

FINANCIAL SERVICES TRIBUNAL

**IN THE MATTER OF THE MORTGAGE BROKERS ACT
R.S.B.C. 1996 C313 SECTION 8**

- AND -

**IN THE MATTER DANH VANH NGUYEN AND EXPRESS
MORTGAGES LTD.**

APPEAL DECISION

CHAIR: Dale R. Doan
Counsel for the Appellants, George Sourisseau
Counsel for the Respondent, Karen Horsman

INTRODUCTION

Pursuant to the Notice of Hearing dated April 28, 2004 and issued by the Registrar of Mortgage Brokers of the Province of British Columbia (the "Registrar") a hearing took place before the Registrar for the purposes of addressing seven alleged offences pursuant to the *Mortgage Brokers Act* (the "Act") between August 1, 2001 and March 11, 2003 by Dan Vanh Nguyen ("Mr. Nguyen") and Express Mortgages Ltd. ("Express Mortgages"). The Notice of Hearing also provided notice that the Registrar may also consider any additional matters as may appear relevant at the hearing.

The Registrar made an interim finding of fault against Mr. Nguyen and Express Mortgages on August 30, 2004 on all of the said allegations and rendered a decision on penalty on December 13, 2004. This is an appeal (the "Appeal") of the decision of the Registrar regarding penalty as well as an appeal with respect to limited portions of the Registrar's finding of fault with respect to the seven allegations against Mr. Nguyen and Express Mortgages.

By virtue of letter dated January 17, 2005 from the Chairperson of the Financial Services Tribunal (the "FST") I was appointed the Member of the FST responsible to hear the Appeal. Due to the volume of materials that emerged from the 10 day hearing before the Registrar as well as the relative complexity of this matter, which involves addressing seven allegations of breaches of the Act as well as determinations with respect to the legislative requirements of the Act and any other orders as may be necessary in the circumstances, it was determined that written submissions by legal counsel may not adequately enable the parties to present their positions to the FST. Therefore, two oral hearings were allowed together with the filing of written submissions. The first oral hearing took place on February 2, 2005 by way of telephone conference call involving legal counsel for Mr. Nguyen, Express Mortgages, the Ministry of the Attorney General and Senior Administrators of the FST. As the FST Member responsible to deal with the Appeal, I chaired that telephone conference meeting which meeting was called for the purposes of setting the record for the Appeal (the "Record").

THE RECORD

Following the February 2, 2005 telephone conference meeting I issued a memorandum bearing that same date setting out the agreement of all parties with respect to the Record. With respect to the Appeal, the Record would comprise the following:

- (a) The Notice of Appeal and the initial Notice of Hearing;
- (b) The decision of the Registrar of Mortgage Brokers dated December 13, 2004; and
- (c) The written Submissions of the Appellant, Mr. Nguyen and Express Mortgages, and the Respondent, the Ministry of the Attorney General.

Following the circulation of my February 2, 2005 memorandum, the senior administrators of the FST brought to my attention that the Record must also include the decision of the Registrar issued following the hearing before the Registrar. Thus, the Record was amended to include both decisions of the Registrar.

ISSUES

In addition, the memorandum set out the agreement by both counsel and myself that written submissions would be submitted by certain dates followed by an oral hearing at the offices of the FST, which Submissions and hearing would address the following issues:

- (A) Did the Registrar err in basing his decision on findings with respect to files other than the 19 files particularized in the Notice of Hearing?
- (B) Did the Registrar err in failing to acknowledge Mr. Nguyen's admission of fault for all aspects of the Notice of Hearing other than "actual knowledge" of the false documents submitted in relation to a number of the mortgages?
- (C) Did the Registrar err in placing any reliance on Mr. Nguyen's apparent lack of remorse when assessing penalty? and
- (D) Did the Registrar err in imposing a penalty that was too harsh or too excessive or unfit in all of the circumstances?

The second oral hearing of the Appeal took place at the offices of the FST on June 22, 2005. Mr. George Sourisseau represented the Appellants, Mr. Nguyen and Express Mortgages, and Ms. Karen Horsman represented the Ministry of the Attorney General at the formal hearing of the Appeal.

ADMITTED MATTERS

At the initial telephone conference hearing held February 2, 2005 and at the formal hearing of this Appeal, both legal counsel acknowledged certain admitted facts and the acceptance of certain findings of fault by the Registrar.

Turning to the Notice of Hearing, the following allegations were made against the Appellant's, Mr. Nguyen and Express Mortgages:

"Between August 1, 2001 and March 11, 2003 the Appellant's have:

1. 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, 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;

2. 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"*);
3. 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., as required by sections 17.3 and 17.5 of the Act and sections 1.1(e) and 14(1) of the Regulations;
4. failed to provide and retain copies of Conflict of Interest Disclosure Statements to lenders Maple Trust, Bank of Montreal, and HSBC Bank of Canada, with respect to the licensees' interests in Pacific Rainbow Investments Ltd., as required by section 17.4 and 17.5 of the Act;
5. 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;
6. 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
7. employed persons as sub-mortgage brokers who were not registered, namely Lisa Tran and John Nguyen, contrary to section 21(1)(d) of the Act.

And the Registrar may also consider any additional matters as may appear relevant at the hearing."

The seven allegations listed above and the seven findings of fault in the decision of the Registrar are admitted in their entirety with the exception only of the finding by the Registrar pursuant to allegation 1. that the Appellant's "conducted business in a manner prejudicial to the public interest, contrary to section 8(1)(a) of the Act, by *knowingly* submitting false documents..." (emphasis added). The Appellant's dispute this aspect of the Registrar's decision only, namely that the Appellant's had actual knowledge of the submission of false documents.

There are also a number of admissions with respect to facts. These admissions also relate directly to the admissions described above with respect to findings of fault. In particular, the Appellant's admit that with respect to 19 mortgage files administered by the Appellant's, false documents including employment letters, income verification letters and bank passbooks, were submitted to financial institutions to facilitate the approval of mortgage applications by client borrowers and that these documents were acted upon by the financial institutions as if they were genuine. In addition, those findings of fact of the Registrar supporting the six other allegations of breach of the Act set out in the Notice of Hearing were admitted by the Appellant's.

THE PENALTY APPEAL

Pursuant to the Registrar's decision, the Appellant's received a ten year suspension of registration eligibility from December 13, 2004 together with a \$50,000.00 administrative penalty and an award of costs against the Appellant's pursuant to Scale 3 of the Supreme Court Rules. The Appellants appeal the penalty imposed by the Registrar.

FACTS

The Registrar made a number of findings with respect to facts. These are set out in the Registrar's August 30, 2004 decision which concluded with the Registrar finding fault in all of the allegations contained in the Notice of Hearing. These facts will not be reiterated here. Rather, they may be referred to in the said Registrar's decision. Certain of the facts will be highlighted below to the extent that they were of particular relevance to the formal hearing in this Appeal.

During the period investigated, Mr. Nguyen was a registered sub-mortgage broker pursuant to the Act and Express Mortgages was registered as a mortgage broker in British Columbia pursuant to the Act. Mr. Nguyen was employed by Express Mortgages at all material times and in particular between August 1, 2001 and March 11, 2003.

Mr. Nguyen is a graduate of the University of British Columbia receiving a science degree in chemical science in 1988 and had experience working as a chemist for three years. He worked as a licensed realtor from 1991 through 1998. In 1998, Mr. Nguyen worked for Canada Trust in its mortgage sales department and as a mortgage development officer until July 2001. In August 2001 Mr. Nguyen commenced the operation of Express Mortgages.

In May 2001, Mr. Nguyen set up a company known as Pacific Rainbow Investments Ltd. ("**Pacific Rainbow**") to lend money through second mortgages.

The business of Express Mortgages was very successful earning gross revenues of approximately \$2 million dollars during the 18 months of operation prior to it's suspension as a mortgage brokerage in March 2003. This suspension led to an initial appeal before a panel of the Commercial Appeals Commission, which Commission on May 9, 2003 ordered a stay of the suspension of the mortgage brokerage licenses of Mr. Nguyen and Express Mortgages with conditions attached to the said Order. One of the conditions required all mortgage applications submitted by Mr. Nguyen to include a copy of the Order of the Commission. As this proved to be a practical difficulty for Mr. Nguyen the result was that his mortgage brokerage business was effectively non-existent from approximately March 11, 2003 onward.

During the period that is the subject matter of the Notice of Hearing Mr. Nguyen brokered 929 mortgage applications. In January 2003 Bank of Montreal representatives approached the Financial Institutions Commission ("**Ficom**") advising that the said Bank was investigating 80 mortgage applications submitted by Mr. Nguyen and Express Mortgages due to suspicions that they contained fraudulent employment or financial information. The mortgages all appeared to

have similar problems, namely that the Bank was unable to determine the sources of down payments or to verify employment letters and income information supplied with the mortgage applications. Bank of Montreal subsequently demanded repayment on 62 of these mortgages and was paid out with respect to all of the said mortgages following demand.

Ficom investigators met with representatives of HSBC Bank Canada in February 2003. That Bank had identified 96 mortgages brokered by Mr. Nguyen which the Bank suspected contained problems similar to those identified by Bank of Montreal. Following an internal investigation by that Bank, demands for repayment were made on all 96 of the mortgages and the Bank was subsequently paid out on all of the said mortgages following demand. In March 2003, Ficom investigators executed search warrants at the offices and residence of Mr. Nguyen and Express Mortgages. Over 900 files were seized at the registered office of both Mr. Nguyen and Express Mortgages and four computers were seized as well.

An RCMP investigator from the Vancouver RCMP Integrated Technological Crime Unit assisted in the execution of the search warrants and later analyzed the hard drives from the seized computers. As will be discussed below when reviewing the decision of the Registrar, employment verification and income verification letters were found on all four computers and details of the search results were documented in a form of a Preliminary Forensic Analysis Report. Five common employers were identified amongst the letters that were discovered by the Ficom investigators. Three of these employers appeared in 19 mortgage files that were the main subject matter of the hearing before the Registrar. In all cases involving these three common employers, the investigations carried out by Ficom investigators established that the various letters used in the mortgage applications with financial institutions were not prepared by the employers and had not been signed by the employers. In all cases, the individuals in question were either not employed by the employer or the salary was overstated in those cases where the employees were employed.

Mr. Nguyen's wife, Lisa Tran, testified that she had typed most of the letters that appeared on the RCMP Forensic Report and Mr. Nguyen testified that he had no knowledge of these letters or that Ms. Tran had prepared any of the same despite the fact that evidence established that a number of these letters were found on Mr. Nguyen own computer. In addition, Ms. Tran gave evidence that the letters were prepared as templates for use by the actual employers and that she had not prepared or printed any letter on any employer's letterhead. The RCMP investigator established and the evidence accepted by the Registrar concludes that Ms. Tran's evidence was false. In fact, letterhead including graphics for some of the employment letters was created on Mr. Nguyen's computer and certain of the letters were printed from the computer facilities under Mr. Nguyen's and Ms. Tran's control. Letters entered in evidence included two letters that did not relate to either of the common employers focused upon with respect to the 19 files reviewed in detail at the Registrar's hearing.

THE REGISTRAR'S DECISION

The Registrar made his decision regarding fault on August 30, 2004. He rendered his decision regarding penalty on December 13, 2004.

The Registrar's decision regarding fault is not the subject matter of this Appeal excepting only to the extent that the Registrar found Mr. Nguyen had "knowingly" submitted false documents including employment letters, income verification letters and bank passbooks to financial institutions to facilitate the approval of mortgage applications by client borrowers. All other findings of fault by the Registrar have been admitted by the Appellant's in this Appeal.

The findings of the Registrar are set out in detail in the Registrar's August 30, 2004 decision. I have been asked to review certain of these findings insofar as they relate to the one disputed factual element, namely Mr. Nguyen's actual knowledge that false documents were submitted to financial institutions in mortgage files administered by Mr. Nguyen and Express Mortgages in their capacities as registered mortgage sub-broker and mortgage brokerage respectively.

In his Reasons for Decision, the Registrar describes in considerable detail the basis upon which he determined that Mr. Nguyen and Express Mortgages were in default with respect to each and every allegation alleged against them.

The Reasons for Decision of the Registrar point out that Mr. Nguyen and Express Mortgages admitted that they had submitted a number of false documents to financial institutions in question, but argued that they did so without the knowledge that the information contained therein was false. The Registrar examined the 19 mortgage files which were the subject matter of detailed examination at the Registrar's hearing. Appendix 2 to his decision outlines his analysis of his findings. Prior to setting out his decision, the Registrar stated that any conclusion that he reached "must be based on clear and convincing evidence". The Registrar then went on in his decision to reach his decisions with respect to the knowledge of Mr. Nguyen and Express Mortgages "after imposing this standard". It should be noted that the Registrar referred to the test as being that of "clear and convincing evidence" whereas certain cases have referred to the test as being "clear and cogent evidence". For the purposes of this Appeal, these terms are used interchangeably.

With respect to the 19 mortgage applications that were reviewed in detail by the investigators and at the hearing before the Registrar, the Appellant does not contest the finding of the Registrar that based upon clear and convincing evidence, false documentation was submitted to the subject financial institutions in order to process and complete the mortgage loans in question. On the question of Mr. Nguyen's actual knowledge that false documentation was being assembled and provided to the financial institutions, the Registrar reviewed the evidence that was presented before him.

In the Appeal, it is the duty of the FST to consider whether or not the Registrar, after hearing the witnesses, after reviewing the evidence and after applying the evidentiary standard governing his review, reasonably could have reached the determination and decision that he rendered. I have reviewed the submissions of legal counsel for both the Appellant's and the Respondent as well as the analysis of the Registrar with respect to the evidence presented at the Registrar's hearing. The Registrar focused his analysis upon: (i) the false documentation respecting employment letters and income verification, (ii) the testimony of Mr. Nguyen and his wife Ms. Tran, (iii) the evidence of Constable Baker respecting the discovery of a number of the false letters of employment on the hard drives of the computers located in the offices of Express Mortgages and

Mr. Nguyen's residence, (ix) the evidence of Ms. Tran that she typed the body of the letters but had not prepared letterhead or printed copies of the same, (v) Constable Baker's evidence in contradiction to that of Ms. Tran and Mr. Nguyen establishing to the Registrar's satisfaction that the testimony of Ms. Tran and Mr. Nguyen was not credible, (vi) Constable Baker's evidence when recalled to the hearing that four of the employment letters located on the hard drives of the computers located in a bedroom in the Nguyen residence contained letterhead including graphics of a company who would be providing the letters, (vii) Constable Baker's evidence that he found the same letters in the print spool on the computer establishing that the documents had been printed, (viii) Constable Baker's evidence that in at least one case an employment letter did not relate to one of the 19 files reviewed in detail at the Registrar's hearing, as well as (ix) other matters of fact considered relevant by the Registrar.

The Registrar considered evidence in relation to the many mortgages that were not a part of the 19 mortgage applications reviewed in detail at the hearing before the Registrar. He considered: (i) Constable Baker's Forensic Report using the keyword string of "to whom it may concern" and Constable Baker's finding of 61 hits recovered from the four computers and one floppy disk located at the Nguyen residence, (ii) the distribution of the hits amongst the computers, (iii) Mr. Nguyen's testimony that he used one of the three computers that contained a number of the hits in question, (ix) Constable Baker's evidence that variations of the false employment letters are located on all four of the computers contrary to the testimony of Mr. Nguyen that he was unaware of the existence of these letters until he read the Forensic Report of Constable Baker, (v) the Registrar's assessment of the credibility of Constable Baker when he stated "I placed great weight in the evidence of Cst. Baker", (vi) the evidence that one letter involving a Canada Trust representative who apparently signed the same was not in fact prepared by the representative in question nor did she sign the letter, (vii) the fact that Mr. Nguyen admitted knowing the representative while Ms. Tran did not, (viii) the Registrar's assessment that the testimony of Ms. Tran and Mr. Nguyen with respect to this matter was not credible insofar as Mr. Nguyen testified that it was merely a coincidence that the client trust company had prepared a false account verification letter and that the representative that Mr. Nguyen happened to know had used her name and signature on the letter, (ix) the Registrar's finding that this letter was prepared by someone at Express Mortgages, (x) the manipulation of employment letters to meet the financial requirement required of the proposed lenders including specific changes to certain of the employment and income verification letters, (xi) the finding that Mr. Nguyen was aware of the fact that a bank was demanding repayment of a mortgage loan based upon misrepresentations in the initial mortgage loan application however he failed to advise the subsequent trust company of the same and submitted the same employment and income information to the trust company knowing that it was false, (xii) the submission of information contained in a gift letter to a bank while knowing that the information was false, (xiii) the knowledge that information contained in a false bank book was being submitted to a bank, (xiv) the submissions of mortgage applications to HSBC and Bank of Montreal based upon 75 or 65% loans to value when in fact Nguyen and Express Mortgages knew that second mortgages were in place on the property, (xv) the submission of false information close to the actual funding date of the mortgage knowing that it would not be closely scrutinized at that late date, (xvi) changes with respect to employment, employment income and assets from the credit application stage to what was ultimately forwarded to financial institutions, (xvii) the evidence of one of the mortgagors herself that she had not seen the employment letter submitted in her application and that she made \$24,000.00

