

FST - 05 -011

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF REAL ESTATE ACT R.S.B.C. 1996, C.397, as amended

BETWEEN:

RONALD PATRICK THOMSON

APPELLANT

AND

THE SUPERINTENDENT OF REAL ESTATE

RESPONDENT

APPEAL DECISION

Chair: Dale R. Doan, LLB, Member of the Financial Services Tribunal

Ronald Patrick Thomson, representing himself

Counsel for the Respondent, Superintendent of Real Estate - Richard Fernyhough

Appeal Decision Date: December 22, 2005

INTRODUCTION

By way of Notice of Appeal dated August 23, 2005, the Appellant, Ronald Patrick Thomson ("Mr. Thomson"), appealed the June 23, 2005 decision of the Superintendent of Real Estate (the "Superintendent") to the Financial Services Tribunal ("FST").

In this appeal (the "Appeal"), the facts presented at the hearing on June 15, 2005 are not in dispute. Nor has the Appellant appealed any findings of facts with the exception only being Mr. Thomson's submission that certain facts surrounding allegations of money laundering and the timing of Mr. Thomson's application to become a nominee are disputed.

Mr. Thomson appealed the length of the suspension ordered by the Superintendent and submits that the suspension is excessive especially in light of industry standards and the amount of time that has elapsed since the commission of the illegal acts in question.

THE SUPERINTENDENT'S DECISION

The Superintendent's decision is dated June 23, 2005. This follows the June 15th, 2005 hearing before the Superintendent where Mr. Thomson represented himself and the Superintendent of Real Estate's office was represented by its legal counsel, Mr. Richard Fernyhough.

Although the facts and findings of fact will not be repeated in this FST Appeal Decision, certain matters will be reiterated. Mr. Thomson was originally licensed as a real estate sales person in January, 1993. He was a nominee from February, 1998 to February 26, 1999. As at the latter date, Mr. Thomson, became an agent until September 3, 2000 when he again became a nominee. His nominee status continued until April 28, 2004 when his license was suspended.

Mr. Thomson was charged in 1999 with a number of criminal code and controlled drug and substance offenses in relation to the importation of 12 tons of cannabis resin into Canada. On April 13, 2004, the Honourable Judge E.A. Arnold found Mr. Thomson guilty of:

1. Conspiring to import 12 tons of cannabis resin into Canada;
2. Conspiring to traffic in 12 tons of cannabis resin;
3. Importing 12 tons of cannabis resin into Canada; and
4. Possessing 12 tons of cannabis resin.

On May 25, 2004 Mr. Thomson was sentenced to 4 years imprisonment. Mr. Thomson has appealed this conviction and the Crown has appealed seeking an increase in the sentence imposed. The Court has not yet dealt with their appeal.

On April 28, 2005, the Superintendent suspended the license of Mr. Thomson after having determined that Mr. Thomson was not a suitable person to hold a real estate license. Mr. Thomson appealed the suspension that was imposed by the Superintendent to the Financial Services Tribunal, which Tribunal found that the Superintendent had reasonably concluded that the reputation and status of licensees generally would be undermined by Mr. Thomson's conviction for the serious drug-related offences, however, the said Tribunal found that the Superintendent had erred when he suspended Mr. Thomson's licence for an "unspecified period of time". The matter was sent back to the Superintendent with a number of directions.

Having reviewed the Superintendent's decision of June 23, 2005, it is readily apparent that the Superintendent complied with the directions imposed upon him by the Financial Services Tribunal. The central focus became that of the appropriate length of suspension for Mr. Thomson. The Superintendent reviewed the case decisions as well as the oral submissions of both Mr. Thomson and the Superintendent of Real Estate's legal counsel. The Superintendent further considered a number of factors in reaching his decision. Notably, the Superintendent reviewed both mitigating and aggravating factors that were presented to him in the submissions as well as in the cases referred to. The Superintendent gave consideration to the public confidence in the province's financial services sector and in particular the real estate industry, the reputation and status of licensees in real estate business generally and the protection of consumers, which I take it refers specifically to the protection of the public in this instance. Further, the Superintendent's decision alludes to a number of observations of the Superintendent which were considered as material and of importance in reaching his decision. In the end, the Superintendent's decision was as follows:

"Suspension Imposed

The confidence in the Financial Services Sector and the reputation of the many thousands of honest, ethical, real estate licensees can only be preserved by not allowing Thomson to be licensed until he has re-established his reputation and suitability. In these circumstances, the public interest consideration had to be placed above Thomson. As a result, I am imposing a suspension which is consistent with the Licencee Practice Manual as follows:

- Thomson is not eligible for licensing under the Real Estate Services Act until five year after completion of his sentence, or five years from the date of the original suspension, whichever is the longer period"

DECISION

The thrust of the submissions filed on behalf of Mr. Thomson and the Superintendent focuses on the length of the suspension imposed by the Superintendent. This in turn considers the requirement that every applicant for a license shall “among other things, be of ‘good reputation’...” (Real Estate Regulation 4.01).

The Real Estate Council produces the “Licencee Practice Manual” (the “Manual”) that specifically deals with the question of “good reputation” and the effect of criminal convictions and other proceedings on the “good reputation” requirement.

In particular, the following guidelines are set out in the Manual:

“C. “Good Reputation” - Guidelines

Regulation 4.01 states that every applicant for a license shall, among other things, be of “good reputation”. General business and personal reputation in addition to criminal convictions and charges will be reviewed when considering an applicant’s “good reputation”...

Applications from individuals with criminal records will not be considered until the following periods have passed following convictions:...

2. Indictable Offences

- (a) Indictable offences unrelated to employment - e.g., possession of narcotics for the purposes of trafficking.

Applications from applicants will not be considered until at least one year following completion of sentence, parole and/or probation. These would include indictable offences for which the applicant received a sentence of imprisonment, a fine, a suspended sentence and probation or a conditional discharge and probation.

3. White-collar crime

The crimes in this category include theft from employer, theft of large sums of money, serious fraud cases, embezzlement, criminal breach of trust, forgery or any other business-related crime or a conviction for a crime where the individual was in a position of trust. Applications from applicants will not be considered until at least five years from the date of completion of sentence, parole and/or probation. These would include both summary and indictable offences for which the applicant receives a sentence of

imprisonment, a fine, a suspended sentence and probation or conditional discharge and probation.

Mr. Thomson is of the view that only Part 2 "Indictable offences" should apply in this case. Counsel for the Superintendent is of the view that both Parts 2 and 3, "Indictable offences" and "White-collar crime", apply. Settling this issue is of significant concern to Mr. Thomson as it is his view that if Part 2 only applies, then a guideline suspension of 1 year following the completion of his sentence would be applicable. On the other hand, if Part 3 is found to be applicable, a guideline suspension of 5 years from the date of completion of his sentence would be required.

Two matters for consideration emerge from this issue. First, in both Parts 2 and 3 the phrase "at least" prefaces the length of the suspension. Neither guideline period is intended to be the minimum suspension period. Second, Part 3 crimes, namely "white-collar crimes", appear to relate primarily to crimes committed in the course of one's employment in business. Therefore, it must be determined whether or not Mr. Thomson's activities related to the importation for purposes of sale of illegal drugs may reasonably fit within the definition of "or any other business-related crime". The question becomes does the phrase "business-related crime" mean a crime committed during the course of a legitimate business, or is it broad enough to include crimes committed in the course of criminal business activities. Seeing no apparent restrictive language in Part 3, I am of the view that the phrase "or any other business-related crime" may reasonably be interpreted to include crimes committed in either a legitimate business environment or a criminal business environment. Criminal business activities in which Mr. Thomson participated involved numerous people, cross border importation of a large quantity of goods, and without doubt a co-ordinated effort that would compare favorably to a medium or large business organization over a considerable period of time. The single fact that it was an illegal business simply does not detract from the fact that it was still a "business activity".

It is my view that both Part 2 and Part 3 of the Manual dealing with "indictable offences" and "white-collar crime" situations have application in this case. Having made this determination, Mr. Thomson's suspension may not be lifted until at least 5 years from the date of the completion of his sentence, parole and/or probation. The decision of the Superintendent fits within this criteria.

Even if the white-collar crime category was not applicable in this case the suspension period set out in the Manual for indictable offences prescribes a suspension period of "at least 1 year" following the completion of the sentence. Given the circumstances of the case under consideration by the Superintendent, a suspension period that considerably exceeds the 1 year would be appropriate in this case in any event.

The Superintendent's ruling was as follows:

"Thomson is not eligible for licensing under the Real Estate Services Act until five year (sic) after completion of his sentence, or five years from the date of the original suspension, whichever is longer."

The Superintendent does not specify whether or not the ruling is pursuant to Part 2 or Part 3 of the Manual as described above. His ruling applies to either or both said Parts.

The FST has considered the “standard of review” applicable in cases such as this. In particular, the decision of the Financial Institutions Commission and Insurance Council of British Columbia v. Branislav Novko (FST-05-008) outlined the standard of review of decisions of administrative tribunals by way of appeal to the FST. At page 4 of that decision, consideration is given to the cases of Dr. Qv. College of Physicians and Surgeons of British Columbia [2003] 1 F.C.R. 226, 2003 F.C.C. 19, and Re: Galaxy Sports Inc. (2004) BCCA 284, where it was determined that the standard of review must be premised upon whether or not there were reasonable grounds for the administrative body to reach its decision based upon clear and cogent evidence presented before that body.

The decision goes on to read as follows:

“The FST does not reconsider the entirety of the evidence in the form of a “re-hearing”; rather, deference is given to the findings of facts and the assessment of credibility made by the administrative body that actually experienced the hearing procedure, heard the witness(es), saw the documentary evidence and, combined with their experience as the administrative body created by the legislation in question, was in the best position to make the findings of fact found in its decision. However, the FST must determine whether or not the administrative body in question after considering the evidence and the documentation, after making its assessments with respect to credibility and after making its findings of fact, could reasonably have reached the decision that it has made, all based upon clear and cogent evidence presented to it”.

In this Appeal the Superintendent considered not only the evidence presented at the hearing, but also gave special consideration to numerous guidelines specifically directed by the Financial Services Tribunal. The Superintendent’s decision clearly shows that all of the evidence as well as the direction of the Financial Services Tribunal were taken into account and were analyzed. Having reviewed all of the submissions filed in this Appeal, the Record and the Superintendent’s decision, I have concluded that the Superintendent could reasonably have reached the decision that he made based upon the clear and cogent evidence presented to and considered by him.

THE FST APPEAL DECISION

The FST assesses the following penalty on Appeal:

1. Mr. Thomson is not eligible for licensing under the Real Estate Services Act until 5 years after completion of his sentence, or 5 years from the date of the original suspension, whichever is longer.; and

2. No cost shall be awarded in this Appeal.

Respectfully submitted,



Dale R. Doan, member of the Financial Services Tribunal

CORRECTION:

The FST has amended this decision to correct a typographical error.

On page 1, the original decision was numbered FST 05-008.

The amended decision is now numbered FST 05-011.