

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER of the *Insurance Act*, R.S.O. 1990, c. I-8, as amended by the *Financial Services Commission of Ontario Act*, 1997, S.O. 1997, c. 28 (the "Act");

AND IN THE MATTER OF a decision dated October 27, 1999 of the Director, Licensing and Enforcement Division of the Financial Services Commission, by delegated authority from the Superintendent of Financial Services, suspending the level II life insurance licence of Keith Rendall and requiring the submission by him of evidence of satisfaction of continuing education requirements in respect of such licence, failing which the licence would be revoked;

AND IN THE MATTER OF an appeal by Keith Rendall from such decision, pursuant to section 393(10.2) of the Act.

BETWEEN:

KEITH RENDALL

Appellant

-and-

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

BEFORE: Colin H. H. McNairn, Vice Chair of the Tribunal

APPEARANCES: David M. Morneau, for the Appellant
Joe Nemet, for the Respondent

HEARING DATE: December 10, 1999

REASONS FOR ORDER

The Background

The Appellant in this matter brought a motion to stay a decision dated October 27,

1999 (the "Decision") of the Director of Licensing and Enforcement of the Financial Services Commission of Ontario (the "Director"). The Decision was made under delegated authority from the Respondent, the Superintendent of Financial Services (the "Superintendent"). It ordered the suspension of the Appellant's level II life insurance licence for sixty days, commencing December 1, 1999, for failure to satisfy the continuing education requirements for licensees. It also ordered the Appellant to make up the continuing education deficiencies by March 31, 2000, failing which the licence would be revoked. The terms of the order essentially followed the recommendations of an Advisory Board, which were made after a hearing at which the Appellant and the Respondent appeared and made representations in the matter.

The Appellant appealed the Decision to the Tribunal by Notice of Appeal filed on November 26, 1999. The grounds of appeal are that, in making the Decision, the Director did not take into account certain relevant factors, such as the Appellant's life situation and temporary disability, the effect of the decision on the Appellant's ability to earn a living and the Appellant's exemplary record,

The appeal is scheduled to be heard by a three member panel of the Tribunal (the "Panel") on December 20, 1999. The Appellant's motion to stay the Decision, pending the disposition of the appeal, was brought pursuant to section 17(6) of the *Insurance Act*. It was heard by conference telephone call on December 10, 1999.

With the consent of the parties and the Tribunal, the procedural requirements for the making of a motion, under the Interim Rules of Practice and Procedure of the Tribunal, were waived pursuant to Rule 13.05. The parties agreed to the Vice Chair of the Tribunal, who is to serve as chair of the Panel, entertaining the motion and hearing it by conference telephone.

The issue that the motion raised was whether this was an appropriate case for a stay of decision pending the outcome of the appeal to the Tribunal.

Conclusion and Analysis

After hearing the parties, an order was made staying the Decision, pending the disposition of the appeal in this matter, for reasons that were given orally. These written reasons are provided at the request of the Respondent.

Section 17(6) of the *Insurance Act* gives the Tribunal discretion to stay a decision of the Superintendent until it disposes of an appeal. It does not provide any guidance as to how that discretion should be exercised.

The Supreme Court of Canada has adopted a three part test for determining whether proceedings under a statute should be stayed pending a final judicial

determination of whether that statute is constitutional (see *Metropolitan Stores (MTS) Ltd. v. Manitoba Food and Commercial Workers, Local 832* (1987), 38 D.L.R. (4th) 321, and *RJR-Macdonald Inc. v. Canada (Attorney-General)* (1994), 111 D.L.R. (4th) 385). That test has been applied by the Ontario Commercial Registration Appeal Tribunal in deciding whether it should stay a decision, made by it, to revoke the registration of a car salesman under the *Motor Vehicle Dealers Act*, pending the result of an appeal of that decision to the Ontario Divisional Court (see *Re Agha (c.o.b. Saied Aghomohammadi)*, [1999] O.C.R.A.T.D. No. 69). This test would seem to be equally appropriate for guiding the exercise of the Tribunal's discretion to grant a stay under section 17(6) of the *Insurance Act*.

The test, as it applies to the circumstances of the present case, would require positive answers to all of the following questions before a stay is granted:

1. Is there a serious (as opposed to a frivolous or vexatious) question to be tried on the appeal?
2. Would the Appellant suffer irreparable harm if the request for a stay were to be denied?
3. Is the risk of harm to the Appellant if the request were to be denied greater than the risk of harm to the public if the request were to be granted?

The Notice of Appeal does raise a serious question to be tried on the appeal, namely whether the Director took account of all relevant factors in deciding the case on the merits and in deciding on the appropriate penalties to be imposed on the Appellant. The Appellant could be expected to suffer irreparable harm if his request for a stay were to be denied because he would then be unable to carry on his life agent business during the term of his licence suspension, which was to begin on December 1. Moreover, he would be denied the full benefit of his right of appeal under the *Insurance Act* were he to be ultimately successful on the appeal against his licence suspension in that he would have served all or a significant part of that suspension by the time the appeal was decided, without any right to be compensated for any losses suffered during the period of suspension he had served. Finally, this risk of harm to the Appellant would not be outweighed by the risk of harm to the public if the stay were to be granted since the conduct of the Appellant in this case did not, apparently, call into direct and immediate question his competence to carry on his life agent business. If it had, one would expect that his licence would have been revoked, rather than suspended for a short term, or he would have been prevented from resuming his business before he had made up the deficiencies in his continuing education requirements.

It is also significant in this case that the motion requesting a stay was made fairly

promptly after the appeal was launched and that the Appellant has co-operated in arranging for an early scheduling of the hearing of the appeal.

For all of these reasons the Appellant's motion for a stay was granted at the conclusion of the hearing on December 10.

DATED the 17th day of December, 1999 at the City of Toronto, Province of Ontario.

"Colin H.H. McNair"
Colin H. H. McNair, Vice Chair of the Tribunal