

**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, 38 and 39; and the following Regulations under the Act; the Mortgage Brokerages: Standards of Practice Regulation, O. Reg. 188/08, in particular section 42, and the Administrative Penalties Regulation, O. Reg. 192/08, in particular section 3.

**AND IN THE MATTER OF** Manuel Antunes Real Estate Inc.;

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

**BETWEEN:**

**MANUEL ANTUNES REAL ESTATE INC.**

Applicant

- and -

**SUPERINTENDENT OF FINANCIAL SERVICES**

Respondent

**BEFORE:**

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

**APPEARANCES:**

Mr. Patrick Di Monte, Counsel, representing the Applicant

Mr. Joe Nemet, Counsel, representing the Respondent

**HEARD:**

March 24, 2010

## REASONS FOR DECISION

This is a decision rendered in connection with a hearing held pursuant to section 39(5) of the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, S.O. 2006, c. 29 (the “Act”). The hearing was held at the request of the Applicant, Manuel Antunes Real Estate Inc., by its principal broker, Mr. Manuel Antunes.

The Superintendent of Financial Services (the “Superintendent”) originally issued Notices of Proposal, dated February 17, 2009, to revoke the mortgage brokerage licence issued to the Applicant, and to impose an administrative monetary penalty of \$1,000 against the Applicant. The Superintendent also made an interim order dated February 17, 2009, pursuant to s.19(3) of the Act, to immediately suspend the Applicant’s mortgage brokerage licence.

The Superintendent’s interim order and proposed orders arose out of the alleged failure of the Applicant to obtain and maintain errors and omissions liability insurance as required pursuant to the Act and the regulations made pursuant to the Act. Subsequent to the issuance of the Notices of Proposal and Interim Order, but prior to the date of this hearing, Mr. Antunes surrendered the Applicant’s mortgage brokerage licence. Accordingly, the Notice of Proposal to revoke the mortgage brokerage licence was withdrawn and this hearing only relates to the administrative monetary penalty proposed to be levied against the Applicant.

### A. Background and Relevant Facts

The facts in this hearing were relatively straightforward and were largely not contested. The Tribunal’s findings of fact in this hearing are based on the following documents and evidence:

- the Agreed Statement of Facts filed by the parties;
- the Agreed Book of Documents filed by the parties;
- the testimony of Ms. Yen Quan Low Sin, Senior Registration Specialist, in the Licensing, Registration and Analysis Unit of the Financial Services Commission of Ontario (“FSCO”);
- the testimony of Ms. Danielle Katic, Senior Co-ordinator, Strategic Communications in the Corporate Policy and Public Affairs Unit of FSCO; and
- the testimony of Mr. Manuel Antunes, the principal broker of the Applicant.

The Superintendent is the Chief Executive Officer of FSCO and is authorized to issue mortgage brokerage licences under the terms of the Act, which came into force on July 1, 2008.

The Applicant applied for a mortgage brokerage licence under the Act by application dated June 26, 2008 (the “Application”). The Application was signed by Mr. Manuel Antunes, in his capacity as sole proprietor, and it identified Mr. Antunes as the proposed Principal Broker for the brokerage.

The Application contained a printed section that read as follows:

15. Errors and Omissions Insurance: (Check applicable box)

The corporation/partnership/sole proprietor, currently has the required errors and omissions insurance in place. Note: if using an existing policy the applicant must have extended coverage for fraudulent acts in place.

Or

The corporation/partnership/sole proprietor, will have by July 1, 2008, the required errors and omissions insurance in place including extended coverage for fraudulent acts.

Note: Only applicants with the required errors and omissions insurance are licensed on July 1, 2008.

The first box was checked in the Application, representing to FSCO that the Applicant had the required errors and omissions insurance in place as of July 1, 2008. In response to the Application, the Superintendent granted the Applicant a mortgage brokerage licence on July 16, 2008.

Section 42 of the Mortgage Brokerages: Standards of Practice Regulation, O. Reg. 188/08, which came into effect on July 1, 2008, requires mortgage brokerages to maintain errors and omissions insurance in a form approved by the Superintendent, with extended coverage for loss resulting from fraudulent acts and a minimum limit of \$1 million per year and \$500,000 per occurrence (the "E&O insurance"). Alternatively, mortgage brokerages must maintain some other form of assurance in a form approved by the Superintendent. The requirement to maintain the E&O insurance, or some alternative form of assurance, is a prescribed standard of practice with which licensed mortgage brokerages are required to comply by virtue of subsection 7(4) of the Act.

FSCO conducted an audit and found that the Applicant did not have the E&O insurance coverage from one of the approved providers. The Superintendent determined that the Applicant did not have the required E&O insurance in place by January 31, 2009. The Applicant and Mr. Antunes acknowledge that Manuel Antunes Real Estate Inc. did not have the required E&O insurance in place at any time after July 1, 2008.

Mr. Antunes testified that both he and the Applicant held the appropriate registrations under the *Real Estate and Business Brokers Act, 2002*, S.O. 2002, c. 30, Sched. C, to enable him to trade in real estate. As registrants under that Act, they became insured, on payment of the applicable premium, under a group errors and omissions insurance policy in the name of the Real Estate Council of Ontario ("RECO"), covering activities as a real estate broker. The policy did not, however, cover any errors or omissions that were fraudulent or any claim in any way relating to or arising out of an insured acting as a mortgage broker.

Mr. Antunes testified that he initially believed that the RECO errors and omission insurance applicable to the Applicant's real estate brokerage activities would satisfy the E&O insurance requirement that applied to mortgage brokerages under the Act. It was not until February of

2009 that he fully understood that the RECO insurance would not satisfy the E&O insurance requirements under the Act.

Ms. Katic testified as to FSCO's distribution of information about the Act and its requirements before its implementation. She identified a mortgage broker tool kit, a mortgage broker e-information newsletter, slide material used at a FSCO information session, and frequently asked questions about the Act together with the answers as posted on the FSCO Website. Copies of all of these items were included in the Agreed Book of Documents filed by the parties. All of the items deal, amongst other things, with the requirement under the Act that mortgage brokerages maintain the proper E&O insurance.

Ms. Katic testified that FSCO distributed large numbers of each of the first two items she identified. She also testified that various "e-Blasts" were sent to mortgage industry participants, including mortgage brokerages, before and after the implementation date of the Act. However, Ms. Katic testified that she had no direct contact with the Applicant or its principal broker and did not have any knowledge of whether any of these communications were received by either of them.

On November 26, 2008 (following its audit), FSCO sent an urgent, standard form message, addressed to Mr. Antunes' e-mail address, directed to the attention of the principal broker. This e-mail message:

- stated that the principal broker was responsible for ensuring that the mortgage brokerage complies with every requirement of the Act,
- advised that the mortgage brokerage was found, as a result of an audit, to have failed to obtain E&O insurance as of October 15, 2008,
- emphasized the importance of the statutory requirement to have E&O insurance and that a failure to obtain such insurance could lead to enforcement action, including an administrative penalty and revocation of licence,
- noted that the only acceptable insurance was specific E&O mortgage broker insurance secured from one of five FSCO-approved insurance providers, which were listed,
- advised that errors and omissions insurance coverage that might be held through RECO only applies to transactions under the *Real Estate and Business Brokers Act, 2002* and does not cover mortgage services, and
- required 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, supporting documentation including any insurance policy/declaration page and a statement of the amount of business conducted since July 1, 2008.

In her evidence, Ms. Low Sin testified that FSCO received no response from Mr. Antunes to that e-mail communication. In his evidence, Mr. Antunes testified that he had not received the e-mail communication, or at least had no recollection of ever having seen it prior to the commencement

of the proceedings before this Tribunal. I found Mr. Antunes to be a credible and candid witness, and his evidence in this regard was not contradicted.

On December 12, 2008, FSCO sent a registered letter to Mr. Antunes. That letter referred to the lack of a reply to FSCO's November 26, 2008 e-mail communication and stated that FSCO required a written response about his brokerage's E&O insurance and an explanation of his failure to respond to the November 26, 2008 e-mail no later than December 31, 2008. In her evidence, Ms. Low Sin testified that FSCO received no response from Mr. Antunes to that registered letter. In his evidence, Mr. Antunes testified that he had not received the letter and indeed, the evidence filed in the Agreed Book of Documents shows that the letter was returned undelivered.

It was also apparent from the testimony given and the Agreed Book of Documents filed that FSCO sent the letter to an incorrect address – although the P.O. Box was correct, the address used on the letter was not the Applicant's mailing address.

Ms. Low Sin also referred to a copy of a "Telephone Call Record Log" in FSCO's files which indicated that another member of the FSCO staff had telephoned Mr. Antunes on January 22, 2009 regarding his failure to respond to the two previous communications. The record log indicated that Mr. Antunes could not be contacted by FSCO (the line was busy on three attempts).

Mr. Antunes testified that although the phone number being used by FSCO to reach him (his cell phone) was correct, he was out of the country in Portugal at the time. He testified that he had his cell phone with him at all times, such that he could be reached if necessary. He also advised that his staff were also able to reach him by phone. Nevertheless, his testimony was that he did not receive any of these calls from FSCO. Again, I found Mr. Antunes to be a credible witness and his testimony in this regard is uncontradicted.

Mr. Antunes testified that he first learned of the requirement to obtain E&O insurance for the Applicant from a FSCO-approved provider when he returned from visiting his mother in Portugal. At that time, after receiving the February 17, 2009 letter from FSCO's legal counsel (accompanying the Notices of Proposal and Interim Order), he contacted Mr. Nemet for an explanation.

Mr. Antunes testified that, following his discussions with Mr. Nemet, he contacted several of the FSCO-approved insurance companies and inquired about obtaining the requisite E&O insurance. But upon learning the cost of such insurance he ultimately decided not to proceed due to the cost and nuisance of having to obtain the E&O insurance, given that he was not undertaking any activities as a mortgage broker.

Mr. Antunes also filed a request for a hearing with the Tribunal on February 23, 2009, in response to the Superintendent's Interim Order and proposed orders.

At the commencement of the hearing the parties advised that Mr. Antunes had on March 12, 2009 submitted to FSCO a request to surrender his mortgage brokerage licence, and that the surrender was accepted by FSCO on April 3, 2009.

## **B. Issues**

The Tribunal does not have to consider the Superintendent's proposal to revoke the Applicant's mortgage brokerage licence as that licence has been surrendered and the surrender has been accepted by the Superintendent.

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

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

## **C. Analysis**

### *1. Whether an Administrative Penalty is Justified*

Subsection 39(1) of the Act provides that if the Superintendent is satisfied that a person has failed to comply with a requirement established under the Act, he may, by order, impose an administrative penalty on that person. If a hearing is requested in respect of a proposal by the Superintendent to make such an order, the Tribunal must be satisfied that there has been such a failure to comply before confirming the proposal, with or without amendments, and directing the Superintendent to carry it out.

The evidence is clear (in fact, it was agreed) that the Applicant failed to comply with the requirement to maintain E&O insurance under the Act. That failure continued from July 16, 2008 until April 3, 2009, when FSCO accepted the surrender of the Applicant's mortgage brokerage licence. In these circumstances, the Tribunal has clear discretion to order the Superintendent to impose an administrative penalty on the Applicant for its failure to maintain E&O insurance as required under the Act.

Mr. Antunes would like the Tribunal to decline to exercise this discretion on the basis that:

- he initially believed that his RECO insurance would satisfy the E&O insurance requirement under the Act and the Regulations thereunder,
- he was not made aware of the full details of the E&O requirement under the Act until after he received the letter of February 17, 2009 from FSCO's counsel, and the accompanying proposed orders, and subsequently discussed the issues therein with Mr. Nemet,
- his absence from the country until February 2009 prevented him from dealing with the issue sooner, and
- neither he nor the Applicant conducted any mortgage brokerage business during the period from the date on which the mortgage brokerage licence was effective until the surrender of his brokerage licence.

I am not persuaded on the basis of these facts that the Tribunal should refrain from ordering the Superintendent to impose an administrative penalty. Even though the evidence is clear that Mr. Antunes believed he had the necessary E&O insurance, clearly he was mistaken in that belief.

I am satisfied that the imposition of an administrative penalty on Mr. Antunes would serve one or both of the purposes for which such a penalty may be imposed as set out in subsection 38(1) of the Act. Those purposes are to promote compliance with a requirement established under the Act and to prevent a person from deriving an economic benefit as a result of failing to comply with a requirement established under the Act.

The situation in the present case is not unlike that in several previous cases, where the Tribunal concluded that the imposition of an administrative penalty would serve both of the permitted purposes of such a penalty. Mr. Antunes' initial failure to obtain the required E&O insurance for the Applicant warrants the imposition of such a penalty, his ignorance of the law is no excuse. Although FSCO's efforts to communicate with Mr. Antunes were initially unsuccessful, that does not and cannot relieve the Applicant of its obligations to comply with the Act.

## 2. *The Appropriate Amount of the Administrative Penalty*

In determining the appropriate amount of the administrative penalty, the Tribunal must take into account those criteria set out in section 3 of the Administrative Penalties Regulation, O.Reg. 192/08, just as the Superintendent is obliged to take those criteria into account when proposing a penalty.

The first criterion is the degree to which the failure to comply with a requirement of the Act was intentional, reckless or negligent. On the evidence presented it is clear that Mr. Antunes did not intentionally breach the Act, nor can his mistaken belief that he had adequate errors and omissions insurance be fairly characterized as reckless. However, the Tribunal has concluded that Mr. Antunes was negligent in failing to obtain the required E&O insurance before February 17, 2009, when the Superintendent issued his notices of proposal. It is ultimately the obligation of the Applicant and its principal broker to understand and comply with the requirements of the Act. While Mr. Antunes may have not fully understood these requirements, his failure to make any inquiries of FSCO to clarify any misapprehensions he had were, in the Tribunal's view, negligent.

However, there are also mitigating factors that should be taken into account in this case in assessing the degree to which Mr. Antunes was negligent in failing to comply with the E&O insurance requirement.

First, Mr. Antunes was, in the Tribunal's view, of the not entirely unreasonable opinion that his RECO insurance would satisfy the E&O insurance requirement under the Act. Second, the evidence is uncontradicted that Mr. Antunes did not receive any of the notifications from FSCO regarding his need to obtain the E&O insurance until February 2009. Third, and most importantly, Mr. Antunes made real efforts to determine the availability and cost of E&O insurance once he became aware of the requirement, and promptly responded to FSCO's communications, once he actually received them.

These factors were not present in some of the Tribunal's earlier decisions in which the Superintendent's proposal to implement an administrative penalty was upheld.

The second criterion is the harm or potential harm to others resulting from the failure. There was, in the Tribunal's view, no actual harm resulting from the Applicant's failure to obtain E&O insurance as the evidence is that the Applicant never commenced a mortgage brokerage business which would have put clients at risk in the absence of E&O insurance. While there may have been some potential for harm, it was very minimal given the fact that Mr. Antunes did not operate 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. As noted earlier in these reasons, Mr. Antunes made real efforts to determine the availability and cost of E&O insurance commencing early in 2009, when he realized that he didn't have the required E&O insurance through RECO. Although he never did in fact obtain the required insurance before the date on which the Superintendent issued his notice of proposal to impose an administrative penalty, he did promptly apply to surrender the Applicant's licence once he had determined that he did not want to obtain the E&O insurance and have the Applicant carry on business as a mortgage brokerage.

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. By not having to pay for E&O insurance, the Applicant received a modest economic benefit that it would not otherwise enjoy, while holding of a mortgage brokerage licence for the period from July 16, 2008 until April 3, 2009.

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.

In previous cases of a similar nature the Executive Director of Licensing and Market Conduct for FSCO has testified that the rationale for the Superintendent proposing administrative penalties of \$1,000 for failure to maintain E&O insurance was that it was considered to be the minimum amount sufficient to send a signal that non-compliance would be taken seriously and it approximated the amount that a mortgage brokerage would save, on an annual basis, by not paying an E&O insurance premium, which could be expected to range between \$800 and \$1,200.

In the Tribunal's view there may be cases where, having regard to mitigating factors, it becomes clear that a penalty of less than or more than \$1,000 is appropriate. There have been several previous cases in which, based on mitigating circumstances, the Tribunal has determined that a penalty of less than \$1,000 was appropriate (as well as several cases in which the Tribunal sustained a penalty in the amount of \$1,000).

In the present case, taking into account the relevant criteria for determining the amount of an administrative penalty in their application to the circumstances of this case, the Tribunal is of the opinion that the imposition of an administrative penalty on the Applicant in the amount of \$250 would be appropriate.

**D. Order**

For the foregoing reasons, the Tribunal hereby directs the Superintendent, by order, to carry out his proposal to impose an administrative penalty on the Applicant, but with a change in the proposed amount of the penalty from \$1,000 to \$250.

**DATED** at the City of Toronto, this 22<sup>nd</sup> day of April, 2010.

“Paul W. Litner”

Paul W. Litner

Member of the Tribunal and Chair of the  
Panel