FST 05-007

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF 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
and
KENNETH SCOTT SPONG

RESPONDENTS

DECISION

BEFORE:	JOHN B. HALL, Presiding Member
DATE OF HEARING:	DECEMBER 19, 2005
PLACE OF HEARING:	SURREY, B.C.
APPEARANCES:	RICHARD FERNYHOUGH, for the Superintendent FRITS VERHOEVEN, for the Council JAMES L. STRAITH, for Mr. Spong

INTRODUCTION

The Superintendent of Real Estate (the "Superintendent") has appealed the decision by a Hearing Committee of the Real Estate Council (the "Hearing Committee" or the "Council") dated March 10, 2005. The hearing resulted from a complaint against Kenneth Spong by Elisabeth Thoma, an unlicensed assistant employed by Mr. Spong. The Council made two findings adverse to Mr. Spong:

(i) he was found negligent within the meaning of Section 9.12 of Regulation 75/61 under the *Real Estate Act* in that he allowed Ms. Thoma to act or hold herself out as salesperson without being the holder of a valid or subsisting salesperson's licence issued under the *Real Estate Act* or without being employed by the agent contrary to Section 3(2) of the *Real Estate Act*; and

(ii) he misconducted himself within the meaning of Section 31(1)(c) of the *Real Estate Act* in that he directed Ms. Thoma to act or hold herself out as a salesperson without being the holder of a valid or subsisting or salesperson's licence under the *Real Estate Act*.

As a result of these findings, the Council decided to suspend Mr. Spong's licence for a period of seven (7) days. The Council also ordered Mr. Spong to successfully complete Chapter 2 of the Real Estate Services Licensing Course within six (6) months of its decision as a condition of continued licensing. Finally, the Council ordered Mr. Spong to pay costs in the amount of $5,585.20 within sixty (60) days of its decision as a condition of continued licensing.

The Superintendent has appealed the Council's decision on the ground that the penalty imposed on Mr. Spong should be varied by increasing the period of suspension. The Superintendent additionally seeks costs under Section 47 of the *Administrative Tribunals Act*.

ISSUES

The written and oral submissions advanced by the parties give rise to the following issues:

1. What is the appropriate standard for reviewing the Council's decision (this necessarily includes the question of how the standard should be determined)?

2. Applying the appropriate standard, did the Council err in imposing a suspension of seven days?

3. If so, what discretionary remedy should follow under Section 242.2(11) of the *Financial Institutions Act*?

FACTS

There is minimal dispute over the facts. The following points are drawn largely from the Superintendent's initial appeal submissions and the Council's reply submissions:

1. Mr. Spong appeared before the Hearing Committee on September 8, 2004 and on January 24 and 25, 2005 on allegations that:

   (a) he allowed Ms. Thoma to act, or to hold herself out, as a salesperson without being the holder of a valid and subsisting salesperson's license or agent's license issued under the *Real Estate Act* and without being employed by an agent;

   (b) he agreed to pay a commission to Ms. Thoma for acting as an agent or salesperson when at the time she did not have a license as required under the *Real Estate Act*; and

(c) he directed or alternatively allowed Ms. Thoma to act or hold herself out as a salesperson without being a holder of a valid and subsisting salesperson's license issued under the *Real Estate Act*.

2. The hearing resulted from a complaint by Ms. Thoma. She had been licensed as a salesperson from June 28, 1990 until September 1, 2001, but was unlicensed during the period that she worked for Mr. Spong. She had indicated from the outset of her employment with Mr. Spong that she wished to resume work in a licensed capacity; however, Mr. Spong had responded she could only work in as an unlicensed assistant.

3. Ms. Thoma's complaint arose out a dispute about remuneration. She believed she deserved to be paid a portion of the commission on two real estate transactions; when Mr. Spong refused to pay her, she threatened to complain to the Real Estate Council, and then did so.

4. There was no complaint from a member of the public, nor any suggestion that any member of the public had suffered any harm of any kind.

5. As indicated, Ms. Thoma was an unlicensed assistant working for Mr. Spong. On two occasions, however, Ms. Thoma worked directly as a buyer's agent on behalf of Mr. Spong without being licensed to do so. On the first occasion, the Council found that "Mr. Spong permitted Ms. Thoma to be in a situation where she was instructed to take buyers around to several properties and spend hours with them while they viewed some of the properties alone. Mr. Spong's stated expectations that she would restrict her activities to opening doors for them was unrealistic in all the circumstances" (decision, at p. 10).

6. On the second occasion, the Council found that when Ms. Thoma presented Mr. Spong with a signed offer on a property Ms. Thoma had shown to a perspective buyer, the only conclusion Mr. Spong could have drawn was that Ms. Thoma had taken the buyer though

the property, discussed it and the offer the buyer should make. Mr. Spong relied on the work of Ms. Thoma and arranged to present the offer as crafted by Ms. Thoma to the listing agent.

7. Ms. Thoma testified that as a former licensee she knew that in order to work with buyers she had to be licensed.

8. The Council found that Mr. Spong did not take steps to ensure that he maintained some degree of supervision over Ms. Thoma's activities; that he permitted her to cross the line into the prohibited area of licensed activity; and that he did not comply with office policy and insist that a contract of employment be in place that clearly defined her responsibilities.

9. The Council found that if Mr. Spong did not directly instruct Ms. Thoma to act as she did, he ought to have known she was carrying out licensed activity. The Council further found that Mr. Spong had benefited from two successful transactions while protesting that he did not know what Ms. Thoma was doing on his behalf to achieve those successful transactions.

10. As set out above, the Council found that Mr. Spong was negligent within the meaning of Section 9.12 of Regulation 75/61 under the *Real Estate Act*.

11. As also set out above, the Council found that Mr. Spong misconducted himself within the meaning of Section 31(1)(c) of the *Real Estate Act*.

12. The Council suspended Mr. Spong's license for a period of seven days and made additional orders as already described.

SUMMARY OF SUBMISSIONS

This appeal was set down for an oral hearing after the Council's reply submissions raised the appropriate standard of review as an important issue to resolve in this case. At the time, the issue was one of first impression for the Tribunal. Since then, and because of the delay in scheduling the hearing in this appeal, other decisions of the Tribunal have addressed the question: see *Danh Vanh Nguyen and Express Mortgages Ltd. v. Registrar of Mortgage Brokers*, FST 05-004 (July 20, 2005); *Novko v. Insurance Council of British Columbia*, FST 05-008 (August 22, 2005); *Chambers v. Real Estate Council of British Columbia*, FST 05-010 (October 28, 2005); and *Financial Institutions Commission v. Insurance Council of British Columbia and Pavicic*, FST 05-009 (November 22, 2005).

I appreciate the extensive and capable submissions made by all counsel in this appeal. Their positions regarding the issues in dispute will be recorded in admittedly concise terms.

The Superintendent rejects application of the "pragmatic and functional" approach (articulated by the Supreme Court of Canada for purposes of judicial review and appeals to the courts) in favour of a "common sense" approach. Support for this position is drawn from the dissenting judgment in *Plimmer v. Calgary (City) Police Service*, [2004] A.J. No. 616 (C.A.), the article by Frank A.V. Falzon, "Appeals to Administrative Tribunals", reported at (1985), 18 C.J.A.L.P. 1, and the Tribunal decisions cited above. With respect to the latter, and while advocating a test of correctness, the Superintendent allows the decisions have generally adopted a standard of reasonableness.

The Superintendent acknowledges a decision on penalty is a question of mixed fact and law; further, while the decision necessarily involves an exercise of discretion, a sentencing body will err if the disposition falls outside an acceptable range absent compelling circumstances. The Superintendent maintains the acceptable range for this case would be a suspension of between six and eight weeks. The Superintendent submits further that the suspension imposed by the Hearing

Committee cannot be supported by the decision as no reasons were given; nor were any reasons given in the two previous cases considered by the Committee.

The Council relies at some length on the applicable statutory framework to support its position regarding the appropriate standard of review. It advocates the pragmatic and functional approach, and says the patently unreasonable standard should be applied; alternatively, the Council argues for the test of reasonableness *simpliciter*. The factors identified by the Council include the "strongly judicial flavour" of the initial proceeding before the Hearing Committee; the nature of the appeal (i.e. "on the record"); and the Tribunal's narrower powers under the *Financial Institutions Act* as compared to provisions of the *Court of Appeal Act*. The Council argues that, even under the reasonableness test, the courts afford a high degree of deference to the original decision maker: see, most recently, *Rainer Zenner v. Prince Edward Island College of Optometrists*, 2005 SCC 77 (at para. 43), and decisions cited therein.

If the standard is reasonableness, the Council says the test is as follows: "After a somewhat probing examination, can the reasons given, when taken as a whole, support the decision?" It submits this question must be answered in the affirmative when one examines the Hearing Committee's decision. The Council also argues a comparison with penalties imposed in other cases is unnecessary and irrelevant under the appropriate test for review. However, it may be acceptable to ascertain whether there is a disparity with other cases and whether there are reasons for the disparity. Nonetheless, the Council rejects the suggestion that this Tribunal should set the range to be followed by a self-regulatory body.

Mr. Spong relies primarily on the Council's submissions regarding the appropriate standard of review, and focuses on the circumstances of his situation. He argues the Council made an appropriate decision following a contested hearing before experienced members; further, those members made a decision in accordance with the statute and based on the facts.

ANALYSIS

I will address the issues in the order set out earlier in this decision.

Standard of Review

I am not obliged to follow decisions by other members of this Tribunal as a matter of precedent: *Practice and Procedure Before Administrative Tribunals*, Robert W. McCaulay, Q.C. (Carswell, 1988). At the same time, the author of that respected reference notes "… there is an exception that an agency or commission should strive for consistency" (p. 6-2). In this case, and having given due consideration to Council's thoughtfully developed arguments to the contrary, I am inclined to agree with the general thrust of the reasoning in the Tribunal's earlier decisions.

I say "inclined to agree" because there is no need to express a definitive opinion in order to dispose of the present appeal. And speaking generally, nothing more than what is necessary should be written -- particularly at this early stage of the Tribunal's experience. But I will elaborate briefly given the resources devoted by the parties to this first issue.

The root of the inquiry is a search for Legislative intent. There is nothing express in the *Financial Institutions Act* to suggest the Tribunal should adopt the pragmatic and functional approach. Notwithstanding the efforts of the Supreme Court of Canada in recent years to clarify and simplify the various standards of review, the test for their application remains a formalistic and time-consuming exercise; moreover, it necessarily preceeds the merits of any appeal. One should reflect at some length before finding the Legislature meant to download the entire exercise on an administrative tribunal.

Such reflection suggests there are far more compelling reasons for finding the Legislature intended something else. Some of the reasons were identified in Mr. Falzon's article and the dissent in *Plimmer* (both cited above). Other reasons include the process for appeals under

Section 242.2 of the *Financial Services Act*. In my view, consideration must be given as well to the background of those who are part of the appeal process: members of the Tribunal are selected after a merit based process but need not be legally trained. The Legislature can also be taken to have appreciated from past experience before the Commercial Appeals Commission that parties will quite often pursue appeals without legal counsel. Nor would it be unusual for an administrative tribunal to establish its own standard of review. For instance, in this jurisdiction, the Labour Relations Board developed standards for reviewing arbitration awards and reconsidering its own decisions through its case law.

These and other factors persuade me that the earlier Tribunal decisions are heading in the right direction. The decisions reject the pragmatic and functional approach, but aptly recognize the degree of scrutiny will depend on the nature of an appeal. For instance, where an appeal challenges findings of fact, there should be a greater degree of deference as the original body will have seen and heard all of the witnesses, have been in a better position to assess credibility, and so on: see *Danh Vanh Nguyen and Express Mortgages Ltd.*, *supra*, at p. 9. The deference may well extend to the point of what is sometimes described as requiring a "palpable and overriding error". On the other hand, where an appeal turns on a pure question of law, there should be little (if any) deference, particularly if one accepts the proposition that the purpose of appeal is to ensure the ultimate decision emerging form the administrative decision-making process is correct: see *Pavicic*, *supra*, at p. 8; and *Plimmer*, *supra*, at para. 59.

The present appeal concerns the length of the suspension imposed by the Hearing Committee. The parties agree this is a question of mixed fact and law, and involves an exercise of discretion. These points suggest a reasonable degree of deference, especially as the original body will have been in a better position to assess any expression of remorse, the need for individual deterrence, and other evidentiary considerations relevant to the imposition of professional discipline. Thus, the Tribunal should be reluctant to intervene where the sentencing body has turned its mind to the relevant considerations, unless a particular penalty falls outside an acceptable range and there are no extenuating circumstances.

But as stated already, there is no need to make a definitive judgment about the appropriate standard of review in this or any other type of appeal. For present purposes, I am prepared to accept the Council's alternative position that the applicable test is the judicial standard of reasonableness (I find no scope for applying the patently unreasonable test). And for reasons which will now be developed, the Hearing Committee's decision falls well short of meeting this standard.

Reasonableness of Hearing Committee's Decision

The Council relies on the description of the reasonableness standard found in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247:

> … The standard of reasonableness basically involves asking "After a somewhat probing examination, can the reasons given, when taken as a whole, support the decision?" This is the question that must be asked every time the pragmatic and functional approach in *Pushpanathan, supra*, directs reasonableness as the standard. Deference is built into the question since it requires that the reviewing court assess whether a decision is basically supported by the reasoning of the tribunal or decision-maker, rather than inviting the court to engage *de novo* in its own reasoning on the matter. … (para. 47)

The Court went on to differentiate between the correctness and reasonableness standards. With respect to the latter, the reviewing body does not ask itself what the correct result would have been; rather, the Legislation intended the specialized body "will have the primary responsibility of deciding the issue according to its own process *and for its own reasons*" (para. 50; emphasis added). Thus, a decision will only be unreasonable "… if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived" (para. 55). The test was similarly stated by the same Court in the recent *Zenner* judgment:

> A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence to the conclusion it

> reached. If any of the reasons used to support the conclusion are tenable in the sense that they can stand scrutiny, then the decision is not unreasonable and a reviewing court must not interfere. This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even though the reviewing court itself may not have reached the same conclusion: *Ryan*, at para. 55; see also *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at paras. 56 and 79. (para. 43)

I intend to quote the entirety of Hearing Committee's decision regarding penalty. Its conclusions regarding the allegations against Mr. Spong are found earlier at pages 10-12. The Committee then noted it had been provided with two prior Council decisions which counsel had suggested "might be helpful … in determining what the appropriate penalties might be" (p. 12), and continued:

> In the case of *Bird and West Coast Realty Ltd. dba Sutton Group - West Coast Realty* (October 16, 2003) (Real Estate Council of British Columbia), the salesperson Anthony Randles Bird was held to have breached section 40 of the *Real Estate Act* in that he agreed to pay commissions to an unlicensed assistant, and was also held to be incompetent within the meaning of section 9.12 of Regulation 75/61 in that he allowed the assistant to hold herself out as a salesperson without having a license. One of the nominees, Roger Hoy Jung, was held to be negligent within the meaning of section 9.12 of Regulation 75/61 in failing to be in active charge of the business of the agent within the meaning of section 9.16 of Regulation 75/61. Mr. Bird was suspended for 10 days and Mr. Jung was reprimanded. In addition, the committee ordered that Mr. Bird be required to successfully complete Chapter 2 (Mandatory Requirements Under the *Real Estate Act* of British Columbia and the Code of Ethics and Standards of Business Practice) of the Real Estate Salesperson Pre-Licensing course, and that he attend the first available "Legal Update" course. Mr. Jung was also required to complete Chapter 2 of the Real Estate Agent's Pre-licensing course within six months.
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> In the case of *Harrop, Smithies and Martello Property Services Inc. dba CB Richard Ellis Property Management Services (CB Richard Ellis) (May 23, 2000)* (Real Estate Council of British Columbia), the agent, CB Richard Ellis was found to have employed an unlicensed salesperson (property manager) contrary to section 42 of the *Real Estate Act.* A licensed real estate salesperson employed as a property manager by CB Richard Ellis, Kim Harrop, was held to be incompetent within the meaning of section 9.12 of Regulation 75/61 in that she permitted an unlicensed person to manage the rental units in question. The agent's nominee, Mr. Smithies, was held to be negligent within the meaning of s. 9.12 of the Regulation in that he was not in

> active charge of the business of the agent within the meaning of s. 9.16 of the Regulation in failing to ensure that an assistant resident manager employed by CB Richard Ellis was licensed under the *Real Estate Act.* The committee decided to reprimand Kim Harrop, Wayne Albert Smithies, and CB Richard Ellis.
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> Mr. Verhoeven presented an estimated Bill of Costs with respect to the hearing in the amount of $4,760.20 (Exhibit 10). The Committee noted that the Bill of Costs as presented did not include a provision for the first day of hearing, September 10, 2004, and amended the Estimated Bill of Costs to include the sum of $ 825.00 under Tariff item (a) (Hearing Panel Members) for that first day for a total of $5,585.20.
>
> **DECISION**
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> The Hearing Committee decided that:
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> [findings of negligence and misconduct against Mr. Spong omitted]
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> and the Committee decided to suspend Mr. Spong's licence for a period of seven (7) days. The Committee further ordered that Mr. Spong successfully complete Chapter 2 (*Real Estate Services Act*) of the Real Estate Services Licensing Course within six (6) months of the date of this decision as a condition of continued licensing.
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> The Committee further ordered that Mr. Spong pay costs in the sum of $5,585.20 within sixty (60) days of the date of this decision as a condition of continued licensing although the Committee also gave liberty to Mr. Spong to apply in writing within seven days of the date of this decision if he wishes to make further submission with respect to the issue of costs.

The stark reality emerging from this extract, as the Superintendent argues, is the absence of any reasons to support the Hearing Committee's decision to suspend Mr. Spong for seven days. The Hearing Committee did not explain how (if at all) the two Council decisions applied to the case it was deciding, or indicate what it found significant about those decisions; nor did the Committee identify what was taken into account when determining the length of Mr. Spong's suspension. There is no "tenable explanation" let alone a "line of analysis … that could reasonably lead the [Hearing Committee] from the evidence to the conclusion it reached".

At the oral hearing, the Council and Mr. Spong were effectively driven to speculating on the factors considered by the Hearing Committee in determining a suspension of seven days was

appropriate in the circumstances. They suggested, based on evidence found in the decision and in the transcripts of the hearing, that certain factors were properly taken into account. With respect, it is a complete "leap of faith" to assume the Hearing Committee turned its mind to the relevant principles. Accepting the respondents' submissions on this point becomes even more problematic when two additional points are recognized: first, the past Council decisions in *Bird* and *Harrop et al* dealt with findings of incompetence by salespersons, as opposed to combined findings of negligence and misconduct; and second, the past decisions themselves did not contain any reasons for penalty, such as the usual emphasis upon protection of the public interest (moreover, the later *Bird* decision placed most weight on *Harrop et al* when imposing penalty).

The former Commercial Appeals Commission dealt with an appeal regarding penalty in *Wong v. Real Estate Council of British Columbia*, [2003] B.C.C.O. No. 3 (Appeal No. CAC - 0010). Somewhat ironically in light of the present appeal, the matter had been remitted to the Commission by the Court of Appeal because an earlier Commission panel "had not given any reasons for finding the penalty imposed by the Hearing Committee was appropriate" (*Wong*, at para. 5). The second Commission panel outlined the principles which govern the determination of appropriate penalties in professional discipline cases, relying in large measure on the leading text by James T. Casey, *The Regulation of Professionals in Canada* (Carswell, 2001). I was a member of the second panel in *Wong* and delivered the Commission's reasons; however, I take comfort in their later approval by the Court of Appeal: see *Wong v. Real Estate Council of British Columbia*, 2004 BCCA 120 (March 3, 2004).

There are three reasons for referring to the Commission's decision in *Wong*. One has already been mentioned; namely, the Commission's first decision was overturned because the panel failed to provide reasons on penalty. The second reason concerns the decision's enumeration of the factors relevant to assessing penalty, and those passages are commended to future Hearing Committees of the Council. The third reason flows from one of the factors; i.e. "ensuring that the penalty imposed is not disparate with the penalties imposed in other cases" (para. 20). The Hearing Committee here found Mr. Spong had been negligent and misconducted himself. In

Wong, the Council itself submitted "the threshold penalty for a finding of 'misconduct' is usually 30 days" (para. 18). The Commission later held "the more critical inquiry is the actual conduct of the agent" (para. 38). Nonetheless, the Hearing Committee's decision to impose a seven day suspension, without providing any rationale for departing from "the threshold" identified by the Council in *Wong*, provides a further basis for allowing the appeal.

There is another and independent basis for allowing the appeal. The judgment in *Ryan* and other cases cited to by the Council refer to *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, regarding the appropriate standard of review. But *Baker* has other implications for administrative decision-makers, including the importance of providing reasons:

> … In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this *where the decision has important significance for the individual, when there is a statutory right of appeal*, or in other circumstances, some form of reasons should be required. … (para. 43; emphasis added)

A decision regarding penalty has "important significance" for persons found guilty of professional misconduct, and there is a statutory right of appeal to the Tribunal from Hearing Committee decisions. In my view, the duty to provide some form of reasons for penalty is no less vital than to the duty to provide reasons for a finding of misconduct. The underlying purposes are similar, if not identical. In addition to assessing whether to appeal, they include public confidence in the outcome, transparency in the decision-making process, and avoiding arbitrary or disparate results. Finding a duty to provide reasons for penalty is consistent as well with the Council's description of Hearing Committee proceedings having a "strongly judicial flavour".

Thus, completely aside from questions related to the appropriate standard of review, I would allow the appeal on the basis the Hearing Committee breached its duty of fairness by failing to provide any explanation on the face of its decision for Mr. Spong's seven day suspension.

Appropriate Penalty

Section 242.2(11) of the *Financial Institutions Act* allows a member hearing an appeal to "confirm, reverse or vary a decision [or] send the matter back for reconsideration, with or without directions". The Superintendent relies on various authorities to support its position that the suspension should be increased to a period of between six and eight weeks. The respondents essentially argue the seven day suspension was appropriate in the circumstances, and the appeal should be dismissed.

I have decided to remit the matter to the Hearing Committee for reconsideration along with directions. In coming to this conclusion, I have been influenced most heavily by the Council's expanded jurisdiction as a self-regulatory body, and the fact the Hearing Committee has heard directly from Mr. Spong on factors relevant to penalty.

In law, remitting a matter "for reconsideration" means the decision-maker may reach the same or a different conclusion. However, the Hearing Committee must be guided by the following directions:

(i) it is not required to re-convene to receive further submissions as the members have already heard the evidence and argument, and should have recourse to the transcripts;

(ii) it must base its decision on factors relevant to the imposition of professional discipline including, but not necessarily limited to, those identified in *Wong*, *supra*; and

(iii) it must endeavour to issue its reconsidered decision *with supporting reasons* within 60 days of this decision.

I reserve jurisdiction to vary the above directions and/or to make such further directions as may be necessary to conclusively resolve this appeal.

CONCLUSION

The Superintendent's appeal is allowed in part. The Hearing Committee's decision to suspend Mr. Spong for seven days is sent back for reconsideration with directions as set out above. There will no order for costs as the parties have had mixed success on appeal.

DATED AT VANCOUVER, BRITISH COLUMBIA, THIS 13TH DAY OF JANUARY, 2006.

FOR THE FINANCIAL SERVICES TRIBUNAL

JOHN B. HALL
PRESIDING MEMBER