

**IN THE MATTER OF THE *MORTGAGE BROKERS ACT*,
RSBC 1996, c. 313 as amended**

- AND -

IN THE MATTER OF SCOTT MICHAEL ALLAN

DECISION ON PENALTY AND COSTS

DATE OF HEARING: Written Submissions

APPEARING FOR STAFF: Joni Worton, Ministry of Attorney General

APPEARING FOR MR. ALLAN: No one

REGISTRAR'S APPOINTEE: Cheryl Vickers

Introduction and Issue

I note that as of November 1, 2019, the Financial Institutions Commission (“FICOM”) was dissolved and all of its ongoing proceedings, obligations, assets, and liabilities were assigned to and acquired by the BC Financial Services Authority pursuant to the *Financial Services Authority Act*, S.B.C. 2019, c. 14 and *Transfer to the BC Financial Services Authority Regulation*, B.C. Reg. 210/2019.

On February 28, 2020, I issued a Decision on Merits finding the Respondent, Scott Michael Allan (“Mr. Allan”) engaged in conduct that breached sections 8(1)(i) and 8(1)(h) of the *Mortgage Brokers Act* (the “MBA”). Mr. Allan altered an email sent to him by Staff of the Registrar of Mortgage Brokers (“Staff”) and redistributed it to two other registrants as if the email was genuine correspondence from FICOM. The email purported to advise the recipients that trade names used by each of them were not registered under the MBA and could not be used. In the course of an investigation, Mr. Allan made a false and misleading statement proposing a false theory about how one of the registrants had received the altered email.

The issue now is to determine the appropriate penalty to be made against Mr. Allan in accordance with section 8(1.2) of the MBA and whether Mr. Allan should pay the investigation and hearing costs pursuant to section 6(9) of the MBA.

Staff seek orders that:

- a) Mr. Allan not be at liberty to apply for registration for a period of two years, retroactive to commence from January 30, 2017;
- b) Mr. Allan pay an administrative penalty of \$10,000;
- c) Mr. Allan pay investigation costs in an amount to be determined if the parties are not able to agree;
- d) Mr. Allan pay hearing costs in an amount to be determined if the parties are not able to agree; and
- e) All payments must be made by cheque, bank draft, or money order, payable to the BC Financial Services Authority, and all amounts outstanding 30 days following execution of the Order will represent a debt owing and be subject to interest pursuant to the *Financial Administration Act*, RSBC 1996, c.138.

With respect to investigation and hearing costs, Staff request the parties have the opportunity to explore the possibility of a Consent Order, reserving determination to me in the event an agreement is not reached within one month of this decision on penalty being issued.

Sanctioning Principles and Considerations

The purpose of administrative sanctions in the regulatory context is to promote compliance with legislation in the public interest. Specifically, in the context of the regulation of mortgage brokers and mortgage brokering in British Columbia, the MBA's role is the protection of the public and maintenance of public confidence in the mortgage industry (*Cooper v. Hobart*, 2001 SCC 79). The purpose of sanctioning orders is fundamentally to ensure protection of the public by promoting compliance with the MBA, thereby protecting the public from mortgage brokering activity that is non-compliant, not in the public interest, and that may result in loss of public confidence in the mortgage industry.

In assessing the appropriate sanction against Mr. Allan, I may rely on principles of specific deterrence (detering the person whose conduct is at issue) and general deterrence (detering those who might be inclined to engage in similar conduct). I must be mindful of the specific circumstances of this case, and may consider various factors including: the gravity of the conduct; evidence of harm; evidence of advantage gained or to be gained by the respondent; intent; extenuating circumstances; evidence of remorse, rehabilitation or reconciliation; any prior discipline record; the probability of recurrence; and the range of penalties imposed in similar cases.

Analysis

Mr. Allan's conduct in altering an email from Staff and redistributing it to other registrants as if it was an official communication from FICOM and in making a false and misleading statement in the course of the investigation is serious. As I said in the Merit Decision, it is not in the public interest for the regulated to start acting as the regulator against other regulated persons. Nor will such conduct enhance public confidence in the integrity and regulation of the mortgage brokering industry. Mr. Allan aggravated his conduct by providing the false statement attempting to blame others for his conduct.

Other than the anxiety and anguish reportedly experienced by one of the recipients of Mr. Allan's altered email, Mr. Allan's conduct did not result in any significant harm or financial loss. While his conduct was foolish, it did not put members of the public at significant risk. The potentially greater harm from Mr. Allan's conduct is to the integrity of the regulatory scheme and reputation of the mortgage brokering industry itself.

As I also said in the Merit Decision, Mr. Allan's expressed motivation for his conduct to "level the playing field" does not justify him taking on the role of regulator. Both his conduct in sending out the altered email, and in subsequently lying about it, demonstrates a lack of respect for the regulator and the regulator's role in enhancing public confidence in the industry. Mr. Allan acted out of self-interest and with disregard to the authority of the regulator.

Although Mr. Allan apologized to the regulator as well as to one of the recipients of the altered email, I am not satisfied that his apology was sincere or that he has accepted the seriousness of his conduct. Upon being asked by the email recipient why he acted as he did, he responded that he didn't know, that maybe he was a sociopath, and that FICOM had done the same to him. These comments demonstrate that Mr. Allan did not appreciate the seriousness of his conduct and did not reflect remorse for the email recipient's distress.

Mr. Allen has subsequently acknowledged that his conduct was "petulant, foolish and improper" and I trust that the investigation and subsequent hearing process resulting in the Merit Decision and this Decision will impress upon Mr. Allan, and others regulated under the MBA, the seriousness of his conduct, the authority of the regulator, and the need to maintain public confidence in the regulator and the mortgage brokering industry. Mr. Allan is not presently registered under the MBA, so there is no present likelihood he will repeat his conduct.

Staff relies on the Decision of the Registrar in *In the Matter of the Mortgage Brokers Act and Robert John Emil Hensel*, February 11, 2016 (*Hensel*) and the Decision of the BC Securities Commission in *In the Matter of Rudolf Walter Brenner*, 2014 BCSECCOM 292, (*Brenner*) in support of their submission that an administrative penalty of \$10,000, in addition to a suspension or period of ineligibility from registration, is appropriate.

In *Hensel*, Mr. Hensel altered an official industry alert by replacing the names of the persons who were the subject of the alert with the names of other individuals and then sent the altered alert to an individual with whom he had business dealings. The Registrar considered Mr. Hensel's conduct to be extremely serious and imposed a two-year suspension of his registration as a mortgage broker. Staff submit Mr. Allan's conduct is more serious than Mr. Hensel's conduct because he was also found to have contravened section 8(1)(h) involving a finding of dishonesty.

Without downgrading the seriousness of Mr. Allan's conduct, I am not inclined to characterize it as "more serious" than the conduct in *Hensel*. The conduct in both cases was serious and deserving of sanction. Mr. Allan aggravated his conduct by providing a false and misleading statement, but the conduct of altering the email and distributing to other registrants as if it was from FICOM was in itself a dishonest action. In my view, the circumstances of *Hensel* were also aggravated by the fiduciary relationship between Mr. Hensel and the individual to whom he distributed the altered alert.

In *Brenner*, Mr. Brenner was found to have made false and misleading statements and to have failed to make timely filing of insider reports in contravention of the *Securities Act*. The Securities Commission imposed an administrative penalty of \$30,000 in addition to numerous orders prohibiting Mr. Brenner from engaging in various activities for a period of two years. Although the imposition of sanctions under the *Securities Act* involves consideration of similar principles and factors as under the MBA, the differences in the two regulated schemes, including the significantly higher penalties permitted under the *Securities Act*, make it difficult to rely on sanction decisions under the *Securities Act* as a guide for what might be an appropriate sanction under the MBA.

Staff submit that the suspension, or ineligibility period of two years, is appropriate and in line with *Hensel*, but that Mr. Allan has also been found to have made a false and misleading statement in the course of the investigation. Staff submits that to meet the goals of specific and general deterrence a financial consequence to Mr. Allan is necessary in addition to the ineligibility period designed to protect the public. Section 8(1.2) certainly gives the Registrar the authority to impose one or both of an order requiring certain action (such as a suspension) and an order requiring payment of an administrative penalty. The decision of the Law Society of BC in *In the Matter of the Legal Profession Act and Diep Thang Hoang Ngyuen (Nguyen)* suggests that, in the context of regulation of the legal profession, imposing both types of penalty in a single case should be limited to cases where doing so can be reasonably be seen as necessary to further the principles underlying the discipline process, primarily protection of the public and maintenance of public confidence in the legal profession, and secondarily rehabilitation of the disciplined lawyer.

As previously expressed, the purpose of sanctioning orders under the MBA, is fundamentally to ensure protection of the public by promoting compliance. I am not convinced that a monetary penalty as high as \$10,000 in addition to an ineligibility period, in the context of this case, furthers protection of the public. However, the two-year ineligibility period between January 30, 2017 and January 30, 2019 provides no consequence to Mr. Allan in the circumstances given that he voluntarily terminated his registration as a mortgage broker on January 30, 2017 and was out of the country until the fall of 2019. Subject to meeting

all application requirements, Mr. Allan would be immediately eligible to re-apply for registration as a mortgage broker in British Columbia should he wish to do so. In the circumstances of this case, the principle of individual deterrence and the need to maintain public confidence in the mortgage brokering industry suggests some monetary penalty is appropriate.

Considering all of the factors discussed above, the principles of specific and general deterrence, and the fundamental purpose of ensuring public protection by promoting compliance, I find that in addition to the ineligibility period of two years Mr. Allan should be required to pay an administrative penalty of \$5,000.

Investigative and Hearing Costs

Pursuant to section 6(9) of the MBA, Staff seeks recovery of investigative and hearing costs, but asks that I permit the parties to attempt agreement on the amount to be paid. I accept this suggestion and make no order with respect to payment at this time. If parties have not come to an agreement with respect to investigative and hearing costs within 30 days following the date of this Order, either party is at liberty to apply for a determination and I remain seized of this matter to make that determination.

Orders

1. Scott Michael Allan shall not be at liberty to apply for registration under the *Mortgage Brokers Act* for a period of two years, retroactive to commence from January 30, 2017 pursuant to section 8(1.2) of the MBA.
2. Scott Michael Allan must pay an administrative penalty of \$5,000, pursuant to section 8(1.2) of the MBA.
3. All payments must be made by cheque, bank draft, or money order, payable to the BC Financial Services Authority, and all amounts outstanding 30 days following execution of the Order will represent a debt owing and be subject to interest pursuant to the *Financial Administration Act*, RSBC 1996, c. 138.

Issue at Vancouver, British Columbia,. This 11th day of May, 2020.



CHERYL VICKERS
Appointee of the Registrar of Mortgage Brokers
Province of British Columbia