
**IN THE MATTER OF THE MORTGAGE BROKERS ACT
R.S.B.C. 1996, C. 313****and****SCOTT MICHAEL ALLAN****DECISION ON MERITS**

DATE OF HEARING: By written submissions

APPEARING FOR STAFF: Joni Worton, Ministry of Attorney General

APPEARING FOR MR. ALLAN: Chris Bolan, Chris Bolan Law

REGISTRAR'S APPOINTEE: Cheryl Vickers

On August 7, 2015, the Registrar of Mortgage Brokers issued a Notice of Hearing setting out allegations against Scott Michael Allan as follows:

1. In your capacity as a sub-mortgage broker, you contravened section 8(1)(i) of the Mortgage Brokers Act (MBA) in that you conducted business in a manner that is prejudicial to the public interest by altering an email sent to you by [REDACTED], [REDACTED] Financial Institutions Commission, on January 16, 2015, and redistributing the altered email to other mortgage brokers and/or sub-mortgage brokers as if it were genuine correspondence from the Financial Institutions Commission, and in particular:
 - a. On or about January 21, 2015, you posted a message to Verico [REDACTED] Mortgage Inc's (Verico) website's contact page at [REDACTED] in which you falsely identified yourself as "FICOM Compliance", which resulted in an email being received by Verico with the message posted by you. The message you posted, in part, advised Verico, that the trade name [REDACTED] " was not a registered trade name under the MBA and could not be used in any advertisement, website, circular, pamphlet or other similar material; all without the knowledge or authorization of the Financial Institutions Commission or the Registrar of Mortgage Brokers to do so and when you knew or ought to have known that such a message would be treated as genuine by the recipient; and
 - b. On or about January 25, 2015, you posted a message to [REDACTED] website's "Quick Contact" page at [REDACTED]) in which you falsely identified yourself as "FICOM Compliance", which resulted in an email being received by [REDACTED] with the message posted by you. The message you posted, in part, advised [REDACTED] that the trade name [REDACTED]

██████████" was not a registered trade name under the MBA and could not be used in any advertisement, website, circular, pamphlet or other similar material; all without the knowledge or authorization of the Financial Institutions Commission or the Registrar of Mortgage Brokers to do so and when you knew or ought to have known that such a message would be treated as genuine by the recipient.

2. You contravened section 8(1)(h) of the MBA in that you made the following statements, or any one of them, in a record filed or provided under the MBA that, at the time and in the light of the circumstances under which the statement was made, were false or misleading with respect to a material fact or that omitted to state a material fact, the omission of which made the statements false and misleading as follows:
 - a. On February 13, 2015, in an interview with ██████████, ██████████, Mortgage Brokers (██████████) at the offices of the Financial Institutions Commission, you stated that you did not send the message identifying as "FICOM Compliance" to Verico as described in paragraph 1(a) above, when in fact you did send the message;
 - b. On February 20, 2015 you sent an email to ██████████ stating that whomever did send the message set out in paragraph 1(a) above may have obtained your information from a previous Facebook comment or "like", when you knew that you had actually posted the message set out in paragraph 1(a) above, and not another person; and
 - c. On March 30, 2015, in an interview with ██████████ at the Financial Institutions Commission, you stated that you did not send the message identifying as "FICOM Compliance" to ██████████ as described in paragraph 1(b) above, when in fact you did send the message.

Mr. Allan admits to the conduct set out in paragraphs 1(a) and (b) and 2(a), (b) and (c) of the Notice of Hearing but does not agree that the conduct described in the Notice of Hearing is contrary to sections 8(1)(i) or 8(1)(h) of the MBA.

Section 8 of the MBA allows the Registrar to impose sanctions on a person registered or formerly registered under the MBA after giving that person the opportunity to be heard if, in the Registrar's opinion, certain factors apply including those set out at 8(1)(h) and (i) as follows:

- (h) *the person has made a statement in a record filed or provided under this Act that, at the time and in the light of the circumstances under which the statement was made, was false or misleading with respect to a material fact or that omitted to state a material fact, the omission of which made the statement false or misleading;*
- (i) *the person has conducted or is conducting business in a manner that is otherwise prejudicial to the public interest*

Mr. Allan concedes that his actions were petulant, foolish and improper. He submits, however, they do not amount to a breach of the MBA. With respect to the conduct described at paragraphs 1(a) and (b) of the Notice of Hearing (the "Email Actions"), Mr. Allan submits the Email Actions do not amount to "conducting business" in a manner that is otherwise prejudicial to the public interest within the meaning of section 8(1)(i) of the MBA. With respect to the conduct described at paragraphs 2(a), (b) and (c) of the Notice of Hearing (the "Investigation

Answers”), Mr. Allan submits the Investigation Answers do not amount to the making of a statement in a “record filed or provided” under the MBA that was false or misleading with respect to a material fact within the meaning of section 8(1)(h) of the MBA.

ISSUE

The only issue for this hearing is whether Mr. Allan’s conduct as described in the Notice of Hearing is contrary to sections 8(1)(h) and/or 8(1)(i) the MBA.

FACTS

The hearing proceeded by written submissions with the parties providing an Agreed Statement of Facts and Book of Documents. The facts are set out below as agreed by the parties.

I note that as of November 1, 2019 FICOM is 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.

Background

Mr. Allan was first registered as a sub-mortgage broker with the Registrar of Mortgage Brokers on August 21, 2012. Mr. Allan terminated his registration on January 30, 2017.

At all material times, Mr. Allan was registered as a sub-mortgage broker with Centrum Pacific Mortgages Inc.

Mr. Allan was a former employee of the Financial Institutions Commission. Mr. Allan was hired on November 24, 2008, on an auxiliary basis, as an office assistant in the investigations department and with the Registrar of Mortgage Brokers. Mr. Allan’s employment ended on July 5, 2010.

The Allan Email Inquiry

On January 16, 2015, Mr. Allan emailed ██████████, an investigator with the Registrar of Mortgage Brokers, advising that some realtor friends of his were wondering why they could not register an anonymous online complaint with the Registrar. ██████████ replied to the email, noting as follows with respect to Mr. Allan’s trade name:

On a side note, I see that you are using a trade name “Scott Allan Mortgages” which is not a registered trade name under the Mortgage Brokers Act (“Act”). Trade names can only be used by registered mortgage brokers not submortgage brokers. If you have questions regarding trade names, you may contact our registration department for further information.

Please be aware that at this time, the trade name “Scott Allan Mortgages” cannot be used in an advertisement, website, circular or other similar material. Using a trade name that is not registered with the Registrar of Mortgage Brokers constitutes an offense

under Section 21(1)(c) of the Act. Specifically, Section 21(1)(c) states that unless exempt under section 11, a person must not advertise or in any other way indicate that the person is a mortgage broker or submortgage broker other than under the registered name of the mortgage broker.

Email

On [REDACTED] appeared on a television show called [REDACTED]. At the material time, [REDACTED] was a registered sub-mortgage broker with Verico [REDACTED] Mortgages Inc. (" [REDACTED]"). At the material times the Designated Individual of [REDACTED] was [REDACTED].

On January 21, 2015, at 3:19 pm an email (the "Initial Email") was sent to [REDACTED] purportedly from "FICOM Compliance" (ficom@ficombc.ca). The email stated, in part, as follows:

Please be advised that [REDACTED] has been using the trade name [REDACTED] [REDACTED] which is not a registered trade name under the Mortgage Brokers Act ("Act"). Trade names can only be used by registered mortgage brokers, not submortgage brokers. If you have any questions regarding trade names, you may contact our registration department for further information.

Please be aware that, at this time, the trade name "[REDACTED]" cannot be used in any advertisement, website, circular, pamphlet or other similar material. Using a trade name that is not registered with the Registrar of Mortgage Brokers constitutes an offense under Section 21(1)(c) of the Act. Specifically, Section 21(1)(c) states that unless exempt under Section 11, a person must not advertise or in any other way indicate that the person is a mortgage broker or submortgage broker other than under the registered trade name of the mortgage broker...

On January 21, 2015 at 3:21 pm, Mr. Allan, as "Scott Allan Mortgages" posted the following comment on [REDACTED] Facebook Page:

Mortgage rates are going to be coming down in the next week or 2, but possibly rising in March /April if oil prices see even a moderate increase. I'd be happy to come in and discuss mortgages anytime 😊

The same Facebook Page with the "Scott Allan Mortgages" comment also shows:

[REDACTED]

On January 22, 2015, [REDACTED] emailed Staff of the Registrar of Mortgage Brokers (Staff) regarding the Initial Email and was advised verbally from Staff that the Initial Email was not sent by FICOM. Staff took a screen shot of [REDACTED] internet portal.

██████████ agreed to look into whether the sender of the Initial Email could be identified through ██████████ webpage.

On January 22, 2015, ██████████ designated individual, ██████████, provided Staff with a screen shot of the Internet Protocol address logs (IP Logs) for ██████████ website. The IP Logs indicate that the only web access to ██████████ website that occurred close to 3:19 and 3:21 pm originated from the IP address ██████████ at 3:18 pm.

On January 26, 2015 Staff emailed Mr. Allan requiring confirmation that Mr. Allan had ceased using the trade name of "Scott Allan Mortgages" by January 27, 2015. The same day, Mr. Allan confirmed he had amended material bearing the name "Scott Allan Mortgages" and included a list of other sub-mortgage brokers he stated were "employing a similar trademark strategy".

On January 28, 2015, Staff interviewed ██████████ and ██████████. ██████████ confirmed:

- a. that she received notice of the Initial Email from ██████████, and that she was very concerned about the email. ██████████ conferred with ██████████ head office and a lawyer to determine what steps she should take;
- b. that she appeared on ██████████ on ██████████ and that ██████████ maintains a Facebook page that identified her as a guest;
- c. a person identifying himself as Scott Allan posted a message to that page offering his services to the show as a guest at 3:21 pm; and
- d. that she attended the next morning at FICOM offices to determine the issues and decide how to rectify it, and that the situation caused her a great deal of anguish and anxiety and she required medication that evening.

██████████ stated:

- a. that he received an email that appeared to be from FICOM advising that ██████████ was not in compliance with Section 21(1) of the MBA. The email was received on January 21 at 3:19 pm through the contact page of his website.
- b. that he thought the email was legitimate because of the professional wording of the email and responded to the email; and
- c. he was able to contact his web host and determine through their IP logs that the traffic to the contact page of his website originated from IP ██████████.

██████████

On January 26, 2015 Staff received an email from ██████████ a sub-mortgage broker with TMG The Mortgage Group. ██████████ was responding to a FICOM email requesting that he remove his logo ██████████ from his website.

The email read in part:

I see that you are using a trade name ██████████ which is not a registered trade name under the Mortgage Brokers Act ("Act"). Trade names can only be used by registered mortgage brokers, not submortgage brokers. If you have any questions regarding trade names, you may contact our registration department for further information.

Please be aware that, at this time, the trade name [REDACTED]" cannot be used in any advertisement, website, circular, pamphlet or other similar material. Using a trade name that is not registered with the Registrar of Mortgage Brokers constitutes an offense under Section 21(1) of the Act. Specifically, Section 21(1)(c) states that unless exempt under Section 11, a person must not advertise or in any other way indicate that the person is a mortgage broker or submortgage broker other than under the registered name of the mortgage broker.

The email was sent on or about January 25, 2015, and the header information in the email indicates the email originated from IP address: [REDACTED].

Further Investigation

On February 4, 2015, Mr. Allan emailed Staff. Mr. Allan stated he was taking steps to be brought back into compliance and also noted that he had "spread the word" to a number of his "broker friends" and they were "scrambling to get into compliance".

On February 4, 2015 Mr. Allan and Staff arranged for Mr. Allan to attend the FICOM office to be interviewed on February 10, 2015 regarding his use of trademarks.

Mr. Allan failed to attend on February 10, 2015. Mr. Allan and Staff then arranged to meet on February 13, 2015.

On February 13, 2015, Mr. Allan attended at FICOM offices for an interview. Mr. Allan stated he had forwarded the email from [REDACTED] to approximately 10 broker friends to provide them with a heads up around the issue of using an unregistered trade name. He denied any knowledge of the Initial Email and surmised that it may have been done by one of his broker friends that he had sent the email to. He stated that it was a coincidence that the Initial Email went to a guest on a television show and that he had posted the Facebook comment the same day.

On February 19, 2015 [REDACTED] requested that Mr. Allan provide a list of the brokers that Mr. Allan forwarded [REDACTED] email to, together with copies of the sent emails. Mr. Allan stated that the emails had been "culled" from his sent folder and purged from the trash folder because the emails had a large attachment which was automatically deleted. Mr. Allan could not recall the names of the brokers he sent the email to.

Staff examined the header information data received from emails sent from Mr. Allan to Staff. The header information on those emails indicates that the originator of the emails received by Staff from Mr. Allan used the IP address [REDACTED].

On March 30, Mr. Allan was interviewed by Staff. Mr. Allan initially denied that he sent the Initial Email, but later admitted that he sent the Initial Email to [REDACTED] after being presented with the IP Log evidence. Mr. Allan stated that he did not admit to it in the earlier interview because he was caught off guard and was surprised as he thought he was only answering the trademark issue. Mr. Allan apologized and assured [REDACTED] it would not occur again. He stated that he did not share the Initial Email with anyone else, only [REDACTED].

Mr. Allan sent a follow up email to Staff on March 30, 2015. He expressed remorse and stated that there was no explanation and no excuse for his actions or for his dishonesty afterwards and assured Staff that it was not a transgression that would be repeated.

On April 3, 2015, Mr. Allan sent a further email to Staff conveying his regrets, advising that he had reached out to [REDACTED] to apologize, and apologizing to the Registrar.

[REDACTED] confirmed that Mr. Allan sent an email apologizing to her on April 3, 2015.

[REDACTED] had a subsequent phone conversation with Mr. Allan in which she advised Mr. Allan that his actions caused her undue stress and asked him why he would act in this manner. Mr. Allan responded that he didn't know, that maybe he was a sociopath and that FICOM had done the same to him.

Mr. Allan admits that he altered an email sent to him by Staff and sent the altered email to [REDACTED] through [REDACTED] website contact page, and to [REDACTED] through the [REDACTED] contact page as if the altered email were genuine correspondence from the Registrar of Mortgage Brokers and the Financial Institutions Commission.

Mr. Allan agrees that on February 13, 2015, in an interview with [REDACTED], [REDACTED], Mortgage Brokers, he stated that he did not send the altered email described in the paragraphs above to [REDACTED] through [REDACTED] website. Mr. Allan did in fact send the altered email to [REDACTED].

Mr. Allan agrees that on February 20, 2015 he stated to [REDACTED] that whomever posted the altered email described above to [REDACTED] must have obtained this information from a previous Facebook comment or "like", when Mr. Allan knew that he had actually sent the altered email to [REDACTED] through [REDACTED] website.

SUBMISSIONS

Section 8(1)(i) and the Email Actions

For ease of reference I set out again the words of subsection 8(1)(i) of the MBA:

- (i) the person has conducted or is conducting business in a manner that is otherwise prejudicial to the public interest

Staff submit there are two aspects to the allegations. Was Mr. Allan "conducting business" when he redistributed the altered emails, and was the conduct "prejudicial to the public interest"? Staff submits there is no reasonable explanation for Mr. Allan's conduct outside of business and that Mr. Allan was taking matters into his own hands to "level the playing field" with other brokers perceived to be in competition with him. 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 that of the Financial Services Tribunal (FST) on appeal (*Hensel v. Registrar of Mortgage Brokers*, BCFST Decision No. 2016-MBA-001(a)).

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 FST, on appeal from the

Registrar's decision to sanction Mr. Hensel, found it was "eminently reasonable for the Registrar to take the view that when a licensed mortgage broker sends a member of the public what purports to be an official (and intentionally altered) regulatory document, that the person is, for the purposes of section 8(1)(i), "conducting business" as he is acting with the authority, legitimacy and imprimatur of his office".

Staff also refers to several other decisions from other regulatory contexts involving the alteration of documents in support of their position.

Mr. Allan submits that the words "conducting business" in section 8(1)(i) must be interpreted with reference to other provisions of the MBA. In particular Mr. Allan references the definition of "mortgage broker" at section 1 of the MBA emphasising the underlined words:

"mortgage broker" means a person who does any of the following:

- (a) carries on a business of lending money secured in whole or in part by mortgages, whether the money is the mortgage broker's own or that of another person;*
- (b) holds himself or herself out as, or by an advertisement, notice or sign indicates that he or she is, a mortgage broker;*
- (c) carries on a business of buying and selling mortgages or agreements for sale;*
- (d) in any one year, receives an amount of \$1 000 or more in fees or other consideration, excluding legal fees for arranging mortgages for other persons;*
- (e) during any one year, lends money on the security of 10 or more mortgages;*
- (f) carries on a business of collecting money secured by mortgages (underlining added)*

Mr. Allan submits that the words "conducting business" in section 8(1)(i) must mean the things a "mortgage broker" as defined does on a day to day basis as he or she "carries on a business". He submits the Email Actions fall outside of the day to day business of a mortgage broker and were not part of "conducting business".

Mr. Allan submits *Hensel* is distinguishable on the facts and does not support Staff's position. In *Hensel*, the broker identified himself to the client in his capacity as a mortgage broker such that the sending of the altered document came with the "imprimatur of his office". Mr. Allan submits it was not the altering of the official document that was the conduct of business in a manner prejudicial to the public interest but, rather, the sending of it to a member of the public. Mr. Allan submits he never sent anything with the "imprimatur" of his office and did not send anything to a member of the public or a client. He sent an email he had received from FICOM regarding his own use of a trade name to other mortgage brokers, altering it to make it look like FICOM thought the registrants were improperly using a trade name. He submits his conduct did not result in any actual harm (as in *Hensel*), and that the emails were not sent with the intent of thwarting a client's refinancing attempts for his own financial gain (as in *Hensel*). He submits the facts of *Hensel* are a "far cry" from the conduct in issue here.

Further, Mr. Allan submits *Hensel* and the FST's decision on appeal do not provide authority on the interpretation of section 8(1)(i) because the Registrar proceeded on the bases that counsel had conceded that a sanction was appropriate.

Mr. Allan submits the cases from other regulatory bodies do not support Staff's position given the different circumstances and legislation.

Section 8(1)(h) and the Investigative Answers

For ease of reference I set out again the words of subsection 8(1)(h) of the MBA:

- (h) *the person has made a statement in a record filed or provided under this Act that, at the time and in the light of the circumstances under which the statement was made, was false or misleading with respect to a material fact or that omitted to state a material fact, the omission of which made the statement false or misleading;*

Mr. Allan submits that he did not make a statement "in a record" that was "filed or provided" under the MBA. He answered questions put to him by an investigator in an interview where he was not under subpoena or oath. All he did was speak to a person, the investigator, at the investigator's insistence and did not "file" or "provide" anything under the MBA. He submits the fact the investigator chose to make a transcript of the interview does not make the transcript a record that is "filed or provided" under the MBA.

With reference to section 6 of the MBA, Mr. Allan submits the Registrar's power to investigate was not properly invoked with respect to any allegations respecting the Email Actions and that ██████████, as investigator, did not have the requisite authority to investigate the Email Actions.

Mr. Allan further submits that the Registrar did not act fairly, and that Mr. Allan did not have a fair opportunity to properly respond to allegations in accordance with the principles of procedural fairness and relies on *Samatar v. Attorney General of Canada*, 2012 FC 1263 in support.

Staff submits the investigation was proper, ██████████ acted with appropriate authority, there was no breach of principles of procedural fairness, and *Samatar* does not apply. Staff submits that a finding that providing dishonest statements to the regulator in an interview is contrary to the MBA is not only a reasonable interpretation but a necessary one that goes to the heart of the regulatory scheme.

ANALYSIS

Statutory Interpretation

The MBA is to be interpreted in accordance with what has been called Driedger's modern approach, namely, that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act and the intention of Parliament" (*Westergaard v. British Columbia (Registrar of Mortgage Brokers)* 2011 BCCA 344).

The legislative scheme of the MBA is to provide a general framework for the efficient operation of the mortgage marketplace, enabling access to capital through mortgage financing while instilling confidence in the system through the registration and regulation of brokers and the conduct of brokers and those purporting to hold themselves out as brokers. As articulated by the Supreme Court of Canada, "the overall scheme of the Act mandates the Registrar's duty of

care is not owed to investors exclusively but to the public as a whole". (*Cooper v. Hobart*, 2001 SCC 79).

Are the Email Actions contrary to section 8(1)(i) of the MBA?

The purpose and scheme of the MBA is for the protection of the public. It is with this overall purpose and scheme in mind, that the words of the MBA must be interpreted. In my view, Mr. Allan's interpretation, focussing on the words "conducting business" in conjunction with the definition of "mortgage broker" is a narrow interpretation that does not give effect to the purpose and scheme of the MBA. The words "conducting business" should not be interpreted solely against the definition of "mortgage broker" but also against the words of the entire section and the context of the MBA as a whole. It is the conducting of business that is "otherwise prejudicial to the public interest" that is contrary to the MBA in the context of a scheme that is intended to regulate the activities of mortgage brokers in the public interest.

I accept that Mr. Allan did not send out the altered emails in the context of a particular business transaction involving his services as a mortgage broker or his relationship with a client. In that way, the actions are different from those in *Hensel*. However, Mr. Allan received the original email because he was a sub-mortgage broker and in connection with his self-promotion as a sub-mortgage broker.

Rather than simply notifying other brokers of their potential non-compliance with trade name regulations or notifying the regulator of potential breaches by other brokers for investigation and follow-up by the regulator, Mr. Allan took it into his own hands to act as the regulator. Mr. Allan may have felt he was being singled out by the original email from ██████████, and arbitrarily at that as the original email was a gratuitous response from ██████████ to an unrelated inquiry from Mr. Allan, and Mr. Allan likely thought it was not fair that other mortgage brokers were using trade names without drawing the attention of the regulator. But these motivations do not entitle him to place himself in the shoes of the regulator and take action to, as he admitted, "level the playing field". The legislative scheme for the regulation of persons working as mortgage brokers for the protection of the public surely does not contemplate individual mortgage brokers assuming the role of the regulator and taking perceived regulatory breaches into their own hands.

Taking a purposive approach to the interpretation of section 8(1)(i), I agree that in altering the email from ██████████ and sending it to other brokers as if it was being sent by the regulator, Mr. Allan was "conducting business in a manner that is otherwise prejudicial to the public interest" contrary to the MBA.

Mr. Allan submits that if the Email Actions are a breach of section 8(1)(i) of the MBA then "anything and everything" could be the conducting of business. However, it is not "anything and everything" done by a mortgage broker or sub-mortgage broker that will be contrary to section 8(1)(i). It is the conduct of a broker that is "otherwise prejudicial to the public interest" in the context of a scheme for the regulation of mortgage brokers for the purpose of protecting the public that may attract sanction.

The legislation provides for the regulation of the regulated by a regulator. It is not in the public interest or within the scheme of the MBA for the regulated to start acting as the regulator against other regulated persons. A regulated individual, taking regulatory matters into one's own hands and purporting to act as the regulator may be engaged in conduct that may attract sanction as "conducting business in a manner that is otherwise prejudicial to the public interest".

I conclude that Mr. Allan's admitted conduct described in paragraphs 1(a) and (b) of the Notice of Hearing was not only petulant, foolish and improper, but also contrary to section 8(1)(i) of the MBA.

Are the Investigative Answers contrary to section 8(1)(h) of the MBA?

The authority of the registrar to investigate is set out in section 5 of the MBA as follows:

5. *The registrar may, and on receipt of a sworn statement must, investigate any matter or thing arising out of this Act or the regulations.*

There is no evidence of the registrar having received a sworn statement with respect to any alleged actions of Mr. Allan. The registrar, nevertheless, had the discretionary power to investigate "any matter or thing arising out of this Act or the regulations".

Section 6 of the MBA sets out the procedures and powers of the registrar for inquiry. For the purposes of section 5 and 8, section 6(2) provides that "the registrar may investigate, inquire into and examine"... (a) the affairs of the person in respect of whom the investigation is being made...". Section 6(2.1) then provides that:

- 6 (2.1) *The registrar, by order may*
(a) appoint a person to conduct an investigation, examination and inquiry referred to in subsection (2) or to assist the registrar in conducting the investigation, examination and inquiry, and
(b) specify terms of reference to be followed by the person appointed.

Section 6(3) gives the registrar the power to summon and force attendance of witnesses and to compel them to give evidence under oath or otherwise. And, for the purposes of subsection (3), subsection (4) provides that the failure or refusal of a person to attend, to answer questions, or to produce records makes the person liable to be committed for contempt of court.

Mr. Allan submits that, according to section 6(2), section 8 is only triggered in the event the registrar investigates something in relation to section 8. He submits the only thing that was apparently being investigated in this case was Mr. Allan's improper use of trademarks. He submits there is no evidence that at the time of his interviews he was being formally investigated for the Email Actions. As such, the Investigative Answers were not provided in the context of a proper investigation and, it follows, they are not part of a record filed or provided under the MBA within the meaning of section 8(1)(h).

Mr. Allan submits further that there is no evidence of the registrar having made an order under section 6(2.1) appointing someone to conduct an investigation, examination or inquiry. As such, ██████████ had no authority to conduct the interview.

Staff submits ██████████ had the authority to investigate and provides copies of authorizations under the MBA, one signed June 24, 2010 and another signed April 20, 2015 purportedly replacing the 2010 authorization as well as authorizations signed November 13, 2013 and April 15, 2014 that do not bear on the matters in issue in this proceeding.

Did [REDACTED] have the authority to investigate?

Section 5 of the Act gives the registrar broad investigatory powers. For the purpose of section 5, as well as section 8, section 6(2) allows the registrar to investigate, inquire into and examine the affairs of the person in respect of whom the investigation is being made as well as, among other things, communications “by, on behalf of or in relation to or connected with the person”. The authorization dated June 24, 2010 in effect at the time of the investigation in this case authorizes, among other individuals, investigators for the Financial Institutions Commission to perform the registrar’s duties with regard to investigations, inquiries and examinations under section 6(2). I find [REDACTED], an investigator employed by FICOM, was authorized to conduct the investigation.

I reject the submission that section 8 is only triggered in the event the registrar investigates something in relation to section 8. Section 5 allows the registrar to investigate “any matter or thing arising out of this Act or the regulations”. The powers granted under section 6(2) are also in relation to this broad investigatory authority and not just in relation to section 8.

Section 8 is triggered if the results of an investigation lead the registrar to conclude any of subsections (e) to (j) of section 8(1) apply. Section 8 then allows for the imposition of penalties if, following a hearing, any of subsection (e) to (j) are found to apply.

I find the investigation into Mr. Allan’s conduct was authorized by the MBA and that [REDACTED], had the delegated authority under section 6(2) to “investigate, inquire into and examine the affairs” of Mr. Allan and any documents and communications by, on behalf of or related to Mr. Allan.

The issue, however, is whether the Investigative Answers are contrary to section 8(1)(h) of the MBA as “a statement in a record filed or provided under this Act” that was false or misleading. The Investigative Answers set out at paragraphs 2(a) and (c) were given in interviews of Mr. Allan conducted by [REDACTED] on February 13, and March 30, 2015, respectively (the Interview Answers). The Investigative Answer set out at paragraph 2(b) is a statement by Mr. Allan in an email to [REDACTED] (the Email Explanation). For the reasons that follow, I find that the Email Explanation is a breach of section 8(1)(h) of the *MBA*, but the Interview Answers do not constitute such a breach.

The Interview Answers

On February 4, 2015 Mr. Allan and Staff arranged for Mr. Allan to attend the FICOM office to be interviewed on February 10, 2015 regarding his use of trademarks. Mr. Allan failed to attend on February 10, 2015.

By email dated February 11, 2015 with subject “Missed meeting”, Mr. Allan wrote to [REDACTED] as follows:

So sorry [REDACTED], got my dates mixed up. Please let me know if [sic] your next availability.

[REDACTED] responded:

Friday morning Feb 13 10:00.

Mr. Allan responded that Friday morning would work but suggested meeting for coffee in Yaletown. He added that he was now “fully in compliance with [REDACTED] requests to remove the unauthorized Scott Allen Mortgages trademark.”

By email dated February 12, 2015 in response to Mr. Allan, [REDACTED] wrote:

You will present yourself at my office Friday at 10:00 or be subject to a summons. Failing to comply under a summons is contempt of a Court Order.

As previously noted, section 6(3) of the MBA gives the registrar the “power to summon and enforce the attendance of witnesses and compel them to give evidence on oath or otherwise”. Section 6(4) provides that for the purposes of subsection (3), the failure of a person to attend, to produce records or to answer questions makes the person liable to be committed for contempt of court as if in breach of a court order.

The authorization of June 24, 2010, however, does not authorize investigators for the Financial Institutions Commission to exercise the powers granted by section 6(3) to compel the attendance of witnesses. I find that while [REDACTED] had the delegated authority to investigate under section 6(2), he did not have the authority to require Mr. Allan to give evidence under oath or otherwise. The provision for contempt only applies to a failure to respond to a request made under subsection 6(3). As [REDACTED] did not have the authority under section 6(3) to compel the attendance of Mr. Allan to give evidence under oath or otherwise, his advice to Mr. Allan that failing to comply was contempt of a court order was inappropriate.

There is no dispute that answers given by Mr. Allan to questions asked by [REDACTED] in interviews conducted February 13 and March 30, 2015 were untruthful. However, as I am not satisfied [REDACTED] had the authority to compel Mr. Allan as he did to attend the interviews to give evidence under oath or otherwise, I find the Investigative Answers are not statements “in a record filed or provided under this Act” within the meaning of section 8(1)(h).

I conclude that Mr. Allan’s admitted conduct set out at paragraphs 2(a) and (c) of the Notice of Hearing, while foolish, improper and ill-advised is not, in the circumstances, a breach of section 8(1)(h) of the *MBA*.

The Email Explanation

Mr. Allan sent the Email Explanation to [REDACTED] on February 20, 2015. When Mr. Allan sent this email to [REDACTED], he knew he was being investigated not just for his unauthorized use of a trademark but also for the Email Actions. The Email Explanation purports to provide an explanation for how someone could have obtained Mr. Allan’s information so as to send the email to [REDACTED]. [REDACTED] had the authority to investigate and inquire into Mr. Allan’s communications and I am satisfied that the Email Explanation was provided by Mr. Allan in response to [REDACTED] investigation into the Email Actions. I find the Email Explanation is a statement provided in a record under the Act within the meaning of section 8(1)(h). There is no dispute the statement provided in the Email Explanation was false and misleading.

Was there a breach of procedural fairness in the investigation?

Mr. Allan submits he was not given a fair opportunity to know the case against him in breach of principles of procedural fairness and relies on *Samatar*. The Federal Court in *Samatar* set aside a decision of the Public Service Commission (Commission) on the basis that the Commission's investigation was unfair. The investigative process in *Samatar* is distinguishable from the process in this case in that the relevant legislation allowed consequences to flow directly from the investigation. Under the *MBA*, the investigative function is separate from the adjudicative function and sanctions cannot be imposed without a hearing. A high level of procedural fairness is not required at the early investigative stage of a discipline process where there is a separate adjudicative process (*Kyle v. Stewart*, 2017 BCSC 522).

Mr. Allan was provided with full disclosure in advance of this hearing and has had full opportunity to respond to the allegations against him.

CONCLUSION

I find the admitted conduct at paragraphs 1 (a) and (b) of the Notice of Hearing is a breach of section 8(1)(i) of the *MBA* and that Scott Michael Allan has breached section 8(1)(i) of the *MBA* as set out at paragraphs 1(a) and (b) of the Notice of Hearing.

I find the admitted conduct at paragraph 2(b) of the Notice of Hearing is a breach of section 8(1)(h) of the *MBA* and that Scott Michael Allan has breached section 8(1)(h) of the *MBA* as set out at paragraph 2(b) of the Notice of Hearing.

I find the admitted conduct at paragraphs 2(a) and (c) of the Notice of Hearing does not constitute a breach of section 8(1)(h) of the *MBA*. I dismiss the allegations at paragraphs 2(a) and (c) of the Notice of Hearing.

PENALTY

I retain jurisdiction to determine issues of penalty and costs. The parties are at liberty to propose a schedule for the hearing of submissions with regard to penalty and costs.

Issued February 28, 2020
at North Saanich, British Columbia



Cheryl Vickers
Appointee of the Registrar of Mortgage Brokers
Province of British Columbia