FST 08-039

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF THE *MORTGAGE BROKERS ACT,*
R.S.B.C. 1996, c. 313

BETWEEN:

LEE DOUGLAS BUSSEY and 0707543 B.C. LTD. dba
VERICO 1ST LANDMARK MORTGAGE

APPELLANTS

AND:

STAFF OF THE REGISTRAR OF MORTGAGE BROKERS

RESPONDENT

BEFORE:	JOHN B. HALL, Presiding Member
APPEARANCES:	RONALD N. PELLETIER, for the Appellants KAREN HORSMAN, for the Respondent
DATE OF FINAL SUBMISSION:	January 22, 2009
DATE OF DECISION:	March 31, 2009

INTRODUCTION

This appeal is brought under Section 9(1) of the *Mortgage Brokers Act*, R.S.B.C. 1996, c. 313 (the "Act") against two decisions by W. Alan Clark, Registrar of Mortgage Brokers (the "Registrar"). The decisions followed a hearing which had been initiated by an Amended Notice of Hearing dated March 14, 2007 (the "Hearing Notice") naming the Appellants Lee Bussey ("Bussey") and 0707543 B.C. LTD. dba Verico 1st Landmark Mortgage ("Verico").

The Registrar's first decision was issued on January 8, 2008 after a hearing and made various adverse findings regarding the Appellants' conduct. The second decision was issued on March 27, 2008 and dealt with penalty; among other things, the Registrar suspended Mr. Bussey's registration as a submortgage broker for a period of five years and ordered the Appellants to pay $20,000 in costs.

The Appellants submit there was a reasonable apprehension of bias resulting from the Registrar's conduct of the hearing, and seek to have the decisions set aside in their entirety on that basis. Alternatively, the Appellants argue the Registrar's findings regarding four allegations in the Hearing Notice were unreasonable, such that the first decision should be varied by removing those findings. In the further alternative, the Appellants submit the penalties and costs imposed by the second decision were unreasonable and should be varied.

BACKGROUND

The chronology below draws largely on the factual background set out in the Respondent's submissions on appeal. Those submissions generally provide a fair summary of the proceedings before the Registrar, and are supported by numerous references to the record (the references have been omitted in this decision). I have taken into account certain points disputed by the Appellants.

The Allegations

The investigation which resulted in the Bussey/Verico hearing began in February 2006 when the Financial Institutions Commission ("FICOM") received a complaint from Bill Hubbard, the manager of Century 21st Realty in Vernon, British Columbia. Mr. Hubbard forwarded an email he had received from Whitney Steel, a Century 21st Realty salesperson, expressing concern about Bussey's conduct in relation to a property purchase in which Ms. Steel acted for the vendors Lyle and Cheri Hollins. Ms. Steel reported that Bussey had asked both her and her clients to re-write the contract of purchase and sale on an accepted conditional offer in order to generate a down payment the purchasers otherwise did not have. Ms. Steel was concerned that this request sought to implicate her and her clients in the preparation of a "fraudulent document".

The FICOM investigation resulted in the Hearing Notice alleging numerous breaches of regulatory requirements. The most serious alleged fraudulent conduct on Bussey's part in relation to two real estate transactions in Vernon. The first transaction involved the sale of the property owned by the Hollins to Mark Ellinson and Susan Nolan. The second involved a purchase by Mohammed Halat.

The Hearing Notice alleged as follows:

1. That Bussey was the president and sole director of Verico at all material times and was identified as the submortgage broker responsible for the operations of Verico ("the Designated Individual").

2. That Bussey attempted to obtain, and did obtain, credit by false pretence or by fraud for Mark Ellinson ("Ellinson") and Susan Nolan ("Nolan"), and thereby conducted business in a manner prejudicial to the public interest.

3. That Bussey counseled Lyle and Cheri Hollins ("the Hollins'") and Whitney Steel to fraudulently change a valid purchase and sale agreement in an attempt to obtain credit for Ellinson and Nolan, and thereby conducted business in a manner prejudicial to the public interest.

4. That Bussey misrepresented Ellinson's and Nolan's ability to obtain financing to Whitney Steel and the Hollins' through Archie McMeeking, and thereby conducted business in a manner prejudicial to the public interest.

5. That Bussey attempted to mislead Colin Parcher ("Parcher"), an investigator with the Financial Institutions Commission, in his investigation into this matter by refusing to produce records requested by Parcher, contrary to section 6(4) of the *Mortgage Brokers Act* ("the Act").

6. That Bussey, as the Designated Individual, arranged a first mortgage with lender Toronto Dominion Bank ("TD Bank") for borrowers Ellinson and Nolan without disclosing to the TD Bank that a second mortgage would be placed on the property, which Bussey attempted to obtain for Ellinson and Nolan through Nelson Anderson, misleading the TD Bank as to the actual indebtedness of the borrowers, and thereby conducted business in a manner prejudicial to the public interest.

7. That Bussey loaned Ellinson and Nolan $14,000.00 to be used as a down payment required by the TD Bank, knowing the down payment could not come by way of a loan and failing to advise the TD Bank as such, and thereby conducted business in a manner prejudicial to the public interest.

8. That Bussey made a false document, a gift letter dated February 17, 2006, knowing it to be false with intent that it should be acted on by the TD Bank as if it were genuine, and thereby conducted business in a manner that was prejudicial to the public interest.

9. That Bussey counseled Ellinson and Nolan to make a false document, a gift letter dated February 17, 2006, knowing it to be false with intent that it should be acted on by the TD Bank as if it were genuine, and thereby conducted business in a manner that was prejudicial to the public interest.

10. That Bussey made a false document, a rental agreement, knowing it to be false with intent that it should be acted on by the TD Bank as if it were genuine, and thereby conducted business in a manner that was prejudicial to the public interest.

11. That Bussey, as the Designated Individual, submitted a gift letter to the TD Bank that he knew to be false in support of a mortgage loan application on behalf of Ellinson and Nolan, and thereby conducted business in a manner that was prejudicial to the public interest.

12. That Bussey, as the Designated Individual, submitted a rental agreement to the TD Bank that he knew to be false in support of a mortgage loan application on behalf of Ellison and Nolan, and thereby conducted business in a manner that was prejudicial to the public interest.

13. That Bussey, as the Designated Individual, attempted to obtain credit by false pretence or by fraud for Mohammed Halat, and thereby conducted business in a manner prejudicial to the public interest.

14. That Verico carried on business as a mortgage broker elsewhere than at or from Verico's registered address through its submortgage broker Judy Ivers ("Ivers") contrary to s. 21(1)(b) of the Act.

15. That Verico failed to disclose to borrowers in the prescribed manner that Verico or its associate or related party had a direct or indirect interest in the mortgage transaction brokered by Verico, contrary to sections 17.3 and 17.5 of the Act. Those borrowers include: Nathan Koebel; Ellinson and Nolan; Mohammed Halat; Michele and Giovanna Minenna; Joanne and Don Emmons; Tammy Geurts; Arthur Fraser and Jeanette Small; David Mclnnes and Andrea Sanders; Shari Svean; Henry Soucy; Dianna Petkau; Doren and Sherry Nyholt; John and Joanne Marion; Thomas Green; Cheri and Richard Wells; Ragbinder Ganger; Herman and Heather Olfert; Lyle Leadley; Michael Dean; Tammy and Richard Gillis; and Jamie Pacheco.

16. That Verico failed to disclose to lenders in the prescribed manner that Verico or its associate or related party had a direct or indirect interest in the mortgage transaction brokered by Verico, contrary to sections 17.4 and 17.5 of the Act. Those lenders include the TD Canada Trust in a mortgage arranged for Ellinson and Nolan.

17. That Bussey, as the Designated Individual, did not ensure that Verico provided proper disclosure to lenders and borrowers pursuant to sections 17.3 and 17.4 of the Act, and did not ensure that Verico retained copies of the disclosure statements for the prescribed period of time pursuant to sections 17.2 and 17.5 of the Act, and thereby conducted business in a manner that was prejudicial to the public interest.

Thus, in relation to the Ellinson/Nolan transaction, it was alleged that Bussey:

- obtained credit for Ellinson and Nolan by false pretence or fraud (para. 2);

- counselled the vendors on the Ellinson/Nolan property purchase, and their real estate agent, to fraudulently change a purchase and sale agreement in an attempt to obtain credit, and misrepresented the purchasers' ability to obtain financing (paras. 3-4);

- arranged a first mortgage for Ellinson and Nolan through the TD Bank[1], without disclosing to TD Bank that a second mortgage would be placed on the property (para. 6);

- loaned Ellinson and Nolan $14,000 to be used as a down payment, while knowing that the TD Bank mortgage prohibited the down payment to be financed by a loan (para. 7);

[1] The lending institution was actually TD Canada Trust.

- created a false gift letter to conceal from TD Bank the fact of the $14,000 loan, and knowingly submitted the false letter to TD Bank in support of the mortgage application (paras. 8-9 and 11); and

- knowingly created a false rental agreement in relation to the property, and submitted the agreement to TD Bank in support of the mortgage application (paras. 10-12).

In relation to the Halat transaction, it was alleged that Bussey attempted to obtain credit for Halat by false pretences or fraud (para. 13).

Finally, the Hearing Notice contained a number of other allegations of improper conduct on the part of Bussey/Verico including failure to meet disclosure requirements (paras. 15-17), and carrying on business as a mortgage broker other than at Verico's registered address through submortgage broker Ivers (para. 14).

The Hearing

The Registrar held a hearing into the allegations contained in the Hearing Notice under Section 8 of the Act. At the outset of the hearing, the Appellants substantially admitted most of the factual allegations set out in paragraphs 1, 6, 7, 9, 14, 15 and 16. The Appellants also admitted the underlying facts alleged in paragraph 3 of the Hearing Notice but denied that the conduct was fraudulent. Counsel for the Appellants indicated that Bussey would give evidence on his own behalf to explain the circumstances surrounding those matters.

The hearing took place over six days in Surrey and Kelowna. The Registrar heard oral testimony from a total of 13 witnesses (11 of whom were called by the Staff of the Registrar), and received 79 exhibits in evidence.

On April 30, 2007, when the hearing was scheduled to recommence in Surrey, counsel for the Appellants indicated to the Registrar that he intended to make an application that the Registrar withdraw from any further involvement in the proceedings on the basis that the Registrar had

intervened in the examination of witnesses to such an extent that it raised a reasonable apprehension of bias. After receiving written submissions, the Registrar released his decision dismissing the bias application on July 17, 2007.

The Appellants brought a petition in the Supreme Court of British Columbia for judicial review of the Registrar's decision refusing to withdraw. The petition was heard by Mr. Justice Goepel on August 29, 2007. Goepel J. released his reasons on September 7, 2007; he dismissed the petition on the basis that it was premature and that the Appellants should first exhaust the statutory remedy available through an appeal to this Tribunal.

The Appellants' first alternative submission challenges the Respondent's findings regarding four allegations in the Hearing Notice. More particularly, the Appellants argue the findings were not "reasonably supported by clear and cogent evidence". The Respondents submit there was "some evidence" to support the findings and, moreover, the findings were supported by "the overwhelming weight of the evidence". Thus, it is necessary at this juncture to review the evidence before the Registrar in some detail.

The Ellinson/Nolan Mortgage

Whitney Steel acted for vendors Lyle and Cheri Hollins (a son and mother) on the sale of their Vernon property. Archie McMeeking was the realtor acting for the purchasers Ellinson and Nolan. Nolan and Bussey both testified that Gerald MacFarlane referred Bussey to Nolan and Ellinson. They had lost their previous home in a fire, forcing them to send Nolan's children to live in different locations. Nolan was "desperate" to have the family reunited.

On February 7, 2006 the Hollins accepted a counter-offer from Ellinson and Nolan of $247,500. McMeeking had told Steel that Ellinson and Nolan were pre-qualified. Shortly after the offer was accepted, Bussey telephoned Loni Crain, the common law spouse of Lyle Hollins, asking her to have the vendors re-write the contract of purchase and sale. Crain did not understand the request, and she telephoned Steel asking that Steel deal with Bussey on the issue. Steel spoke to Bussey on February 8, 2006. Bussey explained that he wanted the vendors to re-write the contract to inflate

the purchase price and thus generate a down payment. Whitney advised her clients not to change the contract as Bussey had requested because it would have been "illegal".

The facts set out in the preceding paragraph were essentially admitted by Bussey in his evidence. Bussey testified that he knew that the Ellinson/Nolan family was in "pretty poor shape" because of the house fire. Bussey agreed that he spoke to Crain about the possibility of creating what he characterized as a "vendor incentive" by changing the purchase price on the contract of purchase and sale. Bussey also agreed that the only purpose of the change to the contract was to generate a down payment which Ellinson and Nolan otherwise did not have.

McMeeking testified that he did not make a lot of effort to determine the financial situation of Ellinson and Nolan because he was "pretty new and pretty lax". McMeeking made no effort to verify that Ellinson and Nolan had proper financing in place before he removed the subjects because, once again, he had been very "lax". McMeeking testified that he had never been involved in a transaction where the purchase price was inflated to create a kick-back to the buyers, and in his view such an arrangement would have been "illegal". When Bussey phoned the vendors in an effort to persuade them to change the contract of purchase and sale it was without McMeeking's consent and McMeeking felt "pretty rotten" about the incident.

After the vendors refused to change the contract of purchase and sale, Bussey arranged with Ellinson's parents to execute a fake gift letter to hide the fact that the downpayment was: (1) to come from borrowed funds, and (2) that Bussey was the lender.

Bussey provided Mark Ellinson with a blank form of gift letter, which Mark brought to his father Gordon Ellinson to sign. Bussey explained to Mark that if the money was to be provided through his father, "that it helps in making things look a little better". Mark Ellinson had no experience in dealing with gift letters, this was the first one he had ever seen. He relied on Bussey because "he's the one who knows what he is doing".

The original gift letter was in the amount of $12,000; the second was in the amount of $14,000 and dated February 17, 2006. The gift letter stated that “The money is a gift and no part of this

gift has to be repaid". There was no dispute that Bussey had provided the gift letter for Ellinson's parents to sign.

Gordon and Doreen Ellinson did not have $14,000 to give to their son, and the parents always understood that the money was a loan to Mark to be secured through a second mortgage on the property. Gordon Ellinson "didn't like the whole thing" and was "really leery" about participating in the scheme, but felt torn because he wanted to help his son so he "broke down and did it". Nolan testified that she believed it was "illegal" to borrow money for the down payment, but that she did not question things because she was "desperate to get my family back together in a house".

Bussey subsequently gave Mark Ellinson a cheque in the amount of $14,000 to provide to his parents Doreen and Gordon Ellinson. The sum was secured by a promissory note signed by Ellinson and Nolan in favour of Bussey. As instructed, Doreen deposited the cheque in her and her husband's account on February 20, 2006 and, the next day, made a cheque out in the same amount to the conveyancing lawyers. Bussey testified that he came up with this scheme because he knew he could not lend money to Ellinson directly. However, the only promissory note in existence was the one signed by Ellinson and Nolan. Bussey had no loan agreement with Ellinson's parents, and in fact had never met them.

Bussey originally anticipated that the $14,000 loan for the down payment would be repaid through a second mortgage held by a private lender by the name of Nelson Anderson. In fact, Anderson never provided financing. In September 2006, a second mortgage was registered on the Ellinson/Nolan property in the name of Bussey's wife Michelle Bussey. By this time, Ellinson and Nolan were missing payments on the mortgage, and Bussey was "getting nervous" about the unsecured loan. The Ellinson/Nolan property subsequently went into foreclosure, and was purchased by Bussey as a home for his adult daughter.

The Nolan/Ellinson mortgage approval had also been premised in part on a rental agreement signed by Gerald MacFarlane agreeing to rent out a suite in the Ellinson/Nolan home for $1550 per month. MacFarlane was a friend of Bussey, Ellinson and Nolan, and had referred Bussey to them on the property purchase.

It was not in dispute that: (1) the rental agreement was submitted to the TD Canada Trust in support of the mortgage application, and relied upon by the Bank in approving the Ellinson/Nolan mortgage; and (2) that $1550 was roughly double what could reasonably have been charged as rent for the suite. However, the evidence surrounding the preparation and execution of the agreement was conflicting.

Susan Nolan testified that the rental agreement had been filled in before she signed it in Bussey's office on February 13, 2006 (without MacFarlane present) at the same time other mortgage documents were signed. Nolan did not know where the $1550 rental figure came from on the agreement; her recollection was that figure had already been filled in at the time she was presented with the agreement for signature.

Ellinson testified that he had one discussion with MacFarlane about renting out the suite in their home for $750 or $800 per month, but that "we ended up having found a renter before Gerry even got back to us". Ellinson was unaware of the executed rental agreement until going through papers at the time of closing, and said that the agreement was “just a big mistake”. Ellinson was not aware that the rental agreement was used to obtain higher financing for Ellinson and Nolan because Bussey never discussed it with him.

MacFarlane testified that he signed the rental agreement on behalf of his daughter and her boyfriend because his daughter was underage. According to MacFarlane, he had understood that the rental agreement was for the entire house (thus justifying the $1550 monthly rental), and that Ellinson and Nolan planned to live in the suite downstairs. MacFarlane's version of events directly contradicted the evidence of both Ellinson and Nolan.

Linda Ruf is the senior mortgage manager with TD Canada Trust, the lender which provided financing on the Ellinson/Nolan mortgage. Ruf’s duties with TD Canada Trust included oversight of the bank's external broker business.

Ruf testified that Ellinson and Nolan originally received pre-approval in January 2006 for a $190,000 mortgage on a property purchase of $200,000. A condition of the pre-approval was that

the down payment could not be financed. A mortgage was subsequently approved on a purchase price of $247,500, with a first mortgage in the amount of $235,125 and a down payment of $12,375. Again, it was a condition of financing that the down payment could not come from borrowed funds. It was a further condition of financing that if the down payment was to come in the form of a gift to Ellinson/Nolan, the gift had to come from an immediate family member with a letter confirming that the gift money did not need to be re-paid.

Ruf testified that the purpose of the "without recourse to financing" condition for the down payment was that if the down payment was borrowed, the bank would have to factor in the debt responsibility of the borrower to ensure that they were capable of carrying both payments. If TD Canada Trust had been aware that Ellinson and Nolan were borrowing funds for a down payment, and that a second mortgage would be registered as security, the bank would not have approved the mortgage. If an applicant (or representative) re-wrote a contract of purchase and sale to hide the fact that there was no down payment, Ruf would have considered the contract "fraudulent". Ruf testified further that without the level of rent in the rental agreement, Ellinson and Nolan may not have qualified for a mortgage in the same amount.

With the exception of the allegations relating to the rental agreement, there was little dispute in the evidence as to the circumstances surrounding the Ellinson/Nolan transaction. Bussey agreed that he had attempted to persuade the vendors to change the contract of purchase and sale to generate a downpayment, prepared the fake gift letter for Ellinson's parents to sign, loaned Ellinson/Nolan $14,000, provided the cheque to Ellinson’s parents to disguise the loan, and failed to disclose any of this to TD Canada Trust. Bussey agreed that his conduct had been "unacceptable", and explained that he had made a "huge mistake" and a "series of bad moves".

The Halat Mortgage

Bussey prepared two mortgage applications for Mr. Halat in relation to the purchase of property at 5600 Willow Drive in Vernon for a price of $262,900. The first application was for a mortgage in the amount of $210,320 with a down payment of $52,580. The application was approved by TD Canada Trust, subject to a number of conditions including that Halat provide confirmation of down payment

"without recourse to borrowing". This first mortgage approval listed a closing date of February 20, 2006.

On February 13, 2006 Bussey and Halat signed a mortgage commitment letter under which Bussey agreed to advance Halat $40,000 to be secured by a second mortgage on the Willow Drive property. The second mortgage was to be registered on or before February 22, 2006.

On February 21, 2006 TD Canada Trust issued mortgage approval to Halat for the same purchase price, but this time with a down payment of $92,015. The approval contained the same condition that the down payment not come from borrowed funds. There was no evidence that TD Canada Trust was made aware at any time of Bussey's agreement to advance Halat $40,000 in return for a second mortgage on the property.

For reasons that are unclear, neither of the mortgages approved by TD Canada Trust for Halat was ever actually funded. In his evidence, Halat gave conflicting explanations as to why neither of the mortgages came through, at times suggesting that one or both of them had collapsed because of credit problems, at other times saying he could not recall. Ultimately, Halat funded the property purchase through a mortgage issued by Maple Trust which involved a $50,000 down payment.

Halat gave reasons for the $40,000 loan agreement from Bussey, under which no funds were ever actually advanced. Halat insisted that he had sufficient funds for the downpayment and the agreement with Bussey was “just in case I need it”. Halat's evidence on this point at times contradicted the admissions that Bussey himself made at the outset of the hearing in relation to the Halat transaction. Halat did agree in response to a question from the Registrar that he was prepared to borrow the $40,000 from Bussey if the second mortgage had gone ahead.

The Appellants note that Mr. Halat’s first language is not English, and say it was apparent at times during his testimony that he had misconstrued the meaning of a question. The Appellants maintain this accounts for some of the “confusion” in his evidence.

Bussey testified that Halat advised him he would have sufficient funds once Halat's divorce was finalized, and that the $40,000 was intended as "bridge financing". Bussey agreed that the $40,000 he was prepared to advance to Halat would form part of the $92,000 down payment on the second mortgage application. Bussey claimed that if the second mortgage approval had gone ahead, Bussey would have disclosed the interim financing to the bank.

The Remaining Allegations

The remaining allegations in the Hearing Notice related to the Appellants' failure to comply with disclosure requirements, and operating a mortgage broker business other than at a registered address. These allegations were all admitted by the Appellants at the outset of the hearing.

Judy Ivers testified that she had been a registered submortgage broker since 2004 and, at the relevant time, was employed by Verico which had a registered office in Kelowna. Ivers testified that she worked at home in Osoyoos and kept all her files at home until they were complete, at which time she sent them to Vernon. Ivers sent faxes to clients, and mortgage applications to banks, through her home fax machine. Verico's Kelowna office sat empty. The only time Ivers ever attended that office was to meet with Bussey.

Ivers testified that she did not understand the circumstances in which she was required to complete a Form 10 (Conflict of Interest Disclosure Statement) and sought advice from Bussey. Bussey instructed Ivers that she needed to complete a Form 10 if a client was paying a fee, but that a conflict statement was not necessary in a situation where the lender was paying the mortgage broker a commission. Ivers agreed that in all 16 of her files entered as exhibits before the Registrar she was paid a commission by the lender, and did not provide a Form 10 to the client.

Bussey confirmed in his evidence his belief that a Form 10 Disclosure Statement was only required when either the broker or the lender was charging a fee to the client, but not when the broker was receiving a commission from the bank. As such, at the time of the FICOM

investigation, there were no Form 10s in the files on which Bussey was paid a commission by a lender (including the Ellinson/Nolan mortgage).

The Registrar's First Decision

The Registrar concluded that the allegations in paragraphs 1-3, 6-7, 9-10, and 13-16 had been proven on the evidence. The Registrar made no findings in respect of paragraphs 8, 11, 12, and 17; he concluded the allegations in paragraphs 4 and *5* were not proven.

For the purpose of considering the alleged contraventions, the Registrar grouped the allegations in the Hearing Notice in respect of the Ellinson/Nolan mortgage into one issue: did the Appellants conduct business in a manner prejudicial to the public interest in respect of this transaction? The Registrar adopted the same approach in respect of the Halat transaction.

In respect of the Ellinson/Nolan mortgage, the Registrar noted that the factual allegations in paragraphs 3, 6-9 and 11 of the Hearing Notice had been admitted. The only matters in dispute were: (1) the allegations in paragraphs 10-12 that Bussey had prepared a false rental agreement and knowingly presented it to the TD Canada Trust in support of the Ellinson/Nolan application, and (2) whether Bussey's actions as a whole constituted an attempt to obtain credit by "fraud or false pretence".

With respect to the rental agreement, the Registrar rejected the testimony of Bussey and McFarlane as to how the agreement had been executed. Their evidence was contradicted by the evidence of Ellinson and Nolan. The Registrar concluded that McFarlane was "one of the least credible witnesses I have ever experienced". The Registrar found, based on his review of the evidence, that the rental agreement was prepared by the Appellants for the purpose of debt servicing. The Registrar further held that it was clear on the evidence that Bussey had obtained credit for Ellinson and Nolan by false pretences or by fraud, and thus conducted his business in a manner prejudicial to the public interest.

The Appellants similarly admitted much of the factual underpinnings of the allegations relating to the Halat transaction. In particular, it was admitted that Bussey had agreed to loan money to Halat for the down payment on the second mortgage application. Bussey's defence was that the arrangement would have simply provided "bridge financing" to Halat, and that Bussey would have disclosed the arrangement to the bank. The Registrar rejected Bussey's testimony on these points:

> I reject Bussey's evidence that if the deal had completed he would have notified the bank. If Bussey was not trying to deceive the bank he would have disclosed this upfront and the second approval would have reflected this in the disclosure. I reject his testimony that this was bridge financing as there are numerous other ways to do that for less cost than a second mortgage. (p. 17)

The Registrar held that the allegations regarding the Appellants conducting business other than at their registered office, and failing to provide Conflict of Interest Disclosure Statements (Form 10s) were also made out. These allegations were, in any event, admitted by the Appellants.

The Registrar's Decision on Penalty

The Registrar subsequently heard submissions from the parties regarding the appropriate penalty for the findings of fault, and issued a written penalty decision. The Registrar highlighted a number of factors he considered relevant to the issue of penalty. These included: Bussey's previous good character, Bussey's admissions and lack of credibility, how Bussey conducted himself, the need to maintain public confidence in the mortgage broker industry in British Columbia, the reputation and status of mortgage brokers, and protection of the public.

Based on all the relevant factors, and the paramount importance of the public interest, the Registrar imposed a five-year suspension on Bussey's registration. No penalty was issued against Verico because it was no longer registered at the time of the penalty hearing. The Registrar also ordered the Appellants to pay $20,000 in hearing costs, which represented a portion of the investigation costs.

ISSUES ON APPEAL

The Appellants submit the issues to be determined on appeal are as follows:

(a) What is the appropriate standard of review?
(b) Did the Registrar apply the correct standard of proof?
(c) Did the Registrar exceed his jurisdiction or err in law by finding that Bussey "attempted to obtain, and did obtain credit by false pretence or fraud" for Ellinson and Nolan as alleged in paragraph 2 of the Hearing Notice?
(d) Was the Registrar's decision reasonable in relation to the allegations in paragraphs 3, 10 and 13 of the Hearing Notice?
(e) Were the penalties and costs imposed reasonable?
(f) Did the Registrar breach his duty of fairness to the Appellants and lose jurisdiction to decide the matter due to a reasonable apprehension of bias arising from the Registrar's conduct of the hearing?

I will address these issues in the course of what follows, although in a different order.

STANDARD OF REVIEW

Both parties agree the standard of review before the Tribunal in most situations is that of reasonableness. See, among other authorities, *Cheema v. Insurance Council of British Columbia*, FST 05-019, at pp. 5-6; and *Pugliese v. Registrar of Mortgage Brokers*, FST 06-024, at p. 10. I accept the Appellants' further submission that the standard of correctness may apply in some cases where issues of natural justice and procedural fairness are concerned. The latter would apply to the allegation of bias raised here. There is no need in the present appeal to consider whether the Tribunal's approach to the appropriate standard of review should be updated or refined following the Supreme Court of Canada's judgment in *Dunsmuir v. New Brunswick*, 2008 SCC 9.

REASONABLE APPREHENSION OF BIAS

This is the last issue identified above by the Appellants. However, I will consider it next as the remaining issues will be academic if the Registrar's decisions are set aside due to reasonable apprehension of bias.

The Appellants submit the Registrar's questioning and "cross-examination" of witnesses in this case "brought him into the arena to such an extent that there is a reasonable apprehension of bias". In this regard, the Appellants cite the Registrar's questioning of Ruf from TD Canada Trust (the lending institution in the Ellinson/Nolan transaction); testimony elicited from Halat with respect to apparent inaccuracies in his mortgage application form (a matter not raised in the Hearing Notice nor by Staff counsel at the hearing); testimony elicited from several witnesses to the effect there is an information imbalance between consumers and financial services professionals; and "attacking the credibility" of McFarlane on inconsequential matters. Further, the Appellants take particular umbrage over the Registrar's questioning of McMeeking (the real estate agent for Ellinson and Nolan) which they characterize as improper, as well as "simply irrelevant and highly prejudicial".

Among other authorities, the Appellants paraphrase *Solicitor "X" v. Nova Scotia Barristers' Society*, [1998] N.S.J. No. 428 (C.A.), at para. 428, and assert "… the extent, manner and substance of the excessive questioning exceeded the bounds of simple clarification of the evidence, and brought the [Registrar] into the arena, cast with the demeanor of [a] prosecutor". They accordingly submit there was a reasonable apprehension of bias and, on this basis alone, the decisions should be set aside in their entirety.

It has long been established that a high standard of justice is required when the right to continue in one's profession or employment is at stake: *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105. At least for present purposes, I am prepared to accept the Appellants' submission that a hearing before the Registrar falls at the "adjudicative" end of the spectrum of administrative tribunals and, accordingly, a high duty of fairness applies. As stated by Cory J. in *Newfoundland Telephone Co. Ltd. v. The Board of Commissioners of Public Utilities*, [1992]

S.C.R. 623, "the conduct of the [Registrar] should be such that there could be no reasonable apprehension of bias with regard to [his] decision" (para. 27). The applicable test has been articulated is several judgments, including *R. v. R.D.S.*, [1997] 3 S.C.R. 484:

> When it is alleged that a decision-maker is not impartial, the test that must be applied is whether the particular conduct gives rise to a reasonable apprehension of bias. ... It has long been held that actual bias need not be established. This is so because it is usually impossible to determine whether the decision-maker approached the matter with a truly biased state of mind. ...
> It was in this context that Lord Hewart C.J. articulated the famous maxim: "[it] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done": *The King v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256, at p. 259. ...
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> The manner in which the test for bias should be applied was set out with great clarity by de Grandpre J. in his dissenting reasons in *Committee for Justice and Liberty v. National Energy Board,* [1978] 1 S.C.R. 369, at p. 394:
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> > [T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information.... [The] test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. ... "
>
> This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. ... Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold". (at paras.109-111)

As to the nature of the allegation here, the authorities recognize the desirability, as well as the necessity, of adjudicators questioning witnesses. But, there are limits -- when the intervention impels one to conclude that the adjudicator "is directing examination or cross-examination in such a manner as to constitute possible injustice to either party, then such intervention becomes interference and is improper": *Majcenic v. Natale*, [1968] 1 O.R. 189 (C.A.), at para. 43.

At the same time, and as the Respondent submits, a broader latitude may be afforded tribunals where the hearing process involves an inquiry into matters concerning the public interest, rather than an adjudication of competing private interests. A tribunal is entitled to ask questions of parties, and may be required to adduce the evidence necessary to fulfill its statutory mandate: see *Kalina v. Directors of Chiropractic (Ontario)* (1981), 35 O.R. (2d) 626 (C.A.); and *Rusonic v. Law Society of Upper Canada* (1988), 28 O.A.C. 57 (Ont. Gen. Div.). An allegation of bias in this context will only succeed where it is evident from the record as a whole that the decision maker has effectively abandoned his or her quasi-judicial role and thus denied a party a fair hearing. The manner and extent of questioning may be objectionable if it demonstrates that the decision maker has clearly pre-judged the issue, is antagonistic towards a party, or is inclined to judge the matter on the basis of evidence not before it. Where the fairness of the hearing process at issue is not affected in this manner, there is no ground for finding an apprehension of bias. See *Beno v. Canada*, [1997] 2 F.C. 527 (C.A.); and *Metis Child, Family and Community Services v. A.J.M.*, 2008 MBCA 30, at paras. 49-79.

The onus of demonstrating a reasonable apprehension of bias lies with the party making the allegation and the threshold for such a finding is high: *R. v. R.D.S., supra*. The test is objective: whether a reasonable and informed person, viewing the matter practically and realistically, would have a reasonable apprehension of bias.

I have considered all of the examples put forward by the Appellants to support this ground of appeal. In each case, the Registrar asked questions of witnesses after direct examination and cross-examination by counsel, and then gave both counsel an opportunity to ask follow-up questions. That format is not determinative, but this was not a situation where the adjudicator injected himself into the arena by intervening in the direct examination or cross-examination of the witness: c.f. *Majcenic v. Natale, supra*. Additionally, the outcome in the first decision suggests the Registrar retained an open mind throughout the proceeding, and had not pre-judged the allegations against the Appellants. It will be recalled that he made no finding on four allegations because they relied on circumstances similar to other allegations, and he found two allegations were not proven on the evidence.

I have read the transcript of McMeeking's testimony with particular attention given its importance to the Appellants' assertion of bias (Transcript from April 4, 2007 at pp. 1-45). Once again, the Registrar's questioning of this witness began after re-examination was complete. The Appellants did not object to any of the questions at the time, and their counsel had "no questions in relation to those question" (p. 45). The Registrar's questions themselves were at times in the nature of cross-examination (i.e. they were leading questions), and they arguably went beyond what was necessary to determine the allegations against the Appellants. Viewed in isolation, the questions might be described as "worrisome and com[ing] very close to the line" (*R. v. R.D.S.*, *supra*, at para. 152). However, when the entire context of the proceeding is considered (including the Registrar's role in protecting the public interest), I find the Appellants have not satisfied the onus of demonstrating a reasonable apprehension of bias.

ALLEGATION NO. 2

Paragraph 2 of the Hearing Notice alleged that Bussey had attempted to obtain, and did obtain, credit by false pretence or by fraud for Ellinson and Nolan, and thereby conducted business in a manner prejudicial to the public interest. The Appellants submit the Registrar both exceeded his jurisdiction and erred in law by making a finding regarding this allegation.

The Appellants note Bussey substantially admitted the conduct in paragraphs 6, 7 and 9 of the Hearing Notice, as well as such conduct being prejudicial to the public interest pursuant to Section 8(1)(e) of the Act. They submit those factual admissions formed the basis of the allegation in paragraph 2, such that it was "a duplicative allegation". The Appellants rely on "the *Kienapple* principle" and the long-established rule of criminal law that a person may not be convicted twice for the same offence: *R. v. Kienapple*, [1975] 1 S.C.R. 729; applied in *Carruthers v. College of Nurses of Ontario* (1996), 31 O.R. (3d) 377 (Div. Ct.).

Further, the Appellants argue the Registrar found the allegation in paragraph 2 had been proven without any analysis of the elements of fraud or obtaining credit by false pretences. In this regard, they rely on authorities which require a *mens rea* element and proof beyond the clear and

cogent standard. For all of these reasons, the Appellants maintain the Registrar's decision with respect to paragraph 2 of the Hearing Notice was unreasonable and should be set aside.

In my view, the Appellants' arguments under this heading are answered by the Registrar's submissions. Dealing first with the *Kienapple* principle, it was premised on the common law rule that a person should not be punished twice for the same delict or matter: *Carruthers, supra*, at para. 85. In the present case, the Registrar did not make separate findings of guilt and impose individual penalties for each finding. Rather, all of the allegations respecting the Ellison/Nolan transaction were considered together. This is plain from page 5 of the first decision where the Registrar stated that the 17 allegations in the Hearing Notice "can be distilled down to six circumstances" with the second being:

> 2. Did Bussey and Verico conduct business in a manner prejudicial to the public interest in the Ellinson/Nolan matter? (Paragraphs 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 16, and 17 of the Notice.)

The Registrar considered the entire Ellison/Nolan transaction at pages 6-12 before providing a summary at pages 12-13 of the first decision. The summary admittedly set out a finding regarding each of the applicable allegations. However, in the later penalty decision, the Registrar found "a single administrative penalty" was appropriate in the circumstances. The penalty was based on the Registrar's assessment of various factors and did not turn on the specific number of allegations which he found had been proven. Therefore, the *Kienapple* principle cannot serve as a basis to interfere with the Registrar's decisions.

The Appellants' arguments based on a *mens rea* element are essentially founded on a proverbial "straw man". The parties all agree that proceedings before the Registrar are not criminal or quasi-criminal in nature; rather, they are regulatory proceedings which permit the Registrar to conduct an inquiry into the conduct of registrants under the *Mortgage Brokers Act* where it is alleged that a registrant has breached regulatory requirements or conducted business in manner prejudicial to the public interest. On such an inquiry, the Registrar does not determine criminal culpability, nor is it necessary for the Registrar to consider issues relating to a registrant's *mens rea* as that term is understood in criminal law (although intent may at times be relevant).

As argued by the Respondent, once one accepts that a false document has been knowingly submitted by a mortgage broker (a fact which was admitted by the Appellants before the Registrar), it is open to conclude that a fraud has occurred. The term "fraud" has many meanings in many contexts and is not simply limited to a criminal offence. In civil law, fraud has been defined as:

> ... a false representation of fact, made with knowledge of its falsehood, or recklessly, without belief in its truth, with the intention that it should be acted upon by the complaining part, and actually inducing him to act on it. (*Parna v. G. & S. Properties Ltd.*, [1971] S.C.R. 306)

In the present case, it was open to the Registrar to conclude from the Appellants' admissions and the evidence that: (1) Bussey provided a false document (the gift letter) to the TD Canada Trust; (2) Bussey knew the document was false; (3) Bussey intended that the lender rely on the document to finance the Ellinson/Nolan mortgage; and (4) the lender in fact relied on the document. It was accordingly reasonable for the Registrar to find that Bussey attempted to obtain, and did obtain, credit "by false pretence or fraud" as the term is understood in civil law based on the circumstances of the Ellison/Nolan transaction.

ALLEGATION NOS. 3, 10 AND 13

The allegations in paragraphs 3, 10 and 13 of the Hearing Notice involved discrete elements of the proceeding before the Registrar but can be considered together. The Appellants challenge the Registrar's findings by submitting the three allegations were not proven based on "clear and cogent evidence" and were accordingly unreasonable (see paragraphs 43, 58, 74 in the Submissions of the Appellants).

The Reply Submissions of the Appellants were filed in June 2008 and the appeal was assigned to another member of the Tribunal. At the time, the authorities had established "a requirement for clear and cogent evidence in the first instance"; that is, in proceedings such as those before the Registrar (see *Cheema, supra*, at p. 5). The parties had understandably argued the appeal in light of the prevailing jurisprudence.

The other Tribunal member was unable to issue a decision due to a sudden illness, and the appeal was re-assigned to me in December 2008. In the meantime, the Supreme Court of Canada had issued its judgment in *F.H. V. McDougall*, 2008 SCC 53, dealing with the standard of proof in civil proceedings. The parties in this appeal were invited by letter of January 14, 2009 to address whether the judgment had any impact on their submissions. A further submission was received from the Respondent; nothing was received from the Appellants as confirmed by the Tribunal's letter of February 12, 2009.

In *F.H.*, the Supreme Court held there is only one standard of proof in civil cases, and it is proof on a balance of probabilities. An adjudicator should be mindful of, and may take into account, the seriousness of the allegations or the potential consequences; however, those considerations do not alter the standard of proof. The evidence must always be clear, convincing and cogent but the one legal rule which applies in all civil cases is "whether it is more likely than not that the event occurred" (para. 44). The Court continued:

> To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. *There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.* (para. 45; emphasis added)

The Court in *F.H.* also stated that, whether the correct standard is expressly stated or not, the presumption of correct application will apply unless it can be demonstrated that an incorrect standard was applied (para. 54). Further, an appellate body is only permitted to interfere with factual findings where the adjudicator below is shown to have committed a palpable and overriding error or made factual findings that are clearly wrong, unreasonable or unsupported by the evidence (para. 55). Of final relevance to the present appeal are the Court's statements that "heightened deference" must be accorded to assessments of credibility by the trier of fact who has seen the witness and heard their testimony, and an appellant body should not reassess the credibility of witnesses where it disagrees with such an assessment (paras. 72 and 76).

The judgment in *F.H.* effectively provides a complete answer to the Appellants' arguments over the Registrar's findings respecting the allegations in paragraphs 3, 10 and 13 of the Hearing Notice. There were numerous discrepancies in the testimony related to those allegations and, accordingly, the Appellants submit there was not "clear and cogent evidence" for the findings. But that is no longer the test on appeal. Moreover, the Appellants' arguments invite and require a reassessment of the evidence, including inferences drawn from the evidence and assessments of credibility. All of those matters were "clearly within the bailiwick of the [Registrar]", and it is not for the Tribunal to second-guess the Registrar "in the absence of a palpable and overriding error" (*F.H.*, at paras. 72 and 71 respectively).

I acknowledge the Appellants' submissions insofar as they recite evidence that might run counter to the Registrar's findings. However, as should be apparent from the extensive exposition of other evidence above, there was testimony to support the findings. And it is relevant to recall that, while the Appellants denied fraudulent conduct, they admitted the facts underlying paragraph 3 in the Hearing Notice. The Registrar was required to determine "whether it was more likely than not that the [alleged events] occurred". I am satisfied from reading the first decision that he scrutinized the evidence with sufficient care. The Appellants have not identified a palpable or overriding error; nor have they shown the Registrar made material findings of fact that were clearly wrong, unreasonable or unsupported by the evidence.

PENALTY

The Registrar's penalty decision followed written submissions by counsel. He commented on various arguments made on behalf of the Appellants, and some of "the numerous cases submitted for [his] consideration by both counsel" (pp. 7-9). The Registrar appeared to disregard one of the authorities put forward by the Appellants, *Re Eron Mortgage Corp.*, 2000 LNBCSC 34, because of his view that "none of the factors [identified in that case] is the protection of the public" (p. 8). In reaching his decision on penalty, the Registrar considered: Bussey's previous good character; Bussey's admissions and lack of credibility in other areas; the need to maintain public confidence in the Province's financial services sector and, in particular, the mortgage broker

industry; the reputation and status of registrants in the mortgage broker industry in general; the protection of the public; and how Bussey conducted himself in business.

As evident from the passage quoted next, the Registrar was most influenced by his own prior decision in *Gurdip Chand*, unreported (March 13, 2006):

> Of all of the cases submitted by counsel, the one that seems to have the most appropriate penalty is the Chand matter, again, one that I am familiar with. The actions of Bussey cannot be described as similarily sophisticated as in the Chand matter but what was lacking in sophistication was more than compensated by shear audacity.
>
> I was particularly troubled by Bussey's actions in the following areas:
>
> - His brazen attempts to have the vendor rewrite a contract to reflect equity where none existed;
> - After failure to accomplish this, he arranged for a second mortgage and then involved the parents of Ellinson in being party to this matter by having them execute two separate phony gift letters;
> - His attempt to involve an innocent third party to fund the second mortgage funds and when this fell through, lending his own funds and subsequently ending up with the property;
> - Involving individuals in creating a phony rental agreement at close to twice what the property would rent for in order to increase the income to debt servicing ratio;
> - His willingness to mislead the bank in the Halat transaction in a number of areas; and
> - His total lack of following basic rules in the Act. (pp. 9-10)

In reviewing all of the factors, the Registrar placed public interest considerations above those of the Appellants, and held:

> - I understand Verico is no longer registered. I issue no penalty against Verico;
> - Bussey's registration is to be suspended for a period of 5 years from the date of this decision;

- Given the length of suspension before being registered again, he must first complete the education requirements in effect for a new applicant at the time of the lifting of this suspension; and

- Before the suspension is lifted, he must also provide proof he has successfully taken a course where an examination is offered on ethics. (p. 10)

The entirety of the Registrar's reasoning on the issue of costs is found in the final paragraph of the penalty decision:

> Both counsel have agreed costs are appropriate. Counsel for Bussey/Verico has argued costs should not be such that it discourages individuals from requesting hearings. I have considered those remarks in ordering costs, however, it should also be noted that it is also unfair for the vast majority of mortgage professionals to bear the costs of regulating those who choose to disregard the rules. I have balanced those factors and arrived at reduced costs of $20,000.00 to be paid by April 30, 2008. (p. 10)

The Appellants argue that the penalties and costs imposed by the Registrar were unreasonable. Most of their submissions focus on Bussey's suspension, which they describe as "punitive in nature", especially when the immediate circumstances are compared to other decisions. Citing numerous authorities, the Appellants maintain the penalties imposed for similar infractions involving an unregistered office and failure to provide Form 10s have generally involved a fine, and contend a reasonable penalty for the more serious allegations here would be a suspension of between four and six months.

The Respondent contends the Appellants' submissions on penalty are "remarkable" given the serious misconduct at issue. Further, Bussey's attempt to justify his actions as "mistakes and errors of judgment" underscores the regulatory concerns at play. The Respondent submits the suspension fell within the range established by cases involving similar findings of misconduct by registrants. Further, the costs order was reasonable and "eminently fair to the Appellants", particularly as they were not required to pay anything towards legal costs.

I confirm the approach articulated at page 6 of *John Winston Carson*, FST 05-018, where the Tribunal is asked to interfere on appeal with a disciplinary penalty imposed by a body responsible for regulating professionals:

> The period [of ineligibility] selected by the Registrar involved an exercise of discretion. Therefore, his decision is entitled to a reasonable degree of deference, especially as the Registrar was in a better position than the Tribunal to assess any expression of remorse by Mr. Carson, to ascertain the need for individual deterrence, and to evaluate other evidentiary considerations applicable to the imposition of professional discipline. The Tribunal should be reluctant to intervene if the Registrar turned his mind to the relevant factors and the penalty falls within an acceptable range, unless there are extenuating circumstances to support a contrary outcome. See *Kenneth Scott Spong* (unreported), January 13, 2006 (FST 05-007).

In *Carson*, the appellant had: submitted at least five applications for registration as a submortgage broker which contained false or misleading statements; knowingly carried on business as a mortgage broker and submortgage broker without being registered, despite five warnings from the Registrar's staff; knowingly carried on business as a mortgage broker using a name which was not registered, despite two warnings from the Registrar's staff; failed to satisfy at least ten judgments rendered against him which arose from personal real estate and mortgage transactions, as well as other business dealings; and admitted avoiding creditors to preserve this assets. These and other facts demonstrated that "Mr. Carson [had] consistently disregarded the [regulatory] scheme in which he was operating for a number of years" (p. 9), and the Registrar's decision to impose a five-year period of ineligibility for registration was upheld. Nonetheless, the Tribunal cautioned that "[t]he five year period selected by the Registrar may well be on the upper end of the scale" but was not "unreasonable in all circumstances of the case" (p. 8).

I do not intend to review every authority put forward on appeal. The highwater mark appears to be *Danh Van Nguyen and Express Mortgages Ltd.*, FST 05-004, where the conduct in question was particularly egregious, if not outrageous. The individual under review had submitted false documents to financial institutions in at least 19 separate mortgages, including employment letters, income verification letters and bank passbooks. His actions caused 158 mortgages to be demanded, and the financial benefits to the individual had been significant (p. 13). Further, the

individual had employed unregistered brokers and carried on business other than at a registered address. The Tribunal upheld the ten year suspension imposed by the Registrar, and added a third condition to apply following future registration. The Registrar subsequently ordered the individual to pay costs of about $35,000 (which represented a discount of 75 percent), and stated "[i]n the financial services sector, the cost of regulating each industry is borne by the industry itself": *In the Matter of Danh Van Nguyen and Express Mortgages Ltd.*, unreported penalty decision (December 6, 2005), at pp. 5-6.

In *Sudarshan Rana*, unreported hearing decision (June 10, 2003), the Acting Deputy Registrar of Mortgage Brokers imposed a five year period of ineligibility for registration as a submortgage broker where the individual had displayed a "lack of insight about his conduct that has been an ongoing concern to regulatory bodies" (final page of decision). As a member of this Tribunal, I upheld a decision by the Real Estate Council that no further application would be received from the same individual to be licensed as a real estate salesperson for the same period: see FST 04-002. There had been a lengthy and on-going history of the individual failing to satisfy financial services industry disclosure requirements in both Ontario and British Columbia.

In the Matter of Aspert Mortgage Inc. et al ("*Toor and Gill*") was a Consent Order signed by the Registrar on September 15, 2006. The facts and admissions indicate that false documents had been submitted in respect of six or seven mortgages; the individual had failed to provide numerous disclosure statements in the prescribed form; and the individual had conspired with a submortgage broker to avoid the latter's creditors. The Consent Order imposed a five year suspension and ordered payment of $10,000 as partial costs for the investigation.

Another Consent Order relied on by the Respondent is *Gurpal Singh (Paul) Beesla* signed more recently by the Registrar on January 7, 2008. While working as a registered submortgage broker, the individual had: submitted a number of false employment letters and mortgage applications; made false documents including pay stubs, residential tenancy agreements, Canada Revenue Aging Income Tax Returns Information Summaries and gift letters which were submitted to lenders; altered numerous genuine documents; and failed to make proper disclosures of interest.

The Consent Order held the individual was not eligible to apply for registration for a period of eight years and until payment of $42,000 in costs.

I turn now to the authorities considered expressly by the Registrar in the decision under appeal. It is unfortunate that he appears to have misinterpreted *Re Enron Mortgage Corp.*; the factors relied upon by the Appellants were all proceeded by the statement that "…the Commission must consider *what is in the public interest* in the context of its mandate to regulate trading in securities" (QL page 3 of 7; emphasis added). At the same time, I agree with the Registrar that the penalties imposed in *David Ford*, unreported hearing decision (February 1, 2002), and *Norman Juraski*, unreported hearing decision (December 7, 2000), did not provide useful guidance for the present findings. The same can be said about *Gerald Thomas Mark McDonald*, unreported hearing decision (November 4, 2004), and other authorities cited in the Appellants' submissions on appeal. For instance, in the *McDonald* proceeding, the primary finding was that the individual had prepared a false gift letter. That act alone resulted in a suspension of four months, an administrative penalty of $1000 and an order to pay $2,300 in costs.

The *Chand* decision invites closer scrutiny given the weight afforded to it in the Registrar's reasons for penalty. An individual requesting registration as a submortgage broker had failed to disclose two outstanding judgments against him. He was later registered and, while acting as a submortgage broker: created a false employment letter; brokered a second mortgage without the knowledge of the first mortgagor; and improperly accepted trust funds. The individual was also licensed as a real estate salesperson, and had failed to disclose an outstanding judgment when renewing has real estate license. In addition to making a finding of fault on every issue in the hearing notice, the Registrar found the individual had: altered a contract of sale and purchase; manipulated bank documents in order to deceive the bank; counselled the submission of false credit information to support the granting of credit; and submitted false documents in order to have the second mortgage registered. The individual had also ignored his personal creditors, and witnessed signatures on legal documents without knowing who had actually signed the documents. The Registrar stated the manner of registering the second mortgage was "sophisticated and cunning and a scheme I have never previously encountered" (third to last page of decision). The individual was suspended for five years and ordered to pay $5000 in costs.

Determining the appropriate length of a suspension in a particular case cannot be done with anything close to absolute precision. That is partially why the Tribunal affords deference on appeal as explained in *Carson*, *supra*. But a general consensus does emerge in one respect relevant here: a five year suspension has been seen as appropriate in the first instance -- and, more critically, has been upheld on appeal -- where there has been a longstanding and/or widespread pattern of misconduct prejudicial to the public interest. This was certainly the situation in all of the *Carson*, *Rana*, *Toor and Gill*, and *Chand* decisions.

The Appellants do not challenge the Registrar's determination that "a single administrative penalty" was appropriate in this circumstance. I am satisfied the Registrar turned his mind to the factors relevant to sentencing and appropriately placed emphasis on protecting the public: see James T. Casey, *The Regulation of Professionals in Canada* (Carswell, 2001); Sara Blake, *Administrative Law in Canada* (Butterworths, Third Edition); and *Wong v. Real Estate Council of British Columbia*, [2003] B.C.C.O. No. 3 (Appeal No. CAC-0010), upheld at 2004 BCCA 120. However, under the approach in *Carson*, the penalty must still fall "… within an acceptable range, unless there are extenuating circumstances to support a contrary outcome" (p. 6). Or as stated in *Kenneth Scott Spong*, FST 05-007, quoting *Wong*, one should ensure that "… the penalty imposed is not disparate with the penalties imposed in other cases (p. 13).

I accept the Respondent's position that Bussey engaged in serious misconduct given the various aspects of the Ellison/Nolan transaction. The gravity of Bussey's malfeasance was compounded by the steps he took in relation to the Halat mortgage and, to a lesser extent, by the remaining allegations that were proven against him. I also accept the unsatisfactory nature of Bussey's attempts to justify his acts and omissions. Nonetheless, I am unable to agree that the penalty imposed by the Registrar "… fell within the range established by cases involving similar findings of misconduct by registrants" (Submissions of the Respondent at para. 87).

The Registrar sought to draw a parallel with *Chand* when he stated: "The actions of Bussey cannot be described as similarly sophisticated as in the Chand matter but what was lacking in sophistication was more than compensated by shear [sic] audacity" (p. 9). But it must be recalled that the "sophisticated and cunning" remark in *Chand* was made solely in respect of the

delay in registering the second mortgage. As set out above, there were other proven allegations in *Chand* -- as well as numerous adverse findings in addition to the proven allegations -- which cumulatively supported the five year suspension. The findings and allegations proven here present a sufficiently different picture to warrant intervention on appeal. I have ultimately concluded that a suspension of more than three years goes beyond what is necessary to properly reflect the public interest and other applicable sentencing principles and, moreover, becomes punitive in terms of the impact on Bussey's ability to carry on in his profession. In reaching this conclusion, I have taken into account the fact that the Registrar had the opportunity to hear directly from Bussey during the first hearing, and thus assess first hand the genuineness of Bussey's explanation for his actions.

Turning to costs, and with respect, it is difficult to discern a consistent line of analysis which explains the wide range of payments ordered in the decisions canvassed above, as well as others cited on appeal. It is even more challenging to reconcile what was said at page 5 of the costs decision in *Nguyen and Express Mortgages Ltd.* (i.e. "In the financial services sector, the cost of regulating each industry is borne by the industry itself."), with the reason for the order here (i.e. "… it is also unfair for the vast majority of mortgage professionals to bear the costs of regulating those who choose to disregard the rules."). In *Chand*, no explanation was given for the order on costs; nor were there any reasons indicating of how the figure was derived.

Further, in *Nguyen and Express Mortgages Ltd.* the investigative costs were discounted by 75 percent and the actual legal costs were also discounted. The Respondent's submissions on appeal indicate the investigative costs here were discounted by about 15 percent but the Appellants were not required to pay anything towards legal costs. Once again, no rationale was provided in *Chand* for the costs order.

The Registrar will hopefully develop a more consistent and transparent basis for determining costs in future proceedings. For this appeal, and given my conclusions above regarding his reliance on *Chand*, I have decided that the Appellants should not be required to pay costs of a amount greater than what was ordered in the decision which the Registrar believed provided the closest guidance.

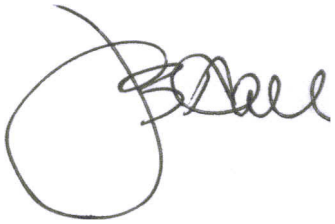
CONCLUSION

The appeal succeeds in part. The Registrar's hearing decision of January 8, 2008 is confirmed under Section 242.2 (11) of the *Financial Institutions Act*. The penalty decision of March 27, 2008 is varied by substituting a suspension of Bussey's registration for a period of three (3) years from the date of that decision, and by reducing to $5,000.00 the costs to be paid by the Appellants.

Neither the Appellants nor the Respondent made submissions on costs under Section 47(1) of the *Administrative Tribunals Act*, and none are awarded. I would not have granted costs in any event given the divided success on appeal.

DATED at Vancouver, British Columbia, this 31st day of March 2009.

FOR THE FINANCIAL SERVICES TRIBUNAL



JOHN B. HALL
PRESIDING MEMBER