

IN THE MATTER OF THE MORTGAGE BROKERS ACT

R.S.B.C. 1996, C313

- AND -

**IN THE MATTER OF THE DANH VAN NGUYEN AND EXPRESS
MORTGAGES LTD.**

DECISION ON PENALTY

Before: W. Alan Clark
Registrar of Mortgage Brokers

Date: October 15, 2004

Place: Vancouver, British Columbia

Appearing: Lynda Wrigley for the Registrar of Mortgage Brokers
- and -
George Sourisseau for Danh Van Nguyen and Express
Mortgages Ltd.

Introduction

On April 28, 2003, a Notice of Hearing was issued pursuant to the Mortgage Brokers Act ("The Act") alleging that Danh Van Nguyen ("Nguyen") and Express Mortgage Ltd. ("Express") between August, 2001 and March 11, 2004 have:

- (a) *conducted business in a manner prejudicial to the public interest, contrary to section 8(1)(e) of the Act, by knowingly submitting false documents including employment letters, income verification letters, and bank passbooks to Maple Trust, Bank of Montreal and HSBC Bank Canada ("HSBC"), to facilitate the approval of mortgage applications by client borrowers; and that such documents were acted upon by the said financial institutions as if they were genuine;*
- (b) *failed to provide Disclosure Statements to their client borrowers as required by section 16 of the Act and sections 1.1(a) and 10 of the Mortgage Brokers Act Regulations B.C. Reg.100/73 ("the Regulations");*

- (c) *failed to provide and retain copies of Conflict of Interest Disclosure Statements to their client borrowers, with respect to the licensees' interests in Pacific Rainbow Investments Ltd. ("Pacific Rainbow"), as required by sections 17.3 and 17.5 of the Act and sections 1.1(e) and 14(1) of the Regulations;*
- (d) *failed to provide and retain copies of Conflict of Interest Disclosure Statements to lenders Maple Trust, Bank of Montreal, and HSBC, with respect to the licensees' interests in Pacific Rainbow, as required by section 17.4 and 17.5 of the Act;*
- (e) *conducted business in a manner that is prejudicial to the public interest, contrary to section 8(1)(e) of the Act, by knowingly arranging second mortgages for their client borrowers through three companies, namely Pacific Rainbow Investments Ltd., TNL Investments Ltd., and Christa Vina Investments Ltd., which were carrying on business as mortgage brokers without being registered, as required by section 21(1)(a) of the Act;*
- (f) *carried on business as a mortgage broker at 4170 Fraser St. Vancouver, B.C., which was not a registered address of Express or Nguyen, contrary to section 21(1)(b) of the Act; and*
- (g) *employed persons as sub-mortgage brokers who were not registered, namely Lisa Tran ("Tran") and John Nguyen, contrary to section 21(1) (d) of the Act.*

Background

The hearing was started on June 1, 2004 and continued until June 14, 2004. On August 30, 2004 I issued my decision where I made a finding of fault for all of the allegations contained in the hearing notice. The matter stood adjourned until October 14, 2004 when arguments were received as to what is the most appropriate penalty I should impose. It should be noted that Nguyen and Express had relinquished their registrations on September 23, 2004.

The Act provides for a number of administrative penalties as follows:

Section 8 of the Act states (in part):

8 (1) After giving a person registered under this Act an opportunity to be heard, the registrar may suspend or cancel the person's registration if, in the opinion of the registrar, any of the following paragraphs apply:

(a) the person would be disentitled to registration if the person were an applicant under section 4;

(b) the person is in breach of this Act, the regulations or a condition of registration;

(c) the person is a party to a mortgage transaction which is harsh and unconscionable or otherwise inequitable;

(d) 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;

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

(1.1) After giving a person registered under this Act an opportunity to be heard, the registrar may order the person to pay an administrative penalty of not more than \$50 000 if, in the opinion of the registrar any of paragraphs (b) to (e) of subsection (1) apply.

Section 6 states (in part):

(9) If the inquiry discloses a contravention of this Act or the regulations or orders or directions of the registrar, the registrar may order the costs to be paid by the person.

Penalties to be considered:

The penalties to be considered are:

1. As a result of Express and Nguyen relinquishing their registration, what would be an appropriate length of time before the Registrar would consider re-registering Express and Nguyen? and
2. What, if any, would be an appropriate administrative penalty?

In addition, the following question also needs to be addressed:

- If costs were to be ordered, what would be appropriate?

Submissions:

Both counsel made verbal submissions accompanied by authorities.

A) Counsel for the Registrar's Staff

Counsel for the Registrar's staff made written and verbal submissions on penalty. The salient points of these submissions were:

- The Registrar was directed to two authorities on the sentencing of professionals under administrative law: Sara Blake, "Administrative Law in Canada", Ch. 4.3 Power to Issue Specific Types of Orders; and James Casey, "Regulation of Professionals in Canada", Ch. 14, Purpose of Sentencing. Additional cases, one involving the Law Society of British Columbia, and a decision of the Supreme Court of Canada, were submitted for consideration as to the factors to be considered when determining a penalty.
- It was pointed out that a finding of fault in each and every count in the hearing notice had been found; that Nguyen and Express executed a well planned scheme designed to take advantage of the weak points in the financial services sector.
- It was pointed out that Nguyen himself admitted that he had placed over 900 mortgages and not one was done in compliance with the Act.
- It was also pointed out that the average submortgage broker does 30 deals a year.
- The impact of the breaches of the Act included the cost to the reputation of mortgage brokers, the time and expenses of the banks involved in investigating and demanding on the 158 mortgages, and the borrowers who had to refinance.
- Ten cases were cited and placed into evidence with penalties ranging from 18 months to 7 years. However, counsel stated that none of these cases contained similar fact patterns to the case before the Registrar.
- The minimum period of time before Nguyen and Express should be suitable to be eligible for registration should be 10 years.
- The maximum administrative penalty of \$50,000 can and should be applied to both Nguyen and Express as separate legal entities.

B) Counsel for Express and Nguyen

Counsel for the Express and Nguyen made written and verbal submissions on penalty. The salient points of these submissions were:

- Although there is no question the company and Nguyen are a separate legal entity, the principals of the Biller case (Biller vs. British Columbia Securities Commission) apply and, as a result, a single administrative penalty is appropriate.
- In none of the cases seen does a maximum fine accompany a longer term of suspension.
- The maximum length of suspension in the cases put before the tribunal was 7 years and in both the cases cited (the Real Estate Council of B.C. vs. Joseph Authenrieth and the Real Estate Council of Alberta vs. Marc Wolfe cases); the conduct exceeds what the Registrar is considering here.
- With respect to the false documents, the Registrar should only look at the nineteen files placed into evidence.
- The Registrar should review carefully the evidence of the bank investigators because, in counsel's view, their evidence does not support a finding that there were breaches in those circumstances.

Some comments on the submissions:

- I have considered the authorities provided to me regarding sentencing.
- I accept the submission that a single administrative penalty in this circumstance is appropriate. I believe it should be assessed against Nguyen as he was the controlling mind of Express.
- I disagree with the suggestion by counsel that this matter is not as serious as the Authenrieth and Wolfe cases. My reasons for this belief are as follows:
 - In the Authenrieth, there were similar instances of the type of behaviour outlined in the allegations of the hearing notice, however, there were only 8 real estate deals involved as opposed to the 19 in this matter. He was suspended for 7 years;
 - The Wolfe also invoked false documents and other regulatory breaches but only involved 3 cases. He was suspended for 7 years; and

- In my opinion this matter exceeds both of those in the number and seriousness of the breaches and I will expand upon this in my reasons for decision.
- I feel the penalty I am imposing would be appropriate even if the only examples of conducting business in a manner prejudicial to the public interest (as contained in count one of the hearing notice), were only found in the nineteen files placed into evidence. However, I believe (and in doing so disagree with counsel) there is also ample additional evidence to conclude misleading information was forwarded to financial institutions in far more than just nineteen files. Reasons for this belief are as follows:
 - Firstly, evidence was placed before me that indicated two financial institutions had issued repayment demands on 158 mortgages because of irregularities in the information submitted to them to support the granting of credit;
 - The sheer number of suspect mortgages can lead to no other conclusion than false information was forwarded to the institutions involved in far more than just 19 files;
 - I have also reviewed the evidence of bank employees and the two spread sheets introduced into evidence and conclude the testimony and the exhibits support the belief that the number of mortgages obtained by the transmittal of false and misleading information is far in excess of the 19 files introduced into evidence.

Decision re Penalty:

Nguyen, who is well educated (having received his Bachelor of Science degree), had been employed in the financial services sector for many years. He and Express were registered under the Act for a period of 18 months and during this period of time he brokered about 900 mortgages and received in return about two million dollars in fees. Clearly he used his knowledge of the financial services sector to his benefit and in return earned substantial fees.

Other than the initial registration of Nguyen and Express, few, if any, of the rules regulating the mortgage industry were followed. There is no doubt some of the breaches of the Act were minor in nature, however, it should be noted that a considerable number were very serious. Viewed in total, the only conclusion one can come to is that Express and Nguyen showed

complete contempt for the regulatory framework put in place to protect the public and increase public confidence in the financial services sector. Not only did Nguyen conduct his business with complete disregard of the Act, his testimony left the impression he also committed numerous breaches of other statutes. Clearly, Express and Nguyen conducted their business as if the rules did not apply to them. My review of the Authenrieth and Wolfe matters does not indicate the hearing tribunals were dealing with such total contempt for the regulatory rules. In fact, Nguyen testified he never brokered a mortgage where Express and Nguyen were in compliance with the Act. This is conduct which cannot be tolerated in the financial marketplace.

I also take note that Nguyen in his testimony refused to take any responsibility for his actions. Instead, he chose to blame others, including his own wife, for his breaches of the Act.

In order to: protect the public from Nguyen; to ensure he understands the seriousness of his actions; and to serve as a deterrent to anyone who wishes to imitate this type of behaviour, I believe the following penalties are appropriate:

- Nguyen is not eligible to be registered as a mortgage broker or submortgage broker for a period of 10 years from the date of this decision;
- Before being registered, he must first complete the education requirements in effect at the time of his application;
- Before being registered, he must also provide proof he has successfully taken a course where an examination is offered on ethics; and
- An administrative penalty of \$50,000.00 is imposed. This is the maximum allowable under the legislation but when compared with the significant monies made by Express and Nguyen (\$2 Million) is, in my opinion, appropriate.

I will now deal with the issue of costs.

Costs:

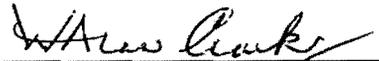
Both counsel made written representations with respect to costs. Both counsels are in agreement that assessing costs is proper for this matter.

What is not in agreement is which scale of costs under the Supreme Court Rules should be used in assessing costs.

Counsel for the Registrar's staff argues this case is of such complexity that the appropriate Scale of Costs is Scale 4, while counsel for Nguyen argues that the matter before me does not meet the standard of "more than ordinary difficulty or importance" as required by Scale 4 and, as a result, costs should be assessed on a Scale 3 basis.

After reviewing the submitted material, I have decided that, although the collection and analysis of the evidence was time consuming and the evidence introduced at the hearing was substantial, and the time taken to review it also considerable, the facts were not complex. The matter does not meet the requirement to be assessed at Scale 4. As a result, I will assess costs at the Scale 3 level against Nguyen, the only principal and controlling mind of Express.

I would ask counsel to try and reach agreement over a Bill of Costs that could be presented to me. I will hear from both counsel if they cannot reach agreement as to proposed dates for submissions on the reasonableness of costs claimed.



W. Alan Clark
Registrar of Mortgage Brokers
Province of British Columbia

Dated at Vancouver, British
Columbia
This 13TH day of December, 2004.