

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.**

AMENDED COSTS DECISION

Before: W. Alan Clark
Registrar of Mortgage Brokers

Date: December 6, 2005

Place: Surrey, British Columbia

Appearing: Karen Horsman for the Staff of the
Registrar of Mortgage Brokers

- and-

Suzanne K. Sheena
for Danh Van Nguyen and Express Mortgages Ltd.

INTRODUCTION

On December 13, 2004, a hearing was held to determine what penalty or penalties would be appropriate to impose on Danh Van Nguyen ("Nguyen") and Express Mortgage Ltd. ("Express"). This was after a lengthy hearing in June of 2004, in which Nguyen was found to have breached a number of sections of the *Mortgage Brokers Act* ("The Act"). In addition to a significant suspension and the imposing of an administrative penalty, my decision with respect to costs was as follows:

Costs:

Both counsel made written representations with respect to costs. Both counsel 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.

As both counsel could not reach agreement on the Bill of Costs, the matter was brought back before me to settle the issue.

Issues

There are issues to be determined:

- 1) Who has the jurisdiction to actually determine the amount of costs; and
- 2) The reasonableness of the bill of costs.

Evidence

There were five exhibits placed into evidence, as follows:

- 1) Submission of FICOM on costs;
- 2) Book of Evidence of FICOM;
- 3) Appellant's costs submissions;
- 4) Case time from Case Management (6 pages);
- 5) File update information (14 pages).

In addition, there was testimony of Mr. Wayne McMillan ("McMillan").

The Law

The relevant section of the Act provides:

"6(9) If the inquiry discloses a contravention of this Act or the regulations or orders or directions of the registrar, the registrar may order costs to be paid by the person."

Issue Number One

It was agreed by all parties that it was appropriate to have a decision on the issue of jurisdiction before dealing with the reasonableness of the costs.

Both counsel made verbal and written submissions which, after review, I made the following decision on December 6, 2005:

The Mortgage Brokers Act at section 6(9) states that: "If the inquiry," and the inquiry in question is the hearing into the allegations and subsequent findings of the Registrar against Danh Nguyen, "discloses a contravention of this Act," and clearly, that hearing disclosed numerous contraventions of the Act, or the regulations, and I think we had contraventions of the regulations as well, or orders or directions of the Registrar – well, there were no orders or directions – "the registrar may order the costs to be paid by the person." The dictionary that I have at my desk defines costs as 1) "the price paid," or 2) "the loss or sacrifice". In this case, it's my feeling that the costs referred to in the subsection (9) would be the costs, or the price paid by the Registrar to deal with the contravention of the Act. I do not believe it was the intent of the legislature of this province to give the Registrar the power to award costs without the ability to assess what it costs to deal with the contravention. This view is supported by the cases both parties have referred to, that being Roberts and Shpak. In both instances, the appeal body did not comment on the inappropriateness of the awarding of costs. As a result, I believe I have jurisdiction to assess costs, and the reasonableness, or lack thereof, is appealable to the Financial Services Tribunal. As a result, I'd like this hearing to continue.

- The actual investigative time costs incurred was \$91,537.50 but only \$31,375.00 was included in the Bill of Costs.
- The reasonableness and necessity of the proposed disbursements must be determined in the context of the inquiry and hearing procedure under the Act.

MacMillan testified to investigative time spent on serving subpoenas.

Counsel for Nguyen submitted that:

- Given the complexity of the case, the tariff amount should be reduced by 24 units bringing the tariff amount claimed to \$14,080.00.
- Transcripts are a luxury and rarely recoverable in a Bill of Costs and the transcript was ordered by the Registrar to assist in deliberation and the writing of the judgement. Therefore, the Bill of Costs should be reduced by \$7,149.00.
- Investigative costs relate to salary-based employees and are not proper disbursements allowed.
- However, if Investigative time is held to be a reasonable expense thus only the expenses relating specifically to this proceeding alone should be allowed. If allowed, the total investigative disbursement should be \$5,400.00 which are the costs that relate exclusively to this hearing.

The Decision

After reviewing all of the submissions, exhibits and the testimony of McMillan, I believe a reasonable bill of costs is \$35,620.00.

I have arrived at this figure by:

- Correcting the addition error referred to earlier;
- Accepting the submission of counsel for Nguyen with respect to the transcript;
- Rejecting counsel for Nguyen's argument with respect to the investigative costs; and
- Agreeing with the argument of counsel for the registrar's staff with respect to the legal bill and tariff units claimed and rejecting the argument of Nguyen's counsel on this issue.

In the financial services sector, the cost of regulating each industry is borne by the industry itself. The end result of accepting the arguments on the issue of investigative

costs advanced by counsel for Nguyen would be increased fees for mortgage broker registrants. In my opinion, those who contravene the Act should bear at least some of the costs. In this case, the investigative cost was discounted by 75 per cent. Also discounted was the actual legal costs. Given the discounting of actual costs to what was submitted, I feel my assessment is more than reasonable.

In closing, I order Danh Van Nguyen to pay costs in the amount of \$51,620.00.¹



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

Dated at Vancouver, British Columbia
this 13th day of June 2006.

¹ This decision was amended to correct an arithmetical error from \$35,620.00 to \$51,620.00