

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. Douglas Wong;

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

BETWEEN:

MR. DOUGLAS WONG

Applicant

-and-

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

BEFORE:

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

Ms. Elizabeth Shilton
Member of the Tribunal and Member of the Panel

Ms. Heather Gavin
Member of the Tribunal and Member of the Panel

APPEARANCES:

Mr. Douglas Wong, Applicant, in person

Mr. Joe Nemet, Counsel,
representing the Respondent,
the Superintendent of Financial Services

HEARD:

May 12, 2009

REASONS FOR DECISION

This is a decision upon a hearing held pursuant to s. 21(3) of the *Mortgage Brokerages, Lenders and Administrators Act*, S.O. 2006 (“the Act”) at the request of Mr. Robert Wong (“Mr. Wong”). Mr. Wong requested the Tribunal to review Notices of Proposal issued by the Superintendent of Financial Services (“the Superintendent”) proposing to revoke a mortgage brokerage licence issued to Mr. Wong, and to impose an administrative monetary penalty of \$1000 against him, and an interim order dated February 17, 2009, made pursuant to s.19(3) of the Act, to immediately suspend the said mortgage brokerage licence. The Superintendent’s actions arose out of circumstances surrounding the failure of Mr. Wong to obtain and maintain appropriate errors and omissions liability insurance as required pursuant to O.Reg.188/08, s.42, made pursuant to the Act. In late February of 2009 Mr. Wong obtained the insurance, and on May 4, 2009, prior to this hearing, the Superintendent accepted a surrender of the mortgage brokerage licence in question. Accordingly this hearing proceeded on the matter of the administrative monetary penalty only.

Background

The provisions of the Act requiring persons and entities engaged in certain dealings in mortgages to be licenced came into force on July 1, 2008. The Superintendent was encouraging those who had been engaged prior to that date in activities which thereafter would require an appropriate licence, or who might wish to do so thereafter, to submit applications in advance of that date, to minimize interruptions to these activities resulting from the licence approval process.

Mr. Wong was employed as an accountant at a real estate brokerage owned by Mr. C.. He also acted as a real estate agent or broker at that brokerage. An application for a mortgage brokerage licence for a corporation with a similar name to that of the real estate brokerage, also to be owned by Mr. C., was prepared by Mr. Wong and submitted on behalf of his employer. A mortgage brokerage licence No. 11523 was subsequently issued to that corporation, naming Mr. C. as the principal broker under that licence. At the same time, Mr. Wong submitted an

application for a mortgage brokerage licence, proposing himself as principal broker. The application form used, headed in large bold print, "Mortgage Brokerage Licence Application", was the appropriate form for a brokerage licence, but not for applications for licences for any of the other categories for dealing in mortgages established by the Act. In this application, Mr. Wong checked a box indicating that he undertook to have required errors and omissions insurance in place by July 1, 2008. A mortgage brokerage licence was subsequently issued to Mr. Wong on July 3, 2008, as number 11522, and it was this licence that was the subject of the revocation proceedings and interim order which were originally intended to be reviewed in this application.

In fact, Mr. Wong never obtained the required insurance before the Superintendent issued the Notices of Proposal and the interim order referred to above. The Superintendent discovered, through an audit of policies issued by the insurers approved to issue policies for the purposes of the Act, that a policy had never been issued to him. A standard-form e-mail message was sent to Mr. Wong on November 26, 2008, advising him of the omission, telling him of the approved insurers and their issuing brokers, warning that insurance coverage obtained in conjunction with his real estate business did not apply to mortgage transactions, and, among other things, that insurance was required even if no business was being done under the licence. The email required a reply containing certain specific information by December 3, 2008. No reply having been received by this date, the Superintendent sent Mr. Wong a follow-up letter, dated December 12, 2008, by registered mail. This attached a copy of the earlier e-mail message and required a written response by December 31, 2008.

Mr. Wong did not respond directly to the December 12 letter. He did, however, send an e-mail message, dated December 18, 2008, to FSCO's Mortgage Broker Audit address, the address provided in all the correspondence, attaching a letter of the same date addressed to Mr. Sean Mitchell, Manager (A), Licensing Compliance, and asking for clarification of the issue raised in the letter. The letter read as follows:

"I, Douglas Wong, a new Mortgage Broker registrant #11522, have been informed by an E/O Insurance Broker [naming a broker referred to in the November 6, 2008 e-mail message referred to above] that since I am registering under my Mortgage Brokerage namely [Naming the corporation owned by Mr. C., referred to above] #11523, I do not need E/O Insurance for myself. If it is not true, please advise and I shall obtain my own E/O Insurance immediately in order to be in compliance with [the Act].

Thank you for your assistance in the matter.

Doug Wong, Mortgage Broker"

There was no reply to this message from the Superintendent's office.

The next communication to Mr. Wong of which we were told was another form letter from FSCO, dated January 16, 2009 and headed "Re: Surrender of Mortgage Broker Licence". This letter began:

You have now notified FSCO that, either:

- a) you wish to apply to surrender your brokerage licence; or
- b) you are now working at a different brokerage from the one noted above.

The letter enclosed surrender documentation, and advised the recipient of the procedure to be followed if he was now working for a different brokerage. It provided the names of two persons in the Superintendent's office if there were further questions, and asked for a reply by January 30, 2009, failing which "your brokerage will be considered non-compliant with the E&O insurance requirement and FSCO may pursue enforcement action against you and your brokerage."

There was no further communication of which we were made aware. Mr. Wong did not respond to this letter. The Notices of Proposal and interim order referred to above followed. Mr. Wong did subsequently obtain insurance from an approved provider, effective February 25, 2009, and filed a certificate thereof with the Superintendent on February 27, 2009, but by that time the Notices of Proposal and interim order had been issued.

In the course of his oral evidence, Mr. Wong testified that he had worked for Mr. C. or his company as its accountant since 1985 and filed the applications discussed in this decision in his capacity as Mr. C.'s employee. While Mr. C. was not presently engaged in the mortgage brokerage business and did not have any immediate intention of doing so, like many real estate brokers he filed an application for a licence prior to July 1, 2008. When Mr. Wong prepared the applications for Mr. C.'s mortgage brokerage and for himself, it was "crystal clear" in his mind that he intended to continue working for Mr. C. or his companies. He never had in his mind any intention to work for himself in the mortgage business in competition with Mr. C..

We find Mr. Wong to be a credible witness. It was clear from his testimony that he did not understand the difference under the Act between a mortgage brokerage and a mortgage broker, despite FSCO's efforts to make this information available. We find that Mr. Wong really intended to apply for a licence to work as a mortgage broker or mortgage agent working for C.'s mortgage brokerage. In submitting the application form for a mortgage brokerage licence, he was applying for the wrong type of licence for his intended degree of involvement in the mortgage business. He did not realize the significance of this (although the application form used is unambiguous as to its purpose), and there was nothing in the application submitted to alert the Superintendent's staff to his error.

The fact that Mr. Wong misunderstood the nature of his licence is corroborated by his letter to Mr. Mitchell, dated December 18, 2008, quoted above. In that letter, Mr. Wong identifies himself as a Mortgage Broker, and it appears that the information he gave the insurance broker was that he was a mortgage broker who would be working for the brokerage owned by Mr. C., licensed as #11523. If this had indeed been the case, the information provided by the insurance broker to the effect that Mr. Wong would be covered by the insurance issued to Mr. C.'s brokerage, and would not need separate insurance himself, would have been accurate. Even in December, 2008, therefore, Mr. Wong was confused about the various possible roles under the Act, and which one he had actually applied to be licenced for. Likewise in his submission to the

Tribunal, prepared in written form in advance of the hearing and submitted as an Exhibit, Mr. Wong repeatedly refers to his “Mtg Broker Lic”. We have concluded that it was only at the hearing itself that Mr. Wong finally understood that he had applied for the wrong licence for what he intended to do.

Decision

The first issue is whether the Superintendent was entitled to levy an administrative monetary penalty at all. Unquestionably, he was so entitled. A regulation pursuant to the Act clearly requires holders of mortgage brokerage licenses to hold errors and omissions insurance in a prescribed form. Mr. Wong held such a licence operative from July 3, 2008 until its suspension by the interim order, and was uninsured throughout that period. He was therefore not in compliance with a requirement under the Act, and the Superintendent was thus entitled to impose an administrative monetary penalty upon him, pursuant to s. 39(1) of the Act. Although Mr. Wong was confused about his status under the Act, there is a legal principle that ignorance of the law or of its provisions does not excuse a breach of that law. That principle must surely apply strongly to what is essentially a consumer protection measure.

The application of an administrative monetary penalty in a given situation where there has been a breach of the Act is a matter, in the first instance, for the exercise of the Superintendent’s discretion. 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. In this case, nothing done by the Superintendent induced error (although we do note that if FSCO had responded directly to Mr. Wong’s letter of December 18, 2008, further confusion might well have been avoided). As mentioned, the application form completed by Mr. Wong was unambiguous. Subsequent communications to Mr. Wong were clear that they were being made to the holder of a mortgage brokerage licence. The Act is clear as to the various categories of licensee, and in our view it should be rare that a holder of a licence under the Act is allowed to escape the imposition of a penalty altogether because of his/her own mistake about the relevant rules. There was a lack of due diligence on Mr. Wong’s part in this case. We find, in agreement with the Superintendent, that this is a proper case to apply an administrative monetary penalty.

In a written statement received in evidence with Mr. Wong’s assent, Mr. Grant Swanson, the Executive Director Licensing and Market Conduct at FSCO, gave evidence to the effect that administrative monetary penalties in the amount of \$1000 were uniformly levied by the Superintendent in all cases of non-compliance with the insurance requirements for licensees under the Act, and explained the reasoning behind this policy decision. The amount was set at what was seen as the lowest level likely to induce compliance across the industry with the insurance requirements, and no “reliable metric for harm” exists to enable accurate differentiation of degrees of guilt. We do not purport to reproduce here the full sophistication of

Mr. Swanson's argument.

The arguments for a standardized penalty for all transgressors may have validity when applied to penalties applied by the Superintendent at first instance. The Tribunal, however, does not operate under the same practical constraints, and accordingly it is not and should not be bound by the same considerations when a standardized penalty imposed by the Superintendent comes before it for review. The Tribunal affords opportunity for oral hearing, cross-examination and argument to a degree that is not practicably available when a penalty is being assessed originally. A person or entity invoking review of an administrative monetary penalty by this Tribunal opens up all aspects of the propriety of the penalty, and must accept the risk of increase as well as entertaining the hope of decrease or cancellation thereof: see *Millenium Mortgage Corporations v. Superintendent of Financial Services*, FST Decision No. M0365-20009-1, May 11, 2009. Parenthetically, we see no reason that the Superintendent might not, after the evidence at a hearing unfolds, see fit to argue for a greater, or consent to a lower penalty than was originally imposed.

The determination of the amount of an administrative monetary penalty is 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 a person or entity tried to mitigate any loss or to 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.

We consider s.3 ¶1-4 to have some application in this case. In our view, the most critical section of the Regulation for assessing the quantum of the penalty, in the circumstances of this case, is s.3¶1. This subsection suggests to us a consideration of the degree of what might be called moral turpitude, running from intentional disobedience of the law at the most severe end, through recklessness as to whether the law is or is not complied with, to mere carelessness in complying with requirements at the least severe end. In the context of the Regulation and the Act which

gives it force, we are of the view that “negligent”, as used in the subsection, encompasses a lack of the degree of care and regard for the interests of the members of the public with whom a licence holder may expect to come in contact in the exercise of the privilege sought and enjoyed through the holding of the licence which the public may reasonably expect. Envisaging a numerical scale, a true “scofflaw”, one who deliberately decides not to comply with the law for reasons of his or her own advantage, and who deliberately seeks to avoid and evade the consequences of his non-compliance as long as possible, would be assigned the highest number. On such a scale, Mr. Wong would be at the lowest end. We have found that he did not intend to transgress the requirements of the Act, although his lack of diligence in coming to an understanding of the Act’s requirements, which we hold constitutes being “negligent” within the meaning of section 3(1) of the Regulation, makes him deserving of a penalty which is neither nominal nor trivial.

With respect to s.3¶2, although Mr. Wong did not in fact carry on business as a mortgage brokerage during the period his licence was operative, he had applied for a licence in order to have the potential to add to his income in the mortgage business, and if an opportunity to engage in a transaction requiring licensing under the Act had arisen while the licence granted to him was in force, he may well have taken it. It is true that he would likely have done so believing that he was acting as an employee of Mr. C’s brokerage. But in fact he was not, and if actionable harm had occurred to a party to that admittedly hypothetical transaction, the party harmed might not have had access to the insurance carried by Mr. C’s brokerage. In that event, there would have been no insurance available, since Mr. Wong had none of his own. Therefore, there was some potential for harm to others flowing from the absence of E & O insurance for Mr. Wong’s brokerage.

With respect to s.3¶3, we believe it should count in Mr. Wong’s favour that he took steps, in his letter of December 18, 2008 to bring to FSCO’s attention the fact that he viewed himself as a Mortgage Broker, and had received advice from a reliable source that did not require his own insurance. While this letter was clearly too little, too late and too indirectly responsive to the barrage of correspondence he was receiving from FSCO at the time, it does show that Mr. Wong was not simply ignoring the issue of insurance, and was taking some responsible steps to ascertain his correct legal position.

We also consider that s.3 ¶4 has some application here. Mr. Wong was licenced as a mortgage brokerage, and was required to take out insurance. He did not do so, and accordingly saved the cost of the premium for such insurance. This is no doubt an economic benefit. In this case, however, we do not give the premium saving a great deal of weight in our assessment of the appropriate penalty, since we do not believe that the possible saving of premium expense played any part in shaping Mr. Wong’s actions, or the lack of them.

The Superintendent’s counsel conceded that s. 3 ¶5 has no application here.

In assessing the proper administrative penalty, we also bear in mind that the Superintendent has in fact been assessing penalties of \$1000 in all cases to date, and that there may be many who have accepted this level of penalty, whatever the nature of their alleged or actual transgression.

At this present early stage of the jurisprudence, we think that in fairness to such persons, we should treat this figure as a current mean from which to judge appropriate deviations, if any. With this in mind, we would assess Mr. Wong with an administrative monetary penalty of \$250.00.

Order

We direct the Superintendent to assess an administrative monetary penalty of \$250.00 against Mr. Wong.

Dated at Toronto this 10th day of June, 2009.

“Ralph Scane”

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

“Elizabeth Shilton”

Ms. Elizabeth Shilton
Member of the Tribunal and Member of the Panel

“Heather Gavin”

Ms. Heather Gavin
Member of the Tribunal and Member of the Panel