FST No. 04-003

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

BETWEEN:

THE SUPERINTENDENT OF REAL ESTATE

APPELLANT

AND:

SHERRY SHOHREH MOALLEM
AND
THE REAL ESTATE COUNCIL OF BRITISH COLUMBIA

RESPONDENTS

DECISION

Chair: Stanley W. Hamilton, member of the Financial Services Tribunal

Counsel for the Appellant, Lynda A. Wrigley and Richard Fernyhough

Counsel for the Respondent, Real Estate Council of British Columbia, Brian K. Evans

Counsel for the Respondent, Sherry Shohreh Moallem, John Bethell

Appeal Decision Date: February 22, 2006

INTRODUCTION

The Superintendent of Real Estate (the "Appellant") has appealed the decision by the Real Estate Council of British Columbia (the "Council") dated November 1, 2004. The actions of Council resulted from a complaint, dated October 23, 2003, against Ms. Sherry Shohreh Moallem ("Ms. Moallem") by a property owner who had accepted an offer for his property presented by Ms. Moallem on behalf of a potential purchaser. The Council determined that this complaint would be resolved by way of a Consent Order. The Council found that Ms. Moallem was incompetent within the meaning of Section 9.12 of Regulation 75/61 under the *Real Estate Act* (the "Act") in that she:

1. failed to advise the sellers and/or their listing agent in a timely manner that she had not received the buyer's deposit of $50,000 within 48 hours of acceptance or on or before August 19, 2003;
2. failed to submit the subject transaction to her agent in a timely manner.

As a result of these findings, the Council decided to suspend Ms. Moallem for fourteen (14) days for incompetence. The Council also ordered Ms. Moallem, as a condition of continuing licensing, to successfully complete Chapter 2 (The Real Estate Act and the Code of Ethics and Standards of Business Practices), Chapter 10 (The Law of Contracts) and Chapter 11 (Contracts for Real Estate Transactions) of the Real Estate Salesperson's Pre-Licensing Course and to enroll in, and attend, the first available "Legal Update" Course. Finally, the Council ordered that, as a condition of continued licensing, Ms. Moallem pay to the Council costs of $400.00 within thirty (30) days of the date of the Consent Order.

The Superintendent appealed the Council's decision on the grounds that:

1. it failed to consider all of the facts before it;
2. it did not adequately address the seriousness of the conduct in question as disclosed by the evidence contained in the Record and the Agreed Statement of Facts, and consequently;
3. it wrongly concluded that a period of suspension of only fourteen (14) days was appropriate in the circumstances.

The Superintendent seeks an order that the period of suspension be increased to between 30-60 days and an order confirming the order of the Council that courses be completed and costs be paid.

FACTS

The Appellant has not disputed the facts as presented in Record and in the Agreed Statement of Facts. Except as noted, the following points are taken from the Agreed Statement of Facts.

1. Ms. Moallem was at all times licensed as a salesperson with Sutton Group-West Coast Realty in Burnaby.
2. Ms. Moallem was licensed from August 23, 1995 to April 28, 2000 as a salesperson with Park Georgia Realty Group Ltd in Burnaby. She was the licensed as a salesperson from April 28, 2000 to February 20, 2004 with Sutton Group-West Coast Realty. From February 20, 2004 to the time of the Consent Order she was licensed as a salesperson with Re/Max Saber Realty Group.
3. On May 3, 2003, Susan English, a salesperson with Royal LePage Showcase Plus listed a sub-dividable residentially zoned development site of 21.63 acres for $2,800,000. The property was owned by six (6) individuals, including the complainant.
4. By Contract of Purchase and Sale dated August 15, 2003 Ms. Moallem presented an offer on behalf of her buyer of $2,300,000, with completion being November 20, 2003.
5. A deposit of $50,000 was to be placed in the Sutton Group-West Coast Realty trust account within 48 hours of acceptance and was to be increased by a further $50,000 to a total of $100,000 upon subject removal on or before October 22, 2003.
6. On August 17, 2003 the offer was accepted by the sellers. The sole subject was a subject to the buyer undertaking a financial feasibility of development study by October 22, 2003.
7. The deposit of $50,000 that should have been provided by the buyer on or before August 19, 2003 was not provided.
8. On or about October 15, 2003 Ms. Moallem advised Ms. English that it did not appear that this purchase was financially viable for the buyer and as such the deal was unlikely to complete.
9. At that time Ms. Moallem, in response to Ms. English's query about the deposit that should have been made in the trust account, advised Ms. English that since the deposit was upon subject removal and as her client was not likely to remove the subject, there was no need for a deposit to be paid.
10. It was at that time that Ms. English brought Ms. Moallem's attention to the fact that the deposit had to be paid within 48 hours after acceptance. Ms. Moallem noted her oversight and apologized to Ms. English as she mistakenly believed that the deposit was due upon subject removal.
11. As a result of this revelation to Ms. English, discussions ensued between their respective nominees at Royal LePage Showcase Plus and Sutton Group-West Coast Realty. It came to light that Ms. Moallem had not submitted the contract to her office and that the $50,000 deposit had not been received.
12. The nominee for Royal LePage Showcase Plus wrote to the nominee for Sutton Group-West Coast Realty on October 15, 2003 advising that the contract would be voidable at the seller's option unless written confirmation was received by 5:00 p.m. Friday October 17, 2003 that the deposit had been made to the Sutton Group-West Coast Realty trust account.
13. On October 17, 2003 a fax dated October 15, 2003 was sent to the attention of Ms. Moallem from the buyer, informing that the buyer did not intend to proceed with the purchase of the subject property and would not be removing the subject

condition from the contract. As a result, a representative of the seller was advised that the transaction had collapsed and also advised that there was no deposit.

14. Ms. Moallem acknowledges that she was in error in this transaction as that she was under the mistaken impression that the deposit was due upon subject removal when in fact it was due within 48 hours after acceptance of the offer.
15. Ms. Moallem also acknowledges that she is to turn in contracts into the office and that she failed to do so in this particular instance.
16. Ms. Moallem acknowledges that had she turned in the contract, the nominee could have noted that the deposit had not been received in accordance with the terms and as such the complainant's concerns could have been averted.
17. The complainant submitted his letter on October 23, 2003, as he was concerned about Ms. Moallem's professional conduct in this matter.

The Statement of Facts also included some mitigating factors.

18. Ms. Moallem explained that while she had been involved in numerous real estate deals prior to this matter, she had not been involved in a real estate transaction involving bare land.
19. Ms. Moallem sought assistance from other licensees in her office regarding appropriate clauses and conditions.
20. Ms. Moallem sought the advise of a co-worker, Mr. Zappone, who had experience in bare land transactions and whose form of offer, unbeknownst to Ms. Moallem, provided that the deposit was to be made payable within 48 hours of acceptance. Usually Ms. Moallem's contracts include the provision that the deposits would be payable upon subject removal.
21. Ms. Moallem states that at no time did she intentionally fail to secure the $50,000 deposit from the potential purchaser within 48 hours of acceptance of the Contract of Purchase and Sale or intentionally fail to inform her nominee, Ms, English or the sellers that a deposit had not been made.
22. Ms. Moallem deeply regrets and is remorseful about her failure in this respect.
23. Ms. Moallem will ensure that in the future she will ensure that she turns in all Contracts of Purchase and Sale to her office as soon as there is an accepted offer and will carefully review each contract to ensure all deposits and other conditions are satisfied by her clients.
24. Ms. Moallem notes that the sellers did not suffer from any financial loss as a result of her lack of diligence and that she has seen no evidence of any financial loss suffered by them.

The Record indicates that on April 29, 2004 the Council sent a Notice of Hearing to Ms. Moallem advising that it would hold a hearing under Section 31 to determine whether Ms. Moallem had breached Section 31(1)(c) (misconduct), Regulation 9.12 (negligence or incompetence) and /or Regulation 9.16 (nominee in regular attendance and in active charge of a business.) All references are to the *Real Estate Act*, R.S.B.C., 1996. Ms. Moallem was advised that she may wish to consider entering into an Agreed Statement of Facts and/or Consent Order. Ms. Moallem subsequently signed an Agreed Statement of Facts and Consent Order.

BASIS OF THE APPEAL

The Appellant appeals the decision of the Council on the following points:

a) it failed to consider all of the facts before it;
b) it did not adequately address the seriousness of the conduct in question as disclosed by the evidence contained in the Record and the Agreed Statement of Facts, and consequently;
c) it wrongly concluded that a period of suspension of only fourteen days was appropriate in the circumstances.

Prior to addressing the submissions on these issues, I was asked to rule on two other matters. The first related to the admission of new evidence by Ms. Moallem and the second related to a submission by the Respondents to file a surreply.

The initial Reply of the Respondent Ms. Moallem included new evidence. Ms. Moallem was advised that her submission introduced new evidence that was not presented at her original hearing and she was asked to submit a new evidence application. Ms. Moallem retained counsel to assist in preparing written submissions to extend the time to submit written argument, an application to submit new evidence, and attached evidentiary documents. The Appellant opposed the introduction of the new evidence; alternatively the Appellant requested the right to cross examine the authors of the new evidence.

The primary issue is whether the new evidence submitted by Ms. Moallem should be admitted. There are two components to the new evidence: A letter from the purchaser, Dr. Kazemi, and an e-mail from Mr. Zappone, a colleague apparently experienced in handling bare land sites that assisted Ms. Moallem and Dr. Kazemi in drafting the Contract of Purchase and Sale ultimately accepted by the vendor. If this question is answered in the affirmative, it is then necessary to address the Appellant's submission that there must be cross examination of the authors of these two documents.

Section 242.2(8) (b) of the *Financial Institutions Act* provides for the introduction of evidence. The Act states:

> "(8) On application by a party, the member considering the appeal may do the following:
>
> (a) permit oral submissions;
> (b) permit the introduction of evidence, oral or otherwise, if satisfied that new evidence has become available or been discovered that
>
> (i) is substantial and material to the decision, and
> (ii) did not exist at the time the original decision was made, or, did exist at the time but was not discovered and could not through the exercise of reasonable diligence have been discovered."

The immediate question before the Tribunal is whether the e-mail and the letter satisfy the requirements as set out in Section 242.2(8) (b).

Much of the information contained in the e-mail from Mr. Zappone was already contained in the Record and simply confirms points that do not appear to be in question As I consequence I concluded that these comments are not material to the Appeal nor do they meet the criteria of being "substantial and material to the decision" to be made.

The second item of new information is a letter from Dr. Kazemi. Dr. Kazemi's letter confirms a number of points in that are already before me. However, the letter does provide information that I believe to be material. The paragraph states:

> "After the second offer refusal, Ms. Moallem arranged a meeting with Mr. Tony Zapone (sic), one of her colleagues at Sutton Group. Mr. Zapone (sic) and us had a lengthy discussion after which he re-wrote the offer for Ms. Moallem with a new price and he also changed the terms. This third offer was accepted on August 19, 2003. One of the changes made by Mr. Zapone (sic) was that the deposit was payable upon acceptance of the offer. <u>This change went on unnoticed by Ms. Moallem and myself as our attention was entirely focused on the subject clause</u> (emphasis added). This was truly an innocent oversight and by no means a deliberate act."

It is my opinion that this paragraph contains new information that is material and relevant. The Appellant has also indicted that this letter from Dr. Kazemi contains "some information." I also note that in the Appellant's Submission specific reference is made to the fact that "the Record does not contain any statement from him." Later, a question is raised "whether the deposit requirements were communicated to the purchaser when he signed the offer." As these matters have been raised by the Appellant, I believe Dr. Kazemi's letter assists in addressing these issues.

The second question is whether this evidence "did not exist at the time the original decision was made, or, did exist at the time but was not discovered and could not through the exercise of reasonable diligence have been discovered." While this evidence, at least in the form of Dr. Kazemi's letter, did not exist at the time the original decision was made, I am of the opinion that the evidence contained in Dr. Kazemi's letter did exist but was not brought forward because the original decision was based on an Agreed Statement of Facts and Consent Order. By their very nature, an Agreed Statement of Facts and Consent Order are summary in nature. The Record contains no statement from Dr. Kazemi and gives no direct indication that such a statement was discussed or considered at the time of the original decision. But the Appellant was not party to this original decision and has specifically raised this issue in the Appeal. I believe it is not reasonable to expect Ms. Moallem to have anticipated all questions that may subsequently come up in an appeal, especially from an appellant that was not party to the original hearing. Therefore I do not believe that the "exercise of reasonable diligence", at the time of the original decision, could have anticipated the need for this specific evidence.

It is my opinion therefore that the letter from Dr. Kazemi meets the tests for admission as set out in section 242.2(8) (b) of the *Financial Institutions Act.*

The Appellant's Submissions in Reply to Ms. Moallem's Application to Admit New Evidence further states that: "It is the Appellant's submission that these 'statements' are incomplete and there must be cross examination of Mr. Kazemi and Mr. Zappone for their evidence to be probative and therefore admissible."

The Appellant submitted that the letter from Dr. Kazemi "does not directly deal with the issue of the $100,000 deposit referred to in the "focused on" subject clause, as outlined in points 4 and 5 of the Appellant's Submissions. The letter is silent on this key point. Cross examination is required here, if Mr. Kazemi's letter is to be considered at all." The Appellant also submitted that: "it is the Appellant's submission that these 'statements' are incomplete and there must be cross examination of Mr. Kazemi and Mr. Zappone for their evidence to be probative and therefore admissible."

I do not believe that the fact the submission from Dr. Kazemi is "incomplete" does in and of itself necessitate cross examination. The Appeal (Point 5(a)) raised the point that "…the Record does not contain any statement from him" (Dr. Kazemi). Ms. Moallem has obtained a statement from Dr. Kazemi and I believe this meets the requirement of "any statement". Moreover, I am not prepared at this time to approve calling Dr.Kazemi for purposes of cross examination without having before me the particulars of the intended cross examination. I believe the Appellant must clearly demonstrate why the witness is needed and what questions the witness will be expected to answer. I do not believe the Appellant has clearly demonstrated why the witness is necessary in this particular instance.

The Council and Ms. Moallem made submissions concerning the final Reply of the Appellant. The Respondents submitted that either the final Reply should not be accepted in the form provided or that the Respondents should have an opportunity to respond by way of written surreply. As to the matter of the scope of the surreply, all parties appear to agree that the appropriate standard of review was an important issue. The Appellant notes that this matter was raised by Ms. Moallem, but not argued comprehensively nor supported with legal authority. For these reasons the Appellant takes no position with respect to the application to file a surreply on this particular issue. The Appellant also submits that the Council should be given the opportunity to file a surreply on this exceptional issue. Indeed, the Appellant submits that a decision on the issue of the appropriate standard of review "may have ramifications for the Council that extend beyond this particular appeal and the Council should be given the opportunity to submit written submissions on this point."

The Appellant submits that "although there is no expressed provision either in the *Financial Institutions Act* or the *Financial Services Tribunal's Directives and Practice Guidelines* that provides for a surreply to the appellant's reply, this is one of those exceptional cases where it would create unfairness if the Tribunal were to deny the Council's application." The Council submits that "the Financial Services Tribunal has the discretion to allow further written submissions, at least in exceptional cases."

I am satisfied that the Tribunal has the flexibility to contemplate a surreply, at least where the circumstances are exceptional. Section 12(2) of the *Administrative Tribunals Act* provides sufficient flexibility to contemplate allowing a surreply under unusual or exceptional circumstances. In the Appeal, the question of the appropriate standard of review is an important issue, one that has potential implications in other cases, and one that had received little attention by the Tribunal at the time of these submissions. Moreover, all parties appear to agree that this issue is important and appears to meet their test of "exceptional".

In addition, Ms. Moallem raises a number of concerns relating to several paragraphs in the Reply of the Appellant. In particular, the Respondent Ms. Moallem invited the Superintendent to clarify their position and state that they are not appealing the Council's finding of incompetence, but only the penalty imposed, and state that they are withdrawing any allegation that Ms. Moallem was in some sort of conspiracy with" the purchaser " to intentionally defraud the purchaser." The Appellant submits that "no new issues were raised in its reply, and the submissions made were limited to addressing the new issues raised by the Ms. Moallem or were otherwise responsive to the Respondent Moallem's argument." The Appellant confirms it is appealing only the penalty decision of the Council. The Appellant also addresses other concerns raised by Ms. Moallem noting that "those submissions are directed solely to the issue of what weight, if any, is to be accorded to the new evidence of the potential purchaser and are not meant to raise new allegations against the Respondent Moallem."

As to the matter of timing of the surreply, the Council submits that the issue of the standard of review is already before the Financial Services Tribunal in FST Appeal 05-005 (the "Spong Appeal") and proposes that this appeal be delayed pending the outcome of the Spong Appeal. The Appellant left this matter to the Tribunal.

The Appellant has clarified its position relating to paragraphs 30 and 41 of their Reply as requested and I believe this clarification adequately addresses the two specific issues raised by Ms. Moallem.

The Respondents have requested that this matter be dealt with after the Spong decision is available. Since we had no specific schedule for the Spong decision I was reluctant to allow the availability of the Spong decision to determine the timetable for this Appeal.

The Respondents' applications to file a surreply are granted, but the surreplies are to be limited to the issue of the appropriate standard of review.

STANDARD OF REVIEW

The Appellant submits that the pragmatic and functional approach utilized to determine the appropriate standard of review in cases of judicial review and statutory appeals to the court is not particularly well suited for determining the standard of review of an

administrative tribunal and draws support from the dissenting judgment in *Plimmer v. Calgary (City) Police Services,* [2004] A.J. No.616 (C.A.), para 50-54.)

The Appellant submits that "administrative review of an administrative decision is meant to ensure that the ultimate decision emerging from the administrative decision-making process is correct, and thus the appropriate standard of review that the final administrative tribunal should apply is the correctness standard unless its powers of appeal clearly indicate otherwise." (Falzon, F., "Appeals to Administrative Tribunals", *Canadian Journal of Administrative Law and Practice,* Vol. 18.1, pp1-36). The Appellant submits that the FST "should show no deference to the Council in this matter and should decide the issue on the basis of correctness, meaning it should 'undertake its own reasoning process to arrive at the result it judges correct'." (*Law Society of New Brunswick v. Ryan* [2003] 1 S.C.R. 247, para 50.) The Appellant also submits that the standard of review may differ depending on the particular issue being considered by the Tribunal…"

The Appellant submits a consideration of the statutory framework is necessary in determining the deference, if any, the Tribunal ought to show the Council. The Appellant cites three separate decisions of the Commercial Appeals Commission (the "Commission") where the Commission determined that the standard of review was the standard of correctness. (*Whitelaw v. Insurance Council of British Columbia* [1997] B.C.C.O. No. 25, para 24; *Express Mortgages Ltd. V. British Columbia (Registrar of Mortgages),* [2003] B.C.C.O. No. 5, para 19; and *Taiwanese Canadian Cultural Society v. British Columbia (Registrar of Companies),* [2002] B.C.C.O. No. 5, para 20.)

The Council submits that the pragmatic and functional approach is a "helpful approach...." The Council submits that the appropriate standard is either patently unreasonable or unreasonable and that if the standard is reasonableness, the test should be: "After a somewhat probing examination, can the reasons given, when taken as a whole, support the decision?"

The Council presents a thoughtful discussion of the statutory framework and submits that in light of the applicable statutory framework, and all relevant factors, the Tribunal should show considerable deference to the discretionary decision of the Council's Consent Order Review Committee in this case. The Council also acknowledges that the standard of review should reflect the "Nature of the question in dispute: Law, Fact or Mixed Law and Fact?"

The Tribunal has now had several occasions to consider the standard of review, the most recent being *The Superintendent of Real Estate v Real Estate Council of British Columbia and Kenneth Scott Spong*, FST 05-007, January 2006, in which the standard of review was a central issue. In Spong, supra, as in previous Tribunal decisions, the pragmatic and functional approach is rejected. The direction of the earlier decisions is to recognize that the degree of deference depends upon the nature of the appeal: less deference should be given on questions of law and more deference should be given on questions of fact. In the present Appeal, the issues relate to the penalty, a mix of fact and law, combined with

a high degree of discretion. Given the direction of past decisions of the Tribunal, the thoughtful analysis in Spong, and the nature of the issues before me, I am inclined to accept the alternative standard of review submitted by the Council and apply a standard of reasonableness in this Appeal.

SUBMISSIONS

The Appellant submits that the Council failed to consider all of the facts before it; did not adequately address the seriousness of the conduct in question as disclosed by the evidence; and consequently wrongly concluded that a suspension of only fourteen (14) days was appropriate under the circumstances.

The Appellant submits that the transaction Record Sheet signed by Ms. Moallem specifies a selling price of $2,300,000 with two deposits of $50,000 for a total of $100,000. The Contract of Purchase and Sale signed by the purchaser and witnessed by Ms. Moallem contained two references to the deposits. On page one it specifies that a deposit of $50,000 is "to be placed in trust within 48 hours of acceptance of this offer" and on page three, amongst other terms and conditions, that "Upon subject removal, the buyer will increase the deposit by a further $50,000 to a total of $100,000." If the subject is not removed or waived by October 22, 2003, "the $50,000 deposit, plus interest earned, will be returned to the buyer." The Record states that Ms. Moallem was unaware her colleague Mr. Zappone had provided that the deposit was to be payable within 48 hours of acceptance (on or before August 19, 2003) and she mistakenly believed that the deposit was due upon subject removal (on or before October 22, 2003).

The Appellant submits that the only logical conclusion to be drawn on the above evidence is that Ms. Moallem did not read the terms and conditions of the contract at all. "If she had read the subject clauses, it would have been clear that there were two (2) deposits of $50,000 for a total of $100,000."

The Appellant submits that based on the evidence, it is not known if Ms. Moallem communicated the deposit requirements to the purchaser when he signed the offer, noting "it is incumbent upon the agent to ensure her client purchaser is aware of what he is offering before the offer is presented by the purchaser's agent and accepted by the vendor. If terms are contained in a contract to which the parties have not agreed, the risk of breach and subsequent disputes is substantial."

The Appellant further submits that the vendor may also have been prejudiced by having the land tied up for two months without the expected deposit showing good faith and good intention.

The Appellant submits that as dealing with bare land was new to Ms. Moallem, it was particularly incumbent on her to exercise due diligence and be fully aware of the terms and conditions included in the contract.

The Appellant submits that it is not just that Ms. Moallem failed to advise the sellers and/or their listing agent in a timely fashion that she had not received the required deposit of $50,000 within 48 hours of acceptance, "but rather, it is obvious that she did not read the essential terms and conditions of the contract, if she read it at all."

The Appellant concurs with the inclusion of the Council's finding of incompetence for Ms. Moallem's failure to submit the subject transaction to the agent in a timely manner and submits this "failure resulted in a breakdown in the usual checks the nominee and staff would normally have done with respect to the monitoring of the deposit."

The Council submits that it properly considered all the facts before it, addressed the seriousness and the nature of the professional conduct and applied proper principles in its imposition of a penalty on Ms. Moallem. The Council submits that "Licensees are expected to check all information and to do all necessary work at a high standard."

Citing James T Casey, the Council submits that some of the factors to be taken into account in determining the appropriate sanction include:

> "A number of factors are taken into account in determining how the public might best be protected, including specific deterrence of the member from engaging in further misconduct, general deterrence of other members of the profession, rehabilitation of the offender, punishment of the offended, isolation of the offender, the denunciation by society of the conduct, the need to maintain the public's confidence in the integrity of a profession's ability to properly supervise the conduct of its members, and ensuring that the penalty imposed is not disparate with penalties imposed in other cases. However, it may be argued that the factors of punishment and denunciation should not be given undue emphasis since these factors may more properly be considered to be part of the domain of criminal law." Casey, James T., *The Regulation of the Professions in Canada* (1997) Carswell pp14-5 – 14-6.

Relying on Casey, the Council submits a number of mitigating factors that may be considered in determining the proper penalty including: attitude since the offence was committed, the age and experience of the offender, whether the misconduct is the individual's first offence, whether the individual has pleaded guilty which is taken as showing acceptance of responsibility, whether restitution has been made, the good character of the offender, and a long unblemished record of professional service. The Council submits that of relevance in the protection of the public is the type of wrongdoing and notes that while findings of incompetence, like findings of misconduct, are deserving sanction, the focus in the public interest often results in remedial training."

The Council further submits that the penalty imposed should be fair and not disparate from other penalties imposed in other cases.

Ms. Moallem submits that the Council adequately considered all of the facts before it; adequately addressed the seriousness of the conduct in question; made a reasonable and informed decision considering all of the aggravating and mitigating factors; made no error in interpreting the facts applying the law to the facts or interpreting the relevant law; imposed a suspension that was reasonable; and generally exercised their discretion to impose a penalties in a proper and informed manner.

Ms. Moallem submits that the Council had before it a letter from the Ms. Moallem's lawyer (record, Tab 6) and the letter "makes it clear that the Respondent worked several drafts of the contract in question, all of which included a deposit upon subject removal, when it was sent to Mr. Zappone with instructions to change a number of terms revolving around a new agreement as to price and the subject clauses. In the letter, it is admitted that the respondent failed to review the deposit conditions, but only reviewed the subject clause conditions upon receiving the final draft of the contract from Mr. Zappone. No 'logical conclusions' need be drawn, this information was squarely before the Council when rendering their decision."

Ms. Moallem submits that the Council adequately considered the circumstances leading to the Respondent's failure to secure the deposit and notify the seller. On the one hand Council found the Ms. Moallem incompetent for failure to secure the deposit and notify the seller. "In making this finding, the Council clearly turned their mind to the fact that the cause of this incompetent breach was a failure by the Respondent to reread the deposit clauses after receiving the final draft of the contract from Mr. Zappone. However, the Council also notes the mitigating aspects of the situation, in the sense that these facts disclosed that the breaches of the Respondent did not occur intentionally, but because of an honest oversight, and the fact that the final draft of the contract was re-written by another participating agent upon whom the Respondent was relying."

Ms. Moallem further submits that out of a total of eight cases included by the Appellant in its Book of Authorities, six of these cases involve suspensions of a similar length, or a lesser suspension or reprimand. "The weight of the authority therefore supports the penalty imposed by the Council. Many of the cases involving similar or lesser penalties cited by the Respondent involved facts whereby the salesperson knew that the deposit had not been secured, but still failed to inform the seller. This conduct is more aggravating than that of the Respondent, in the sense that the Respondent made an unintentional mistake." The Respondent Moallem submits the decisions cited by the Appellant support the penalty imposed as being well within the appropriate range of penalties.

In surreply, the Appellant submits that the fact that Ms. Moallem "had worked several drafts of the contract in question" does not rebut the Appellant's submission that the only logical conclusion to be drawn from the facts as stipulated is that Moallem did not read the terms and conditions of the contract at all because those drafts were simply that, drafts. It was the final contract that mattered."

The Appellant submits that paragraphs 20 and 21 of the Agreed Statement of Facts do not lead to the conclusion that the Council considered whether Ms. Moallem had read the terms and conditions of the contract at all. These paragraphs merely state that the Ms. Moallem "sought the advise of a co-worker who had experience in bare land transactions and whose form of offer, unbeknownst to Ms. Moallem, provided that the deposit was to be made payable within 48 hours of acceptance and that Moallem did not intentionally fail to secure the deposit or disclose that it hadn't been made."

In response to Ms. Moallem's submission, the Appellant submits that it is impossible to ascertain what the Council "turned their mind to" because no reasons were provided. Normally an adjudicating body would make findings of fact, and then give reasons based on those factual findings to support its ultimate decision (or finding) on verdict and penalty. In this case, the Council went straight from a finding of fact to the ultimate decision on verdict and penalty without supporting reasons. "…It is the Appellant's submission that had the Council considered that the only logical inference to be drawn from the Agreed Statement of Facts and the Record upon which it was based was that Moallem had not even read the essential terms and conditions of the contract, the Council would either have imposed a more severe penalty or been in error in not doing so."

The Appellant submits that Council may well have reasoned that Ms. Moallem had read the deposit provisions of the contract and was aware of them and had inadvertently failed to advise the various parties of the unfulfilled deposit requirement or had read the terms and conditions of the contract and had forgotten about the deposit requirements. "Moallem's conduct in either of these cases may be seen as less egregious than in the case where she failed to read the essential terms…"

In response to Ms. Moallem's submission that the monetary value of the impugned contract and the size of the deposit are irrelevant factors when considering the penalty, the Appellant notes that the provisions of the Criminal Code wherein it increases the seriousness of the offense and the severity of the penalty imposed depending upon the amount of money involved in offenses such as theft and fraud. "In addition, the greater the amount of money involved, the greater the temptation for wrongdoing, and therefore the greater the need for deterrence."

In response to Ms. Moallem's submission that she "did not fail to consider the proper contractual terms to be included, but rather failed to ascertain that an improper contractual term had been inserted into the final draft of the contract," the Appellant submits that "there is no basis in the record or Agreed Statement of Facts to conclude that the contractual term regarding the requirement of a $50,000 deposit within 48 hours of acceptance of the offer was improper."

The Appellant submits that the new evidence of Dr. Kazemi is "so inherently unreliable and of so little probative value that no weight should be accorded it. In addition, the letter raises more questions than it answers." The Appellant submits that Dr. Kazemi has an inherent bias in this matter as he was the prospective purchaser who was the beneficiary of the impugned conduct of Respondent Moallem in that he did not provide

the $50,000 deposit as required but still kept the property in question off the market and retained his option to purchase it. The Appellant further submits that Dr. Kazemi's claims that the deposit requirements went unnoticed by Ms. Moallem and himself and that he had "no doubt that this was absolutely an innocent oversight" are indicative of a bias in favor of Ms. Moallem. The Appellant further submits that Dr. Kazemi stated in his letter that he noted on the first two offers he made that the buyer would pay the deposit upon subject removal. "It is submitted that this concession raises concerns with respect to his credibility when he says the change to the deposit condition on the third and final offer went unnoticed." Dr. Kazemi further states that Respondent Moallem arranged a meeting with himself, Respondent Moallem and a colleague Mr. Zappone and they "had a lengthy discussion after which he re-wrote the offer…" The Appellant submits this alleged discussion was not mentioned in a letter sent to Council by Respondent Moallem's lawyer contained in the Record and the evidence of such a lengthy meeting was not before Council so it was not able to clarify what was discussed with Mr. Zappone. The Appellant submits Dr. Kazemi's letter is "classic hearsay evidence" and that "in assessing the weight to be attached to relevant evidence, the tribunal should consider the extent to which the evidence is reliable and persuasive." The appellant submits "that Dr. Kazemi's letter has little probative value in any event." Dr. Kazemi's knowledge of the deposits would only be relevant if he did have knowledge, "as that would cast serious doubts on Moallem's assertion that she was unaware of those clauses."

Penalty issues

The Appellant submitted references to eight Council decisions with respect to penalty for failure to secure the deposit and/or failure to notify the seller and/or her agent that the required deposit was not obtained and for failure to report the transaction to the agent. Five of the eight decisions resulted in either a reprimand or a suspension of seven days. One case resulted in a penalty of two weeks and two cases resulted in a suspension for sixty (60) days. The Appellant submits the conduct of the Ms. Moallem is more serious than any of the six cases involving reprimand or suspensions of three weeks or less and more closely resembles the two cases involving penalties of sixty (60) days.

The first of the two cases resulting in a sixty (60) day suspension was *Council and Louis Tze-Yin Au* (December 24, 1998). In this decision, Council found that Au misconducted himself within the meaning of Section 31(1)(c) of the *Real Estate Act* in that he failed to disclose to the first mortgage lender in a timely manner that the seller would be granting the buyer financing which he knew was not stipulated in the contract, and which contract was presented to the first mortgage lender by the buyer to assist in obtaining mortgage financing. In addition, Au was found to be negligent within Section 9.12 of Regulation 75/61 under the *Real Estate Act* in that he failed to ascertain whether in fact the seller had received a deposit from the buyer in the amount of $150,000. In this regard, the Hearing Committee of Council noted that Au had stated that he had never had a deal where this amount of money was paid directly to the seller and that he found this unusual. The Hearing Committee concluded that Au should have made some effort to inquire whether the seller had in fact received the $150,000 deposit, particularly when the buyer was also talking about secondary financing.

Council and Sunil Ahuja (May 4, 1995) was the second case cited that involved a suspension of 60 days. In this case, the Hearing Committee found that Ahuja had been negligent within the meaning of Section 9.12 of Regulation 75/61 under the *Real Estate Act* in that: he failed to stipulate in a Contract of Purchase and Sale and construction agreement as to who would be responsible to pay the GST and how any deficiencies were to be dealt with; he failed to ascertain whether there would be a fee paid to a mortgage broker who arranged the purchaser's financing when he had recommended the mortgage broker; he failed to stipulate in the Contract to Purchase and Sale as to who would hold the deposit; and he failed to report the transaction to his agent.

A third case cited by the Appellant is *Council and Brian Charles Jenkins* (July 9, 2002). This case was handled by Consent Order. Jenkins wrote a Contract of Purchase and Sale dated June 4, 2001 that called for a deposit of $10,000 upon subject removal. Subject clauses were removed June 16, 2001 and Jenkins received the deposit cheque. Jenkins failed to turn in the cheque and contract to his agent before going out of town, and when he returned he was ill and did not go to the office for two weeks. On or about July 2, 2001, Jenkins discovered he failed to turn the cheque into his office and also forgot to write up a deal sheet or hand in any details to his office. Jenkins contacted the buyer who asked for some time to transfer money into the account that the cheque was drawn on. There were further delays until July 5, 2001, when Jenkins advised his nominee and the seller's agent of the circumstances. Eventually the sale collapsed. Jenkins was found negligent in that: he failed to pay or deliver to his agent a deposit received from the buyers in accordance with the terms of the contract; he failed to report the said transaction to his agent in a timely manner; and failed to advise the seller's agent in a timely manner that the deposit cheque was not deposited into a trust account as required. Jenkins was suspended for two weeks.

Counsel for Ms. Moallem submitted that the decision *Council and Louis Tze-Tin Au* (December 24, 1998) cited by the Appellant can be distinguished on the following grounds: Au failed to show up for his hearing whereas Ms. Moallem fully cooperated with Council; Au acted with full knowledge of the existence of a second mortgage which he failed to disclose to the first mortgage lender; and Au failed to ascertain whether a deposit had in fact been paid. "In this sense, the case involved intentional conduct of a more serious nature …"

Counsel for the Ms. Moallem submitted that the decision *Council and Sunil* Ahuja (May 4, 1995), cited by the Appellant, can be distinguished on the following grounds: the case involved a full hearing rather than a Consent Order; the case involved a failure to consider basis contractual elements such as the payment of GST; dealing with deficiencies in the constructed residence and as to who would hold deposits; failure to ascertain whether a fee would have to be paid to a mortgage broker; and various problems resulting in monetary damages.

Counsel for Ms. Moallem submits that the decision in *Council and Jeanne Patricia O'Neil* (September 10, 1998) cited by the Appellant, is most factually similar. O'Neil

wrote an offer to purchase on July 25, 1997 and acknowledged receipt of a deposit from the buyer when in fact she had not received the deposit. O'Neil testified she normally always wrote offers with deposits payable within some specified hours of acceptance, but on this occasion she forgot to do so. O'Neil did receive a deposit cheque of $5,000 six days later, and left this in the office transaction box, along with the transaction record sheet. O'Neil was found negligent for her failure to secure the deposit as required, and for her failure to report the transaction to her agent in a timely manner. When the buyers notified O'Neil that the building inspection was unsatisfactory and they wanted out of the deal, O'Neil retrieves the documents, including the cheque, from her office. The cheque was returned to the buyers without a proper release being signed and contrary to Section 59 of the *Real Estate Act.* O'Neil was found to be incompetent on this matter. The Council reprimanded O'Neil.

The Council submitted that the penalty imposed should be fair and not disparate from penalties on other cases. The Council submitted nine cases. I have identified four that appear to be most helpful in that the facts are most similar to those in the Appeal. One case, *Council and Jenkins*, supra, was also submitted by the Appellant.

In *Council and Ramneek (Ron) Basra* (August 18, 2003) Basra, while acting as a limited dual agent, wrote a $390,000 offer calling for a deposit of $15,000 to be made within 24 hours of acceptance. The cheque was received on time and deposited with Basra's agent. Approximately three weeks later Basra was informed by his office that the cheque was returned for insufficient funds. Basra contacted his buyer and was told a replacement certified cheque would be provided. The cheque was not provided and Basra's office faxed the seller's notary to this effect, but apparently the seller's notary did not receive the fax. Basra left town and informed a licensee that was looking after his affairs that a replacement cheque was expected. On May 24, 2002 Basra returned and found the cheque had not been received. Basra made several attempts to obtain the cheque, but on June 16, 2002, the buyer informed Basra of the buyer's intention not to proceed with the purchase. On June 17, 2002, the seller called Basra and was informed the purchase was not proceeding and the deposit cheque had been returned for insufficient funds. On June 20, 2002, the property was sold for $350,000. Basra waived his $10,000 commission and gave the seller an additional $8,000 to offset their losses. By Consent Order, Basra was found negligent in that he failed to advise the sellers in a timely manner that the deposit cheque had been returned by the bank for insufficient funds, and that he failed to advise the sellers in a timely manner of the ongoing problems in obtaining a replacement cheque. The Council suspended Basra for fourteen (14) days and required that he successfully complete programs of study as a condition of continued licensing.

In *Council and Patricia Ann Goss et al* (September 10, 2000) Goss was found to be negligent within the meaning of section 9.12 of Regulation 75/61 of the *Real Estate Act* and reprimanded. Goss failed to obtain a $10,000 deposit cheque within 24 hours of acceptance as required by the contract, and failed to advise the sellers and/or their salesperson in a timely manner that she had not received the required deposit. Goss admitted she believed the deposit was required on subject removal, not within 24 hours of

acceptance. The deposit cheque was due on or before December 13, 2000 and received on December 19, 2000.

In *Council and Terry James Minnie* (March 22, 1991) Council found that Minnie failed to deliver a required $1,000 deposit cheque to his agent and was negligent within the meaning of Section 9.12 of the regulations under the *Real Estate Act* in that he failed to report the subject transaction to his agent after his offer was accepted. Council suspended Minnie for fourteen days. On September 13, 1990 Minnie, having disclosed he was a real estate licensee, made on offer on a property acknowledging receipt of the $1,000 deposit. Minnie testified he or his assistant had completed all records, including the transaction sheet and deposit and left them with his manager's mailbox on September 14, but his office had no record of receiving these. On September 26, 1990 Minnie advised the listing agent the purchase would not be completed and submitted a signed form authorizing the release of the deposit. An inquiry to Minnie's office disclosed there was no record of the deposit or of the transaction. The conveyancing officer in Minnie's office asked Minnie for the records and received the records including a transaction sheet, but not the deposit, on September 27, 1990. On September 28 the conveyancing officer acknowledged they had the deposit.

DECISION

The primary issues on appeal are whether Council failed to consider all of the facts before it; whether Council adequately addressed the seriousness of the conduct in question and; whether Council wrongly concluded a suspension of fourteen (14) days was appropriate under the circumstances. The Appellant submits that a suspension of between 30 and 60 days is more appropriate.

I first address the question of whether Council failed to consider all of the facts before it. The facts state that Ms. Moallem did not submit the paperwork to her office immediately after acceptance of the offer as per office policy. The Appellant submits that had this been done, the nominee would have been able to inquire if the required deposit had been received. The nominee for Sutton Group-West Coast Realty made exactly the same point to Ms. Moallem. The Appellant concurs with the Council's finding of incompetence for Ms. Moallem's failure to submit the subject transaction to her agent in a timely manner (Consent Order, para 1(b)). In my opinion Council considered all of the facts as they relate to this issue.

The Agreed Statement of facts indicates that Ms. Moallem was unaware that her colleague (Mr. Zappone) had provided that the deposit was to be made within 48 hours of acceptance, and mistakenly believed the deposit was due on subject removal. Usually her contracts include a provision that deposits would be payable upon subject removal. I am of the opinion that given this belief, it would reasonably follow that Ms. Moallem did not advise the seller and/or their listing agent that the deposit had not been received since she believed it was due on subject removal. But the fact remains that Ms. Moallem's belief

concerning the timing of the deposits was wrong and it seems helpful to better understand what circumstances might have caused this to happen.

The Appellant submits that "that the only logical conclusion to be drawn on the above evidence is that the licensee, Sherry Moallem, did not read the terms and conditions of the contract at all. If she had read the subject clauses, it would have been clear that there were two (2) deposits of $50,000 for a total of $100,000." The Appellant submits that it is not just that Ms. Moallem "failed to advise the seller and/or their listing agent in a timely manner that she had not received the deposits within 48 hours, … (Consent Order, para 1(a)), but rather it is obvious that she did not read the essential terms and conditions of the contract, if she read it at all."

There are two relevant documents where Ms. Moallem should have read the deposit requirements. The first is the Transaction Record Sheet that is to be filed with her office. A copy of this document is contained in the Record, signed by Ms. Moallem, and clearly sets out the two $50,000 deposits, but with no dates for these deposits, for a total deposit of $100,000. The Transaction Record Sheet has no date to indicate when it was completed and signed by Ms. Moallem. The Agreed Statement of Facts indicates it was not submitted to the office until sometime in or around October 14, 2003; hence it is entirely possible that this form was not completed until this time. As noted above, Ms. Moallem was found incompetent for failing to submit the Transaction Record Sheet to her office in a timely manner, but there is no reference as to when it was completed.

The second document referencing the deposit requirements is the Contract of Purchase and Sale. This document, originally three (3) pages, was completed on August 15, 2003 and indicates the document was prepared by Sutton West Coast Realty, per Sherry S. Moallem. A major point on page one provides "2. DEPOSIT: A deposit of $50,000 which will form part of the Purchase Price, will be paid on the following terms:" and on the line immediately below is the insert, in capital letters, stating that the "DEPOSIT TO BE PLACED IN TRUST WITHIN 48 HOURS OF ACCEPTANCE OF THIS OFFER." This page is initialed, but the initials are unclear. Page two of the contract is signed by the purchaser and witnessed by Ms. Moallem. No mention of the deposits appears on page two. On page three of the document, the subject clause(s) are set out in five paragraphs. The second paragraph states "Upon subject removal, the buyer will increase the deposit by a further $50,000 to a total of $100,000. If the subject is not removed or waived by Otober (sic) 22, 2003, the $50,000 deposit plus any interest earned, will be returned to the buyer. …" Page three of the document is signed by the purchaser and witnessed by Ms. Moallem. A fourth page was added later, but contains no reference to the deposits and contains no signatures from either the buyer or Ms. Moallem.

Ms. Moallem states she was under the mistaken impression the initial $50,000 deposit was due on subject removal. Council had before it a letter from Sharene Orstad, solicitor for Ms. Moallem, (Record, Tab 6) that states "when Mr. Zeppone (sic) provided Ms. Moallem with the newly drafted offer, <u>she immediately reviewed the subjects only</u>, (emphasis added) and sent the offer to Ms. English. Unbeknownst to Ms. Moallem, Mr. Zeppone (sic) had amended the deposit clause to make it payable within 48 hours of

acceptance." If, as stated, Ms. Moallem "immediately reviewed the subjects only" (emphasis added), she would not have read page one of the contract where the amount and timing of the first $50,000 deposit are clearly stated. If Ms. Moallem "reviewed the subjects only", then it would appear to follow that she did not confirm the purchase price, civic address, legal descriptions, PID number, completion date and adjustment date, all contained on page one of the contract and not reported elsewhere in the contract. This would be critical since the letter from Ms. Orstad "makes it clear that the Respondent worked several drafts of the contract in question, all of which included a deposit upon subject removal, when it was sent to Mr. Zappone with instructions to change a number of terms revolving around a new agreement as to price (emphasis added) and the subject clauses." But if Ms. Moallem "reviewed the subjects only", as set out on page three of the contract, then one is left to question how she overlooked the fact the second (of five paragraphs) on this page begins with "Upon subject removal, the buyer will increase the deposit by a further $50,000 to a total of $100,000…."

There is one further point relating to the statement that Ms. Moallem "immediately reviewed the subjects only." Paragraph six in the Agreed Statement of Facts six reads "On August 19, 2003 the offer was accepted by the sellers. The sole subject (emphasis added) was a subject to the buyer undertaking a financial feasibility of development study by October 22, 2003." The Contract of Purchase and Sale is contained in the Record and it appears to contain more than one subject clause. Indeed Ms. Orstad refers to "subjects" (plural) in her letter on behalf of Ms. Moallem and the purchaser. Dr. Kazemi refers to "my subject conditions (plural) in his fax dated October 15, 2003 (Record, Tab 3). The first paragraph on page three of the Contract of Purchase and Sale addresses Point six of the Agreed Statement of Facts and reads "Subject to the buyer undertaking a due diligence process and satisfying himself in his sole and absolute discretion as to the viability and financial feasibility of development…." Paragraph three on the same page reads "The seller will deliver to the buyer a copy of the most recent title search and survey of the subject property by Aug. 19, 2003 and the said title search and survey will be subject to the buyers inspection and approval (emphasis added) on or before October 22, 2003. The condition is for the sole benefit of the buyer." This suggests that there are possibly two subject clauses, not one as noted in the Agreed Statement of Facts. The clauses may not be of equal important, but both appear to be subject conditions. But even if one concludes that there is but one subject clause, it is not clear how Ms. Moallem could reach this conclusion, and know it is contained in paragraph one of page three, without reading the entire page three.

I am of the opinion that this apparent inconsistency in paragraph six of the Agreed Statement of Facts is important because paragraph two in the Contract of Purchase and Sale (on the same page as the subject clauses) contains reference to the deposits and reads "Upon subject removal, the buyer will increase the deposit by a further $50,000 to a total of $100,000…" It is not clear from the evidence whether the Council considered this potential inconsistency or what weight, if any, it may have given to this matter. At minimum, it would have been helpful if the Council had commented on this matter.

I do not accept, as the Appellant submits, that the only conclusion (emphasis added) to be drawn is that Ms. Moallem did not read the contract at all, but it is certainly one rather probable conclusion. Even if Ms. Moallem reviewed only on the subject clauses as submitted, her reading of the subject page would have been careless and /or superficial to have missed the paragraph referencing "increasing the deposit to $100,000 upon subject removal" set out in the midst of the five clauses on page three, the same page she signed as witness to the purchaser's signature. The reference to "increasing the deposit to $100,000 upon subject removal" appears to be between two subject clauses that Ms. Moallem "reviewed".

The Agreed Statement of Facts cites several mitigating circumstances. One circumstance is that Ms. Moallem had not previously been involved in a bare land transaction. She sought assistance from other licensees, including Mr. Zappone who had experience in such transactions. Recognizing her lack of experience and seeking assistance is commendable. I accept the submission of the Appellant that realizing that bare land transactions were a new area of activity for her, "it was particularly incumbent on her to exercise due diligence and be fully aware of the terms and conditions she was including in the contract." In the final analysis, independent of how many others may have assisted Ms. Moallem in drafting the contract, Ms. Moallem was responsible for understanding the elements of the proposed offer, and the deposit requirements are a fundamental element of this contract. I am of the opinion that the fact that Ms. Moallem was preparing an offer on bare land, an area of business where she had little or no experience to be important, yet it is not clear this fact received the attention it deserves in the Agreed Statement of Facts.

Ms. Moallem had a responsibility to ensure her client, the purchaser, understood the terms and conditions of the offer to purchase. However, the Record is silent on this matter. The letter from the potential purchaser, Dr. Kazemi, admitted as new evidence, does not resolve this matter. I accept the submission of the Appellant that Dr. Kazemi may be biased and that his letter was not subject to cross examination, but I am of the opinion it does offer two helpful insights. First, Dr. Kazemi states that "One of the changes made by Mr. Zapone (sic) was that the deposit was payable upon acceptance of the offer. This change went on unnoticed by Ms. Moallem and myself as our attention was entirely focused on the subject clause." I note that Dr. Kazemi refers to a "subject clause" in this letter, but earlier referred to "subject clauses" in his fax dated October 15, 2003. Dr. Kazemi's observation that Respondent Moallem "was entirely focused on the subject clause" is speculative, but his letter, combined with Ms. Moallem's statements, suggest that two individuals either reviewed or focused on the subject clause(s) contained on page three of the contract, yet failed to read and/or understand the deposit implications set out in the midst of these subject clauses on which they claim to have focused attention. The second insight in Dr. Kazemi's letter is the fact that he does not indicate what, if anything, Ms. Moallem told him about the deposit requirements in the offer.

I accept, as indicated in the Record, that Ms. Moallem usually included a clause stating deposits were due on subject removal. However, as stated, her normal area of activity did not include bare land. Seeking the assistance of others in preparing the contract is

commendable, but this does not absolve her of ultimate responsibility to understand the proposed terms and ensure her client understands the terms of the offer he was signing. Then having "read the subjects only", Ms. Moallem still failed to be aware of the deposit requirements. Moreover, had she submitted the Transaction Record Sheet to her office in a timely manner, as required, this issue may have been avoided.

The Council submits that all licensees "are expected to check all information and to do all necessary work at a high standard." The Council submits that "Negligence and incompetence are not defined, but in considering whether a licensee might have breached Regulation 9.12, the accepted and normal standards are taken into account."

There is also a possible inconsistency in the evidence before me relating to the events in and around October 15, 2003. A statement from Mary Anne Buholzer, conveyance officer for Sutton Group-West Coast Realty, states that on October 14, 2003 she received a call from Ms. English, the listing agent, asking to confirm that the $50,000 deposit was being held (Record, Tab 5). Ms. Buholzer checked her files and advised that there was no deposit or any record of a contract. The statement from Ms. English confirms that this conversation took place on October 14, 2003 (Record, Tab 4). Ms. Buholzer called Ms. Moallem and asked about the deposit. Ms. Moallem said the deposit was due on subject removal and Ms. Buholzer suggested she review the deposit requirements. The same day Ms. Buholzer informed her nominee of the situation (Record Tab 5).

On the same day, October 14, 2003, the nominee for Sutton Group-West Coast Realty spoke to Ms. Moallem about the situation, at which time she stated it was her error. The nominee also reminded Ms. Moallem about the need to turn in to the office all paperwork on her transaction immediately after acceptance as per the office policy. Ms. Moallem's nominee contacted Royal LePage and advised that they were holding no deposit (Record Tab 5).

I raise these observations because the Agreed Statement of Facts indicates that Ms. Moallem became aware of her error concerning the deposit during a phone conversation with Ms. English, but the evidence in the Record (Tab 5) indicates both the conveyancing officer and nominee for Ms. Moallem's firm raised the matter first, potentially one day earlier. If this is true, and the ambiguity rests with the fact that Ms. Moallem spoke with Ms. English "on or about October 15, 2003", it suggests that Ms. Moallem may have been less than forthcoming during her conversation with Ms. English. The chronology of events provided by Ms. English in her letter (Record Tab 4) does not assist in clarifying this matter since Ms. English makes not mention of a conversation with Ms. Moallem on October 15, 2003. If Ms. Moallem became aware of the potential incorrect deposit requirements through conversations with her conveyancing officer and nominee on October 14, 2003, it raises the question of why Ms. Moallem did not immediately call Ms English or her purchaser to clarify the matter. In the alternative, if Ms. Moallem first heard of the potential incorrect deposit requirements during her conversation with Ms. English, why did she not immediately advise her nominee and the purchaser? I am of the opinion that this potential conflict required attention and it is not evident that it received appropriate attention by the Council.

The Appellant submits that Council failed to consider all of the facts before it; and did not adequately address the seriousness of the conduct in question as disclosed by the evidence contained in the Record and Agreed Statement of Facts. The Council submits it had considered all the evidence. While I cannot determine with any degree of certainty whether Council considered all the evidence before it, I can conclude that some of the evidence in the Record appears not to have received the appropriate attention and was not afforded the weight it deserved, as evidenced by the Agreed Statement of Facts. I recognize that the Agreed Statement of Facts is a summary document and not intended to provide a comprehensive presentation of all the evidence. But as noted above, I am of the opinion that several facts in the evidence before the Council appear not to have been fully addressed, and as a consequence, the Council may have determined the incorrect penalty.

While the Council did not describe what it understands to be the "accepted and normal high standard" of conduct expected of a licensee, I am of the opinion that Ms. Moallem's handling of this transaction falls far short of any reasonable definition of "accepted and high standards." Having reached this conclusion, I turn my attention to the submission that the Council wrongly concluded a penalty of two (2) weeks was appropriate.

I agree with the submission of the Appellant that it is impossible to ascertain what the Council "turned their mind to" because no reasons were provided. "In this case, the Council went straight from a finding of fact to the ultimate decision on verdict and penalty without giving reasons." The issue of having no reasons provided by the Council for a verdict or penalty was addressed in *Spong*, supra, and the matter was referred back to the Council. I believe this Appeal can be distinguished from the Spong appeal on several grounds. The Moallem Appeal proceeded by way of Consent Order and Ms. Moallem, with assistance of Counsel, accepted the verdict and penalty and waived her right to appeal. As between Ms. Moallem and the Council, the failure to provide reasons is of lesser importance given the Consent Order. Second, there is evidence in the Record, albeit limited, to indicate some level of discussion relating to the verdict and penalty took place between the Council and Ms. Moallem. This is not intended to imply that the Council need not give reasons when the case relies on a Consent Order, as the Superintendent has the right to appeal. However, I am reluctant to delay proceedings further while the Council provides the Appellant reasons for the verdict and penalty.

All parties made submissions on the issue of penalty and provided cases in support of their positions. While I am not bound by these prior decisions by other members of the Tribunal, I do believe that the Tribunal should strive for a degree of consistency (see Robert W. McCaulay, *Practice and Procedures Before Administrative Tribunals*, Carswell Press, 1988, pp 6-2).

The Appellant cited eight cases with penalties ranging from reprimand to sixty (60) day suspensions and submitted that the two cases involving suspensions of sixty (60) days were most comparable. Counsel for Ms. Moallem submits they are not similar. I am inclined to accept the submission of Ms. Moallem on this matter. In my opinion each of

these two cases involved activities that were more serious that of Ms. Moallem. In Au, supra, the Council found that Au misconducted himself, a more serious finding than incompetence, and failed to attend the hearing. In Ahuja, supra, Ahuja was found to be negligent, and the Council cited five separate matters where Ahuja failed, resulting in monetary damages.

The remaining cases provide penalties ranging from reprimand to a two week suspension. I have been provided with no case involving facts that are even close to the facts in this Appeal where the penalty has exceeded a two week suspension.

I acknowledge that this matter was handled by Consent Order, but recognize that the penalties derived through a Consent Order may be changed on appeal (*British Columbia (Superintendent of Real Estate) v. Real Estate Council of British Columbia*, [2004] B.C.C.O. No. 2 (CAC)(QL), Book of Authorities of Appellant, Tab 15.) I accept the mitigating circumstances cited in the Agreed Statement of Facts. I also note that the amount of the deposit and the time period the deposit was outstanding are greater than in the other cases. While the amount of the deposit and length of time it remains outstanding do not, by themselves, necessitate a longer suspension, they are a consideration.

Based on the analysis above, I accept, in part, the submission of the Appellant that the Council either did not consider all of the evidence before it or did not adequately address the seriousness of the conduct as disclosed by the evidence and Agreed Statement of Facts. While the penalty determined by the Council falls within the range of penalties in the cases before me, I believe the conduct in question is more serious that the conduct in any of the cases resulting in penalties of two weeks or less. The Appellant seeks a penalty between 30-60 days. I reject this length of penalty as I believe the conduct involved is less serious than in the two cases cited with 60 day penalties.

In the absence of directly comparable cases, I conclude that a penalty of three (3) weeks will recognize the serious nature of Ms. Moallem's conduct while providing adequate deterrence of Ms. Moallem from engaging in further misconduct. A suspension of three (3) weeks will also provide a general deterrence of other members of her profession, and "serve to maintain the public's confidence in the integrity of a profession's ability to properly supervise the conduct of its members." At the same time, I do not believe the suspension of three (3) weeks is disparate with penalties imposed in other cases, given the somewhat more serious nature of the actions of Ms. Moallem.

CONCLUSIONS

The Appellant's appeal is allowed in part. The FST assesses the following penalty on appeal:

1. The suspension of the licensee of Ms. Moallem imposed by the Council shall be varied to increase the suspension to a period of three (3 weeks);

2. The other provisions in the decision of the Council relating to successful completion of Chapter 2 (The Real Estate Act and the Code of Ethics and Standards of Business Practices), Chapter 10 (The Law of Contracts) and Chapter 11 (Contracts for Real Estate Transactions) of the Real Estate Salesperson's Pre-Licensing Course and enrollment in, and attendance, in the first available "Legal Update" Course remain unchanged. The Council's order that, as a condition of continued licensing, Ms. Moallem pay to the Council costs of $400.00 within thirty (30) days of the date of the Consent Order remains.

No costs are awarded in this appeal.

Submitted this 22nd day of February, 2006.

Stanley William Hamilton
Member, Financial Services tribunal