

No. 0501-12032

IN THE COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL DISTRICT OF CALGARY

BETWEEN:

SALVATORE AIELLO

Plaintiff/Applicant

- and -

THE REAL ESTATE COUNCIL OF ALBERTA

Defendant/Respondent

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE LUTZ

THE COURT:

The matter before the court is

by way of an originating notice by the appellant,
Salvatore Aiello and with the Real Estate Council of
Alberta as respondent. I will refer to the latter
as RECA. The appeal is pursuant to Section 52 of
the Real Estate Act, RSA 2000, Chapter R-5.

It is an appeal from the July 18, 2005,
decision of the appeal panel of the Real Estate
Council of Alberta, RECA, following its decision
dismissing the appellant's appeal of the November 4,
2004, and January 13, 2005, decisions of a hearing
panel of RECA in which the appellant was found to
have committed conduct deserving of sanction and was
sentenced pursuant to the act. The appellant was
found to have acted contrary to Sections 4(d), 6(c),

1 7(c), 2(a), 5, 2(c), 2(i); 4(d), 6(c) and 3(c) of
2 the code of conduct for industry members of the Real
3 Estate Code and which is part of the Real Estate Act
4 rules. As a result, the panel directed that: the
5 appellant not be authorized to trade in real estate
6 in Alberta as an agent for a period of one year, to
7 pay a fine of \$10,000.00 within 60 days and to pay
8 costs of \$15,571.72 within 60 days and to complete
9 the Real Estate Institute of Canada course R-E-I-C
10 2250, of "Ethical Principles and Professional" or
11 substitute within six months.

12 The grounds advanced by the appellant are five
13 in number. One, failure of the appeal panel to
14 consider relevant facts during the appeal; two,
15 failure by the appeal panel to grant the appellant's
16 appeal on the grounds of a denial of the appellant's
17 right to natural justice and fairness; three, errors
18 by the appeal panel in application of the relevant
19 law; four, failure by the appeal panel to grant the
20 appellant's appeal on the grounds of an
21 inappropriately excessive sanction; and five, such
22 further and other grounds as may be determined upon
23 a review of appeal record.

24 The background is one that stems from, to use
25 the words of the appellant, two allegations against
26 the appellant.

27 The first allegation, RECA I-N-V.1006-01, the

1 Jhuty, J-H-U-T-Y, allegation was founded on events
2 which allegedly occurred between December and
3 January 2001. The letter of complaint which
4 initiated the investigation was received by RECA on
5 May 10, 2001. The essence of the Jhuty allegation
6 was that the appellant was either involved or was
7 complicit in an illegal or fraudulent scheme to
8 obtain mortgage financing involving Mr. J. Jhuty and
9 Mr. Vance Hatt. The panel found conduct deserving
10 of sanction against Mr. Aiello with respect to this
11 allegation. Neither the complainant, Mr. Jhuty or
12 Mr. Hatt were called by the Executive Director at
13 the hearing which took place on September 23 and 24,
14 2004.

15 The second allegation RECA I-N-V.1457-03, the
16 Siegmund, S-I-E-G-M-U-N-D, allegation, was based on
17 events which allegedly occurred between August and
18 November 2002. The complaint was made on November
19 24, 2002. The essence of the Siegmund allegation
20 was that the appellant who was acting as dual agent
21 had wrongfully taken the washer and dryer from his
22 clients, had granted unauthorized access to the
23 subject property and had failed to act in his
24 clients best interests. The panel found conduct
25 deserving of sanction with respect to this
26 allegation as well.

27 Adopting the pragmatic and functional approach

1 enunciated in Law Society of New Brunswick v. Ryan,
2 which followed and applied Pushpanathan v. Canada,
3 deference is at the centre of this approach.

4 The appellant argues that there can be no
5 interference unless one explains how the Real Estate
6 Council hearing panel and subsequently the appeal
7 panel process decisions were incorrect, unreasonable
8 or patently unreasonable. The appellant argues the
9 higher standard of correctness is the standard in
10 addressing the privative clause or statutory right
11 of appeal. The respondent submits that fairness is
12 the standard, but concedes that it matters not in
13 this particular milieu, and I agree.

14 One must consider the court's expertise of the
15 panel appealed from, identify the nature and
16 specific issue before this panel relative to this
17 expertise.

18 The grounds advanced here are a denial of
19 natural justice and procedural fairness and these
20 are two questions of law, see Canada v. Mossop,
21 [1993] 1 S.C.R. 554, attention must be directed to
22 correctness.

23 RECA is a self-regulating body; no requirement
24 for legal expertise is present. Thus, there is
25 reduced deference. However, a higher standard of
26 fairness is required here when the appellant's
27 livelihood is at stake, see Lee v. Canadian Kennel

1 Club (Appeal Commission), [2003] A.J. 64, or put
2 another way,

3
4 "A high standard of justice is
5 required when the right to continue
6 in one's profession or employment is
7 at stake",

8
9 see Abbott v. Sullivan, [1952] 1 K.B. 189, at page
10 198.

11 I am mindful that the application of a standard
12 of care is a mixed question of law and fact. The
13 definition of a standard is a question of law, see
14 Creager v. Nova Scotia (Provincial Dental Board),
15 [2005] 230 N.S.R. (2d) 48.

16 With that backdrop I direct myself to the
17 respondent's brief, which appropriately sets forth
18 a set of relevant facts, which are apparently not in
19 dispute and I will not repeat them here. The
20 respondent argues that the question before us is one
21 that requires an assessment of the procedures and
22 safeguards, quoting Knight v. Indian Head School
23 Division No. 19, [1991] S.C.R. The respondent says
24 the standard of review here is whether a reasonable
25 person, reasonably apprised of the facts would
26 reasonably apprehend the procedure used was not
27 fair.

1 The July 18, 2005, appeal panel noted,

2

3 "As stated previously, the appeal
4 panel can overturn decisions made by
5 the hearing panel on law, but should
6 be hesitant to overturn factual
7 findings of the hearing panel."

8

9 As the decision indicated, this appeal panel simply
10 set forth arguments of counsel for the appellant and
11 the Executive Director, accepted the facts found by
12 the hearing board and dismissed the appeal without
13 delving into the muddled evidence on which the board
14 based its finding. One gets the impression that the
15 allegations only need to be made and any purported
16 backup is but window dressing.

17 The appeal panel's decision opened with this,

18

19 "Three, Standard of Review. Appeals
20 of hearing panel decisions are dealt
21 with in Sections 48 to 50 of the Real
22 Estate Act. An appeal panel may
23 choose to overrule findings on law
24 that were made by the hearing panel.
25 However, on issues of fact, the
26 appeal panel typically defers to the
27 hearing panel's decision. The appeal

1 panel can only overturn factual
2 findings of the hearing panel if
3 those findings are patently
4 unreasonable.

5 In the July 29, 2004, written
6 decision of the RECA appeal panel
7 decision in the Michael James matter
8 the appeal panel stated that the
9 reason for treating matters of law
10 and fact different in an appeal on
11 the record is that the hearing panel,
12 having heard directly from the
13 witnesses, is in a better position to
14 make the factual findings than is the
15 appeal panel, which is restricted to
16 documents and the record of the
17 hearing panel proceedings. For this
18 reason, an appeal panel should give
19 deference to a hearing panel's
20 factual findings and should not
21 overturn them unless they are clearly
22 unreasonable based on the evidence
23 that was presented at the hearing.
24 It is not appropriate for the appeal
25 panel to overturn a hearing panel's
26 factual findings merely because it
27 disagrees or holds a different

1 opinion with respect to them."

2

3 The jurisdiction of this court under the act,
4 and that is under Section 52(5) of the Real Estate
5 Act, is that this court may,

6

7 "(a) make any finding or order that,
8 in its opinion, ought to have
9 been made,

10 (b) quash, confirm or vary the
11 decision of the Appeal Panel or
12 any part of it,

13 (c) refer the matter back to the
14 Appeal Panel for further
15 consideration in accordance
16 with any direction of the
17 Court, or

18 (d) direct that a trial of any
19 mixed questions of law and fact
20 related to a finding or order,
21 or both...of the Appeal Panel
22 be held before the Court."

23

24 To cut to the chase here, two offences were
25 heard together. There is no issue today on this
26 point, in my view, as there is nothing to suggest
27 that the panel was unduly influenced by one charge

1 to the other or that any bias was given birth
2 because of the matters being heard together.

3 The two principal and crucial witnesses in the
4 first allegation, that is that, that involved one
5 J. Jhuty, was that one has found that neither Jhuty
6 nor Vance Hatt were called as witnesses. Rather, a
7 letter purporting to have been written by Jhuty and
8 doctored by a third party comprised Jhuty's evidence
9 so that the right of cross-examination was denied to
10 the appellant, a most basic right, see *Innisfil v.*
11 *Vespra* [1981] 2 S.C.R. 145.

12 The RECA practice and procedure guidelines say
13 this,

14
15 "Where credibility is often an issue,
16 it is important that industry members
17 be given the opportunity to cross-
18 examine adverse witnesses so that
19 they can develop and present their
20 case."

21
22 A transcript of dubious accuracy of an
23 interview of a RECA investigator with the appellant
24 was utilized based on a tape which was not made
25 available and which the appellant testified was
26 incomplete. That issue was glossed over by the
27 appeal panel, but the appeal panel acknowledged that

1 one Clermont testified she, "reviewed the transcript
2 quickly to compare it with what was on the tape."

3 The appellant was without legal representation.
4 That is an issue that counsel raised. However, I
5 must agree with counsel for the respondent that the
6 appellant had many opportunities and several
7 adjournments at his request and although urged to
8 secure legal counsel, did not do so with the reason
9 given that he could not afford legal counsel.

10 It was not for the appellant to call Hatt or
11 Jhuty, for that matter, as he purportedly said, by
12 the respondent, had evidence that supported the RECA
13 panel's prosecution. The appeal panel strikingly
14 took the strong position that denial to the
15 appellant of the right to cross-examine Hatt was not
16 a breach of the fundamental rules of natural justice
17 and procedural fairness, a most profound statement
18 in the context here so shockingly calloused of the
19 rights of the appellant.

20 I note that Section 42(h) of the Real Estate
21 Act provides as follows, "the laws of evidence
22 applicable to judicial proceedings do not apply to
23 hearings", that are commenced under Part 3 of the
24 Act. My retort is that neither does cowboy justice
25 apply. However, when reference was made to the
26 transcript of Farlee Clermont, I reiterate that the
27 appeal panel concluded and this was at paragraph

1 three on page eight,

2

3 "That the transcript of Ms. Clermont
4 was accurate despite the fact that
5 the tapes and transcripts from the
6 interview were lost."

7

8 Furthermore, the appeal panel concluded in its
9 decision that "Aiello admitted he had closed an
10 eye", to this transaction. In coming to his
11 conclusion, it is assumed that reliance was placed
12 on the evidence of Farlee Clermont and more
13 specifically a "transcript" dated October 20, 2003,
14 from a taped interview with Mr. Aiello.
15 Ms. Clermont gave evidence at page 13 of the
16 transcript that she had no idea about the location
17 of the tapes of this interview. Of course,
18 Mr. Aiello did not have opportunity to review these
19 tapes.

20 To find any reasonable and sensible foundation
21 for a decision based on the mocked up evidence of
22 Jhuty and the two third parties, Clermont and
23 Cushman, made mockery of the entire proceeding.
24 Much of the evidence before the hearing panel was
25 hearsay and though permissible, a decision where
26 reliance is almost entirely hearsay can be said
27 generally to breach the duty of fairness, see Bond

1 v. New Brunswick (Board of Management), [1992] 8
2 Administrative Law Report (2d) 95, a decision of the
3 New Brunswick Queen's Bench.

4 Furthermore, as is noted in the guidelines at
5 page 36 regarding hearsay evidence,

6
7 "This type of evidence can never be
8 considered as reliable as firsthand
9 evidence and therefore should not be
10 given as much weight as firsthand
11 evidence. Caution should be
12 exercised in accepting hearsay
13 evidence because such evidence cannot
14 be subject to cross-examination.
15 This is especially important in a
16 disciplinary hearing where the
17 credibility of the witness is often
18 at issue."

19
20 There could be no substantive validity to the
21 necessity and reliability argument relied upon by
22 the respondent as it references Jhuty and Hatt's
23 evidence. It has no application in this context
24 anymore than the panel's finding any comfort could
25 be taken from Ms. Clermont's endeavour to verify the
26 accuracy of the missing audio tape without the
27 presence of the tape.

1 Finally, one is entitled to expect this
2 administrative tribunal, on the applicable standard
3 of reasonableness, to reflect the issues of
4 contention here, see Pottie v. Nova Scotia Real
5 Estate Council, [2005] N.S.J. 276, a decision of
6 Mr. Justice Gregory Warner of the Supreme Court,
7 Trial Division.

8 I note that the RECA regulation that I wish to
9 reference now is, "an industry member must not allow
10 unauthorized access to or control of a client's
11 property to third parties." This, of course,
12 relates to the second allegation, the Siegmund
13 allegation, so called. The evidence with respect to
14 this matter was contradictory and muddled. RECA
15 Investigation 1457-3 resulted in allegations four
16 through nine in the notice of hearing record. At
17 tab six, allegation six alleges that Aiello allowed
18 unauthorized access to a client's property to a
19 third party. Mr. Reid argued at the hearing that
20 the evidence submitted demonstrates that while
21 Ms. Siegmund had access to the property she had
22 purchased on October 21, 2003, Mr. Aiello was not
23 present and, in fact, Mr. Aiello had not given her
24 the front door key to the condominium building,
25 rather that Mr. Aiello had provided her with a key
26 to the parking garage and to the unit she had
27 purchased, but did not provide her with a key to the

1 building. The combination of the parking garage key
2 and the suite key appears to have, in fact, allowed
3 access to the condominium unit to Ms. Siegmund.
4 That contradictory and muddled evidence has
5 particular application to the allegation that the
6 appellant took advantage of the Siegmunds respecting
7 a washer and dryer. He had a separate agreement
8 with them respecting them and there was evidence
9 that he paid for the same. In short, the Real
10 Estate Council restated its evidence heard and found
11 without accurate reasoning for a finding that the
12 appellant violated the council's code of ethics on
13 grounds that do not suggest procedural fairness, in
14 effect, blindly accepting the plethora of hearsay
15 evidence with little or no attention to the
16 witnesses not called, a lack of cross-examination,
17 non-disclosure of materials, contested evidence
18 which played such a significant part of the findings
19 and which were shrouded over, ignored or stated
20 without any reasoned foundation, the required
21 standard of reasonableness demanded of the council
22 in the hearing and appeal process was as a result of
23 absence and/or inadequacy of reasons. The standard
24 was not met.

25 In the result, the appeal is allowed. The
26 subject decisions are quashed and any penalties paid
27 are to be returned to the appellant. Do counsel

15

1 wish to speak to costs?

2 MR. REID: M'Lord, with respect to costs

3 I don't have any submissions to make at this point.

4 Perhaps if counsel and I can agree on our own, we

5 will do so. If not, we will perhaps appear before

6 you again. Otherwise, perhaps we could have the

7 tariff with respect to a half day special.

8 THE COURT: Mr. Lee?

9 MR. LEE: I'm -- I'm gonna suggest, sir,

10 in -- in these matters where it's not a pecuniary

11 matter, column two usually applies. And again, I

12 mean, my -- my friend was successful, so I can only

13 assume that -- that costs will be awarded. I would

14 suggest column two and as my friend suggests, half

15 day special seems appropriate to me.

16 THE COURT: Costs are awarded on that
17 basis and, of course, together with any reasonable
18 disbursements and any other applicable matters that
19 would be included such as Goods and Services Tax and
20 the like.

21 MR. LEE: Okay, thank you, sir.

22 THE COURT: Thank you.

23 MR. REID: Thank you, My Lord.

24

25 PROCEEDINGS CONCLUDED

26

27

16

1 Delivered orally at the Courthouse, Calgary, Alberta on
2 the 1st day of November, 2005.

3

4 B. Reid, Esq.

5 For the Plaintiff/Applicant

6

7 T. Lee, Esq.

8 For the Defendant/Respondent

9

10 P. Lorenz

11 Court Clerk

12

13 dlb

14 Date November 03, 2005

15

16 *Certificate of Record

17 I, Paula Lorenz, certify that the recording herein
18 is a record of the oral evidence of these
19 proceedings held in courtroom 505 at the Court of
20 Queen's Bench, in Calgary, Alberta, on the Tuesday,
21 November 1, 2005, and I was in charge of the sound-
22 recording equipment.

23

24

25

26

27