

**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*, SBC 2019, c. 14 and Transfer to the BC Financial Services Authority Regulation, B.C. Reg. 210/2019.

On February 8, 2020 I issued a Decision on Merits (“Merits Decision”) finding that Mr. Allan conducted business in a manner prejudicial to the public interest contrary to section 8(1)(i) of the *Mortgage Brokers Act*, (“MBA”) by altering an email sent to him by FICOM and redistributing the altered email to two other mortgage brokers or sub-mortgage brokers as if it were genuine correspondence from FICOM. I also found that Mr. Allan contravened section 8(1)(h) of the MBA in that he made a statement filed under the MBA that was false or misleading with respect to a material fact. I dismissed two other allegations respecting false statements that I found, in the circumstances, did not constitute a breach of section 8(1)(h) of the MBA.

On May 11, 2020, I issued a Decision on Penalty (“Penalty Decision”) ordering that Mr. Allan:

- a) Shall not be at liberty to apply for registration for a period of two years, retroactive to commence from January 30, 2017 pursuant to section 8(1.2) of the MBA;

- b) Must pay an administrative penalty of \$5,000; and
- c) All payments must be made by cheque, bank draft or money order 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.

I made no order as to payment of investigative and hearing costs enabling the parties to come to an agreement but remained seized in the event the parties were not able to agree. The parties have not come to an agreement respecting costs and Staff of the Registrar of Mortgage Brokers (“Staff”) now seeks an order that Mr. Allan pay investigative costs in the amount of \$6,568.33 and hearing costs of \$10,705.00.

Section 6(9) of the MBA provides the discretion to order costs against a person who has been found to have contravened the MBA. Mr. Allan has been found to have contravened the MBA. The issue is whether I should exercise my discretion to order that he pay costs, and if so, the amount of those costs.

### **Chronology of Proceedings**

The original Notice of Hearing in this matter was issued on August 7, 2015. The matter was first scheduled for hearing in November 2015 and adjourned. New hearing dates were set for August 13 and 14, 2019. I am not aware of the reason why the matter took so long to be rescheduled.

On August 13, 2019, Mr. Allan attended by telephone as he was out of the country. He was not represented and sought an adjournment to a date when he would be back in the country. Staff opposed the adjournment and was prepared to proceed with the hearing as scheduled. After hearing submissions from Mr. Allan and counsel for Staff, I granted the adjournment and scheduled the hearing for October 29 and 30, 2019. There had been no factual admissions at this point in the proceedings.

Mr. Allan retained counsel for the October hearing. The parties agreed to proceed based on an Agreed Statement of Facts and ultimately the hearing on Merits was conducted by way of written submissions.

Mr. Allan did not appear or participate either in person or by counsel in the Penalty hearing which also proceeded by way of written submissions.

This hearing respecting costs also proceeded by written submissions without Mr. Allan’s participation.

### **Analysis**

I accept Staff’s submission that although this is an administrative proceeding, the usual approach to costs adopted by the BC Courts is instructive. Costs are typically awarded to the litigant who has been substantially successful, unless there is some reason why that party ought to be deprived of costs (*Fotheringham v. Fotheringham*, 2001 BCSC 1321). While a costs award is discretionary, the burden of displacing the usual rule that costs follow the event falls on the person who seeks to displace that rule (*Giles v. Westminster Savings Credit Union*, 2010 BCCA 282).

In addition to indemnification of the successful litigant, the courts have identified a number of objectives of a costs award including: deterring frivolous actions or defences; encouraging conduct that reduces the duration and expense of litigation and discouraging conduct that has the opposite effect; encouraging litigants to settle whenever possible; and to have a winnowing function in the litigation by requiring litigants to carefully assess the strength or weakness of their respective case at the start of and throughout the litigation (*Giles, supra*).

As far as legal costs go, as the Registrar does not have its own tariff of costs, it is appropriate to assess costs using the BC Supreme Court Tariff (*Shpak v. Institute of Chartered Accountants of British Columbia, 2003 BCCA 149*).

I accept that Staff achieved “substantial success” in the matter. Mr. Allan has not provided any reason why Staff should be deprived of their costs.

With respect to investigative costs, Staff provides a Certificate of Costs calculating the investigative costs at \$9,852.50. Staff submits partial investigative costs are appropriate and suggests Mr. Allan be ordered to pay two-thirds of the investigative costs for a total of \$6,568.33. I agree that it is not appropriate for Staff to recover the whole of their investigative costs given my findings in the Merits Decision that two of the allegations set out in the notice of hearing did not, in the circumstances, constitute a breach of the MBA. As I found two of the five allegations did not constitute a breach of the MBA, and as the reason for that finding related directly to the conduct of the investigator himself, I will reduce the investigation costs by two-fifths to \$5,911.50 ( $\$9,852.50/5 = \$1,970.50$ ;  $\$1,970.50 \times 3 = \$5,911.50$ ).

As for hearing costs, Staff submits any cost award should consider the hearing preparation required to prepare for a full in-person hearing, the adjournment application, and the written submissions required for both the hearings on Merits and Penalty. Staff submit that because of the very late application for adjournment of the August 2019 hearing, Staff was required to prepare for a full oral hearing regardless of the outcome of the application. Witnesses were prepared to testify, and a court reporter was arranged for and present. Staff submit the adjournment was a result of Mr. Allan’s lack of preparation. Staff calculates costs in accordance with Scale B of the Supreme Court Civil Tariff and claims legal costs of \$10,285.00. In addition, Staff seeks to recover the disbursement of \$420 for the Court Reporter required for the August hearing.

I accept that it is appropriate to assess costs using Scale “B” of the Supreme Court Tariff. I also accept that it is appropriate that costs be awarded for preparation for the adjourned in person hearing. Mr. Allan did not seek to have the hearing adjourned until the last minute, necessitating Staff’s preparation for the hearing. Had he brought the application earlier, these costs could have been avoided.

Staff has claimed the maximum units of the ranges allowed for several of the tariff items including items 2: Correspondence, instructions after the start of the proceeding; 6: Process for commencing and prosecuting a proceeding; 15: Process for making admission of facts; and 36: Written Argument (Merits Proceeding). In the absence of any reasons for the maximum claim for items 2,6 and 15, I exercise my

discretion to assess these costs at the mid-point of the range for each of those items. Doing so reduces the total units claimed to 68.5 which multiplied by the Scale B Unit Value of \$110 equals \$7,535.00. I accept the disbursement of \$420 for the Court Reporter for the August hearing as reasonable and allow total hearing costs of \$7,955.00.

Staff submits that the costs claimed represent a small fraction of the actual legal costs and time in this matter. I do not doubt that to be true. But other than in circumstances where special costs are warranted, or where a tribunal has the legislative authority to award actual costs, a litigant cannot expect to recover all of their costs of a proceeding, even when they have been substantially successful. That a successful litigant is unlikely to receive full indemnification of their costs also plays into the objectives for costs identified earlier on. Both parties need to be mindful of the potential cost of litigation and consider strategies and alternatives that may assist with settlement or that avoid protracted litigation. Even a litigant with a strong case sometimes has to consider whether getting the desired result will be worth the cost of doing so.

I find it is appropriate in all of the circumstances of this case that Mr. Allan be required to contribute to Staff's costs of the investigation and hearing. However, I am not satisfied that the full amount of Staff's claim is appropriate. I find Mr. Allan should pay investigative costs of \$5,911.50 and hearing costs of \$7,955.00.

### **Orders**

1. Scott Michael Allan must pay investigative costs of \$5,911.50 and hearing costs of \$7,955.00 pursuant to section 6(9) of the *Mortgage Brokers Act*.
2. 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.

Issued at Vancouver, British Columbia, this \_\_19th\_\_ day of August, 2020.



---

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