

**FINANCIAL SERVICES TRIBUNAL**

**IN THE MATTER OF**  
**THE *REAL ESTATE SERVICES ACT* S.B.C. 2004, c. 42**  
**and THE *REAL ESTATE ACT* R.S.B.C., 1996, c. 397, as amended**

**BETWEEN:**

THE SUPERINTENDENT OF REAL ESTATE

**APPELLANT**

**AND:**

REAL ESTATE COUNCIL OF BRITISH COLUMBIA,  
CHRYSTALE ASHWORTH and MASTER KEY REALTY LTD.

**RESPONDENTS**

**-AND-**

**BETWEEN:**

CHRYSTALE ASHWORTH and  
MASTER KEY REALTY LTD.

**APPELLANTS**

**AND:**

REAL ESTATE COUNCIL OF BRITISH COLUMBIA  
and THE SUPERINTENDENT OF REAL ESTATE

**RESPONDENTS**

**PRELIMINARY DECISION**

**BEFORE:** JOHN B. HALL PRESIDING MEMBER

**DATE OF LAST SUBMISSION:** NOVEMBER 24, 2005

**APPEARING:** RICHARD FERNYHOUGH FOR THE SUPERINTENDENT

DAVID P. BERGER FOR THE COUNCIL

CHRYSTALE ASHWORTH FOR HERSELF AND MASTER KEY

THE PRELIMINARY DECISION AND REASONS OF THE TRIBUNAL ARE DELIVERED BY THE PRESIDING MEMBER.

**INTRODUCTION**

I have been assigned to hear two appeals brought in respect of a decision made by a Discipline Hearing Committee of the Real Estate Council (the "Council"). The first appeal was filed by the Superintendent of Real Estate (the "Superintendent"). The second appeal was filed by Chrystale Ashworth and Master Key Realty Ltd. ("Ms. Ashworth" and "Master Key"). The appeals have been designated respectively by the Tribunal as FST 05-012 and FST 05-015. The Council is a respondent in both proceedings.

This decision addresses certain preliminary issues arising from the written submissions filed to date by the parties in the two appeals. The main issues can be stated in these terms:

1. Whether the Tribunal should hold an oral hearing.
2. Whether the Superintendent's appeal in FST 05-012 should be stayed pending a decision regarding the appeal brought by Ms. Ashworth and Master Key in FST 05-015.

3. Whether the stay of the Council's decision resulting from the filing of the appeal in FST 05-015 should be lifted.
4. Whether a temporary stay should be granted in FST 05-015.

Other related questions raised by the parties' submissions will also be addressed in the reasons which follow.

### CHRONOLOGY

The Council issued its decision on August 5, 2005 (the "Decision"). This followed a hearing over the course of nine days between October 2004 and May 2005. Among other things, the Council determined that Master Key breached Section 9.16 of Regulation 75/61 under the *Real Estate Act* by failing to have a managing broker in regular attendance at the brokerage's office and in active charge of the business; that Ms. Ashworth was negligent within the meaning of Section 9.12 of Regulation 75/61 in that she failed to provide three landlords with a copy of lease agreements for their properties as required by Section 37(1) of the *Real Estate Act*; that Ms. Ashworth was incompetent within the meaning of Section 9.12 of Regulation 75/61 for six separate reasons, including disregarding the awards of two arbitrators under the *Residential Tenancy Act*; and that Ms. Ashworth misappropriated \$2,176.36 received in her capacity as a licensee on behalf of her clients contrary to Section 31(1)(a) of the *Real Estate Act*. As a result of these determinations, the Council decided:

- (a) to reprimand Master Key Realty Ltd;
- (b) to suspend Ms. Ashworth's licence as a managing broker for a period of one year;
- (c) that, as a condition of re-licensing as a managing broker, Ms. Ashworth successfully complete Chapter 2 (Mandatory Requirements Under the *Real Estate Services Act*) of the Broker's Licensing Course;

- (d) Master Key Realty Ltd. and Chrystale Ashworth are jointly and severally liable for the costs in the amount of \$13,728.90 plus the service costs incurred by the Council and these costs are payable within one (1) year from the date of this decision as a condition of Ms. Ashworth's re-licensing as a managing broker;
- (e) Ms. Ashworth is prohibited from any property management activities until she has completed the Property Management Supplemental Course and passed the examination;
- (f) Ms. Ashworth is immediately eligible to be licensed as a representative or an associate broker. (Decision, at p. 32)

The Superintendent's appeal of the Decision was filed on August 25 and became FST 05-012. The grounds of appeal are that the Council erred in concluding a reprimand was appropriate for Master Key, and also erred in concluding the suspension of Ms. Ashworth's managing broker's license for one year, while making her immediately eligible for licensing as a representative or associate broker, was appropriate in the circumstances. The Superintendent seeks to have Master Key's license suspended, and to have Ms. Ashworth's suspension increased, along with a term of ineligibility before she can be considered for licensing as a representative or associate broker.

The Chair of the Tribunal assigned me to hear the Superintendent's appeal on August 26. After the Tribunal received the record from the Council, it advised the Superintendent of the 30 day period for filing submissions in support of the appeal. Ms. Ashworth and the Council were copied on this correspondence dated September 2.

On September 27 the Tribunal received a "Notice of Appeal & Application for Stay" from Ms. Ashworth on behalf of herself and Master Key. The document requests that the appeal act as a stay, and seeks to have all of the determinations and orders made by the Council dismissed. There are 14 grounds of appeal. The primary ground alleges the Council "erred in the facts". Other grounds assert the credibility of the primary witness and complainant is in question due to new evidence, the Council exceeded its jurisdiction, "[a] different standard was afforded the Council and the Appellants throughout the hearing process", the Council "erred in its decision",

and the Council made reference to cases where the circumstances were very different and “prejudice[d] the Appellant”.

The Tribunal advised Ms. Ashworth on September 28 that her appeal could not be processed until an Application to File Late had been received as the appeal had been received after expiry of the 30 day time limit. Ms. Ashworth’s Application to File Late was received on October 11 and was granted by the Tribunal’s Vice-Chair on October 12. Her appeal became FST 05-015.

The Superintendent’s appeal submissions in FST 05-012 were received on September 30. The Tribunal’s letter of October 3 gave notice to both the Council and Ms. Ashworth that they had 14 days to file a reply.

The Vice-Chair of the Tribunal assigned me to hear the appeal of Ms. Ashworth and Master Key on October 12. Ms. Ashworth had earlier been advised that her appeal might be heard together with the Superintendent’s appeal as the two matters involved similar questions.

Ms. Ashworth’s appeal operated as a stay of the Council’s Decision due to Section 79(2) of the *Real Estate Act*. On October 13 the Superintendent applied for an order lifting the stay under Section 242.2(10)(a)(ii) of the *Financial Institutions Act*. The application addresses the three part test enunciated by the Supreme Court of Canada and adopted by our Court of Appeal in *Shpak v. Institute of Chartered Accountants of British Columbia*, [2002] B.C.J. No. 1704; namely, (a) whether there is a serious question to be tried; (b) whether the appellants (here, Ms. Ashworth and Master Key) would suffer irreparable harm if the stay were lifted; and (c) whether the potential harm to the public interest caused by the stay outweighs the potential harm to the appellants if it is lifted (i.e. the balance of convenience test). In this respect, the Superintendent submits:

It is submitted that Ms. Ashworth's Notice of Appeal discloses no reasonable grounds of appeal and therefore her appeal has little or no chance of success. It would appear Ms. Ashworth's appeal rests almost entirely on her dissatisfaction with the

[Council's] decision with respect to findings of fact and credibility, findings which will be afforded a fair degree of deference by the Tribunal.

An appeal to the Tribunal is an appeal on the record, although the Tribunal has the discretion to admit new evidence if the evidence is substantial and material to the decision and did not exist or was not discoverable at the time the original decision was made. Ms. Ashworth's Notice of Appeal references material that is not part of the record and, it is submitted, would not satisfy the requirements to permit its introduction before the Tribunal as new evidence. As such, it is submitted that there is no serious question to be tried.

It is submitted that the lifting of the stay will do no irreparable harm to Ms. Ashworth, as the penalty imposed by the [Council] allows Ms. Ashworth to be immediately eligible to be licensed as a representative or associate broker and the license of her brokerage Master Key Realty Ltd. was not suspended.

It is submitted that the conduct of Ms. Ashworth as found by the [Council] discloses a real risk to the public should the disposition imposed by the [Council] be stayed. It is submitted that much more severe sanctions than the [Council] imposed are warranted in this matter, as argued in FST Appeal # 05-012.

It is submitted that it is apparent from Ms. Ashworth's Notice of Appeal that she accepts no responsibility for her conduct, nor does she feel her conduct was blameworthy in any respect. It is submitted that Ms. Ashworth would likely conduct herself in the same manner which led to the sanctions against her if the decision of the [Council] was stayed pending the determination of her appeal. It is submitted that the potential harm to the public interest far outweighs any harm to Ms. Ashworth should the stay be lifted.

The Superintendent's application to have the stay lifted also invites me to dismiss Ms. Ashworth's appeal pursuant to Section 242.2(10)(f) of the *Financial Institutions Act* on the basis it discloses no reasonable ground of appeal, and is frivolous and vexatious.

On October 14 the Tribunal advised Ms. Ashworth and the Council they had 10 days to file a response to the Superintendent's application to have the stay lifted and the appeal in FST 05-015 dismissed.

The deadline for filing a reply to the Superintendent's appeal in FST 05-012 was October 17. A

submission was received from the Council but not from Ms. Ashworth. Instead, the Tribunal received a letter from Ms. Ashworth via facsimile which stated her call display was showing the Tribunal's fax number "but there is no message or documents". She also asked for "a chronology of the deadlines in this matter". Ms. Ashworth further advised that she was "under my doctor's care and need more time for document preparation".

The Tribunal responded on the same day, and provided Ms. Ashworth with a letter detailing the chronology of both appeals and clearly identifying the filing deadlines in each proceeding. The letter went on to advise that, if Ms. Ashworth needed an extension for any of the deadlines, she should make a timely request in writing which fully set out the basis for the request.

On October 18 Ms. Ashworth acknowledged receipt of the chronology provided by the Tribunal. She stated she had reviewed the deadlines with her doctor, and included a handwritten note from her doctor stating "[Ms. Ashworth] is under medical care. She needs to have the deadline extended for the FST documents". Ms. Ashworth requested that three outstanding deadlines be extended to October 29.

The Tribunal provided the other parties with an opportunity to address Ms. Ashworth's request for extensions. The Council took no position; the Superintendent opposed the request noting, among other things:

Ms. Ashworth has applied for an extension of the time in which to file submissions on FST appeal # 05-012 two days after the deadline for filing those submissions expired. Ms. Ashworth has provided no explanation as to why she was unable to apply for an extension prior to the expiration of that deadline.

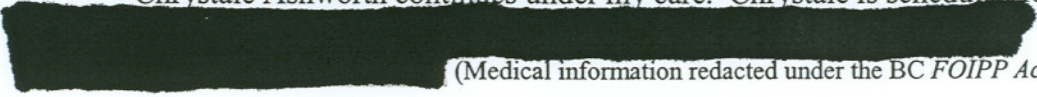
The reason Ms. Ashworth gives for requiring an extension is that she requires her doctor's care. She does not disclose the reason for requiring her doctor's care. She does not disclose when it was she found herself to be requiring her doctor's care. She does not disclose how long she expects to be under her doctor's care. She does not disclose why being under her doctor's care prevented her from filing her submissions in the time allotted.

The "letter" purportedly from Ms. Ashworth's doctor ("the Letter") does not disclose the reason she is under "medical care". The Letter is not addressed to the FST nor is it in the form of a letter, merely a note written on a prescription pad. The Letter is dated October 18, 2005, which is a day after Ms. Ashworth's submissions were due. The Letter discloses no reason why Ms. Ashworth "needs to have the deadline extended for the FST documents." There is no explanation as to how the proposed deadline of October 29<sup>th</sup>, 2005 was arrived at. It seems evident that being under her doctor's care is not an impediment to filing her submissions, only an impediment to filing her submissions on time.

Ms. Ashworth was advised on October 21 that her request for extensions to October 29 had been granted. However, instead of filing the submissions, she sent the Tribunal a letter on October 28 stating she "still require[d] doctor's care in addition to further tests and specialist appointments". Ms. Ashworth requested the deadlines be extended by a further 14 days and included a letter from her doctor:

To Whom It May Concern:

Chrystale Ashworth continues under my care. Chrystale is scheduled for

 (Medical information redacted under the BC FOIPP Act.)

Ms. Ashworth requires a further 14 day extension of time for document preparation for the Financial Services Tribunal.

The other parties were given an opportunity to address Ms. Ashworth's most recent request. The Council continued to take no position, while the Superintendent remained opposed:

Although Ms. Ashworth reiterates that she is still under her doctor's care, she does not indicate the reason or why being under a doctor's care has prevented her from filing her submissions. The Superintendent, while being sympathetic to any real medical problem Ms. Ashworth may have, continues to have the concerns raised in my letter of October 20, 2005 (enclosed).

In addition, it has come to my attention that the Real Estate Council has released another decision dated November 1, 2005 concerning the conduct of Ms. Ashworth (enclosed). Ms. Ashworth had applied for two adjournments of that hearing, one of



which was granted, the second of which was denied. In addition, the Real Estate Council again found that the testimony of Ms. Ashworth was not credible.

Given that Ms. Ashworth has been found on two separate occasions to have given incredible testimony under oath, the Superintendent is reluctant to simply accept Ms. Ashworth's assertions that she was unable to meet the deadlines imposed by the FST because she was "still requiring doctor's care". The Superintendent is therefore opposed to any further extensions being granted to Ms. Ashworth.

In order to avoid further delay, the Tribunal wrote Ms. Ashworth on November 4 and gave her an opportunity to address the Superintendent's opposition to any further extension by November 10. The letter also advised Ms. Ashworth of a final deadline for filing her outstanding submissions:

Further, Mr. Hall has decided that that you must file **all** outstanding submissions by **November 10, 2005** regarding FST appeals 05:012 and 05:015. Your faxed letter to the FST on October 18, 2005 (attached) indicates that you understand these outstanding obligations.

Mr. Hall will decide whether to accept your outstanding submissions **at that time**.  
(bold and underlining in original)

Despite the unmistakable directions provided by the Tribunal, Ms. Ashworth responded as follows:

Your letter is unclear. I am assuming that a time extension has been granted.

The time of 4:30 p.m. on November 10, 2005 I am assuming means that documents received until 8:30 a.m. on November 14, 2005 will comply with that time line. If I don't hear anything to the contrary by 4:30 p.m. on November 7, 2005 I will take this to be the case.

The Tribunal re-iterated on November 7 that "all outstanding submissions **must** be filed by **4:30 pm on November 10, 2005**" (bold in original). In accordance with its prior letter of October 17 (and confirmed by Ms. Ashworth on October 18) those outstanding submissions were: (i) a reply to the Superintendent's appeal submissions in FST 05-012; (ii) a reply to the Superintendent's application to have the stay lifted and the appeal in FST 05-015 dismissed; and (iii) a response to

the Tribunal's proposal that the appeals be heard together by one member. Also outstanding at that time, but not yet due, were Ms. Ashworth's submissions concerning the merits of her appeal in FST 05-015. The Tribunal's letter of October 24 had confirmed receipt of the record from the Council -- being the same as the record in FST 05-012 -- and had given Ms. Ashworth 30 days to file her submissions (i.e. until November 24).

The Tribunal received a 10 page facsimile transmission from Ms. Ashworth on November 10. It consisted of a cover sheet, a one page letter, an "Application for Temporary Stay" (2 pages; "the first November 10 application"), and an "Application for Stay, Request for Information and Application for an Oral Hearing" (6 pages including one exhibit; "the second November 10 application"). The latter document seeks numerous orders and determinations. If granted, the overarching effect would be to stay the Superintendent's appeal in FST 05-012, stay the Superintendent's application to have the stay of the Council's Decision lifted, and stay "all other actions initiated by the Superintendent of Real Estate" in order that Ms. Ashworth's appeal in FST 05-015 can be dealt with separately at an oral hearing before the Superintendent's appeal is heard. Ms. Ashworth also seeks certain disclosure from the Tribunal, and raises concerns of prejudice and bias.

The specific relief sought by Ms. Ashworth in the second November 10 application is set out in these terms:

1. an Order that the Chrystale Ashworth / Master Key Realty Ltd. and the Real Estate Council of B.C. appeal be heard and decided in advance of the Superintendent of Real Estate appeal.
2. an Order that the Chrystale Ashworth / Master Key Realty Ltd. and the Real Estate Council of B.C. appeal be heard and dealt with separately from the Superintendent of Real Estate appeal.
3. an Order that the appeal of the Superintendent of Real Estate be stayed pending the outcome of the Chrystale Ashworth / Master Key Realty Ltd. and the Real Estate Council of B.C. appeal.

4. an Order that the Application for a Stay filed by the Superintendent of Real Estate in the Chrystale Ashworth / Master Key Realty Ltd. and the Real Estate Council of B.C. matter be stayed pending the outcome of the appeal of the Chrystale Ashworth / Master Key Realty Ltd. and the Real Estate Council of B.C.
5. an Order that all other actions initiated by the Superintendent be stayed pending the outcome of the Chrystale Ashworth / Master Key Realty Ltd. and the Real Estate Council of B.C. appeal.
6. an Order allowing the Superintendent of Real Estate, should they find it necessary to do so, to file an appeal to the findings of the Financial Services Tribunal in Chrystale Ashworth / Master Key Realty Ltd. and the Real Estate Council of B.C. matter within a designated time frame. The time frame would commence after the conclusion of the Chrystale Ashworth / Master Key Realty Ltd. and the Real Estate Council of B.C. appeal.
7. the Financial Services Tribunal to provide Chrystale Ashworth and Master Key Realty Ltd. with full disclosure of which of the materials produced by counsel for the Superintendent have been provided to Mr. John Hall, the hearer of the appeals.
8. a position from John Hall, the hearer of the appeals, as to whether Chrystale Ashworth and Master Key Realty Ltd.'s fundamental right to an unbiased hearing has been irreparably damaged.

The Application for Temporary Stay, or first November 10 application, asks that Ms. Ashworth's appeal in FST 05-015 "be stayed temporarily" without any indication of the duration.

The Superintendent and the Council filed submissions in response to Ms. Ashworth's November 10 applications. Some of their arguments will be noted in the next part of this decision. The Superintendent maintains all of Ms. Ashworth's applications should be dismissed with costs. The Council urges the Tribunal to hear the appeals together without further delay. The Tribunal acknowledged those submissions on November 21 through a letter copied to Ms. Ashworth. She responded on November 24 with a one sentence letter that read: "I am preparing a response to your latest correspondence and expect to have it to you in the next day or two". However, as of this decision and reasons being prepared nothing further has been received by the Tribunal.

**DECISION**

I will address the main issues arising from the parties' applications and submissions in the same order as they were identified at the outset of this decision.

**Oral Hearing**

The first issue is whether the Tribunal should hold an oral hearing to deal with Ms. Ashworth's November 10 applications and/or any other preliminary issue.

Under Section 242.2(5) of the *Financial Institutions Act*, an appeal to the Tribunal "...is an appeal on the record, and *must* be based on written submissions" (emphasis added). This provision is subject to Section 242.2(8) which allows the member hearing an appeal "[o]n application by a party ... [to] permit oral submissions". Similar provisions are found in the Tribunal's *Directives and Practice Guidelines* (September 2005). Section 3.12 reads more fully that a party to an appeal may apply in writing to make oral submissions, and the application "should set out why written submissions are not appropriate".

Ms. Ashworth has not applied for permission to make oral submissions regarding her first November 10 application for a stay in FST 05-015 and, indeed, simply presumes an oral hearing will be scheduled:

**TAKE NOTICE** that Chrystale Ashworth and Master Key Realty Ltd., the Appellants, hereby apply to the Financial Services Tribunal for a temporary stay of the appeal.

**AND FURTHER TAKE NOTICE** that the Financial Services Tribunal will be moved at the hearing of the Application for Temporary Stay for:

1. an Order that this Appeal be stayed temporarily.

Her second November 10 application is in part described as an "Application for an Oral

Hearing”. However, it too presumes that a hearing will be scheduled:

**AND FURTHER TAKE NOTICE** that the Financial Services Tribunal will be moved at the oral hearing of the Application for Stay for: ...

At no point has Ms. Ashworth explained why written submissions are not appropriate or why oral submissions should otherwise be permitted. The materials filed with the Tribunal reveal she is quite capable of advancing her interests in writing, at times in quite formal if not legalistic terms. Further, her requests for extensions to file written submissions have been granted. For these reasons, I am not prepared to allow oral submissions regarding any of the preliminary issues being addressed at this stage of the appeals.

### **Order of Appeals**

The second issue is whether the Superintendent’s appeal in FST 05-012 should be stayed pending a decision on the appeal brought by Ms. Ashworth and Master Key in FST 05-015.

The main reason Ms. Ashworth seeks to have her appeal determined separately and before the Superintendent’s appeal is her position that findings of fact contained in the Council’s Decision are erroneous. She notes the Superintendent’s reliance on those findings, and argues in part:

- (e) In the Appellant's Submissions of the Superintendent’s appeal Mr. Fernyhough in his “Statement of Facts” Page 2 #11 says “*The Appellant accepts the finding of facts and the findings of credibility as enunciated in the Council's decision of August 5, 2005 (“the Decision”)*”. The Council's findings of August 5, 2005 are the subject of an appeal by Chrystale Ashworth and Master Key Realty Ltd.; an appeal that is unheard. Chrystale Ashworth and Master Key Realty Ltd. respectfully submit that Mr. Fernyhough cannot accept something as fact that is the subject of an unheard appeal.
- (f) It is submitted that prejudice in Chrystale Ashworth and Master Key Realty Ltd. is occurring because the appeal of the Real Estate Council's August 5, 2005 findings is not being dealt with in advance of the Superintendent of Real Estate matters. Almost all the material from Richard Fernyhough, counsel for the

Superintendent of Real Estate, reflects the prejudice. Mr. Fernyhough has based his material on acceptance of the facts from the Real Estate Council's August 5, 2005 findings. The facts in the findings are in error. Mr. Fernyhough is not researching the facts and is advancing positions based on his reliance on incorrect information. The findings relied on by Mr. Fernyhough are the subject of an unheard appeal.

\* \* \*

- (h) ...Chrystale Ashworth and Master Key Realty Ltd. believe that the combining of the appeals may have already irreparably damaged their fundamental right to a fair hearing. The appeals must be separated and the Chrystale Ashworth/Master Key Realty Ltd. and Real Estate Council of B.C. appeal must be heard first. (*italics in the original*)

In my view, there are compelling reasons for both appeals to be heard by the same member of the Tribunal. They include the obvious fact that both appeals are taken from the same decision. This is undoubtedly why I have already been assigned in that capacity.

It is my further view that the appeals should be combined and heard at the same time as permitted by Section 3.7 of the *Directives and Practice Guidelines*. However, as a matter of adjudicative logic, the appeal in FST 05-015 must be answered first before turning to the Superintendent's appeal on penalty. The practical necessity of determining the appeals in that order is recognized by both the Superintendent and the Council in the responses they filed to Ms. Ashworth's November 10 applications. The Superintendent goes further and concedes, if Ms. Ashworth's appeal is successful, there will be no reason to address the appeal on penalty "as that appeal will have become moot". In other words, the appeals should be heard at the same time, but they will be adjudicated in sequence with FST 05-012 being determined before FST 05-015.

As a result of my conclusion regarding this issue, the orders sought in paragraphs 1-3 of Ms. Ashworth's second November 10 application are denied.

### Stay of Council's Decision

The next issue is whether the stay of the Council's Decision resulting from the filing of Ms. Ashworth's appeal should be lifted. As recorded earlier, the appeal by Ms. Ashworth and Master Key had the effect of staying the Decision. The Superintendent applied on October 13 for an order lifting the stay, and also applied to have the appeal in FST 05-015 dismissed. As also recorded above, the Superintendent relies on the three part test applied in *Shpak, supra*. All other parties were given an opportunity to respond to the Superintendent's application.

Strictly speaking, the test in *Shpak* is used to determine whether a stay should be granted pending an appeal being heard. For present purposes, I am prepared to assume the same approach should adhere when deciding whether to lift a stay under Section 242.2(10)(a)(ii) of the *Financial Institutions Act* where the stay has "automatically" resulted from the exercise of a statutory right of appeal.

It must be noted immediately that Ms. Ashworth has not advanced any substantive arguments against lifting the stay. Her second November 10 application seeks an order that the Superintendent's application for a stay "be stayed pending the outcome of the appeal in [FST 05-015]". However, no facts or reasons are asserted to support such an order being granted. Nor has Ms. Ashworth availed herself of the opportunity provided by the Tribunal to respond to the Superintendent's application to have the stay of the Council's Decision lifted.

In these circumstances, the Superintendent's arguments must prevail. I am not prepared to dismiss Ms. Ashworth's appeal outright at this stage of the proceeding. But under the first part of the test in *Shpak*, it can be fairly stated that a preliminary assessment of the merits discloses "an uphill battle". Many of the grounds take umbrage with the Council's findings of fact and assessments of credibility. These are areas where appeal bodies are loathe to intervene. Moreover, in terms of pursuing this appeal, the Tribunal's deadline of November 24 for Ms. Ashworth to file her written submissions has now passed without any request for an extension.

Under the second part of the test, Ms. Ashworth has not pointed to any irreparable harm. And as noted by the Superintendent, the penalty imposed by the Council will allow her to be eligible immediately for licensing as a representative or associate broker. Finally, I am amply persuaded that the balance of convenience favours protection of the public interest pending a ruling on the merits of Ms. Ashworth's appeal by the Tribunal.

As a result of my conclusions on this issue, the order sought in paragraph 4 of Ms. Ashworth's second November 10 application is denied. I also decline to grant the order sought in paragraph 5 to stay "all other actions initiated by the Superintendent" pending the outcome of her appeal.

### **Stay of Appeal in FST 05-015**

Ms. Ashworth's first November 10 application seeks a "temporary stay" of the appeal she filed on behalf of herself and Master Key. The grounds include the filing of her second November 10 application, "unanswered questions and unresolved issues" in FST 05-012, a "concern of bias" resulting from the appeals being combined, and the need for "unresolved issues in the Superintendent's appeal to be resolved prior to advancement of [her] appeal".

Ms. Ashworth has now effectively obtained a "temporary stay" by ignoring the Council's deadline for filing her appeal submissions and, instead, filing her November 10 applications. She has offered no reason for her failure to abide by the Tribunal's directions, and the November 10 applications demonstrate she is fully capable of preparing written materials in a timely manner. In another proceeding, such a unilateral assumption of process by an appellant could result in the appeal being dismissed where the requested stay is not granted. I have decided such action would not be appropriate here. The reasons for this decision include my earlier determination to lift the stay of the Council's Decision and thereby minimize any benefit to Ms. Ashworth through further delay.

More generally, the grounds enumerated by Ms. Ashworth do not provide sufficient reason to



stay her appeal. Her second November 10 application will be conclusively dealt with by the end of this decision (except insofar as it raises matters going more properly to the merits of her appeal), and there are no “unanswered questions and unresolved issues” falling outside the usual parameters of the appeal process. For reasons already given, the two appeals should be heard together, with the merits in FST 05-015 being considered before turning to the Superintendent’s appeal on penalty. There is nothing unusual about appeals and “cross-appeals” of the same decision being heard together in either the administrative or the judicial contexts. Nor does a “concern of bias” arise in law because two appeals from the same decision are heard in this manner.

Ms. Ashworth’s “Application for a Temporary Stay” of her appeal in FST 05-015 is denied. She is hereby directed to file her appeal submissions previously due on November 24, 2005 within 10 business days of this decision. She is additionally directed to file her reply to the Superintendent’s appeal in FST 05-012 by the same date.

### **Other Matters**

Paragraph 8 of Ms. Ashworth’s second November 10 application concerning the appellant’s “right to an unbiased hearing” has been implicitly addressed in the last part of this decision. The order sought in paragraph 6 is redundant given my determinations about how the appeals will be heard. In terms of the remaining paragraph 7, Ms. Ashworth may contact the Tribunal’s Deputy Registrar to confirm “which of the materials produced by counsel for the Superintendent” have been provided to me as the member hearing the appeals. That being said, I am not aware of receiving anything beyond the record, supplemented by correspondence and submissions on behalf of the Superintendent which have all been copied to Ms. Ashworth and the Council as parties to the appeals.

## Costs

The Superintendent's response to Ms. Ashworth's November 10 applications complains about the resulting delay, and maintains the Tribunal "was designed to allow a cost effective and efficient avenue of appeal ... as an alternative to the courts". As well as having the November 10 applications dismissed, the Superintendent submits that an order for costs be made against Ms. Ashworth.

I decline to make an order for costs as part of this decision. Any order for costs associated with these preliminary issues can be considered along with costs of the appeals generally.

## CONCLUSION

I have made the following determinations in specific answer to the preliminary issues identified at the outset of this decision:

1. The appeals in FST 05-012 and FST 05-015 continue as appeals on the record based on written submissions, and Ms. Ashworth's application for an oral hearing is denied.
2. The two appeals will be heard together; however, it will be necessary to deal with the grounds of appeal in FST 05-015 before turning to the Superintendent's appeal on penalty in FST 05-012.
3. The stay of the Council's Decision dated August 5, 2005 resulting from the appeal brought by Ms. Ashworth and Master Key is lifted under Section 242.2(10)(a)(ii) of the *Financial Institutions Act* pending a ruling by the Tribunal in FST 05-015.
4. The request for "temporary stay" of the appeal in FST 05-015 is denied.

Following from this last determination, and as set out above, Ms. Ashworth is directed to file her appeal submissions within 10 business days of this decision. She is additionally directed to file her reply to the Superintendent's appeal in FST 05-012 by the same date.

DATED AT VANCOUVER, BRITISH COLUMBIA, this 16<sup>th</sup> day of December, 2005.

FOR THE FINANCIAL SERVICES TRIBUNAL

JOHN B. HALL  
PRESIDING MEMBER