

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 7-10, 14, 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 Ms. Roberta Hashemi;

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

BETWEEN:

MS. ROBERTA HASHEMI

Applicant

-and-

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

BEFORE:

Mr. Martin Brown
Member of the Tribunal and Chair of the Panel

APPEARANCES:

Ms. Roberta Hashemi, acting in her own behalf as applicant

Mr. Stephen Scharbach, counsel,
representing the respondent,
the Superintendent of Financial Services

HEARD:

July 29, 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”, sometimes called the “MBLAA”), which came into force on July 1, 2008.

Ms. Roberta Hashemi, the applicant in this proceeding, applied for a mortgage brokerage licence under the Act to be held by her personally as sole proprietor of a proposed mortgage brokerage business. The application was dated May 20, 2008 but it appears that the application was not submitted until June 17, 2008. The application form contained a section that read as follows:

12. 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 from fraudulent acts in place.

or

The corporation/partnership/sole proprietor, will have by July 1, 2008, the required errors and omissions insurance in place.

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

In the application form as completed and signed on behalf of Ms. Hashemi (the “Application”), the second box in the errors and omissions insurance section is checked, which states that Ms. Hashemi would have in place by July 1, 2008, the required errors and omissions insurance.

The Application names Ms. Hashemi as the proposed principal broker for the mortgage brokerage. In response to the Application, Ms. Hashemi was granted a mortgage brokerage licence on July 2, 2008, effective as of July 1, 2008.

Mortgage brokerages are required by section 42 of the *Mortgage Brokerages: Standards of Practice Regulation* 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 (“E&O insurance”). Alternatively, mortgage brokerages must maintain some other form of assurance in a

form approved by the Superintendent. This Regulation came into effect at the same time as the Act, on July 1, 2008. The requirement to maintain E&O insurance, or some alternative form of insurance, is a prescribed standard of practice with which licensed mortgage brokerages are required to comply by the terms of subsection 7(4) of the Act.

On November 26, 2008, FSCO sent an urgent e-mail to Ms. Hashemi, at her e-mail address as set out in the Application;

- stating that the principal broker was responsible for ensuring that the mortgage brokerage complies with every requirement of the Act,
- advising 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,
- emphasizing the importance of the requirement, in the regulations under the Act, 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,
- noting that the only acceptable insurance was specific E&O mortgage broker insurance secured from one of five FSCO –approved insurance providers, 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, supporting documentation including any insurance policy/declaration page and a statement of the amount of business conducted since July 1, 2008.

This e-mail also included a series of additional questions and answers (“Q and A’s”). The first Q and A was 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*.

On December 9, 2008, Ms. Hashemi responded by e-mail to this communication stating that she had been travelling and had not had a chance to check her e-mails. She further stated that she did not have errors and omissions insurance and that she had neither been active nor intended to be active for a few months as she had to attend to her sick grandmother in Portugal. She requested to know if it would be possible to put her licence application on hold for this time period.

On January 16, 2009, the FSCO sent a letter to Ms. Hashemi to advise her that she could surrender her mortgage brokerage licence and sent her the appropriate Declaration form to do so. FSCO requested that this Declaration be returned by January 30, 2009 and stated that failure to do this would result in her brokerage being considered to be non-compliant with the E&O insurance requirement and that FSCO may pursue enforcement action against her brokerage.

On January 30, 2009, Ms. Hashemi informed FSCO by e-mail that she was in the process of obtaining errors and omissions insurance and, having stated that she had been out of the country until January 29, 2009, requested an extension of the deadline to February 2, 2009.

On February 17, 2009, the Superintendent sent Ms. Hashemi, by e-mail, registered and regular mail, a notice of proposal to revoke her mortgage brokerage licence, a notice of proposal to impose an administrative penalty on her in the amount of \$1,000 and an interim order suspending her licence for the 15 day period during which Ms. Hashemi was entitled, under the Act, to apply to this Tribunal for a hearing on the proposal to revoke her licence and the proposal to impose an administrative penalty. On February 27, 2009, Ms. Hashemi filed a request for hearing with the Tribunal in respect of the notice of proposal issued by the Superintendent to impose an administrative penalty.

On February 20, 2009, Ms. Hashemi e-mailed to FSCO a copy of a Certificate of Professional Liability Insurance indicating that the required E&O insurance coverage was in effect for her mortgage brokerage for the period from February 20, 2009 until April 1, 2009.

On April 27, 2009, Ms. Hashemi faxed to FSCO a request to surrender her mortgage brokerage licence. The required Declaration was actually dated April 10, 2009 and Ms. Hashemi advised that she had faxed it to FSCO on that date but, for reasons unknown, it was not received by FSCO until Ms. Hashemi faxed it (again) on April 27, 2009.

At the commencement of the hearing before the Tribunal, the parties advised that as a result of Ms. Hashemi's surrender of her mortgage brokerage licence, the notice of proposal to revoke her licence had been resolved by way of minutes of settlement between Ms. Hashemi and the Superintendent.

However, Ms. Hashemi did not have E&O insurance in place for several months from July 1, 2008, the effective date of her mortgage brokerage licence and February 20, 2009, when she obtained the required coverage.

B. Issues

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

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

C. Analysis

Ms. Hashemi testified before the Tribunal that:

- She was aware that she needed errors and omissions insurance in place but she overlooked putting it in place because she was travelling to and from Portugal to look after her sick grandmother and so she was otherwise occupied.
- She stated that she had tried to put her licence application on hold but she was advised by FSCO that this was not permitted and so she then decided to apply for errors and omissions insurance.
- However, she had never been active in the mortgage brokerage business and did not intend to be, so she then decided in April, 2009 not to proceed and consequently to surrender her licence, as she could not afford to keep errors and omissions insurance in place with no business.
- Ms. Hashemi also stated that the mortgage brokerage business was not a priority for her at the time and so she did not act in a timely manner. She acknowledged that she was aware that errors and omissions insurance should have been in place from July 1, 2008, in accordance with her Application for a licence, but she failed to act as she had more pressing priorities looking after her grandmother. She said that she had originally made a few enquiries about insurance but did not do anything further.
- Even when she received the e-mail dated November 26, 2008 from FSCO requiring an urgent response, Ms. Hashemi admitted that she did not immediately take action, partly due to her travel to Portugal. However, she agreed that she was in Canada for periods of a week or two in between three to four week trips to Portugal and she did ultimately respond from Toronto to the FSCO e-mail on December 9, 2008. She told the Tribunal that she had decided at that time that she wanted to keep her mortgage brokerage licence. However, she had spoken with someone at FSCO and was advised that she could not put the licence on hold. So, when FSCO told Ms. Hashemi that she should surrender her licence, she then decided to put errors and omissions insurance in place, so she could keep her licence. She again acknowledged that she clearly understood that she should have had errors and omissions insurance in place during the period of her licence.
- Ms. Hashemi stated that when her errors and omissions insurance became effective on February 20, 2009, she was not at that time aware of the interim order to suspend her licence, or the notice of proposal to revoke her licence or the notice of proposal to impose an administrative penalty on her, which were sent out by FSCO on February 17, 2009. She acknowledged receiving these documents but not seeing them before February 20, 2009 when she arranged the insurance.

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 and directing the Superintendent to carry it out.

The Tribunal is satisfied that Ms. Hashemi failed to comply with the requirement, established under the Act, to maintain E&O insurance. That failure continued for the period from July 1, 2008 until February 20, 2009, when Ms. Hashemi arranged such insurance. Therefore, the Tribunal has the discretion to impose an administrative penalty on Ms. Hashemi on the basis of her failure to maintain E&O insurance.

Ms. Hashemi admitted that she clearly understood the need for having insurance in place during the period of her licence. I am sympathetic to her position that she had to travel outside the country for extended periods, during the relevant timeframe, to attend to a sick family member. However, in my view, Ms. Hashemi had plenty of time in Canada to consider the need to arrange insurance from the date her licence was granted and, indeed, from the date of her original Application. Therefore, I am not persuaded that the Tribunal should decline to exercise its discretion to impose an administrative penalty.

Therefore, I believe that, in the circumstances, the imposition of an administrative penalty on Ms. Hashemi is justified on the basis of her failure to maintain E&O insurance while holding a mortgage brokerage licence under the Act.

Subsection 38(1) of the Act provides that an administrative penalty may be imposed for either of two purposes, namely 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. I have concluded that the imposition of an administrative penalty on Ms. Hashemi would satisfy both of these purposes (similar conclusions were reached by the Tribunal in *Millennium Mortgage Corporation v. Superintendent of Financial Services* (FST Decision No. M0365-2009-1), in *Mortgage Magician Inc. v. Superintendent of Financial Services* (FST Decision No. M0396-2009-1), in *Chen v. Superintendent of Financial Services* (FST Decision No. M0359-2009-1), and in other decisions of this Tribunal). Such a penalty would promote compliance by other persons with the requirements of the Act including, in particular, the requirement to maintain E&O insurance. It would also prevent Ms. Hashemi from realizing a modest economic benefit that she would otherwise enjoy, were it not offset by an administrative penalty, derived from her holding of a mortgage brokerage licence for the period from July 1, 2008 until February 20, 2009 when she arranged E&O insurance. Of course, she didn't exploit that benefit as she was not active in the mortgage brokerage business.

In determining the appropriate amount of the penalty, I 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. It appears to me that Ms. Hashemi was

negligent in the sense that, while she clearly understood the requirement to obtain insurance, she was seriously careless in not taking action due to there being other priorities in her life at that time and so she simply overlooked the insurance requirement and admitted to so doing.

The second criterion is the harm or potential harm to others resulting from the failure. There was, in my view, no actual harm to others resulting from Ms. Hashemi's failure to obtain E&O insurance as she never operated 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 to others, it was very minimal given the fact that Ms. Hashemi was not active.

The third criterion is the extent to which the person tried to mitigate any loss or take any other remedial action. In my view, Ms. Hashemi made no real effort to obtain errors and omissions insurance for several months from the date of her Application on May 20, 2008, received by FSCO on June 17, 2008, and Ms. Hashemi did not take serious and timely action to remedy the situation until February 20, 2009, when she arranged E&O insurance coverage. By that time, on February 17, 2009, the Superintendent had issued his interim order to suspend her licence, his notice of proposal to revoke the licence and his notice of proposal to impose an administrative penalty. Ms. Hashemi states that she was not aware of these actions when she arranged the insurance. Nevertheless, Ms. Hashemi agreed she was aware of the insurance requirement but simply did not take the necessary action.

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. As I have already concluded, Ms. Hashemi received a modest economic benefit as a result of her failure to maintain E&O insurance.

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.

I am also mindful of evidence presented to the Tribunal through the affidavit of Mr. Grant Swanson, Executive Director Licensing and Market Conduct for FSCO. In his affidavit, Mr. Swanson 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 also that 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.

Taking account of the five criteria for determining the amount of an administrative penalty, in their application to the circumstances of this case, I am of the opinion that an administrative penalty upon Ms. Hashemi of \$1,000, as proposed by the Superintendent,

would be appropriate. This is not out of line with penalties imposed by this Tribunal in other similar cases (see, for example, *Millennium Mortgage Corporation v. Superintendent of Financial Services* (FST Decision No. M0365-2009-1), *Mortgage Magician Inc. v. Superintendent of Financial Services* (FST Decision No. M0396-2009-1) and *Chen v. Superintendent of Financial Services* (FST Decision No. M0359-2009-1)).

D. Order

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

DATED at the City of Toronto, this 13th day of August, 2009.

“Martin Brown”

Martin Brown, Member of the Tribunal
and Chair of the Panel