

**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; 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** a Notice of Proposal to Revoke the Mortgage Brokerage Licence issued to Continental Capital Inc. (“Continental”) and a Notice of Proposal to impose an Administrative Monetary Penalty on Continental, dated February 17, 2009;

**AND IN THE MATTER OF** Continental’s Request for a Hearing before the Financial Services Tribunal (the “Tribunal”) pursuant to subsections 21(3) and 39(5) of the Act.

**BETWEEN:**

**CONTINENTAL CAPITAL INC.**

Applicant

- and -

**SUPERINTENDENT OF FINANCIAL SERVICES**

Respondent

**BEFORE:**

Mr. Denis Boivin  
Member of the Tribunal and Chair of the Panel

**APPEARANCES:**

Mr. Patrick Jackson, Principal Broker for Continental, representing the Applicant

Mr. Robert Conway, representing the Respondent

**HEARD:**

July 14, 2009

## REASONS FOR DECISION

### A. BACKGROUND

On March 30, 2008, Mr. Patrick Jackson applied for a mortgage brokerage licence on behalf of Continental Capital Inc. (“Continental”). In this application, Mr. Jackson was identified as the President and Proposed Principal Broker for Continental. Among other things, he declared that his brokerage would have by July 1<sup>st</sup>, 2008 the required errors and omissions insurance in place.

The Superintendent of Financial Services (the “Superintendent”) issued a licence to Continental on May 25, 2008. However, during the course of an audit conducted on October 15, 2008 it was determined that this brokerage did not have the liability insurance that was required by July 1, 2008 the date on which the new *Mortgage Brokerages, Lenders and Administrators Act* 2006, S.O. 2006, c. 29 (the “Act”) came into force.

Compliance officers with the Financial Services Commission of Ontario (the “Commission”) informed Mr. Jackson of this deficiency by email on November 26, 2008, by registered mail on December 12, 2008, and by telephone on January 22, 2009. During each of these communications, Mr. Jackson was asked to provide proof of liability insurance on behalf of Continental.

On February 17, 2009, having not received the requested proof of insurance, the Superintendent issued two Notices to Continental: 1) a Proposal to revoke its brokerage licence and 2) a Proposal to impose an administrative monetary penalty of \$1,000. The Superintendent also issued an Interim Order suspending the licence of Continental immediately and until the expiry of the period for requesting a hearing before the Financial Services Tribunal (the “Tribunal”) with respect to the Notices.

Three days later, on February 20, 2009 the Commission received a copy of a Certificate of Professional Liability Insurance issued to “Patrick Jackson”. The certificate was dated February 20, 2009 and showed a period of coverage ending April 1<sup>st</sup>, 2009. The Commission subsequently received proof of a second certificate of insurance, dated April 6<sup>th</sup>, 2009 showing that Continental was covered from April 1<sup>st</sup>, 2009 to April 1<sup>st</sup>, 2010.

On March 2, 2009 Mr. Jackson requested a hearing before the Tribunal with respect to the two Notices issued by the Superintendent. There is no evidence before the Tribunal that the Interim Order issued by the Superintendent was extended following this request for a hearing. Presumably, having received the required proof of insurance, there was no need to maintain a suspension of Continental’s licence. In fact, at the commencement of the Hearing, counsel for the Superintendent confirmed that the Notice of Proposal to revoke the brokerage’s licence had been withdrawn.

## **B. ISSUE**

Since the Notice of Proposal to revoke the licence of Continental has been withdrawn, the only issue is whether an administrative monetary penalty of \$1,000 is justified in the circumstances of this case.

## **C. STATUTORY FRAMEWORK**

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, unless this person or entity is exempt from the requirement to have such a licence. There is no suggestion that Continental benefits from any of the current exemptions.

Section 7 of the Act provides for brokerage licences such as the one issued to Continental in May of 2008. Subsection 7(4) requires any licensee to comply with such standards of practice as may be prescribed for the brokerage licence. In addition, subsection 7(6) requires a licensee to designate a principal broker to exercise such powers and perform such duties as may be prescribed, and provides that this person – Mr. Jackson in the present case – shall carry out his or her powers and duties in accordance with any regulations.

Standards of practice for mortgage brokerages have been prescribed by O. Reg. 188/08, the “Standards of Practice Regulation”. According to section 42 of this regulation, every brokerage licenced under the Act shall maintain errors and omissions insurance of at least \$500,000 per occurrence and \$1 million per policy period in a form approved by the Superintendent, with extended coverage for loss resulting from fraudulent acts, or shall have some other form of assurance approved by the Superintendent. Of significance, section 42 creates no distinction whatsoever on the basis of whether the licenced brokerage actually conducts any business with respect to mortgages. On the contrary, according to section 4 of the Standards of Practice Regulation, the requirement to maintain liability insurance is a standard of practice that applies to “every brokerage license that is issued under the Act”.

When they are read together, sections 38 and 39 of the Act provide that a general administrative penalty may be imposed on a mortgage brokerage such as Continental if three conditions are met:

- 1) The brokerage is contravening or not complying with or has contravened or not complied with a requirement established under the Act, other than a requirement for which a penalty is provided under section 40 or a requirement prescribed under subsection 55(5)(a).
- 2) The penalty is aimed at promoting compliance with the requirements of the Act or at preventing the brokerage from deriving an economic benefit from not complying with said requirements.
- 3) The Superintendent has followed the procedural steps prescribed by section 39, in particular the requirements to give written notice of the proposal to impose a

monetary penalty to the brokerage and to inform the brokerage of its right to request a hearing before the Tribunal.

With respect to the amount of the administrative penalty, section 41 of the Act provides a maximum penalty of \$25,000 for a brokerage such as Continental and O. Reg. 192/08, the “Administrative Penalties Regulation”, provides that the Superintendent is authorised to determine the amount of the penalty up to this limit (section 2) having regard only to the five criteria listed in section 3 of the regulation. These criteria are discussed below under the heading “Analysis”.

Lastly, according to subsection 39(6) of the Act, when the Tribunal has held a hearing following a notice of proposal to impose an administrative penalty, the Tribunal may, by order, direct the Superintendent to carry out the proposal, with or without changes, or substitute its opinion for that of the Superintendent.

#### **D. EVIDENCE**

The evidence presented to the Tribunal during the Hearing was straightforward and uncontradicted. Counsel for the Superintendent filed a Book of Documents containing three types of documents:

- 1) General documents establishing the need for mortgage brokerages licenced under the new Act to maintain errors and omissions insurance and describing the many measures taken by the Commission to inform potential applicants of this requirement (Tabs 1-14).
- 2) Witness statements from Yen Quan Low Sin (Compliance Officer with the Commission – Tab 15), Danielle Katic (Communications Officer with the Commission – Tab 16), and Grant Swanson (Executive Director of Licensing and Market Conduct at the Commission – Tab 17), describing the rationale for compulsory liability insurance and for administrative monetary penalties, enumerating the measures taken by the Commission to communicate with the mortgage industry before and after the coming in force of the new Act in July of 2008, describing the audit conducted by the Commission in the Fall of 2008 to determine whether licenced brokerages had the required insurance, and enumerating the measures taken following this audit to ensure compliance with the requirement for liability insurance.
- 3) With respect to Continental, the application for a mortgage brokerage licence made in March of 2008 (Tab 18), documents establishing all communications between Continental’s Principal Broker, Mr. Jackson, and the Commission with respect to its failure to maintain errors and omissions insurance and emphasising the need to rectify the situation without delay (Tabs 19-24 and 26), and copies of the two certificates of insurance obtained on behalf of Continental and filed with the Commission in February and April of 2009 (Tabs 25 and 27).

During the Hearing, Mr. Jackson confirmed that he had read the documents contained in the Book of Documents and accepted that they be introduced as evidence for the truth of

their contents. He was candid in his testimony and did not attempt to contradict any of the information disclosed in these documents and witness statements. With respect to his failure to secure liability insurance on behalf of Continental, his excuse was both direct and simple: he testified that the brokerage was not fully operational and he could not afford to pay the premiums for the required insurance. During his testimony, he did not ask the Tribunal to excuse his behaviour, but simply to reduce the amount of the penalty proposed by the Superintendent as much as possible.

## **E. ANALYSIS**

As conceded by Mr. Jackson, there is a basis for imposing an administrative monetary penalty upon Continental under subsection 39(1) of the Act. Indeed, both of the substantive conditions outlined above are present in the circumstances of this case:

- 1) For a period of approximately eight months (1 July 2008 to 17 February 2009), Continental was in contravention of the requirement imposed by subsection 7(4) of the Act, namely, the requirement to comply with the standards of practice prescribed for brokerage licences. Liability insurance is a standard prescribed by section 42 of the Standards of Practice Regulation and Mr. Jackson, as Principal Broker for Continental, had the statutory obligation to carry out his powers and duties in accordance with said regulation (subsection 7(6) of the Act). During his testimony, Mr. Jackson did not contend that he was unaware that brokerages licenced under the new Act needed errors and omissions insurance. Given the extensive measures taken by the Commission to inform the mortgage industry of this requirement (Tabs 1-14) and given the fact that this requirement is specifically mentioned in the application form submitted on behalf of Continental (Tab 18), the Tribunal is prepared to infer that Mr. Jackson knew about this requirement when he submitted the licence application on March 30, 2008.
- 2) The imposition of a monetary penalty on Continental would serve both of the purposes for which a penalty may be imposed under subsection 38(1) of the Act. First, a penalty would encourage Continental to maintain the errors and omissions insurance that it eventually purchased in February and April of 2009 for as long as it remains licenced as a mortgage brokerage. In particular, a penalty would encourage Continental to renew its insurance policy before the expiry of its current coverage in April of 2010. Although the Tribunal has some empathy for Mr. Jackson and the financial constraints he was facing when he applied for a mortgage brokerage licence on behalf of Continental, the Tribunal is far more concerned with the public interest pursued by compulsory liability insurance. This standard of practice is primarily designed to protect the public from the financial consequences of negligence and fraud by a brokerage or its authorised agents and brokers (Tab 17). Any gap in a licensee's coverage – whether momentary or ongoing – exposes the public to potential financial hardship far exceeding any premiums that would have been necessary to secure the required insurance. Second, the penalty would prevent Continental from deriving an economic benefit as a result of failing to comply with the requirement for liability insurance for approximately eight months, that is, the period of time between July 1, 2008 (the

effective date of the licence) and February 17, 2009 (the date of the Interim Order suspending this licence). According to the certificates of insurance produced by Mr. Jackson (Tabs 25 and 27), the annual premium for the coverage eventually purchased on behalf of Continental was \$850. Although the benefit derived from not paying this premium for eight months is modest, it is undeniable.

In determining the amount of the monetary penalty, the Tribunal must take into account only the five criteria listed in section 3 of the Administrative Penalties Regulation, just as the Superintendent was obliged to limit himself to those criteria in the first instance. Having reviewed the evidence and submissions, the Tribunal makes the following findings with respect to the application of these criteria to the circumstances of this case:

- 1) *The degree to which Continental's contravention was intentional, reckless or negligent:* As discussed above, Mr. Jackson must have known about the requirement for errors and omission insurance when he applied for a mortgage brokerage licence on behalf of Continental. During his testimony, he candidly admitted that the only reason for not securing this insurance was the inability of his brokerage to cover the costs of the premiums. However, when Continental was faced with the prospect of losing its licence, Mr. Jackson managed to borrow the required funds from his sister. Based on this evidence, the Tribunal finds that Mr. Jackson's failure to secure liability insurance by July 1<sup>st</sup> 2008 was reckless at a minimum, if not intentional.
- 2) *The extent of the harm or potential harm to others resulting from Continental's contravention:* The Tribunal accepts the un-contradicted testimony of Mr. Jackson to the effect that his brokerage did not engage in any mortgage business from 1 July 2008 to 17 February 2009, the timeframe during which Continental was an uninsured licensee. As such, the contravention of Continental did not result in any actual harm to the public. However, the Tribunal is troubled by the admission readily made by Mr. Jackson during cross-examination. When asked whether he would have accepted an unsolicited mortgage business opportunity in exchange for a \$1,000 fee, Mr. Jackson admitted that he would have conducted the business even though his brokerage was not insured against his professional liability. This admission suggests that Continental's contravention exposed the public to potential harm for a period of approximately eight months.
- 3) *The extent to which Mr. Jackson took any remedial action on behalf of Continental:* Mr. Jackson did not respond to the email sent by the Commission on November 26, 2008 (Tab 19) informing him that an audit had been conducted and that his brokerage had been included on the list of brokerages without the required insurance. The email requested a response by December 3<sup>rd</sup> 2008. During his testimony, Mr. Jackson admitted that he received this email. A subsequent letter sent by registered mail on December 12, 2008 (Tab 20) was also unanswered – indeed it was returned to the Commission on January 9, 2009. Like the previous email, the letter requested an explanation for Continental's failure to have the required insurance and proof that this contravention had since been remedied. On January 22, 2009 a compliance officer spoke to Mr. Jackson by telephone and sent

an email confirming the contents of this conversation (Tab 21). Once again, Mr. Jackson was asked to provide both an explanation and proof of insurance on behalf of Continental. On February 3, 2009 (Tab 23) Mr. Jackson responded to the email sent on January 22<sup>nd</sup> 2009 saying that he was still working on securing the required errors and omissions insurance and explaining that his email address had changed and that the one used in the November 26<sup>th</sup> 2008 email was not working. (In his testimony, however, he acknowledged that he received the email sent on November 26, 2008.) On February 20, 2009, three days after the Superintendent issued the two Notices and the Interim Order suspending the licence of Continental, Mr. Jackson finally provided proof that the required insurance had been obtained (Tab 24). The certificate of insurance submitted to the Commission indicated that February 20, 2009 was the effective date of coverage (Tab 25). Based on this evidence, the Tribunal finds that Mr. Jackson took minimal remedial action on behalf of Continental to mitigate its failure to have the required liability insurance.

- 4) *The extent to which Continental derived any economic benefit from its contravention:* On the basis of the evidence before the Tribunal with respect to the cost of the insurance eventually purchased by Mr. Jackson on behalf of Continental (Tabs 25 and 27), it is reasonable to infer that Continental derived a modest economic benefit of approximately \$570 as a result of failing to comply with the requirement for liability insurance for eight months.
- 5) *Any other contraventions by Continental during the preceding five years:* This criterion has no application in the circumstances of this case. There was no suggestion that Continental has, in the past, failed to comply with any other requirement under the Act or with any other legislation.

In view of these findings, the Tribunal concludes that an administrative penalty of \$1,000 is entirely appropriate to secure Continental's future compliance with the Act and to prevent this brokerage from deriving an economic benefit from its contravention. Since the Superintendent has not urged the Tribunal to increase the proposed penalty, it is decided that a penalty of \$1,000 should be imposed in this case.

## **F. ORDER**

The Tribunal orders the Superintendent to carry out his Notice of Proposal to impose an administrative monetary penalty of \$1,000 on Continental.

**DATED** at the City of Toronto, this 30th day of July, 2009.

\_\_\_\_\_  
"Denis Boivin"  
Denis Boivin, Member of the Tribunal  
and Chair of the Panel