

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, S.O. 2006, c. 29 (the “Act”), in particular sections 7, 18, 19, 21, 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, section 3;

AND IN THE MATTER OF Mr. Amit Airi;

AND IN THE MATTER OF a request for hearing pursuant to subsections 21(3) and 39(5) of the Act.

BETWEEN:

MR. AMIT AIRI

Applicant

-and-

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

BEFORE:

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

Mr. John Solursh
Chair of the Tribunal and Member of the Panel

Mr. David Short
Member of the Tribunal and of the Panel

APPEARANCES:

Ms. Larissa Easson, counsel,
representing the respondent,
the Superintendent of Financial Services

No one appearing for the applicant Mr. Amit Airi

HEARD:

May 1, 2009

REASONS FOR DECISION

A. Background and Relevant Facts

The Superintendent of Financial Services (the “Superintendent”), the chief executive officer of the Financial Services Commission of Ontario (“FSCO”), is authorized to issue mortgage brokerage licences under the terms of the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, S.O. 2006, c. 29 (the “Act”), which came into force on July 1, 2008. Mr. Amit Airi applied, as a sole proprietor, for such a licence by completing an application form, under date of April 10, 2008, which was received by FSCO on April 24, 2008 (the “Application Form”). He named himself as the proposed principal broker on the Application Form and marked a box on the Form to indicate that his brokerage would have the required errors and omissions insurance (“E&O insurance”) in place by July 1, 2008. Before that date, the Superintendent issued a mortgage brokerage licence to Mr. Airi.

An earlier decision of this Tribunal, in *Millennium Mortgage Corporation v. Superintendent of Financial Services* (FST Decision No. M0365-2009-1), describes the information about the Act that was distributed by FSCO in advance of the implementation of the Act. The same documents containing that information that were admitted in evidence in that case were admitted in evidence in the present case.

On November 28, 2008 FSCO sent an urgent message, in a standard form, to the principal broker for Mr. Airi’s mortgage brokerage advising that the brokerage was found, as a result of an audit, to have failed to obtain E&O insurance as of October 15, 2008 and requiring an e-mail response no later than December 3, 2008, such response to include a detailed description of why E&O insurance was not in place or documentation of such insurance. Mr. Airi responded by e-mail on December 3, 2008 as follows:

I’m totally new to mortgage industry and I haven’t opened up my brokerage yet. I applied for the license as I was planning to get into mortgage industry but currently I’m working as real estate broker. I haven’t done any mortgage deals and was planning to join under some existing brokerage. I was aware of that I

need error and omission insurance but was not aware of the fact that even if I don't trade I still need the insurance. I'll work quickly on joining under any existing brokerage and there coverage should cover me as well. [sic]

FSCO responded, by letter dated January 16, 2009, setting out the steps required to be taken if Mr. Airi was working for another mortgage brokerage and if the licence issued to his mortgage brokerage was to be surrendered. A copy of the form that had to be completed to surrender the licence was enclosed. The letter also threatened enforcement action against Mr. Airi and his brokerage unless the required information was provided to FSCO by January 30, 2009. FSCO has heard nothing further from Mr. Airi.

On February 17, 2009, the Superintendent issued two notices of proposal to Mr. Airi and made an order against him. The first notice proposed that Mr. Airi's mortgage brokerage licence be revoked because of his failure to maintain E&O insurance in a form approved by the Superintendent, among other grounds. The second notice proposed to impose an administrative penalty of \$1,000 on Mr. Airi due to the same failure to obtain E&O insurance. The order was to the effect that Mr. Airi's mortgage brokerage licence was immediately suspended on the basis of the Superintendent's opinion that a delay in the revocation of his licence would adversely affect the public interest since his mortgage brokerage did not have E&O insurance. This order was subsequently extended, by further order of the Superintendent on March 10, 2009, until such time as the proposal set out in the first notice of proposal is finally determined. The first notice of proposal was accompanied by the Superintendent's reasons for the revocation proposal and the second notice of proposal was accompanied by details of the contravention of the Act that gave rise to the administrative penalty proposal.

On February 23, 2009, Mr. Airi filed a Request for Hearing before the Tribunal, stating as follows:

I'm new as mortgage broker and I haven't brokered any mortgage deal. I was in the process of joining another mortgage broker to fulfill my E&O insurance requirement but the person has been busy and on vacation. Please let me continue my status and I'll fulfill all the requirements. [sic]

The date for a hearing in this matter was set for May 1, 2009 and a Notice of Hearing to that effect was sent by the Registrar of the Tribunal to the parties, Mr. Airi and the Superintendent, on March 24, 2009. The Notice included a statement that "if any party fails to participate in the hearing in accordance with this Notice of Hearing, the Tribunal may proceed without that party's participation and that party will not be entitled to any further notice in the proceeding." This statement is part of the required content of a Notice of Hearing prescribed by the Rules of Practice and Procedure for Proceedings before the Financial Services Tribunal (see Rule 22.03(c)). Mr. Airi did not appear before the Tribunal at the appointed time and place for the hearing on May 1, 2009, as set out in the Notice of Hearing. The Registrar of the Tribunal then phoned Mr. Airi and he advised that he would not be attending the hearing. He indicated, however, that he had received

the Notice of Hearing. The Tribunal decided to proceed with the hearing in Mr. Airi's absence.

B. Relevant Legislation and Regulations

Subsection 2(2) of the Act prohibits a person or entity from carrying on the business of dealing in mortgages in Ontario without a mortgage brokerage licence. Section 7 of the the Act provides for such licences and, in subsection (4), requires any licensee to comply with such standards of practice as may be prescribed, by regulation, for its variety of licence. The Mortgage Brokerages: Standards of Practice Regulation, O. Reg. 188/08 prescribes standards of practice (see section 4) for every mortgage brokerage licence that is issued under the Act, including the following:

42. (1) A brokerage shall maintain errors and omissions insurance in a form approved by the Superintendent with extended coverage for loss resulting from fraudulent acts or shall have some other form of assurance in a form approved by the Superintendent.

(2) The insurance or other assurance must be sufficient to pay a minimum of \$500,000 in respect of any one occurrence involving the brokerage or any broker or agent authorized to deal or trade in mortgages on its behalf and \$1 million in respect of all occurrences during a 365-day period involving the brokerage or any such broker or agent.

Subsection 19(1) of the Act authorizes the Superintendent to revoke a licence issued under the Act in any of the circumstances in which he would be authorized to suspend such a licence under the Act. The circumstances in which a licence may be suspended, and therefore the circumstances in which a licence may be revoked, include the following; "if the licensee contravenes or fails to comply with a requirement established under [the] Act" (subsection 18(1)(d) of the Act).

Before revoking a licence, the Superintendent must first give a notice of proposal to do so to the licensee (subsection 19(2)), in which case the licensee may request a hearing on the proposal before this Tribunal (section 21), as has happened in this case. If the Superintendent is of the opinion that the interests of the public may be adversely affected by any delay in the revocation of a licence as a result of giving a notice of proposal, he may make an interim order suspending the licence (subsection 19(3)), as has also happened in this case.

The Act provides for the imposition of administrative penalties as follows:

38. (1) An administrative penalty may be imposed under section 39 or 40 for either of the following purposes:

1. To promote compliance with the requirements established under this Act.

2. To prevent a person or entity from deriving, directly or indirectly, any economic benefit as a result of contravening or failing to comply with a requirement established under this Act.

(2) An administrative penalty may be imposed alone or in conjunction with any other regulatory measure provided by this Act, including a compliance order or the amendment, suspension or revocation of a licence.

39. (1) If the Superintendent is satisfied that a person is contravening or not complying with or has contravened or not complied with a requirement established under this Act, other than a requirement for which a penalty is provided under section 40 or a requirement prescribed under clause 55(5) (a), the Superintendent may, by order, impose an administrative penalty on the person or entity in accordance with this section and the regulations.

Section 39 goes on to provide that the Superintendent shall give a notice of proposal to impose an administrative penalty, which may be combined with a notice of proposal authorized by any other section of the Act, and that the person on which the penalty would be imposed may request a hearing on the proposal before this Tribunal (subsections (2) and (3)), as has happened in this case.

The Administrative Penalties Regulation, O. Reg. 192/08, provides criteria to govern the amount of an administrative penalty as follows:

3. The Superintendent shall consider only the following criteria when determining the amount of an administrative penalty to be imposed under section 39 of the Act for a purpose set out in section 38 of the Act:

1. The degree to which the contravention or failure was intentional, reckless or negligent.
2. The extent of the harm or potential harm to others resulting from the contravention or failure.
3. The extent to which the person or entity tried to mitigate any loss or to take any other remedial action.
4. The extent to which the person or entity derived or reasonably might have expected to derive, directly or indirectly, any economic benefit from the contravention or failure.
5. Any other contraventions or failures to comply with a requirement established under the Act or with any other financial services legislation of Ontario or of any other jurisdiction during the five preceding years by the person or entity.

Section 41 provides that the maximum administrative penalty that may be imposed for a failure to comply with a requirement of the Act is \$25,000.

Upon holding a hearing on a notice of proposal under the provisions of the Act relating to a proposed revocation of a mortgage brokerage licence or a proposed imposition of an administrative penalty, the Tribunal may direct the Superintendent to carry out the proposal, with or without changes, or substitute its opinion for that of the Superintendent (subsections 21(4) and 39(6)).

C. Issues

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

1. Has there been a failure by Mr. Airi to comply with the requirement under the Act to maintain E&O insurance that would justify the revocation of his mortgage brokerage licence?
2. Is the imposition of an administrative penalty against Mr. Airi appropriate given his failure to obtain E&O insurance in the circumstances of this case and, if so, what should be the amount of that penalty in those circumstances?

D. Analysis

The general approach by which this Tribunal had been guided in previous cases, decided in the context of proposed refusals by the Superintendent of a licence under the Act, is equally applicable in this case. Therefore, we take the view that:

(1) The Tribunal need not show any deference to the Superintendent's opinion on the question of whether there are grounds for the revocation of a mortgage brokerage licence, as proposed in his notice of proposal to revoke the licence and supported by the reasons for that proposal. In other words, the Tribunal must look at the matter afresh, as one of first impression, and come to its own conclusion, based on the evidence before it, as to whether there are grounds for the revocation of the mortgage brokerage licence.

(2) The Tribunal must be mindful, in deciding whether to revoke a mortgage brokerage licence, of two considerations, namely:

- (i) the underlying rationale of the Act in that it is designed to protect the public interest and enhance public confidence in the mortgage industry; and
- (ii) the consequences of a decision to revoke a licence which can be financially severe for the licensee in that such a decision will preclude him or her from earning a livelihood in a chosen line of work.

These considerations must be balanced by the Tribunal.

We now address the two specific matters that we have identified as issues in this case.

1. The Failure to Maintain E&O Insurance

Mr. Airi must have been aware of the requirement that mortgage brokerages maintain E&O insurance as this was referred to in the licence application form that he completed and featured prominently in the information that was distributed by FSCO in advance of implementation of the Act.

Mr. Airi indicated to FSCO, in his e-mail of December 3, 2008, that he was working quickly on joining an existing mortgage brokerage with the result that he would have the benefit of its E&O insurance coverage. But he hasn't joined another brokerage, as he admitted in this Request for Hearing nor has he taken the step of surrendering his own mortgage brokerage licence. Therefore, he remains subject to the requirement under the Act to maintain E&O insurance for his brokerage. He did not have that insurance on July 1, 2008, when it was first required, or on October 15, 2008, the date of the audit, nor has he provided FSCO, or this Tribunal, with evidence of any efforts he may have made to obtain E&O insurance since the latter date.

We have concluded that there has been a failure by Mr. Airi to comply with the requirement under the Act to maintain E&O insurance for his brokerage that justifies the revocation of his mortgage brokerage licence under section 19(1) of the Act, as read with subsection 18(1)(d) of the Act.

2. The Appropriateness of an Administrative Penalty and the Appropriate Amount of any such Penalty

As we have already concluded that Mr. Airi has not complied with a requirement established under the Act, namely the requirement to maintain E&O insurance, there is a basis for imposing an administrative penalty upon Mr. Airi under subsection 39(1) of the Act. We are of the opinion that the imposition of such a penalty would serve one or both of the purposes for which a penalty may be imposed under subsection 38(1) of the Act. Our reasons for coming to this view are essentially the same as those on which we relied in our decision in the *Millennium Mortgage Corporation* case. Most obviously, an administrative penalty on Mr. Airi would serve the first purpose set out in subsection 38(1) of the Act, i.e. promoting compliance with the requirements of the Act, particularly, in the present case, the requirement that mortgage brokerages maintain E&O insurance. We have the discretion, therefore, to impose an administrative penalty, in the circumstances of this case, just as the Superintendent had that discretion in the first instance. We believe that it is appropriate in those circumstances to impose such a penalty.

In determining the appropriate amount of the penalty, we must take into account only those criteria set out in section 3 of the Administrative Penalties Regulation, just as the Superintendent was obliged to take into account those criteria in the first instance.

The first criterion is the degree to which the failure to comply with a requirement of the Act was intentional, reckless or negligent. In the absence of evidence that Mr. Airi took any steps at all to obtain E&O insurance, we can only conclude that his failure to secure that insurance was negligent at a minimum and perhaps even reckless or intentional. The second criterion is the harm or potential harm to others resulting from the failure. There was, in our view, no real harm or potential harm to others resulting from Mr. Airi's failure to obtain E&O insurance as he appears not to have commenced a mortgage brokerage business. The third criterion is the extent to which the person tried to mitigate any loss or take any other remedial action. Mr. Airi did not take action to surrender his mortgage brokerage licence although he was provided with the necessary form by FSCO to do so. Had he taken that action, he would have eliminated the need for E&O insurance going forward.

The fourth criterion is the extent to which the person derived or reasonably might have expected to derive any economic benefit from the failure to comply with a requirement of the Act. Mr. Airi received a modest economic benefit by virtue of retaining a licence to carry on a mortgage brokerage business (although he did not, apparently, broker any mortgage deals), while avoiding payment of an E&O insurance premium for the period from July 1, 2008 until February 17, 2009, when his licence was suspended by order of the Superintendent. The fifth criterion is any other contraventions or failures to comply with a requirement established under the Act or with any other financial services legislation, of Ontario or another jurisdiction, within the preceding five years. There was no suggestion that there was any such contravention or failure in this case.

Taking account of these criteria in their application to the circumstances of this case, we are of the opinion that an administrative penalty upon Mr. Airi of at least \$1,000 would be appropriate. Since the Superintendent has not urged us to increase the proposed penalty of \$1,000, we have decided that an administrative penalty in that amount should be imposed in this case.

E. Orders

On May 1, 2009, we made the following orders in oral form:

We hereby direct the Superintendent, by order, to carry out his proposal to revoke Mr. Airi's mortgage brokerage licence.

We hereby direct the Superintendent, by order, to carry out his proposal to impose an administrative penalty upon Mr. Airi in the amount of \$1,000.

DATED at the City of Toronto, this 15 day of May, 2009.

“Colin McNairn”

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

“John Solursh”

John Solursh, Chair of the Tribunal
and Member of the Panel

“David Short”

David Short, Member of the Tribunal
and of the Panel