

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, S.O. 2006, c. 29 (the “MBLA Act”), in particular ss. 7, 18, 19, 21, 29, 38 and 39, and the following Regulations under the Act; the Mortgage Brokerages: Standards of Practice Regulation, O. Reg. 188/08, in particular s. 42, and the Administrative Penalties Regulation, O. Reg. 192/08, in particular, s. 3;

AND IN THE MATTER OF Azfar Mohammad Tahir;

AND IN THE MATTER OF a request for hearing pursuant to s. 39(5) of the MBLA Act.

BETWEEN:

AZFAR MOHAMMAD TAHIR

Applicant

-and-

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

BEFORE:

Mr. Colin McNairn
Member of the Tribunal and Chair of the Panel

APPEARANCES:

Mr. Azfar Mohammad Tahir,
the Applicant, representing himself

Mr. Joe Nemet, Counsel,
representing the Respondent, the Superintendent of Financial Services

HEARD:

November 18, 2009

REASONS FOR DECISION

This matter arises out of a request for a hearing before this Tribunal that was made by the Applicant, Mr. Azfar Mohammad Tahir (“Mr. Tahir”), in respect of a proposal by the Superintendent of Financial Services (the “Superintendent”) to impose an administrative penalty of \$1,000 upon him. The stated basis for the proposal is that Mr. Tahir failed to maintain errors and omissions insurance on his licensed mortgage brokerage as required under the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, S.O. 2006, c. 29 (the “MBLA Act”).

I have decided, after an oral hearing in respect of the Superintendent’s proposal, to confirm that proposal and to direct the Superintendent to carry it out.

A. The Statutory Background

The MBLA Act came into force on July 1, 2008. It prohibits a person from carrying on the business of dealing or trading in mortgages in Ontario without the benefit of a mortgage brokerage licence (ss. 2(2) and 3(2)). It also prohibits an individual from dealing or trading in mortgages in Ontario except on behalf of a licensed mortgage brokerage and with the benefit of a mortgage broker’s licence or a mortgage agent’s licence (ss. 2(3) and 3(3)). There are limited exemptions from these prohibitions none of which is relevant in the present case.

Mortgage brokerage licences, mortgage broker’s licences and mortgage agent’s licences are issued by the Superintendent, the Chief Executive Officer of the Financial Services Commission of Ontario (“FSCO”), under the terms of the MBLA Act (ss. 13 and 14). A mortgage broker’s licence and a mortgage agent’s licence authorize the licensee to deal or trade in mortgages in Ontario on behalf of a single, specified mortgage brokerage (ss. 8(2) and 9(2) of the MBLA Act).

The MBLA Act requires every licensed mortgage brokerage to designate a principal broker (s. 7(6)). The Principal Brokers: Eligibility, Powers and Duties Regulation, O. Reg. 410/07, provides that an individual is eligible for designation as the principal broker of a mortgage brokerage if he or she is a licensed mortgage broker, has authority to deal or trade in mortgages on behalf of the brokerage and is the sole proprietor of the brokerage if it operates as a sole proprietorship (s. 1).

The Mortgage Brokerages: Standards of Practice Regulation, O. Reg. 188/08, requires licensed mortgage brokerages to maintain errors and omissions insurance with certain minimum coverages and in a form approved by the Superintendent (s. 42). This requirement is a prescribed standard of practice with which licensed mortgage brokerages must comply by the terms of the MBLA Act (s. 7(4)).

The MBLA Act provides that if the Superintendent is satisfied that a person has contravened, or failed to comply with, a requirement established under the MBLA Act, he may, by order, impose an administrative penalty on that person (s. 39(1)). If a hearing

is requested in respect of a proposal by the Superintendent to make such an order, this Tribunal may, upon hearing the matter, direct the Superintendent to carry out the proposal, with or without changes, or substitute its opinion for that of the Superintendent (s. 39(6)).

The MBLA Act authorizes the imposition of an administrative penalty for either of two purposes: to promote compliance with the requirements of the Act and to prevent a person from deriving any economic benefit as a result of contravening, or failing to comply with, such a requirement (s. 38(1)). The Administrative Penalties Regulation, O. Reg. 192/08, limits the criteria that the Superintendent may take into account in determining the amount of an administrative penalty, imposed for one of these purposes, to the following;

- the degree to which the contravention or failure was intentional, reckless or negligent;
- the extent of the harm or potential harm to others resulting from the contravention or failure;
- the extent to which the person tried to mitigate any loss or take any other remedial action;
- the extent to which the person derived, or reasonably might be expected to derive, any economic benefit from the contravention or failure; and
- any other contravention or failure by the person to comply with a requirement established under the MBLA Act or any other financial services legislation that occurred during the preceding five years (s. 3).

B. The Relevant Facts

Mr. Tahir was registered under the *Real Estate and Business Brokers Act, 2002*, S.O. 2002, c. 30, Sched. C, as a real estate broker. He decided that it would be a useful adjunct to that business if he were authorized to carry on business as a mortgage broker as well. His evidence before the Tribunal was that he didn't know the detail of the process of qualifying for a licence under the MBLA Act, but decided to put in an application for a mortgage brokerage licence in his own name as sole proprietor, although his preference was to work as a mortgage broker for another person. He stated that as the July 1, 2008 effective date of the MBLA Act was fast approaching, he didn't have the opportunity to fully investigate all his options.

Mr. Tahir submitted an application, dated June 20, 2008, for a mortgage brokerage licence that was received by the Licensing and Market Conduct Division of FSCO on July 2, 2008. The application was signed by Mr. Tahir in his capacity as sole proprietor of the mortgage brokerage. On July 8, 2008, at the request of FSCO, he remedied some

deficiencies in the application and a licence was issued to him on July 10, 2008 with effect from July 1, 2008.

The completed licence application indicated, among other things, that;

- the proposed principal broker for the mortgage brokerage was Mr. Tahir;
- the required E&O insurance would be in place by July 1, 2008; and
- Mr. Tahir was familiar with the laws of Ontario relating to the licensing of mortgage brokerages and promised to abide by those laws and regulations, this being set out by way of a printed form of attestation on the application.

Mr. Tahir testified that, at the time he completed the licence application, he thought that the errors and omissions insurance coverage he had as a real estate broker, through the Real Estate Council of Ontario (“RECO”), would cover him in his mortgage brokerage activities. However, this is inconsistent with the fact that he checked a box on the application form which indicated that he would have the required errors and omissions insurance in place by July 1, 2008, rather than the alternative box that would have indicated that he currently had the required errors and omissions insurance in place. Mr. Tahir admitted, in cross-examination, that he did not check with RECO to determine whether its insurance policy would cover his mortgage brokerage activities. Mr. Tahir also suggested in evidence that after he received his mortgage brokerage licence, he didn’t think there was a need for errors and omission insurance as no brokerage business was being conducted.

The next step in the over-all licensing process under the MBLA Act, after the issue of a mortgage brokerage licence to Mr. Tahir, would be for the brokerage to apply on-line, through the FSCO website, for a mortgage broker’s licence for Mr. Tahir in his individual capacity, using an ID and password e-mailed to the brokerage by FSCO. Such a licence would enable Mr. Tahir to satisfy an essential qualification for serving as principal broker for the licensed mortgage brokerage. Mr. Tahir testified that he didn’t remember receiving an account and ID number from FSCO but conceded that he must have received them. In any event, it appears that Mr. Tahir did become duly licensed as a mortgage broker working for his own mortgage brokerage.

On November 26, 2008, FSCO sent an urgent e-mail to Mr. Tahir in the standard form used to communicate with all licensed mortgage brokerages that were found, by virtue of an October 15, 2008 audit, to be without errors and omissions insurance. That e-mail set out the statutory basis for the requirement that mortgage brokerages maintain errors and omissions insurance and stated, among other things, that;

- the only acceptable insurance was errors and omissions insurance for mortgage brokers secured from one of five FSCO-approved insurance providers, which were listed;

- errors and omissions insurance coverage that might be held through RECO does not cover mortgage services;
- errors and omission insurance was still required even if no mortgage brokerage business had been conducted; and
- a response to the e-mail was required no later than December 3, 2008, such response to include a detailed description of why errors and omissions insurance was not in place, supporting documentation including any insurance policy/declaration page and a statement of the amount of business conducted since July 1, 2008.

Mr. Tahir admitted that he read the e-mail of November 26, 2008 and, in fact, he responded, by e-mail of December 3, 2008, advising that he had been out of the country, had not done any mortgage brokerage business and would “contact one of the companies” for errors and omissions insurance. FSCO referenced this response in a further e-mail to Mr. Tahir, dated January 16, 2009, in which it was noted that no evidence had been received to the effect that the required errors and omissions insurance had been obtained. Mr. Tahir was asked to provide a declaration page for his errors and omissions insurance policy no later than January 30, 2009. However, he didn’t respond to this second e-mail from FSCO. He had not, apparently, contacted any insurers nor did he contact any insurers after receipt of the e-mail of January 16, 2009.

Mr. Tahir testified that he didn’t really want to run his own mortgage brokerage and serve as a principal broker and, therefore, he approached the principal broker of another licensed mortgage brokerage, Centum Future Mortgage Group Inc. (“Centum”), in December of 2008 about the possibility of becoming a mortgage broker with that brokerage and, in fact, joined Centum as a mortgage broker some time in January of 2009. This is not consistent with the documentary evidence introduced by the Superintendent, which indicated that, according to FSCO’s records, Mr. Tahir had become licensed as a mortgage broker with Centum on August 28, 2008. Whether the date of Mr. Tahir’s licensing as a mortgage broker with Centum was the end of August, 2008 or some time in January, 2009, he would likely have already been licensed, at the time, as a mortgage broker for his own mortgage brokerage. Although a licensed mortgage broker cannot be associated with more than one brokerage, FSCO had no system in place that would flag a situation in which a mortgage brokerage made a licence application for an individual who was to work as its mortgage broker where that individual was already licensed as a mortgage broker for another mortgage brokerage.

Mr. Tahir testified that he had paid for and obtained errors and omissions coverage under Centum’s insurance policy and that he had relied on Centum to regularize matters with FSCO, including getting him off the hook as a principal broker. He claimed that he was assured by the principal broker for Centum that everything had been, or would be, taken care of. He did not advise FSCO directly that he was becoming associated with Centum and wanted to give up the licensing related to his own mortgage brokerage.

Ms. Danielle Katic, the Senior Co-ordinator, Strategic Communications, in the Corporate Policy and Public Affairs Unit of FSCO, testified that FSCO had engaged in an extensive outreach program, prior to the implementation of the MBLA Act on July 1, 2008 and thereafter, through conferences, association events and FSCO information sessions, “E-blasts” (generic e-mails), newsletters and postings on the FSCO website, all by way of informing affected persons of the requirements of the Act. Mr. Tahir did not say whether he had taken advantage of any of these sources of information but did admit that he had not looked at the FSCO website before completing his application for a mortgage brokerage licence. Most of the information he gleaned about the licensing process seems to have come from colleagues and acquaintances. Mr. Tahir testified that he had left some voice messages and sent some faxes to FSCO about his situation, to which he didn’t receive replies. But it is not clear to me whether these attempts to get some direction from FSCO were before or after the issue of the notices of proposal.

On February 17, 2009, the Superintendent issued a notice of proposal to revoke Mr. Tahir’s mortgage brokerage licence, a notice of proposal to impose an administrative penalty on Mr. Tahir in the amount of \$1,000 and an interim order suspending Mr. Tahir’s licence for the 15 day period during which he was entitled, under the MBLA Act, to apply to this Tribunal for a hearing on the proposal to revoke his licence. Mr. Tahir filed a request for a hearing before the Tribunal on February 20, 2009. The Superintendent then extended the interim order of licence suspension, by a further order of March 5, 2009, until such time as the notice of proposal to revoke Mr. Tahir’s mortgage brokerage licence is finally determined by the Tribunal.

Some time after receipt of the February 17, 2009 notices and interim order, Mr. Tahir contacted a representative of FSCO and was told that he held two licences – as a mortgage brokerage and as a mortgage broker – and was advised of the process for surrendering his mortgage brokerage licence. On April 17, 2009, Mr. Tahir submitted a Surrender of Mortgage Brokerage Licence Declaration to FSCO. By letter of April 22, 2009, FSCO notified Mr. Tahir of the Superintendent’s acceptance of his surrender of licence and advised that, as a consequence of the surrender, the Superintendent had terminated the interim order to suspend his licence. Mr. Tahir and the Superintendent were then able to settle the matter of the proposed revocation of Mr. Tahir’s mortgage brokerage licence, leaving only the notice of proposal to impose an administrative penalty to be dealt with by the Tribunal.

C. Issues

The issues to be determined in this case are as follows:

1. Is the imposition of an administrative penalty against Mr. Tahir justified in the circumstances of this case; and
2. If so, what should be the amount of that penalty in those circumstances.

D. Analysis

1. Whether an Administrative Penalty is Justified

Before confirming a proposal by the Superintendent to impose an administrative penalty under the MBLA Act and directing the Superintendent to carry out the proposal, I must be satisfied that there has been a contravention of, or a failure to comply with, a requirement established under that Act. In this case, I am satisfied that there was a failure by Mr. Tahir to comply with the requirement under the MBLA Act to maintain errors and omissions insurance in respect of his mortgage brokerage, which continued from July 10, 2008, when the mortgage brokerage licence was issued, at least until February 17, 2009, when the Superintendent issued his notices of proposal and made an order suspending the licence. Therefore, I have the discretion to order the imposition of an administrative penalty upon Mr. Tahir. The question, then, is whether there is any basis for my declining to exercise that discretion in this case.

There are no circumstances of this case that lead me to conclude that an administrative penalty should not be imposed on Mr. Tahir. Rather, several circumstances, taken together, suggest that the imposition of a penalty is appropriate in this case. Mr. Tahir did not make any serious attempts to determine, from reliable sources that were available to him, the precise nature of the errors and omissions insurance requirement for licensed mortgage brokerages. After his receipt of FSCO's e-mail of November 26, 2008, he had no reason to persist in any belief he may have had that the errors and omissions coverage he had under RECO's insurance policy would satisfy the insurance requirement under the MBLA Act or that he need not maintain errors and omissions insurance so long as his brokerage was inactive.

FSCO did not mislead Mr. Tahir in any way as to the requirement to maintain errors and omissions insurance or suggest that it was willing to relax the requirement in his situation. By his own account, Mr. Tahir never looked to obtain the required insurance, despite saying that he would do so in his e-mail to FSCO of December 3, 2008. Rather, he took steps to associate himself as a mortgage broker with another mortgage brokerage. In pursuing this latter course, he didn't seek out, in a timely fashion, any reliable information as to whether he should then surrender his mortgage brokerage licence and, if so, as to how he should go about doing so.

Mr. Tahir didn't appear to understand, at this point, that he was licensed not only as a mortgage broker but as a mortgage brokerage organized as a sole proprietorship. Therefore, he didn't seem to understand that, although he might obtain errors and omissions coverage as a mortgage broker for Centum, under its insurance policy, that didn't relieve him of the obligation that he had as the sole proprietor of his own mortgage brokerage to maintain errors and omissions insurance for so long as the licence of the brokerage continued in effect. The licensing system under the MBLA Act, including the Regulations under the Act, is certainly complicated, but I believe that it is capable of

being mastered by a real estate broker, such as Mr. Tahir, by the exercise of due diligence, given the extent and availability of sources of reliable information.

Even if I were to accept these misunderstandings on the part of Mr. Tahir as an excuse for his failure to take timely steps to surrender his mortgage brokerage licence, the fact remains that he failed to maintain errors and omission insurance during the period between July 10, 2008, when his mortgage brokerage licence was issued, and the time he joined Centum as a mortgage broker, whether that occurred at the end of August, 2008 or, as maintained by Mr. Tahir, in January of 2009. Therefore, Mr. Tahir failed to comply with a requirement under the MBLA Act during that period, for which I find no reasonable excuse.

I am satisfied that the imposition of an administrative penalty on Mr. Tahir would serve one or both of the purposes for which such a penalty may be imposed under the MBLA Act (s. 38(1)). Those purposes are to promote compliance with a requirement established under the MBLA Act and to prevent a person from deriving an economic benefit as a result of contravening, or failing to comply with, such a requirement. The situation in the present case is not unlike that in *Chen v. Superintendent of Financial Services* (FST Decision No. M0359-2009-1) and other previous decisions where this Tribunal concluded that the imposition of an administrative penalty would serve both of the permitted purposes of such a penalty.

2. The Appropriate Amount of the Administrative Penalty

In determining the appropriate amount of the administrative penalty, I must take into account only those criteria that the Superintendent is obliged to apply when proposing a penalty (the criteria and their source are set out at the end of section A of these reasons for decision).

The first criterion is the degree to which the contravention of, or failure to comply with, a requirement established under the MBLA Act was intentional, reckless or negligent. I believe that Mr. Tahir's failure to comply with the requirement to maintain errors and omissions insurance for his mortgage brokerage was negligent if not reckless in that he didn't take serious steps to inform himself of the licensing requirements for mortgage brokerages under the MBLA Act or to take appropriate action on the basis of the information that he did have at his disposal. He also acted negligently if not recklessly when, upon associating himself with another mortgage brokerage, he did not take reasonable and timely action to inform himself as to what, if anything, needed to be done to relieve himself of the obligations in respect of his licensed mortgage brokerage, including the obligation to maintain errors and omissions insurance. His inaction in obtaining the required errors and omissions insurance and his delay in surrendering his mortgage brokerage licence so as to eliminate the need for such insurance was, therefore, negligent if not reckless.

The second criterion is the harm or potential harm to others resulting from the contravention or failure. There was, in my view, no actual harm resulting from Mr. Tahir's failure to maintain errors and omissions insurance since he never commenced his

own mortgage brokerage business so as to put clients at risk in the absence of such insurance. There was, however, some limited potential for harm given Mr. Tahir's capacity, by virtue of his licence, to hold himself out as engaging in the mortgage brokerage business and to conduct mortgage brokerage transactions, although he never did either on behalf of his mortgage brokerage.

The third criterion is the extent to which the person tried to mitigate any loss or take any other remedial action. Mr. Tahir never did initiate any action to obtain errors and omissions insurance for his mortgage brokerage. While he ultimately surrendered his mortgage brokerage licence, eliminating the need for errors and omissions insurance going forward, he didn't do so until April of 2009, after being prompted into action by the Superintendent's notices of proposal. This was too late to remedy his failure to maintain errors and omission insurance for his mortgage brokerage before February 17, 2009, which was the basis for the Superintendent's proposal to impose an administrative penalty of \$1,000.

The fourth criterion is the extent to which the person derived or reasonably might be expected to derive any economic benefit from the contravention or failure. Mr. Tahir received a modest economic benefit that he would not otherwise enjoy, were it not offset by an administrative penalty, derived from his holding of a mortgage brokerage licence (although he did not, in fact, act under that licence) while, at the same time, avoiding payment of a premium for errors and omission insurance coverage for the brokerage during that period.

The fifth criterion is any other contravention or failure by the person to comply with a requirement established under the MBLA Act or with any other financial services legislation that occurred within the preceding five years. There was no suggestion that there was any such contravention or failure in this case.

I have come to the conclusion, after taking account of the relevant criteria for determining the amount of an administrative penalty in their application to the circumstances of this case, that the imposition of an administrative penalty on Mr. Tahir in the amount of \$1,000 would be appropriate.

E. Order

For the foregoing reasons, I hereby direct the Superintendent, by order, to carry out his proposal to impose an administrative penalty on Mr. Tahir in the amount of \$1,000.

DATED at the City of Toronto, this 4th day of December, 2009.

"Colin McNairn"
Colin McNairn, Member of the Tribunal
and Chair of the Panel