

Citation: Ho (Re), 2023 BCRMB 8
Date: 2023-06-02
File # INV17.255.38332

BC FINANCIAL SERVICES AUTHORITY
IN THE MATTER OF THE *MORTGAGE BROKERS ACT*
SBC 1996, c 313 as amended

AND

IN THE MATTER OF
HOU YIN (JEFFREY) HO
(Registration No. 500987)

REASONS FOR DECISION ON APPLICATION

[This Decision has been redacted before publication.]

DATE OF APPLICATION: June 1, 2023

Counsel for BCFS: Amandeep Sandhu
Catherine Davies

Counsel for Respondents: Owais Ahmed

Hearing Officer: Andrew Pendray

Introduction

1. On September 9, 2019, the Registrar of Mortgage Brokers issued, pursuant to sections 8 and 8(1) of the *Mortgage Brokers Act* (the “MBA”), a Notice of Hearing in respect of Hou Yin (Jeffrey) Ho, a registrant under the MBA. The Notice of Hearing alleges that Mr. Ho conducted mortgage business in a matter prejudicial to the public interest, as contemplated by section 8(1)(i) of the MBA, in respect of a number of transactions which occurred in 2014, 2015, 2016, and 2017.
2. The hearing of this matter is set to commence on June 12, 2023, continuing through June 27, 2023.
3. A pre-hearing conference was held on April 28, 2023, with directions made requiring the parties to do a number of things. Included in those directions were the date upon which BCFSA was to provide the index to its Book of Documents and access to those documents to Mr. Ho, May 19, 2023, as well as the date upon which BCFSA was to provide a list of witnesses it intended to call, along with a general summary of what evidence the witnesses would provide (“will-say statements”), also May 19, 2023.
4. Mr. Ho now brings this application, submitting that BCFSA has not complied with the directions as to the disclosure of documents and the provision of will-say statements for its witnesses, and provides an affidavit setting out correspondence between his counsel and counsel for BCFSA regarding those issues. Mr. Ho says that his ability to prepare for the hearing, and to know the case he has to meet, has been prejudiced by that non-compliance, and as a result, Mr. Ho seeks the following relief:
 - (a) An order striking BCFSA’s witness list, with the exception of the witnesses [Witness 1] and [Witness 2];
 - (b) An order prohibiting staff from entering into evidence at the hearing of this matter documents which were delivered to Mr. Ho on May 29 and 30, 2023 (identified as BCFSA’s 7th and 8th supplemental disclosure), or any further documents that may be obtained by Staff in the lead up to the hearing; or
 - (c) An adjournment of the hearing to the earliest available dates available to the parties and the hearing office, but with directions to the parties governing their reciprocal obligations to provide final will-say statements that adequately set out the substance of the witness’ anticipated evidence.
5. BCFSA opposes Mr. Ho’s application. BCFSA takes the position that while some of the will-say statements it initially provided to Mr. Ho were deficient, its interviews of all witnesses on its witness list will be completed by end of day June 2, 2023, with updated will-say statements provided to Mr. Ho at that time. BCFSA suggests that the hearing commence on June 14, rather than June 12, in order to allow Mr. Ho time to prepare in light of any new information in the will-say statements or any new disclosure.

Background

6. As set out above, the transactions at issue in this matter occurred a number of years ago.
7. At the pre-hearing conference held on April 28, 2023, I issued the following directions:
 1. The hearing of this matter will proceed on June 12 - 27, 2023 regarding liability only;

Production of Documents / Books of Documents

2. BCFSA will provide the index to its Book of Documents and electronic access to the documents referred to therein, to Mr. Ho, no later than May 19, 2023;
3. Mr. Ho will provide BCFSA with any documents he intends to rely upon at the hearing, no later than June 5, 2023;
4. Mr. Ho will indicate whether he admits the authenticity of each of the documents listed on BCFSA's index to its Book of Documents, no later than June 5, 2023;

Witness Lists / Summaries

5. BCFSA will provide Mr. Ho a list of witnesses it intends to call, with a general summary of what evidence the witnesses will provide, no later than May 19, 2023; and
 6. Mr. Ho will provide BCFSA a list of witnesses he intends to call, with a general summary of what evidence the witnesses will provide, no later than June 5, 2023.
8. On May 19, 2023, BCFSA sent Mr. Ho its Book of Documents, which included new documents that had not previously been disclosed to Mr. Ho. Also, on that date BCFSA sent to Mr. Ho its "Witness List and Summary of Evidence".
 9. On May 25, 2023, BCFSA wrote to Mr. Ho and indicated that it had received "some documents" from witnesses who were to be called at the hearing, and that it was in the "process of preparing that material for disclosure."
 10. On May 26, 2023, Mr. Ho indicated to BCFSA that he was of the view that the will-say statements provided for the witnesses were deficient. Mr. Ho further indicated that if additional documents had been received from witnesses BCFSA intended to call, he did not understand why those documents were not being provided to him immediately.
 11. In a May 26, 2023 response, BCFSA indicated that the documents from the witnesses ought to be ready for delivery to Mr. Ho on Monday, May 29, 2023.
 12. On May 29, 2023, Mr. Ho wrote to BCFSA, and provided an explanation of his position that the will-say statements were deficient. Mr. Ho also indicated his view on the disclosure requirements applicable to the hearing, and reiterated his request that any further relevant documents be shared with him immediately.
 13. Later, also on May 29, 2023, BCFSA wrote to Mr. Ho and provided updated will-say

statements. BCFSA also indicated at that time that not all witnesses summonsed for the hearing had been interviewed, and as such BCFSA was unable to update some of the will-say statements. BCFSA indicated that it was prepared to update the will-say statements as witnesses were interviewed and new information was obtained.

14. Also on May 29, 2023, BCFSA provided Mr. Ho with further disclosure, listing 43 new documents, totalling 249 pages.
15. On May 30, 2023, BCFSA provided Mr. Ho with still further disclosure, listing 6 new documents, totalling 57 pages.

Discussion

Summary of Witness Evidence/Will-Say Statements

16. As indicated above, the direction issued on April 28, 2023 was that BCFSA provide Mr. Ho with its witness list and a generally summary of what evidence each of those witnesses would provide, by May 19, 2023.
17. Although BCFSA did provide a witness list, as well summaries for each witness by the required date, I agree with Mr. Ho that those summaries fall short of what would be expected, and required, in order that he can properly know the case he has to meet.
18. The general purpose of a will-say statement, or a summary of a witness's evidence in advance of a hearing, is to "ensure fairness, efficiency, and preparedness and to prevent ambush at trial": *Bartch v. Bartch*, 2017 BCSC 1625, para. 7, citing *Sawridge Band v. Canada*, 2007 FC 657.
19. As the court in *Bartch*, indicated, a will-say statement must provide a summary of the substance of a what a witness will say when called to testify. Will-say statements that provide brief and nebulous statements on the topics of a witness' evidence were found, in *Bartch*, to not meet the standard required.
20. I consider that the principles as to the nature of what should be expected of a party when providing a pre-hearing summary of a witness's anticipated evidence, as set out in *Bartch*, to have equal application to a disciplinary hearing under the MBA.
21. In my view, the purpose of the pre-hearing exchange of witness lists and a general summary of the anticipated evidence of those witnesses is precisely to ensure the fairness of the hearing, to ensure that the hearing process is able to proceed efficiently, and to ensure that the parties to the hearing are prepared and know the case they have to meet.
22. I agree with the submissions of Mr. Ho regarding the nature of the will-say statements provided in this matter, and consider that the summaries of the evidence of BCFSA's witnesses, as provided on May 19, 2023, were far too vague to meet the standard expected. Simply put, the majority of those summaries set out only the topic of what the witness was expected to testify about. In many of the witness summaries, no indication was provided as to the substance of what the witness was anticipated to say.
23. As an example, the will-say statement for one of the anticipated witnesses, [Witness 3] indicated that [Witness 3] was anticipated to:

...give evidence regarding his dealings, including communications, with

Jeffrey HO in respect of the 2015 mortgage financing for [Property 1], Vancouver, and the 2015 mortgage refinancing for the [Property 2], Vancouver, including evidence regarding the purpose of the refinancing of [Property 3], Port Coquitlam.

24. Although I consider the above to provide the subjects or topics regarding which [Witness 3] is anticipated to give evidence, it does not provide, in my view, any indication as to what the nature of that evidence will be. I do not consider that a will-say statement such as set out above is sufficient to enable a responding party such as Mr. Ho to prepare his case and to know the case that he has to meet.
25. There were a number of other will-say statements for other anticipated BCFSA witnesses which were similar to that provided for [Witness 3], as well as some which provided less information.
26. While I acknowledge that BCFSA did, on May 29, 2023, provide some updates to the May 19, 2023 will-say statements which added some additional substance, that process of adding substance to the will-say statements remained incomplete at the time of the hearing of this application on June 1, 2023. In fact, BCFSA noted that it did not anticipate being able to provide a final update to the will-say statements to Mr. Ho until end of day on June 2, 2023, which is essentially one week prior to the intended commencement of the hearing.
27. In my view, the late timing of the updates to these will-say statements creates an unfairness to Mr. Ho, who is essentially left with one week to prepare for his hearing, rather than the three weeks that was intended when the date of May 19, 2023 was set in the pre-hearing conference directions.
28. I note that I do not find the submission of BCFSA, that Mr. Ho was generally aware of the role of the witnesses in this matter, as well as the allegations at hand, such that the will-say statements as initially provided were placed in the appropriate context and did sufficiently set out what the evidence of the witnesses would be. I consider that if that were in fact the case, BCFSA would not be endeavoring, as it indicated it was at the hearing of this application, to interview the witnesses and to provide further updates to the will-say statements provided.
29. While I accept that counsel for BCFSA is doing its utmost to ensure that Mr. Ho is provided with the information he requires in order to ensure a fair hearing process, including updating the will-say statements to provide substantive information regarding the witnesses BCFSA anticipates calling at that hearing, I consider the reality of the situation to be that Mr. Ho has lost a significant amount of his preparation time as a result of the fact that appropriate will-say statements were not provided by May 19, 2023.

Document Disclosure

30. Mr. Ho submits that in a disciplinary hearing under the MBA, he is entitled to receive disclosure akin to the *Stinchcombe* standard, as articulated by the Supreme Court of Canada in *R. v. Stinchcombe*, [1991] 2 SCR 326. He submits that this means that BCFSA has a positive duty to disclose to the respondent all relevant information in BCFSA's possession, whether inculpatory or exculpatory.
31. I note that I do not take Mr. Ho to submit that BCFSA is not engaged in ensuring that it is meeting the standard set out above.

32. Rather, Mr. Ho's position is that he is receiving new documents from BCFSA at a late date, just prior to his hearing, due to the fact that BCFSA is just now interviewing its anticipated witnesses to the hearing. Mr. Ho again takes the position that this creates an unfairness to him, as it impedes his ability to prepare for the hearing in a fulsome manner.
33. Again, I agree.
34. While I accept that BCFSA is engaged in appropriate document disclosure as required, as I have indicated above, the reality of the current situation is that with the ongoing disclosure of new documents, and, given that BCFSA was interviewing further witnesses today, the potential for still further document disclosure now, just one week prior to the scheduled start of the hearing, Mr. Ho has lost a significant amount of the time he would have anticipated having to prepare for his hearing.

Decision

35. In my view, the overarching goal of the disciplinary process under the MBA is the protection of the public, with a view to providing a fair and just process for the hearing of disciplinary cases. In conducting disciplinary hearings, the Hearings Division must balance the public interest with the registrant's right to a fair hearing.
36. I consider my view in this regard to be consistent with the comments of the BC Supreme Court in *Navarro v. Doig River First Nation*, 2015 BCSC 2173, where, in considering an adjournment application, Justice Dillon indicated that:

[19] There are numerous factors to be considered on an adjournment application. However, the paramount consideration is the interest of justice in ensuring that there will remain a fair trial on the merits of the action (*Cal-Wood Door* at para. 13; *Graham v. Vandersloot*, 2012 ONCA 60 at para. 12 (*Graham*)). Because the overall interests of justice must prevail at the end of the day, courts are generous rather than overly strict in granting adjournments, particularly where granting the request will promote a decision on the merits (*Graham* at para. 12). The natural frustration of judicial officials and opposing parties over delays in processing civil cases must give way to the interests of justice, which favours a claimant having his day in court and a fair chance to make out his case (*Graham* at para. 12).

37. In this case, Mr. Ho's preferred resolution to the delayed will-say statements and the delayed document disclosure is an order striking BCFSA's witness list, with the exception of two witnesses, and an order prohibiting BCFSA from entering into evidence and relying on any of the new documents it has produced since May 29, 2023.
38. BCFSA has indicated that they consider that they require the witnesses listed on its witness list (absent two changes), and to rely on those documents, in order to ensure that a fair hearing of the allegations set out in the Notice of Hearing occurs. BCFSA's preferred resolution is that the hearing commence two days later than scheduled, in order to provide Mr. Ho with time to prepare in light of the late information now being provided.
39. I find that the appropriate relief in the circumstances is to adjourn the hearing of this matter to the earliest dates available to the parties.
40. In reaching this conclusion, I acknowledge that it is not the outcome sought by either party.

I consider, however, it is the outcome that the interests of justice require.

41. I find that commencing the hearing two days later than planned, will not rectify the unfairness that is created by the fact that Mr. Ho's time to prepare for the hearing and know the case he has to meet has essentially been reduced from three weeks to one.
42. I also do not consider that it would serve the interests of justice, and the public's interest in having this matter heard on its merits, to issue an order preventing BCFSA from calling witnesses and relying on documents which it says are necessary in order to ensure a full and fair hearing of this matter.
43. In reaching this conclusion, I acknowledge Mr. Ho's concerns regarding what he describes as BCFSA's conduct leading up to the hearing of this matter, and the fact that BCFSA did not manage to meet the timelines set out in the pre-hearing conference directions. I note, however, that Mr. Ho, to his credit, acknowledged that he did not consider that BCFSA's actions in this regard were intentional, but that the result of allowing the proceeding to occur as scheduled would be trial by ambush.
44. I consider that in those circumstances, the interests of justice require that an adjournment is granted.

Conclusion

45. The hearing of this matter, scheduled for June 12 through 27, 2023, is adjourned to the earliest dates available to both parties.
46. The parties are directed to provide new proposed hearing dates to the Hearings Division by June 9, 2022.

Dated this 2nd day of June, 2023, at the City of Vancouver, British Columbia

"ANDREW PENDRAY"

Andrew Pendray
Chief Hearing Officer