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Appeal
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December 8, 2009

MEMORANDUM

***Re: Alan W. Chang
v.
Registrar, Real Estate and Business Brokers Act, 2002***

Enclosed herewith please find a copy of the Reasons for Decision and Order of the Licence Appeal Tribunal with respect to this matter.

DISTRIBUTION LIST:

Karen M. McArthur, Counsel for the Applicant
Tim Snell, Counsel for RECO

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ALAN W. CHANG

APPEAL FROM A PROPOSAL OF THE REGISTRAR, *REAL ESTATE AND BUSINESS BROKERS ACT, 2002*, S.O. 2002, c.30, Sch. C

TO REFUSE TO RENEW A REGISTRATION

TRIBUNAL: DAVID GREGORY FLUDE, Vice-Chair

APPEARANCES: KAREN M. McARTHUR, Counsel, representing Alan W. Chang (the "Applicant")

TIM SNELL, Counsel, representing the Registrar, *Real Estate and Business Brokers Act, 2002*

DATES OF HEARING: November 23 and 24, 2009

Toronto

REASONS FOR DECISION AND ORDER

The Applicant appeals from the Notice of Proposal (the "Proposal") of the Registrar, *Real Estate and Business Brokers Act, 2002* (the "Registrar") to refuse to renew his registration as a real estate broker. The Proposal, issued on March 13, 2009 and amended by the removal of one paragraph of reasons and ten paragraphs of particulars, now comprises 186 paragraphs of particulars. The Applicant admitted to all of the particulars. As a result of those admissions, the Registrar called no evidence and the hearing was limited to hearing from one witness for the Applicant and also from the Applicant himself.

THE FACTS

To précis the extensive particulars, they establish that between December 2003 and July 2006 the Applicant, acting in his capacity as an appraiser and a member of the Appraisal Institute of Canada, made false appraisals of 21 properties in Hamilton as part of a mortgage fraud scheme involving 33 properties in total.

In many of the Applicant's appraisals, the represented values on the false appraisals were in the region of double that of the transactions shortly preceding the appraisals when the conspirators had purchased the properties. In reliance on the false appraisals, a major financial institution advanced mortgages well in excess of the actual fair market value of the properties. The financial institution suffered extensive losses on the sale of these properties pursuant to a receivership. The financial institution was then involved in litigation to recoup its losses. It was the evidence at the hearing that the litigation settled, largely as a result of the Applicant's cooperation with the financial institution, and that the financial institution has fully recouped its losses plus costs.

The Applicant's lawyer in the litigation, Jeffrey Sol Klein, testified before the Tribunal concerning the Applicant's cooperation with the financial institution. The action commenced with the issuance of an *ex parte Mareva* injunction. When the Applicant was served, he retained Mr. Klein, a civil litigator with experience in professional errors and omissions cases and commercial litigation generally. Mr. Klein testified that he advised the Applicant to cooperate fully with the financial institution. In exchange for the Applicant's cooperation, Mr. Klein was able to negotiate a standstill agreement with respect to the litigation and finally he negotiated a settlement that included the payment of \$260,000.00 in compensatory damages and costs and cooperation at trial. The total amount of the financial settlement was in excess of the Applicant's personal benefit from the scheme.

The first step in the Applicant's cooperation was to provide evidence in support of a continuation of the *Mareva* injunction in early 2007. The Applicant was examined under oath to that end. As the matter proceeded to trial, set for the first week of October 2009, the Applicant met with the plaintiff's counsel and briefed them extensively to assist in their preparation. At the end of the first week of trial the matter settled. It was Mr. Klein's evidence that the Applicant's cooperation was instrumental in bringing the otherwise intransigent principals of the scheme to the settlement table.

There was a suggestion in Mr. Klein's evidence that the Applicant's cooperation was not without some risk of harm. He testified that one of the principals in the scheme called the Applicant frequently and tried to feed him misinformation. In his own evidence, the Applicant confirmed this evidence. Mr. Klein also testified that a lawyer, who was also an alleged co-conspirator, was beaten up after he decided to cooperate. Mr. Klein stated that the lawyer advised him of the lawyer's belief that the beating was arranged by the two main conspirators to discourage the lawyer's testimony. Mr. Klein stated that the Applicant expressed concern about his safety but "continued to take the high road".

In reviewing the underlying fraudulent scheme, Mr. Klein pointed out that this was not a typical mortgage fraud scheme where the actors flee after receipt of funds. Here, there appeared to be a genuine attempt to build a real estate portfolio using inflated mortgage proceeds to purchase other properties. The schemers maintained the mortgages in good standing. It seems they were of the opinion that a rise in property values would solve their valuation problems. Ultimately, it appears that it was non-payment of property taxes that brought the house of cards crashing down.

Mr. Klein pointed out that the Applicant was not the main benefactor of the scheme. He also testified to the Applicant's remorse over his involvement.

In testifying on his own behalf, the Applicant outlined the process whereby he became involved with the fraudulent scheme. In late 2003, as part of a continuing process to market his appraisal services, he met the two masterminds of the scheme at the office of one of them in Toronto. The meeting was innocent enough in that he laid out his services and promised prompt accurate appraisal reports. He met with the two masterminds for approximately an hour.

Approximately one month later, the Applicant was called to a second meeting. At this meeting, the Applicant was asked if he would be prepared to get involved in a creative way of mortgaging properties. It was explained to him that each property would be purchased and then renovated to some extent. The Applicant would then be asked to do an appraisal on the renovated property. When he started to explain that renovations might increase the value of a property, the masterminds explained to him that their plan was for him to issue appraisals of \$75,000.00 or more over the recent purchase price. The Applicant expressed concern over his professional liability if any of the properties were to be sold under a power of sale. He was advised not to worry, that mortgages would be kept in good standing so power of sale proceedings were not a problem.

The Applicant stated that he did not want to become involved in the scheme. To deter the masterminds from seeking his services, he testified that he said he would do it for \$10,000.00 per appraisal. When he stated this amount, one of the masterminds became very angry and belligerent. The Applicant left the meeting to avoid further confrontation. Several weeks later, the previously angry and belligerent mastermind contacted the Applicant and dealt with him in an affable manner. The caller was persistent, calling five to seven times before the Applicant returned the call. He apologized for the previous anger. He invited the Applicant back for another meeting. This meeting led to the Applicant's acceptance of his first appraisal assignment. The Applicant attended this meeting knowing beforehand that he intended to join the scheme and provide false appraisals.

It was the Applicant's evidence that he attended at each property where he provided an appraisal report. He would take photographs and do measurements. Initially, each of the properties had some form of renovation. Later, there were no renovations and the Applicant was asked to issue an inflated appraisal report despite the lack of renovation. The Applicant stated that he raised the issue of lack of renovations with the masterminds because he was worried. It was also the case that, with respect to several of the properties, the Applicant had acted in his capacity as a realtor in the earlier purchase and earned commission.

The Applicant's regular fee for an appraisal was in the region of \$150.00 to \$250.00. While he stated on a number of occasions that he set the \$10,000.00 fee as a deterrent, he received in the region of \$4,000.00 to \$8,000.00 per fraudulent appraisal. All told the Applicant made approximately \$150,000.00 out of the fraud.

The fee would vary from appraisal to appraisal and was not set beforehand. Lower payments were justified by the masterminds on the grounds that they had incurred increased expenses on the transaction in question. Payments were made in cash and there were usually two or three payments per transaction.

The Applicant presented evidence of his educational background and training. He has continuously taken courses to upgrade his knowledge. Initially, after coming to Canada, he graduated in engineering from the University of Toronto. He worked for a time with Ontario Hydro on the Nanticoke Generating Station before transferring to the head office in 1975. In 1977, he registered as a real estate agent and worked part-time. In late 1980 or early 1981 he was laid off from a consulting engineering firm so he decided to take the real estate broker courses, which he completed in 1984. He became a Fellow of the Real Estate Institute of Canada in 1984. He took a diploma course at Ryerson Polytechnic in Business Administration in 1981, and in 2003 he became a Certified Reserve Planner for Condominium Reserves. As stated earlier, he was also qualified to give real estate appraisals and was a member of the Appraisal Institute of Canada until he resigned following the unwinding of the fraudulent scheme. In August 2009, he completed the Ethics and Business Practices course at the Real Estate Institute of Canada. He stated that the ethics course was of great value to him.

Throughout his testimony, the Applicant expressed remorse and regret for his actions. He testified that there were a number of reasons why he became involved but failed to delineate them in a clear manner. In cross-examination, the Applicant stated, in a very roundabout manner, that he felt threatened. He stated that he was pressured and that allusions were made about the masterminds' acquaintance with biker gangs. He stated that he tried to say no but was pressured. This evidence stands in direct conflict with his evidence in examination in chief that prior to the third meeting, when he attended knowing he would participate in the fraud, the conversations with the masterminds were affable.

The Applicant also testified about his standing in the community. He stated that he is treated with respect as an elder statesman and is approached by people seeking advice. He referred one couple, who had been defrauded by their real estate lawyer with respect to discharging a mortgage, to Mr. Klein. He assisted another young man, a student, by referring him to Ms. McArthur. He seeks no compensation for providing advice to community members.

The Applicant's wife has been supportive of him since she became aware of the details of the litigation and settlement. She consented to a mortgage on the matrimonial home to pay the settlement. The Applicant testified that it was not until late in the litigation process that he confessed to her about his involvement but, thereafter, she was supportive. He had earlier kept her uninformed because of concerns about the effect of the worry and tension on her health.

The Applicant stressed his cooperation with the financial institution in the litigation as indicative of his repentant mindset. Mr. Klein testified that the Applicant did not have to cooperate but chose to do so. The Applicant stated that he knew his evidence was very important, and that it was an essential element in the process. Despite pressure from the masterminds, he saw cooperation and restitution as the right course. He has been taught a very valuable lesson and will not repeat the same actions. Notwithstanding his stated desire to cooperate, when first approached by investigators for the financial institution in October 2008, he decided not to cooperate but to seek legal advice. His cooperation arose after the commencement of the litigation and on the advice of counsel.

The Applicant has also given testimony in criminal proceedings against at least one of the masterminds. He appeared at the preliminary enquiry in April 2009. He has also committed to appear at the trial. The Applicant was charged with 21 counts arising out of the scheme but these charges were withdrawn at the request of the Crown in March 2009. Ms. McArthur stated on behalf of the Applicant that, in addition to the element of cooperation, there were issues of proof that she discussed with the Crown counsel which led to the withdrawal of the charges.

With respect to the preliminary enquiry, Ms. McArthur advised the Tribunal that there is a publication ban in place regarding evidence. The Applicant was cross-examined on a part of his testimony at the preliminary enquiry. The Tribunal orders that the questions he was asked regarding his testimony at the preliminary enquiry, together with his answers to those questions, shall be subject to a publication ban. Nothing in this order restricts the normal access permitted to members of the public to proceedings before the Tribunal.

ANALYSIS

The statutory test to be applied for registration applicable in this matter is set out in s. 10: (1) (a) (ii) of the *Real Estate and Business Brokers Act, 2002*, S.O. 2002, c.30 Sch. C (the "Act"), as follows:

10. (1) An applicant that meets the prescribed requirements is entitled to registration or renewal of registration by the registrar unless,
 - (a) the applicant is not a corporation and,
 - ...
 - (ii) the past conduct of the applicant or of an interested person in respect of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty.

The right of appeal to this Tribunal is set out in s. 14. (5) of the Act as follows:

14. (5) If a hearing is requested, the Tribunal shall hold the hearing and may by order direct the registrar to carry out the registrar's proposal or substitute its opinion for that of the registrar and the Tribunal may attach conditions to its order or to a registration.

A hearing before the Tribunal is unfettered by any deference to the decision of the Registrar. In reviewing the applicable standard of review in *Ontario (Motor Vehicle Dealers Act, Registrar) v. Shine Car Sales* [2003] O.J. No. 603, the Divisional Court reviewed the standard as follows:

In our view, the test in the Divisional Court case of *Brenner v. Ontario (Registrar of Motor Vehicle Dealers and Salesmen)* [1983] O.J. No. 1017, remains the proper test for this purpose. *Brenner* must be read carefully. It does not establish a rule that the Registrar must be shown to be wrong in having concluded that there was reason to doubt that the registrant would carry on business appropriately. The Tribunal approaches the matter uninhibited in any way by the Registrar's view. The test as set out in par. 12 of *Brenner* is as follows:

"The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal."

In our view, properly read, this Court in the subsequent case of *Ontario (Registrar of Real Estate and Business Brokers) v. Faccenda* [1994] O.J. No. 954 did not import into the *Brenner* test a further test of error on the part of the Registrar. That case reiterated the *Brenner* test and did not add any element of deference to the Registrar. It should be clearly understood that the Tribunal owes no deference to the Registrar's opinion. The Registrar is the investigator. The Registrar is not a trier of fact whose opinion is based upon a hearing and so entitled to deference.

It is clear from the statutory test that the focus of the Tribunal's enquiry is the past conduct of the Applicant. This Tribunal has taken the position on a number of occasions that it is the whole of the past conduct that must be taken into account, not just the wrongdoing that led to the issuance of a proposal. That past conduct comprises the period before the impugned behaviour; the seriousness and extent of the impugned behaviour; and conduct following the impugned behaviour. The Tribunal must be satisfied, after a full review of the Applicant's past behaviour, that there are reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

Prior to 2003, the Applicant had been involved in the real estate business for approximately 26 years, initially in a part-time capacity but for approximately 22 years in a full-time capacity. There is no record of any wrongdoing during this period, before the Tribunal. He had upgraded his qualifications to the status of broker and pursued other self-improvement courses. Then for a period of two and a half years, he knowingly embarked on a scheme to defraud a financial institution. Since that time, he has been involved in unravelling the scheme and testifying against his co-conspirators.

It cannot be concluded with any certainty that the Applicant's lack of a record prior to his involvement with the scheme is due to inherent trustworthiness or lack of opportunity. What can be concluded is that, once an opportunity presented itself, the Applicant jumped at it.

The Applicant involved himself in a very extensive fraud scheme netting millions of dollars in fraudulent mortgages. Weeks before his involvement, he had had the scheme laid out for him. He chose to become an integral figure in the fraud rather than walk away. He testified that he was not in need of money at the time, so his involvement can only be attributed to greed.

The Tribunal does not accept the Applicant's testimony that he did not want to become involved so he suggested a \$10,000.00 fee as a deterrent. In light of the events leading up to the third meeting, and the Applicant's admission that by that time he knew he was going to join the scheme, the Tribunal finds that the \$10,000.00 figure was the opening gambit in the negotiations. It is of note that the average amount the Applicant garnered for his wrongful appraisals was in excess of \$7,000.00. It was the Applicant's own testimony that the telephone conversations leading up to this meeting were affable. There can be no suggestion of threat, pressure or coercion. The Applicant's Counsel argued that the Applicant was dealing with very persuasive manipulators. The Applicant only referred to persistence in his testimony concerning the period leading up to his first fraudulent appraisal.

It flows from this finding that, even before this Tribunal, the Applicant is attempting to rationalize his involvement rather than confront it. The Applicant has not yet reached the point of necessary rehabilitation. His major claim to rehabilitation is his extensive cooperation with the financial institution and in the criminal process. Both before the Tribunal and before the civil courts, the evidence against the Applicant was irrefutable. In those circumstances he took the prudent course of admitting his involvement and cooperating. Prudence, while a virtue, does not imply rehabilitation. While the Tribunal has no doubt that the Applicant rues the day he decided to become involved, it is because of the consequences rather than a fundamental acceptance of the wrongful nature of his actions.

With respect to the completion of the ethics course in the summer of 2009, it was the Applicant's evidence that he had learned a great deal from the course. This is laudable, but the Tribunal does not accept the proposition that it is necessary to take an ethics course to comprehend that extensive criminal behaviour is wrong. The Applicant testified that he was well aware his actions were wrong when he undertook to meet with the masterminds of the scheme on the third occasion.

It has also been suggested that the Applicant extricated himself from the fraudulent scheme. His last fraudulent appraisal was in July 2006. He was contacted by investigators from the financial institution in October 2006. The Applicant's Counsel suggests that this three month hiatus indicates that he had already reformed himself and was no longer involved. The Applicant gave no evidence in this regard.

It is equally likely that the financial institution was in the process of investigating the scheme and it referred no further work his way.

What is of note is the Applicant's behaviour when approached by the financial institution's investigators. His initial reaction was to inform the investigators that he wanted the advice of counsel. The right to counsel is the Applicant's fundamental right and the Tribunal does not condemn him for exercising his rights in light of his extensive involvement in criminal behaviour. However, the Applicant did not exercise this right to counsel until two months later when he was confronted with a *Mareva* injunction. Again, the Applicant did not testify that he saw the approach by the investigators as an opportunity to begin to rectify his malfeasance. He missed an opportunity to demonstrate a true change of heart after July 2006 and prior to becoming a defendant in the civil litigation.

In the above review of the evidence regarding the Applicant's animus for his cooperation, the Tribunal does not seek to minimize his contribution to the successful prosecution of the civil litigation. The Applicant also has future contributions to make in the criminal prosecution of at least one of the masterminds. These efforts start the Applicant on the road to rehabilitation. The Tribunal's role, however, is to apply the provisions of the Act. The Act is public protection legislation. Its role is to ensure that all persons dealing with real estate professionals can do so with the understanding that their professional realtor acts in accordance with the law and with integrity and honesty. To put the Applicant's position at its highest, it is that he was an integral part of creating the fraudulent scheme and now he is helping clean up his own misdeeds. The Tribunal needs more evidence of rehabilitation before it can repose the public trust in the Applicant again.

ORDER

Having considered all of the evidence, the admissions of the Applicant, and the submissions of both Counsel, pursuant to the authority set out in s. 14 (5) of the Act, the Tribunal orders the Registrar to carry out his Proposal, dated March 13, 2009, to refuse to renew the Applicant's registration as a real estate broker.

LICENCE APPEAL TRIBUNAL



David Gregory Flude, Vice-Chair

RELEASED: December 8, 2009

The hearing was recorded. Transcripts can be made available at your expense. The period to appeal a decision to the Superior Court of Justice or Divisional Court (<http://www.ontariocourts.on.ca/>) is 30 calendar days from the date of release of the decision. Please arrange to pick up your Exhibits within 30 days after that period has passed. The Tribunal requires seven days notice prior to releasing Exhibits.

Mr. Chang appealed this Decision of the Licence Appeal Tribunal to the Superior Court of Justice (Divisional Court). The appeal was heard on May 4, 2010 at which time the Divisional Court dismissed Mr. Chang's appeal with written reasons to follow. This site will be updated once those written reasons are released by the Divisional Court.