of care of a managing broker at the material time was that required in 2014, not what the Report specified one or more years later. Having said that, I find that the articles in the Report were merely an explanation of the standard of conduct of a managing broker which was in effect at the time of the conduct.

[73] The responsibility of a managing broker in supervising his or her licensees is not a new obligation, and indeed is captured, at least in part, in the RECBC Rules.

[74] The Committee does refer to the Brokerage Standards Manual which references the relevant Rules which were in effect at the material time.

[75] The Appellant does not address the Real Estate Rules from which his liability arose; notably Rules 3-1 and 3-3 with respect to the supervision of his licensees.

[76] These Rules are quite clear (underlining added):

> **Managing broker responsibilities**
> 3-1
>
> (1) *Supervision* – A managing broker must
>
> (a) be actively engaged in the management of their related brokerage,
>
> (b) ensure that the business of the brokerage is carried out competently and in accordance with the Act, regulations, rules and bylaws, and
>
> (c) ensure that there is an adequate level of supervision for related associate brokers and representatives and for employees and others who perform duties on behalf of the brokerage.
>
> (2) *Knowledge of improper conduct* – If the managing broker has knowledge of conduct that the managing broker considers
>
> (a) may constitute professional misconduct, or conduct unbecoming a licensee, on the part of a related licensee, or
>
> (b) may be improper or negligent conduct, in relation to the provision of real estate services, on the part of
>
> (i) a related licensee, or
>
> (ii) an employee of the brokerage or any other person associated with the brokerage,
>
> the managing broker must take reasonable steps to deal with the matter.
>
> **Duties to clients**

> 3-3
>
> Subject to sections 3-3.1 and 3-3.2, if a client engages a brokerage to provide real estate services to or on behalf of the client, the brokerage and its related licensees must do all of the following:
>
> a) act in the best interests of the client;
>
> …
>
> d) advise the client to seek independent professional advice on matters outside of the expertise of the licensee;
>
> i) take reasonable steps to avoid any conflict of interest;

[77] The articles in the Report from Council to which the Appellant objects, provide scenarios to highlight the issues arising from the lending of money to a client, the conflict of interest that arises and that the client's interests must always come before that of the licensee. They do not introduce any new duty but merely provide practical examples referencing the existing rules and the duties which were already imposed.

[78] While there might have been a valid objection to the introduction of the Report if it were to impose a higher duty of care, I find the Report was not used for this purpose. Additionally, and in any event, there is no indication in the Liability or Sanction Decisions that the Committee relied on these articles or the Report.

[79] In the Liability Decision the Committee specifically referenced a much older case involving a licensee, his managing broker and a conflict of interest, being *Bodnar v. British Columbia (Real Estate Council*), 1994 CanLII 1609 ("*Bodnar*"). In *Bodnar*, the finding of guilt made by the Real Estate council and upheld by the Commercial Appeals Commission was ultimately upheld by the Court of Appeal. The finding was that the both the licensee and managing broker were guilty of negligence for not taking reasonable steps to avoid a conflict of interest. In that case, the action giving rise to the finding of negligence was the licensee personally offering to purchase his client's property.

[80] I find that the Committee did not misstate the standard of care of a managing broker at the material time and that its analysis of the standard of care required by the Appellant in the context of this case was reasonable.

g) Did the Committee err in finding the Appellant committed professional misconduct by failing to ensure the Licensee documented the loan?

[81] The Appellant spends an inordinate proportion of his submissions on the nature and validity of the loan agreement made by the Licensee with the Client and the timing of the advancement of funds by the Licensee. He submits that the Committee erred in finding he misconducted himself with regard to the allegation that he "failed to ensure that [the Licensee] documented the terms of the Loan before agreeing to pay the construction invoices contrary to section 3-4 (act with reasonable care and skill)…" (Liability Decision at para 3(1)(c)).

[82] The Appellant argues that the Committee erred in making this finding against him because the Licensee documented the terms of the loan on behalf of the Client before the Client proceeded with the loan and received funds from the Licensee.

[83] This is a matter of mixed fact and law regarding what evidence the Committee considered and whether and how it applied the law. The standard of review is reasonableness.

[84] As pointed out by the Respondent, at no time during the hearing did the Council find there was no valid contract between the Licensee and the Client; the Respondent concedes that the Committee was presented with evidence concerning the verbal contract between the Licensee and the Client.

[85] The Appellant appears to be submitting that because the terms of the loan were, in fact, a valid verbal contract that he should not have been found to have committed professional misconduct for failing to ensure the Licensee documented the terms of the loan. I find that the Appellant's argument shows that he misapprehends the nature of the allegation and findings against him.

[86] The Committee was concerned that the Appellant failed to act in his role as managing broker in supervising the Licensee. Whether a loan contract was in existence before advancement of funds was not a relevant consideration. It was the Appellant's conduct that the Committee was analyzing.

[87] The Committee ultimately held (Liability Decision at para 36):"[a]lso respecting Notice Item #1c, and putting aside the conflict of interest arising from the Loan, the [Appellant] failed to ensure that [the Licensee] documented the terms of the Loan on behalf of the Client, before to the Client proceeded with the Loan and received funds through payment of the construction invoices, so that he would comply with Rule 3-4 [act with reasonable care and skill].

[88] The Appellant does not appear to understand that his duty of care was to avoid a conflict of interest and ensure that the Client was well-represented. Giving advice to his Licensee to ensure there was a loan contract prior to advance of funds and to obtain security for such loan did not satisfy the Appellant's obligations to the Client under the Rules.

[89] The Committee found that even leaving aside the findings surrounding the origin of the conflict of interest, the Appellant, as the managing broker, was required to take reasonable steps to act in the best interests of the Client and to do so, he had to ensure that the Licensee documented the loan with the Client prior to it proceeding which the Committee found that he did not do.

[90] Contrary to the Appellant's submissions, nothing in the Committee's decision relied on whether there was a valid contract, or the timing of the loan agreement or advance of funds.

[91] The Committee's determination that the Appellant had breached his obligations based on these factual findings was reasonable.

h) Did the Committee err in holding that the RECBC was not bound to refer the Appellant's consent order proposal to a consent order review committee?

[92] Section 41 of the *RESA* sets out the process for delivering and handling consent order proposals ("COP") as follows:

> *Consent orders*
>
> 41 (1) At least 21 days, or a shorter period permitted by the real estate council, before the time set for the discipline hearing, the licensee who received a notice under section 40 *[notice of discipline hearing]* may deliver to the real estate council a written proposal that includes the licensee's consent to a discipline committee making a specified order under section 43 *[discipline orders]* without conducting a hearing.
>
> (2) If a proposal under subsection (1) is received, the real estate council
>
> (a) may postpone the time set for commencing the hearing until the proposal has been dealt with in accordance with this section, and
>
> (b) if the hearing is to be conducted after the postponement, must give notice of the time and place of the hearing in accordance with section 40 (3) *[delivery of hearing notice]*.
>
> (3) The real estate council may refer or decline to refer a proposal to a discipline committee.
>
> (4) If a proposal is referred under subsection (3), the discipline committee may accept the proposal, in which case
>
> (a) the discipline committee may make the proposed order, and
>
> (b) no further proceedings may be taken under this Division or Division 5 *[Administrative Penalties]* with respect to the matter, other than to enforce the terms of the order as proposed or to deal with a contravention of the order. …

[93] Under this section of the RESA, the Appellant could potentially have avoided the hearing by making a written proposal consenting to a discipline committee making a specified order under section 43 *RESA.* Upon receipt of such a proposal, the RECBC could either refer or decline to refer the proposal to a discipline committee.

[94] The Appellant submits that the Committee erred in not accepting the COP which he provided to the lawyer for the Council. The Appellant's argument is that external counsel for the RECBC exceeded his authority in refusing to direct the proposal to the RECBC. This argument and the Appellant's evidence were first raised at the sanction hearing, which was conducted by written submissions.

[95] This issue appears to raise both a legal question and a factual question. The legal question is what the obligation is on the RECBC to refer a COP on to a Consent Order Review Committee. The factual question is whether RECBC Counsel acted in accordance with any such obligation. I will review the legal question for correctness, and I will review the factual question for reasonableness.

[96] As part of his written submissions the Appellant included what appears to be an email from Counsel for the RECBC to the Appellant. The email appears to be in response to an email from the Appellant regarding the Appellant's proposal for a consent order. The relevant portion of the email from Counsel for the RECBC states:

> To be clear, I am not here to support your recommendations for a reprimand. As you are aware, I act for the RECBC whose interests are adverse to yours. My instructions from Council are that it will not support a COP for which you are

> proposing only a reprimand as a penalty. In Council's view this is not sufficient in the circumstances and will not be supported by the Consent Order Review Committee.

[97] Although the Committee accepted into evidence the Appellant's argument about his provision of the COP and his written submissions and email evidence in support, it ultimately concluded that it had "little relevance or significance to its sanction decision" (Sanction Decision at para 21).

[98] The Committee determined that the Council is not bound to proceed with a COP to a Consent Order Review Committee if the COP proposes a penalty that Council does not agree is appropriate. It further held that in the Appellant's particular case, "the Council had no obligation to refer Mr. Siemens' suggested COP to a CORC" (Sanction Decision at para 17).

[99] I have little difficulty finding the Committee's conclusion on this point is both correct in relation to the legal question, and reasonable in relation to the factual question.

[100] On the legal point, section 41(3) of the RESA expressly states that the RECBC may refer or decline to refer a proposal to a discipline committee. Simply because the Appellant provided a COP to the RECBC does not obligate the RECBC to act in a certain way.

[101] On the factual point, it is implicit in the Committee's reasons that it accepted that Counsel for the RECBC was acting in accordance with instructions from his client, and that his refusal to pass the COP on to a Consent Order Review Committee constituted the RECBC's denial to refer the COP as provided for in the legislation.

[102] The Committee did not err in its decision. The RECBC was not bound to refer the Appellant's consent order proposal to a consent order review committee.

i) Was the penalty ordered by the Committee reasonable?

[103] The Appellant in his Notice of Appeal submits that the penalty order made by the Committee is out of line with other RECBC decisions and that at worst, the penalty should be more in line with *Roberts (RE)* 2013 CanLII 14176 RECBC.

[104] The *Roberts* case was settled by a Consent upon an "Agreed Statement of Facts, Proposed Acceptance of Findings" with only the penalty being argued before the Committee. The Licensee was prepared to accept a finding that he committed professional misconduct when he failed to avoid conflicts of interest and failed to act in the best interests of the client *inter alia* in a convoluted series of transactions in which the Licensee was both personally and professionally involved and loaned money. The penalty in that instance was that the Licensee was:

a) to be suspended for 14 days,

b) to successfully complete the Real Estate Trading Services Remedial Education Course within a specified time,

c) to pay a discipline penalty in the amount of $2,000 within 90 days, and

d) to pay enforcement expenses in the amount of $3,683.80 within 60 days.

[105] The Appellant also submits that the cases of *Magnus* (Re) 2015 Canlii 90646 (BC REC) and *Hachey* (Re), 2015 Canlii 41250 referred to by the Committee were dissimilar to the facts of this case.

[106] The Respondent submits that the Committee noted that in *Magnus* and *Hachey* the licensees entered into consent proposals and agreed to penalties of $5,000 and $2,500 respectively. The Respondent also argues that in the Appellant's case there were no mitigating factors as were present in the *Roberts* case.

[107] The Standard of Review for penalty is reasonableness.

[108] In determining whether the Committee acted reasonably I had the benefit of its 18 pages of Reasons for Decision regarding Sanction. The Committee outlined some of the history and the guiding principles for the imposition of penalties in RECBC disciplinary matters and referred to the *Sanction Guidelines* published in 2018. The six specific purposes of sanctions to further the overarching goal of protecting the public include (Sanction Decision at para 25):

a. denouncing misconduct, and the harms caused by misconduct;
b. preventing future misconduct by rehabilitating specific respondents through corrective measures;
c. preventing and discouraging future misconduct by specific respondents through punitive measures (i.e., specific deterrence);
d. preventing and discouraging future misconduct by other licensees (i.e., general deterrence);
e. educating respondents, licensees and the public about rules and standards;
f. maintaining public confidence in the real estate industry.

[109] The Committee outlined the specific purposes of the Guidelines and the relevant principles of proportionality, progressive discipline, effectiveness, need to prevent profit from wrongdoing, and consideration of mitigating and aggravating factors, and then went on to conclude that the Appellant's misconduct was serious in nature and direct harm to the public resulted based on the finding of an actual or potential conflict of interest and the law suits that resulted.

[110] The Committee went on to consider the Appellant's clean disciplinary record and his taking some responsibility in his written submissions. However, the Committee held that his admission came late in the disciplinary process and it was therefore entitled to little weight as a mitigating factor.

[111] The Committee also concluded that the issue of public confidence in the disciplinary process is of importance with respect to the sanction for this case.

[112] The Committee reviewed the authorities presented by the parties, notably the *Roberts* case. The Committee distinguished *Roberts* however, as in that case the licensee had taken active steps to mitigate the damage. With respect to the *Hachey* and *Magnus* cases, the Committee held that as they were both consent orders it should be cautious in applying their outcomes, but that they could provide some guidance.

Those cases of a licensee loaning money to a client resulted in penalties of $5,000 and $2,500 respectively.

[113] In this case, the Appellant was the managing broker of the Licensee. It was the Applicant who suggested the action of the loan which resulted in the conflict of interest and then failed to take reasonable steps to avoid or deal with the resulting conflict of interest when the Licensee acted upon that suggestion. He failed to take reasonable steps to avoid or deal with the conflict of interest. The Licensee who had actually made the loan which resulted in the conflict of interest had agreed to a $5,000 penalty and the Committee ordered the same penalty for the Appellant.

[114] The Committee clearly articulated the basis for its penalty order and carefully considered relevant precedent cases. I find the Committee's penalty order of $5,000 is not an unreasonable order in the circumstances.

j) Did the Committee impose unreasonable enforcement expenses?

The Order for enforcement expenses

[115] The Appellant disputes the order made for him to pay enforcement expenses of $26,000 as being unreasonable. Although the original claim was for $27,637.90 it was corrected during the sanction hearing to $29,137.90 due to an addition error by the RECBC.

[116] After setting out its statutory authority for ordering enforcement expenses and reviewing the schedule of enforcement expenses submitted by Counsel for RECBC, the Committee found that "the expenses submitted by the Council reflect reasonably necessary expenses relating to the Council's investigation, the liability hearing, and the sanction hearing". The Committee went on, however, to exercise its discretion to order expenses "at less than full indemnity" reducing the expenses required to be paid by slightly more than $3,000.

[117] The Appellant submits that the order for enforcement expenses was unreasonable, based on the short duration of the hearing and the use of two counsel at the hearing. Additionally, he disputes whether all the expenses were legal expenses incurred in his case and not that involving the Licensee.

[118] The Appellant goes on to question the use of outside legal counsel and the reasonability of the expenses in the absence of analysis. He quotes from the case, *Deng v RECBC,* FST Decision No 2018-RSA-004(a), where the Tribunal reduced the enforcement expenses award by one-half.

[119] The Respondent submits that the Appellant's argument that the Council should not have used external counsel is without merit and was not argued by the Appellant in his submissions on penalty. The Respondent further submits that the Committee has the statutory authority to order the payment of enforcement expenses including those of external counsel. In particular, the Respondent quotes section 44 of *RESA* and the maximums set out in section 4.2 of the *Real Estate Services Regulation*, BC Reg 506/2004 (the "Regulation").

[120] With respect to the *Deng* case, the Respondent distinguishes it from the current situation. In *Deng* the enforcement expenses were reduced by the Tribunal to account

for the fact that there had been two hearings; the second hearing necessitated by the licensee having been denied procedural fairness at the first hearing. I accept that the *Deng* decision does not have application in the circumstances here.

[121] In the Sanction Decision, the Committee set out the following provisions for enforcement expenses under section 44 of the *RESA,* which gives the Committee discretion to order the Appellant to pay the expenses or part of the expenses incurred by the Council in relation to the investigation and discipline hearing of which he was the subject:

> Enforcement expenses and discipline penalties
>
> 44 (1) A discipline committee may, by an order under section 43 (2) (h) *[recovery of enforcement expenses]*, 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.
>
> (2) Amounts ordered as referred to in subsection (1)
>
> (a) must not exceed the applicable limit prescribed by regulation in relation to the type of expenses to which they relate, and
>
> (b) may include the remuneration expenses incurred 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.
>
> (3) Money received by the real estate council on account of a discipline penalty under section 43(2)(i) or, subject to the regulations, an additional penalty under section 43(2)(j) may be expended by the real estate council only for the purpose of educating the public, and licensees and other participants in the real estate industry in British Columbia, about
>
> (a) the operation and regulation of the industry, and
>
> (b) issues related to real estate and real estate services.
>
> (4) An amount ordered to be paid under section 43 (2) (h), (i) or (j) is a debt owing to the real estate council and may be recovered as such.

[122] The Committee went on to set out the rationale for the imposition of enforcement expenses as follows (at para 62):

> Enforcement expenses are a matter of discretion. A discipline committee will ordinarily order expenses against a licensee who has engaged in professional misconduct or conduct unbecoming a licensee. Orders for enforcement expenses serve to shift the expense of disciplinary proceedings from all licensees to wrongdoing licensees. They also serve to encourage consent agreements, deter frivolous defenses, and discourage steps that prolong investigations or hearings.

[123] The Committee then stated that the practice of discipline committees "has been to allow the Council to establish enforcement expenses through a schedule summarizing such expenses, subject to the Committee requesting that the Council provide further documentation, either at the request of the Respondent or as part of the Committee's own discretion." The Committee also set out that the practice of discipline committees has been to assess the reasonableness of enforcement expenses

by examining the total amounts in the context of duration, nature and complexity of the hearing and its issues.

[124] The Committee went on to recite the expenses claimed and stated that the legal services expenses were based on hourly rates for legal counsel that fell below the maximum hourly rate for external legal services. It then noted that the total amount claimed was actually $1500 more than the total shown due to an addition error. The Committee stated that it considered the submissions of the parties and concluded that the expenses submitted totaling $29,137.90, of which $22,375 were for legal services, reflected reasonably necessary expenses relating to the investigation, liability hearing and sanction hearing. There was no expressed assessment of the expenses with respect to the stated practice of considering the duration, nature or complexity of the hearing and its issues.

[125] The Committee had earlier indicated that discipline committees have discretion to reduce awards of enforcement expenses in special circumstances. It specifically noted that there were no special circumstances in this instance, but then exercised its discretion to order expenses to be paid at less than full indemnity, making an order that the Appellant pay $26,000 of enforcement expenses.

Discussion and Analysis

[126] In the present case, the enforcement expenses imposed on the Appellant were significant, amounting to more than five times the amount of the penalty awarded against him. The Committee recognized this as a large sum but went on to state that enforcement expenses are based on the "resources the Council reasonably expends to address misconduct, including the expense of an investigation and the greater expenses arising from a discipline hearing"

[127] As discussed earlier in this decision (at para 20), the standard of review the FST will apply for decisions which involve an exercise of discretion is reasonableness (*Kadioglu*).

[128] I will apply this standard using guidance from the decisions in *Kia*, *Schoen*, *Bridge Tolls* and *Vavilov.*

[129] The Supreme Court of Canada in *Vavilov* (*supra* at para 19*)* reset the framework governing how courts should review decisions of administrative decision-makers. The Court specifically did not address appeals from first-instance administrative decision-makers to an appellate administrative tribunal. However, in subsequent court decisions the new framework has coloured appeals from such administrative decisions.

[130] *Vavilov* set out the importance of transparency in administrative decision-making and, in particular, the importance of transparency of reasons to an affected individual as follows (at para 95):

> [95] That being said, reviewing courts must keep in mind the principle that the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it.

[131] In the present case, the Committee, while exercising its discretion to order the Appellant to pay enforcement expenses at less than full indemnity, did not provide any

rationale for doing so. Further, the Committee recited the practice of discipline committees assessing the reasonableness of enforcement expenses by examining the total amounts in the context of duration, nature and complexity of the hearing and its issues but failed to set out its own assessment of those factors. While the Committee might well have undertaken this assessment, it did not expressly set out how it had determined the reasonableness of the enforcement expenses. In line with the expectations set out in *Vavilov*, it would have been helpful to both the Appellant and the FST for the Committee's exercise of its discretion to have been supported by a more well-developed analysis of the factors it set out as relevant to that exercise of discretion. This is particularly the case considering the short length of the hearing and the significant enforcement expenses incurred.

[132] The Committee stated that it considered the submissions of the parties and concluded that the expenses submitted by the RECBC reflected reasonably necessary expenses. Although perhaps less than ideal, I have determined that the absence of more fulsome reasons does not render the Committee's exercise of its discretion unreasonable. Considering the parameters of the legislation and regulations which anticipate full or partial indemnification and set maximum rates for enforcement expenses, and the exercise of the Committee's discretion in ordering less than full indemnification, the order, while large, is within a range of reasonable outcomes and sufficiently transparent and justified.

[133] I decline to interfere with the order for the payment of enforcement expenses made by the Committee.

COSTS

[134] The Appellant asks for the return of his appeal fee of $850 and later in his "Points of Concern and Issues being appealed" asks to be awarded costs of the appeal.

[135] The Respondent submits that the costs of the appeal should be awarded against the Appellant because the grounds of appeal were manifestly unfounded in the circumstances and that they were without merit, fresh argument and veiled attempts to reargue the evidence. The Respondent cites *Yang v Real Estate Council of BC,* Decision No 2017-RSA-001(b), for the criteria the FST considers in ordering costs. The criteria quoted are those listed in the FST Practice Directives and Guidelines:

a. whether there was conduct that was improper, vexatious, frivolous or abusive;

b. whether the participant submitted a position that was manifestly unfounded.

c. whether the participant unreasonably delayed or prolonged the proceeding, including any failure to comply with an FST undertaking or order.

d. whether the participant assisted the Tribunal in understanding the issues;

e. whether the participant unreasonably failed to cooperate with the other parties during the appeal.

f. whether the participant failed to attend a hearing or other proceeding, or to send a representative, despite receiving notice;

g. the degree of success in the proceeding; and

h. any other matter the Tribunal considers relevant.

[136] The FST is authorized to award costs pursuant to section 47 of the ATA, and section 242.1(7) of the FIA. However, unlike the courts, the FST does not routinely award costs to the successful party. The Appellant was unsuccessful in all his arguments and appeal. While the Appellant attempted to introduce new arguments at the appeal level, his actions did not rise to the level of the misconduct addressed by the Guidelines criteria.

[137] The Appellant may have misunderstood the legal basis for his discipline and spent too much time arguing points of questionable relevance. However, I do not find the Appellant's position was manifestly unfounded or that he otherwise behaved improperly during the course of the appeal.

[138] I decline to order costs in this instance.

DECISION

[139] I have no basis to interfere with the evidentiary findings of the Respondent. Nor do I find any breach of procedural fairness on the part of Respondent. I have not accepted any of the Appellant's legal arguments. I find that the penalties imposed are reasonable and that the enforcement expenses fall within the range of reasonable outcomes for the exercise of the Committee's discretion.

[140] I dismiss the appeal on all grounds. The Penalty Decision and the Liability Decision are confirmed.

"Jane A. G. Purdie"

_____

Jane A. G. Purdie, Q.C.
Financial Services Tribunal

April 15, 2021