

THE 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, 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 s. 3

AND IN THE MATTER OF Dawson Pereira

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

BETWEEN:

DAWSON PEREIRA

Applicant

and

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

BEFORE:

Mr. Ralph Scane
Member of the Tribunal and Chair of the Panel

APPEARANCES:

Mr. Dawson Pereira (the Applicant)

Mr. Stephen Scharbach, representing the Respondent

HEARD:

July 31, 2009

REASONS FOR DECISION

This is a decision upon a hearing held pursuant to s.39(5) of the *Act* at the request of Mr. Dawson Pereira (“Mr. Pereira”). The Superintendent of Financial Services (“the Superintendent”), originally issued Notices of Proposal to revoke a mortgage brokerage licence issued to Mr. Pereira, and to impose an administrative monetary penalty of \$1000 against him, and made an interim order, dated February 17, 2009, pursuant to s. 19(3) of the *Act*, to immediately suspend the said mortgage brokerage licence. The Superintendent’s actions arose out of the failure of Mr. Pereira to obtain and maintain errors and omissions liability insurance as required pursuant to s.7(4) of the *Act* and *O.Reg. 188/08*, s.42, made pursuant to the *Act*. Subsequently, Mr. Pereira obtained the required insurance, effective February 23, 2009, and the interim order suspending the licence was terminated by an order of March 4, 2009. On June 10, 2009, Mr. Pereira applied to surrender the said mortgage brokerage licence, and the surrender was accepted by the Superintendent. This request for hearing was made only with respect to the administrative monetary penalty proposed to be levied against Mr. Pereira.

Background

The *Act* requires persons and entities engaged in certain dealings in mortgages to be licensed as provided therein. These provisions came into force on July 1, 2008. The Superintendent encouraged those who had been engaged in mortgage activities which would require a licence under the *Act*, or who wished to do so after that date, to submit applications in advance of that date, to minimize interruptions or delays to those activities resulting from the licence approval process.

Mr. Pereira was a licensed real estate broker. He submitted an application, dated May 29, 2008, for a mortgage brokerage licence in his name. That application required the applicant to state, by checking the appropriate box, either that the applicant has the required errors and omissions insurance in place, or, that the applicant would have such insurance in place by July 1, 2008. Mr. Pereira checked the box indicating that he would have the required insurance in place by the date mentioned. The application also asked for the principal place of business address in Ontario. This area was completed in hand printing, giving an address intended to be read as a number on “Tideswell Blvd” in Toronto. The printing of the last four characters in “Tideswell” was sufficiently unclear as to be capable of being misread. Unfortunately, the name was misread in the Superintendent’s office as “Tideswsic”, and was so recorded as the business address of the brokerage.

In fact, Mr. Pereira did not have the required insurance in place by July 1, 2008, nor afterward until February 23, 2009, following the issuance of the Notices of Proposal and interim order referred to above. He did some checking with insurers, but, between his activities connected to his real estate business and serious personal problems which were engaging him at that time, he decided not to proceed with a mortgage brokerage business. To the extent that he would participate in mortgage brokering, he would do so as a

mortgage broker or mortgage agent with another brokerage. However, the mortgage brokerage licence for which he applied had been issued to him on July 1, 2008, and he took no steps either to comply with his undertaking to obtain insurance or to give up the licence, until spurred into activity by an e-mail communication from the Superintendent's office on November 26, 2008.

The Superintendent had caused an audit of the insurers approved by him to issue the insurance required by the *Act* to ascertain any mortgage brokerages licensed under the *Act* which did not in fact have the necessary insurance as of October 15, 2008. A substantial number of these were discovered, including Mr. Pereira. On November 26, 2008, a lengthy e-mail message was sent by the Financial Services Commission of Ontario (FSCO) to all of these apparent defaulters, advising that the recipient appeared to be in default, reminding of the requirements, and requesting a response, to include certain explanations and information, by December 3, 2008. The e-mail also contained a question and answer section, to deal with frequently asked questions. The first two questions and answers supplied were as follows:

Q: I have not done any business under the *MBLAA* and/or got my licence just in case I wanted to do business in the future. Do I still need coverage and am I still in violation of the *MBLAA*?

A: Yes you still require coverage and are in violation of the *MBLAA*.

Q: I have not done any business under the *MBLAA* and want to cancel my licence. Does this exempt me from possible enforcement action?

A: You are subject to possible enforcement action even if you now elect to cancel your licence since you declared on your application that you would have the insurance in place for July 1, 2008 and on that basis you were issued a licence.

On the same date, Mr. Pereira, who acknowledged receiving the e-mail of November 26, 2008 from FSCO, sent an e-mail to FSCO reading:

Dear FSCO

Please terminate my registration of Dawson Pereira (Brokerage # 11294) and all agents under me effective November 26, 2008. I will be joining Sun Mortgage as a mortgage agent.

Unfortunately, Mr. Pereira did not address his own e-mail to the e-mail address indicated by FSCO in its e-mail for reply, namely MortgageBrokerageAudit@fso.gov.on.ca, which would have gone directly to the division of the Superintendent's office which had conducted and was now following up on the results of the insurance audit. Instead, he used both of two addresses he obtained from the website, which were more general addresses used by FSCO. Even so, the message should have been forwarded from the addresses he used to the proper recipients within FSCO. For some unexplained reason,

this did not happen. Counsel for the Superintendent has acknowledged that the Superintendent must accept responsibility for this failure.

Mr. Pereira said in his evidence that after sending his e-mail of November 26, 2008 to FSCO, he thought “it was all done”. The responsible officials in the Superintendent’s office, not being aware of his communication (which did not in any event address the matters required to be addressed by the FSCO e-mail) considered Mr. Pereira a non-responder to the FSCO e-mail. FSCO sent Mr. Pereira (and all others whom it had identified as non-responders) a registered letter, dated December 12, 2008, to the address for service given on the application for licence. The “address for service” supplied in Mr. Pereira’s application differed from the “business address” which he supplied. It is FSCO policy to send registered mail to the “address for service”, and ordinary mail to the “business address”. This letter repeated the requirements set out in the FSCO e-mail of November 26, 2008, enclosed a copy of that e-mail, pointed out that Mr. Pereira had not responded to that e-mail and required a written response by December 31, 2008, including an explanation for the failure to respond to the e-mail.

On receipt of this letter, Mr. Pereira telephoned the number at FSCO given in the letter, and was asked to forward to the appropriate division a copy of his e-mail of November 26, 2008. This was received by that division, the Licensing and Market Conduct Division, on December 19, 2008. On January 16, 2009, that Division mailed to Mr. Pereira a form letter used to reply to brokerages which had indicated a desire to surrender their licences. This attached a declaration of surrender, to be completed by the brokerage concerned and returned to FSCO. Unfortunately, as this letter was being sent by ordinary mail, FSCO used the “business address” it had on its records for the brokerage. As mentioned above, this was the wrong address, due to the misreading of the original handwritten application, and was never delivered to Mr. Pereira. Also, FSCO, which keeps returned undelivered mail in the appropriate file, did not have any such record of a return. The Tribunal finds that it was not returned to FSCO, and therefore FSCO was unaware that the January 16, 2009 letter was undelivered. Accordingly, FSCO treated Mr. Pereira as a non-responder, and his file was ultimately forwarded to the Legal Services Branch of FSCO for further action. On February 17, 2009, the Notices of Proposal and Interim Order referred to above were issued. The mishaps of communication which occurred on and following November 26, 2008 were unfortunate for Mr. Pereira. A witness for the Superintendent, Ms Low Sin, an officer of the Licensing and Market Conduct Division of FSCO, expressed the opinion that, had Mr. Pereira completed the surrender of his licence before the file was sent to the Legal Services Division to institute formal prosecution, FSCO would not have levied the administrative monetary penalty. Obviously, neither the Notice of Proposal to revoke the licence, nor the Interim Order of Suspension which accompanied the Notice of Proposal to levy the monetary penalty would have come into existence.

Mr. Pereira spent considerable time during his evidence describing his efforts to resolve another problem which arose with the Superintendent. He discovered that he was listed as principal broker at two brokerages, his own, and at another brokerage with whom he wished to work as a mortgage broker or mortgage agent. The evidence did not make it

clear how this came about. However, while his attempts to resolve this situation no doubt added to the stress Mr. Pereira was undergoing due to the regulatory steps being taken against him by the Superintendent, the Tribunal finds that this issue is not relevant to the issues before it, the appropriateness of the administrative monetary penalty being reviewed here and its amount.

Decision

The first question is whether the Superintendent was entitled to levy any administrative monetary penalty. By s.39(1) of the *Act*, the Superintendent is entitled to impose such a penalty upon a person or entity who “is contravening or not complying with or has contravened or not complied with a requirement established under this Act....” *O.Reg. 188/08*, s.42 requires holders of mortgage brokerage licences to hold errors and omissions insurance in a prescribed form. Mr. Pereira held such a licence from the date of its grant on July 1, 2008 until it was suspended by the interim order of February 17, 2009, and does not dispute that he was without the prescribed insurance throughout this period. The Superintendent clearly met this threshold test.

Subject to meeting the requirement of s.39(1) of the *Act*, the imposition of an administrative monetary penalty is a matter within the discretion of the Superintendent, exercised within the directions and limits of the *Act* and its regulations. S. 38(1) of the *Act* provides that such a penalty may be imposed

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

Both grounds apply here. The Superintendent was, and this Tribunal is entitled to proceed to examine the circumstances to determine whether to impose such a penalty, and in what amount.

The Tribunal holds that, notwithstanding the communications mishaps between Mr. Pereira and the Superintendent described above, an administrative monetary penalty is warranted in this case. In the absence of these failures, and particularly the wrong addressing of the letter to Mr. Pereira of January 16, 2009, and assuming that he would have submitted the surrender document promptly after receiving it, Mr. Pereira would probably have escaped without being assessed a penalty as a result of prosecutorial discretion of the Superintendent. However, the fact that he was in a position to have such a penalty levied against him was completely a matter of his own knowing contravention of the insurance requirements. He had been in contravention for almost five months, and had moved to mitigate or remedy the contravention only after receipt of the e-mail from FSCO on November 26, 2008, which made it clear that FSCO had identified him as a person not in compliance with the requirements. Mr. Pereira must also bear significant responsibility for the communications problems referred to. No fault is attributed to him

for the initial failure of his e-mail of November 26, 2008 to FSCO to reach the proper division, but this really only imposed a delay of slightly over three weeks in dealing with his indication of a desire to surrender his licence. The significant cause of the failure to surrender the licence before formal prosecution steps were initiated in mid-February, 2009, was the wrong address on the letter of January 16, 2009 from the Superintendent. Here, Mr. Pereira must share the responsibility with the Superintendent. The Tribunal finds that the interpretation of the hand printed address made by FSCO during the processing of the application for licence, while not inevitable, was certainly possible, and Mr. Pereira must accept responsibility for creating this possibility for error through his unclear hand printing. The harm to Mr. Pereira arising out of the communication lapses is a matter for consideration when the amount of the penalty is determined.

The considerations in assessing an administrative monetary penalty are governed by *O.Reg. 192/08*, made pursuant to the *Act*. S.3 of the Regulation provides:

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 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 take 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 jurisdiction during the preceding five years by the person or entity.

With respect to #1, the Tribunal finds that Mr. Pereira knew of the requirements for insurance at the time of his application. He undertook in his application to obtain such insurance by July 1, 2008, and testified that he did make enquiries about obtaining it, but he did not obtain it until late in February, 2009, after the formal prosecution against him had been initiated by the Superintendent.

With respect to #2, there is no evidence that Mr. Pereira made any effort to deal in mortgages as a brokerage, and no actual harm to anyone resulted. Potential for harm did exist in that he was in a position to deal in mortgages by virtue of his licence if an

opportunity to do so had arisen and tempted him, but this is speculative and the Tribunal does not weigh this potential harm significantly against him in this case.

With respect to #3, Mr. Pereira did, from November 26, 2008 on, attempt to surrender his brokerage licence and initiated communication with FSCO to implement this. His difficulties here, arising out of the communication errors described above, were partly, but not wholly of his own making. It is under this criterion that the possible loss of an opportunity to benefit from an exercise of a discretion not to prosecute must be weighed.

With respect to #4, Mr. Pereira did gain an economic benefit from the insurance premiums he would have had to pay from July 1, 2008, had he complied with the *Act*. Giving him the benefit of all doubt, and charging him only with premiums until his decision to surrender the licence was first communicated to FSCO in November, 2008, he saved almost five months of premiums.

There was no suggestion that #5 has any relevance in these proceedings.

At the hearing, counsel for the Superintendent acknowledged that, bearing in mind errors in the FSCO office that impeded Mr. Pereira's attempt to surrender his brokerage licence, this would be a proper case to discount the standard \$1000 penalty that the Superintendent has been assessing in these cases of violations occurring during the transition to and early stages of the implementation of the *Act*. However, counsel did not make submissions as to the proper amount of the penalty. Many previous panels of this Tribunal have pointed out that the Tribunal does not afford deference to decisions of the Superintendent in connection with the enforcement of the *Act*. However, the Tribunal has also recognized that the Superintendent has in fact been assessing a standard penalty, and that in fairness to those who may have accepted his standard penalty without appeal, it should currently treat the \$1000 amount as a mean from which to judge appropriate deviations in particular cases. *Wong v. Superintendent of Financial Services, M0375-2009-1*. Weighing all the above factors, and giving Mr. Pereira the benefit of any doubt, the Tribunal assesses the administrative monetary penalty in this case at \$400.

Order

The Tribunal directs the Superintendent to assess an administrative monetary penalty of \$400 against Mr. Pereira.

Dated at Toronto this 12th day of August, 2009.

"Ralph Scane"

Ralph Scane
Member of the Tribunal and Chair of the Panel