

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF the *Mortgage Brokers Act*, R.S.O. 1990, Chapter M. 39 as amended by the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997 s.28 (the "Act");

AND IN THE MATTER OF the Superintendent's Notice of Proposal to Revoke the registration of Global Mortgage Link Corp.;

AND IN THE MATTER OF the decision of the Financial Services Tribunal to uphold the Notice of Proposal;

AND IN THE MATTER OF an application pursuant to subsection 7(9) of the Act to stay the Financial Services Tribunal's decision to uphold the Notice of Proposal.

BETWEEN

**PETER CHATT
GLOBAL MORTGAGE LINK CORP.**

Applicant

- and -

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

Before:

Mr. Paul Litner
Member of the Tribunal and Acting Chair of the Panel

Mr. Kevin Ashe
Member of the Tribunal and of the Panel

Appearances:

Mr. H. J. Doan
For Peter Chatt and Global Mortgage Link Corp.

Mr. Stephen Scharbach
For the Superintendent of Financial Services

Heard:

October, 3, 10, 2003
January 14, 2004

REASONS

Nature of this Hearing

The Applicant brings an application to this Tribunal in which he asks us to stay our Order dated July 17, 2003 (written Reasons For Decision dated January 12, 2004) directing the Superintendent to uphold the Notice of Proposal to revoke the registration of Global Mortgage Link Corp. (the "Tribunal Decision").

The Applicant requests a stay of the Tribunal Decision in order to allow Global Mortgage Link Corp. ("Global") to carry on business as a mortgage broker until the final disposition of the appeals of (i) the criminal conviction of Mr. Chatt and (ii) the Tribunal Decision.

While the *Act* only empowers us to grant a stay pending the disposition of the appeal of the Tribunal Decision, it is important to note that the criminal conviction of Mr. Chatt (which was not directly related to Mr. Chatt's or Global's activities as a mortgage broker), formed the primary basis for the Superintendent's revocation of Global's registration under the *Act* and thus the appeal of the Tribunal Decision is likely contingent upon the outcome of the appeal of Mr. Chatt's criminal conviction.

Further, Mr. Chatt submits that carrying on business through Global is his only source of income and that he requires that income in order to fund his legal expenses in order to perfect the above noted appeals.

The Tribunal convened a hearing on October 3, 2003 to consider the application for a stay of the Tribunal Decision. At the parties' request, the hearing was adjourned to October 10, 2003, in order to enable the parties to come to agreement on conditions that "would protect the public interest" should the stay be granted by the Tribunal. That hearing too was adjourned, and the Tribunal scheduled a teleconference for October 14, 2003, to review the status of the parties' discussions with respect to acceptable conditions to granting a stay of the Tribunal Decision. That session was cancelled at the parties' request.

Written submissions of the Applicant were received by the Tribunal on October 9, 2003. In those submissions, the Applicant included a copy of a Notice of Appeal to the Divisional Court dated August 8, 2003, with respect to the Tribunal Decision.

After hearing the submissions of the parties, an oral order was made staying the Tribunal Decision, subject to the fulfilment of certain conditions to be specified in these written reasons.

Relevant Sections of the Act

Section 7

- 7(1) If the Superintendent proposes to...revoke a registration, the Superintendent shall serve notice of the proposal, together with written reasons for it, on the...registrant.
- 7(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, ...may by order direct the Superintendent to carry out the Superintendent's proposal or refrain from carrying out the proposal and to take such action as the Tribunal considers the Superintendent ought to take in accordance with this Act and the regulations ...

Section 30.1

- 30.1 A party to a proceeding before the Tribunal under Section 7...may appeal to the Divisional Court from the decision or order of the Tribunal in accordance with the rules of the court.

Section 7 (9)

- 7(9) Even though a registrant appeals from an order of the Tribunal under Section 30.1, the order takes effect immediately but the Tribunal may grant a stay until disposition of the appeal.

The Test on a Stay Application

Section 7 (9) of the *Act* provides that the Tribunal may grant a stay of its decision, pending the disposition of an appeal of its decision. It does not provide any guidance as to how the Tribunal's discretion should be exercised in deciding whether or not to grant such a stay.

Although both parties filed written submissions commenting on the test(s) that we should employ in determining whether to exercise our discretion to grant a stay of the Tribunal Decision, neither party was able to point us to a case in which a court or this Tribunal had ever considered the factors which should guide the Tribunal in the exercise of its discretion under Section 7 (9) of the *Act*.

The Tribunal has, however, had to consider the appropriate test to be used in deciding whether or not to exercise its jurisdiction to grant a stay under a similar provision of the *Insurance Act* (Ontario). In *Rendall v. Superintendent of Financial Services* (FST File No. 10087-1999) (a decision of the Financial Services Tribunal dated December 17, 1999), Mr. Colin McNairn, the Vice-Chair of the Tribunal, stated as follows:

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?

We are persuaded by the reasoning of the Tribunal in the *Rendall* case and we conclude that this test would also seem to be appropriate for guiding the exercise of this Tribunal's discretion under subsection 7(9) of the *Act*.

We turn next to an examination of each of the three components of the test in the circumstances of the present case.

Consideration of the "Test"

Part 1: Is there a serious (as opposed to frivolous or vexatious) question to be tried on the appeal?

Counsel for the Superintendent conceded that the appeals were not frivolous or vexatious and that they may have merit. As noted above, the Tribunal only has jurisdiction to grant a stay pending the disposition of an appeal of its own decision. We reviewed the Notice of Appeal filed with us and it does raise a serious question to be tried on the appeal; namely, whether this Tribunal acted in excess of its jurisdiction in adopting its findings of fact and in declining to postpone or stay the proceedings before this Tribunal until Mr. Chatt's criminal appeal was concluded, among other things.

In determining whether or not there is a serious question to be tried, we note from the cases cited to us that the threshold is a low one. Accordingly, we find that the Applicant has met the requirements of the first part of the test.

Part 2: Would the Appellant suffer irreparable harm if the request for a stay were to be denied?

It is reasonable to conclude that the Applicant would suffer irreparable harm if his request for a stay were denied by this Tribunal because he would then be unable to carry on business as a mortgage broker (due to the revocation of the registration of Global under the *Act*). Moreover, he would be denied the full benefit of his right of appeal under the *Act* were he to be ultimately successful in his appeal of this Tribunal's decision since he would have had his license revoked and been unable to carry on business as a mortgage broker for a potentially substantial period of time until the appeal is concluded.

Counsel for the Superintendent conceded that the revocation of the registration of Global has placed the Applicant in a difficult financial situation, and that the Applicant would suffer irreparable harm if the stay is not granted.

Therefore, we find that the Applicant has met the requirements of the second part of the test.

Part 3: Is the risk of harm to the Appellant if the request were to be denied greater than the risk to the public if the request were to be granted?

In order to meet this part of the test, the Applicant must convince the Tribunal that he would suffer greater harm if the stay of the Tribunal's order is not granted than the risk of harm which may be suffered by the public if the stay is granted.

As noted above, the hearing of this matter was adjourned several times. It was the Tribunal's hope that the parties would jointly submit acceptable conditions for consideration by the Tribunal. That was not the case. Although the Applicant and the Superintendent agreed on many of the conditions, significant issues were excluded from agreement; namely, the choice of an acceptable supervisor and the reporting requirements to the Superintendent and his staff.

It was submitted by the Applicant that the risk to the public was modest and that the conditions offered by the Superintendent were too restrictive and not practical. The Superintendent continued to be opposed to the unconditional granting of the stay but did make submissions on the requirements of conditions that the Applicant should be required to adhere to, if the stay were granted.

The Tribunal carefully considered the conditions as offered by both parties and has concluded that the public interest would be adequately safeguarded in staying the Tribunal Decision, provided that the conditions set forth below are met.

Accordingly, the Tribunal is of the view that the Applicant has met the requirements of the third part of the test, subject to fulfilling the conditions set forth below.

Conditions to the Stay of the Tribunal Decision

1. Global shall perfect its appeal of the Tribunal Decision within 60 days of the stay of the Tribunal Decision becoming effective.
2. In any mortgage transaction brokered by Global, Global shall not receive, hold or retain any mortgage funds.
3. Global shall enter into an agreement with a Supervisor. Such a Supervisor may be (i) a lawyer, (ii) a natural person who is a registered mortgage broker or, (iii) a natural person who has been qualified as a mortgage broker and is an officer and director of a corporation registered as a mortgage broker under the *Act*, (except a former agent or employee of Global), approved by the Superintendent or his delegate(s). The Superintendent may waive the former agent or employee of Global requirement in his sole discretion if satisfied that adequate supervisory provisions can be met. The

Supervisor shall enter into an agreement with Global containing the provisions attached hereto and marked as Schedule "A."

4. Global shall retain an Accountant licenced under the *Public Accountancy Act*. The Accountant shall provide accounting services including maintaining all of the books and records of Global.
5. A copy of these conditions and the agreement with the Supervisor shall be provided to the Accountant.
6. If for any reason the Accountant ceases to be retained by Global, Global shall notify the Superintendent immediately. In such circumstances, Global shall retain another Accountant within 30 days of receiving the notice of termination from the original Accountant.
7. Global shall enter into a written agreement with the Accountant concurrently with the granting of a stay. Such agreement shall be submitted to, and approved by the Superintendent prior to its execution.
8. Global shall declare to the Accountant and to the Supervisor all existing bank accounts and shall not open any new bank account without first notifying the Superintendent, the Supervisor and the Accountant.
9. In addition to maintaining all books and records of Global, the Accountant shall prepare quarterly unaudited financial statements which shall be provided to the Superintendent within 30 days of the end of each calendar quarter.
10. Global shall co-operate with and facilitate examinations and inspections by examiners appointed by the Superintendent. Such examinations may take place during normal business hours, with or without notice.
11. It is understood and agreed that any fees or expenses of any type whatsoever arising out of the services provided to Global by the Accountant or arising out of the supervisory activities of the Supervisor, are the responsibility of Global and not the responsibility of the Superintendent or his staff.
12. Global shall not arrange any mortgage transaction except those in which the lender is a Canadian chartered Bank, a trust company licenced under the *Loan and Trust Corporations Act*, an Ontario licenced insurer or a Credit Union under the *Credit Unions and Caisses Populaires Act, 1994*.
13. Global shall obtain and maintain errors and omissions insurance which shall provide coverage of at least \$1,000,000.

ORDER

The Order of the Financial Services Tribunal, dated July 17, 2003 (written Reasons For Decision dated January 12, 2004) is stayed pending resolution of the Applicant's appeal to the Divisional Court under Section 30.1 of the *Act*. This stay shall become effective upon presentation to the Registrar of the Tribunal of the following: (i) written confirmation to the Registrar from the Applicant that all conditions listed herein have been fulfilled; (ii) an executed copy of an agreement between Global and a Supervisor in the form attached as Schedule "A" hereto, and (iii) the Superintendent's written acknowledgement that the conditions listed below have been met by the Applicant (such acknowledgement not to be unreasonably delayed or withheld).

We note that this order is only a stay of the Tribunal Decision, not a reconsideration of the Tribunal Decision. Accordingly, it would be open to either party at any time to apply to the Tribunal to lift the stay. It was agreed to by the parties at the hearing that either party could make application to this Tribunal to lift the stay (on three days notice to the other party) if some dispute or disagreement arises as to whether or not the conditions to the stay described herein continue to be met by the Applicant on an ongoing basis.

Confidentiality Motion

At the hearing, the Applicant also requested that the Tribunal Decision, which had been made public on the Financial Services Commission of Ontario website through the normal and usual means of publication, be kept confidential as it was damaging to his reputation. However, neither counsel for the Applicant nor counsel for the Superintendent was able to refer us to any authority which we would have to make such an order under the *Act* or otherwise.

We note that this Tribunal is a creature of statute and thus only has the jurisdiction and authority to exercise powers granted to it under the *Act* or any other applicable statute. Neither the *Act* nor the *Financial Services Commission of Ontario Act, 1997* appear to grant us the authority to keep confidential a decision of this Tribunal which as a matter of course would be part of the public record. Accordingly, the Applicant's request that the Tribunal Decision be kept confidential or otherwise not be disclosed to the public in accordance with the normal and usual practice is denied.

DATED at the City of Toronto this 29th day of January, 2004

"Paul W. Litner"

Paul W. Litner
Member of the Tribunal
and Acting Chair of the Panel

"Kevin Ashe"

Kevin Ashe
Member of the Tribunal and the Panel

Schedule "A"
Provisions to be Included in a Supervisory Agreement

1. All of Global's mortgage transactions shall be reviewed by the Supervisor to ensure that they comply with the *Mortgage Brokers Act* (Ontario) and the regulations enacted thereunder.
2. The Supervisor shall provide to the Superintendent or his staff, on a bi-weekly basis, written confirmation that he/she has reviewed all of Global's mortgage transactions that took place during the previous week and whether all such transactions are in full compliance with the *Mortgage Brokers Act* (Ontario) and regulations made thereunder. In any case where such transactions are not in full compliance, the Supervisor shall immediately report such non-compliance to the Superintendent.
3. In any case, the Supervisor shall review each mortgage transaction before any funds are received or disbursed.
4. Global shall maintain a separate file for each mortgage transaction including those that have been initiated by an application only, those that are in progress, and those that are closed.
5. Every document relating to a particular mortgage transaction that comes into Global's possession shall be maintained in the relevant file. Each file shall contain a list of every document contained in the file. Such documents shall not be removed from the relevant file and shall not be otherwise disposed of except in accordance with the *Mortgage Brokers Act* (Ontario) and the regulations enacted thereunder.
6. If, for any reason, the Supervisor cannot meet his/her obligations under this agreement, the Supervisor shall immediately inform the Superintendent. Unless and until a replacement Supervisor can be arranged, Global shall cease all mortgage brokering activity.
7. It is understood and agreed that any fees or expenses of any type whatsoever arising out of the activities of the Supervisor are the responsibility of Global and not the responsibility of the Superintendent or the Financial Services Commission of Ontario.
8. This agreement may be terminated at any time upon prior written notice to the other party and to the Superintendent.
9. Subject to termination of the agreement by the parties, this agreement shall remain in force until the earlier of:
 1. A decision by the Financial Services Tribunal (FST) vacating the stay; or

2. The Divisional Court renders its decision on the appeal filed by Global of the FST's decision dated July 10, 2003.
10. Any notice or communication with the Superintendent made under or concerning this agreement shall be addressed to:

Cecil Persaud
Senior Manager, Examinations
Financial Services Commission of Ontario
5160 Yonge Street, 4th Floor
North York, ON M2N 6L9