

**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 IN THE MATTER OF** Sanjay Babbar;

**AND IN THE MATTER OF** a request for hearing pursuant to subsection 21(3) of the Act.

**BETWEEN:**

**SANJAY BABBAR**

**Applicant**

**- and -**

**SUPERINTENDENT OF FINANCIAL SERVICES**

**Respondent**

**BEFORE:**

Mr. John M. Solursh  
Chair of the Tribunal and Chair of the Panel

**APPEARANCES:**

Mr. Sanjay Babbar  
Applicant

Mr. Stephen Scharbach  
Counsel, representing the Respondent the Superintendent of Financial Services

**HEARD:**

October 29, 2009

## REASONS FOR DECISION

### A. Background and Relevant Facts

The Act requires persons and entities engaged in certain dealings in mortgages to be registered as provided therein. These provisions came into force on July 1, 2008.

The following summary of facts is based on the agreed statement of facts filed by the parties and other evidence produced at the hearing.

Sanjay Babbar submitted an application as a sole proprietor for a mortgage brokerage licence under the Act. In his application Mr. Babbar stated that he would have in place by July 1, 2008 the required errors and omissions insurance ("E&O Insurance") in accordance with the Act and related regulations. Mr. Babbar was granted a brokerage licence effective on July 1, 2008.

Mr. Babbar testified that he was a licenced real estate broker. His primary objective in obtaining a mortgage brokerage licence by July 1, 2008 was to qualify for an exemption from the educational requirement under the Act and related regulations granted to licenced real estate brokers.

Mr. Babbar acknowledged that he was aware of the need to obtain the requisite E&O insurance. However, he was concerned about the cost of that insurance. He obtained quotes from insurance companies regarding the premium payable to obtain the E&O insurance in July 2008 and October 2008. The quotes were in a range that is consistent with a statement by Grant Swanson, the Executive Director of Licensing and Market Conduct of the Financial Services Commission of Ontario ("FSCO") set out in an affidavit filed with consent of the parties as evidence in this matter to the effect that the cost of such insurance typically is in the amount of \$800 to \$1,200 per annum. Mr. Babbar's concern about incurring the cost of the E&O insurance was based on the fact that he was not currently carrying on a mortgage brokerage business and in his view "no one would be hurt" if he did not acquire that insurance.

Mr. Babbar also testified that difficulties arose in his marital relationship with his spouse commencing in September 2008. Eventually, on November 29, 2008 he moved out of the matrimonial home. He stated that as his personal life was in turmoil, he did not do any work for several months and decided to further delay any decision regarding the purchase of E&O insurance.

Mr. Babbar acknowledged that his home address had been specified for his mortgage brokerage business in the application for the mortgage brokerage licence that he had filed with FSCO. He did not advise FSCO after he left the matrimonial home of his change of mailing address for the brokerage licence until February 19, 2009. He further testified that from the time he moved out of the matrimonial home on November 29 until January 8, he chose not to stop by the matrimonial home to pick up any correspondence, including correspondence from FSCO.

During cross examination Mr. Babbar confirmed that the main reason he did not purchase the E&O insurance was because he did not think that, in light of the lack of business, that expenditure would be “cost effective”.

As noted in the agreed statement of facts, FSCO determined that a number of brokerages that had been granted a licence, based on their representation that they had or would have E&O coverage, in fact did not have coverage. One of those brokerages was Mr. Babbar’s mortgage brokerage business.

On December 12, 2008, FSCO sent a letter to Mr. Babbar stating that according to FSCO approved E&O insurance providers, Mr. Babbar did not have E&O insurance in place. Mr. Babbar acknowledged that he picked up the letter from his home on January 8, 2009.

Mr. Babbar was asked in the December 12, 2008 letter from FSCO to either confirm that E&O coverage was in place or obtain coverage and provide supporting documentation. FSCO asked for a response by December 31, 2008, after which FSCO stated that it may pursue enforcement action. Mr. Babbar did not respond to that letter.

On January 22, 2009, a FSCO staff member had a telephone conversation with Mr. Babbar in which Mr. Babbar stated to the staff member that he was not doing business as a mortgage broker and did not have E&O coverage. He was advised that he must either get E&O coverage or surrender his licence. Mr. Babbar told the FSCO staff member that he was undecided as to whether to terminate his brokerage licence and work for another company or get E&O coverage. He was told that a response from him was required no later than January 30, 2009, and he was given FSCO contact information.

Mr. Babbar did not respond and on February 17, 2009, he was served with an Interim Order to Suspend Licence, a Notice of Proposal to Revoke Licence and a Notice of Proposal to Impose an Administrative Monetary Penalty.

On that same day (February 17, 2009), Mr. Babbar sent a fax to FSCO dated February 11, 2009 asking that his brokerage licence be terminated until further notice. It is clear from the evidence presented, including the date stamp, that it was received on February 17, as acknowledged in the agreed statement of facts after the service by FSCO on Mr. Babbar earlier that day of the Notices and Interim Order. Mr. Babbar testified that the decision to surrender his licence was entirely voluntary and not in response to the proposed suspension of his licence. The Tribunal does not find Mr Babbar’s evidence on that point to be either consistent or credible and instead finds that he clearly was responding to the proposed suspension of his licence when he asked that his brokerage licence be terminated until further notice.

On February 18, 2009, FSCO faxed to Mr. Babbar the surrender declaration form. Mr. Babbar completed the form and sent it back to FSCO on March 3, 2009. Mr. Babbar’s brokerage licence was terminated as of March 20, 2009.

On February 19, Mr. Babbar provided FSCO with his current business address.

## **B. Relevant Legislation and Regulations**

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. Section 7 of the Act provides for such licences and, in subsection (4), requires any licensee to comply with such standards of practice as may be prescribed, by regulation, for its variety of licence. The Mortgage Brokerages: Standards of Practice Regulation, O. Reg. 188/08 prescribes standards of practice (see section 4) for every mortgage brokerage licence that is issued under the Act, including the following:

- “42.** (1) A brokerage shall maintain errors and omissions insurance in a form approved by the Superintendent with extended coverage for loss resulting from fraudulent acts or shall have some other form of assurance in a form approved by the Superintendent.
- (2) The insurance or other assurance must be sufficient to pay a minimum of \$500,000 in respect of any one occurrence involving the brokerage or any broker or agent authorized to deal or trade in mortgages on its behalf and \$1 million in respect of all occurrences during a 365-day period involving the brokerage or any such broker or agent.”

Subsection 19(1) of the Act authorizes the Superintendent to revoke a licence issued under the Act in any of the circumstances in which he would be authorized by subsection 18(1)(a), (b), (c) or (d) to suspend such a licence under the Act. The circumstances in which a licence may be suspended, and therefore the circumstances in which a licence may be revoked, include the following: “if the licensee contravenes or fails to comply with a requirement established under [the] Act” (subsection 18(1)(c) of the Act).

Before revoking a licence, the Superintendent must first give a notice of proposal to do so to the licensee (subsection 21(2)), in which case the licensee may request a hearing on the proposal before this Tribunal (subsection 21(3)), as has happened in this case. If the Superintendent is of the opinion that the interests of the public may be adversely affected by any delay in the revocation of a licence as a result of giving a notice of proposal, he may make an interim order suspending the licence (subsection 18(3)), as has also happened in this case.

The Act provides for the imposition of administrative penalties as follows:

- “38.** (1) An administrative penalty may be imposed under section 39 or 40 for either of the following purposes:
1. To promote compliance with the requirements established under the Act.
  2. To prevent a person or entity from deriving, directly or indirectly, any economic benefit as a result of contravening or failing to comply with a requirement established under the Act.

- (2) An administrative penalty may be imposed alone or in conjunction with any other regulatory measure provided by the Act, including a compliance order or the amendment, suspension or revocation of a licence.
- 39.** (1) If the Superintendent is satisfied that a person 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 clause 55(5)(a), the Superintendent may, by order, impose an administrative penalty on the person or entity in accordance with this section and the regulations.”

Section 39 goes on to provide that the Superintendent shall give a notice of proposal to impose an administrative penalty, which may be combined with a notice of proposal authorized by any other section of the Act, and that the person on whom the penalty would be imposed may request a hearing on the proposal before the Tribunal (subsections (2) and (5)), as has happened in this case.

The Administrative Penalties Regulation, O. Reg. 192/08, provides criteria to govern the amount of an administrative penalty as follows:

- “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 harm or 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 to take any 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 other jurisdiction during the five preceding years by the person or entity.”

Section 41 of the Act provides that the maximum administrative penalty that may be imposed for a failure to comply with a requirement of the Act in these circumstances is \$25,000.

Upon holding a hearing on a notice of proposal under the provisions of the Act relating to a proposed revocation of a mortgage brokerage licence or a proposed imposition of an administrative penalty, the Tribunal may direct the Superintendent to carry out the proposal, with or without changes, or substitute its opinion for that of the Superintendent (subsections 21(4) and 39(6)).

### **C. Issue**

Mr. Babbar's mortgage broker's licence was surrendered as previously noted. Furthermore, he acknowledged at the hearing on October 29 that he took responsibility for not arranging for the requisite E&O insurance and stated that he was willing to pay a fine but wanted the amount reduced to \$250. Accordingly, the only issue to be determined in this case is what is the appropriate amount of the administrative penalty which should be levied against Mr. Babbar given his failure to obtain E&O insurance in the circumstances of the case.

### **D. Analysis**

It is clear from the evidence, including the testimony and the agreed statement of facts, that when Mr. Babbar submitted his application for a mortgage brokerage licence, he knew he was required to obtain the necessary E&O insurance in order to be licenced as a mortgage broker. He made inquiries regarding the potential cost of such insurance coverage and decided to defer purchasing the insurance having regard to the estimated cost of the range of \$800 to \$1,200 per annum. The personal circumstances culminating in his departure from the matrimonial home at the end of November 2008 appear not have been the major motivation for deferring a decision to purchase the insurance; rather, it is clear that at least prior to his departure from the matrimonial home Mr. Babbar's decision not to purchase E&O insurance was motivated by the desire to avoid incurring the cost recognizing that he was not yet carrying on a mortgage brokerage business but in the meantime could shelter under the exemption granted to real estate brokers from the educational requirements under the Act. Mr. Babbar ultimately decided not to obtain the E&O insurance and surrendered his mortgage brokerage licence.

Consequently, there is a basis for imposing an administrative penalty upon Mr. Babbar under subsection 39(1) of the Act. The Tribunal is of the opinion that the imposition of such a penalty would serve both of the purposes for which a penalty may be imposed under subsection 38(1) of the Act. The Tribunal's reasons for coming to this view are essentially the same as those on which the Tribunal relied in its decision in the *Millennium Mortgage Corporation* case. Most obviously, an administrative penalty on Mr. Babbar would serve the first purpose set out in subsection 38(1) of the Act, namely encouraging all members of this regulated industry to comply with the requirements of the Act, particularly, in the present case, the requirement that mortgage brokerages maintain E&O insurance regardless of whether or not they actually conduct business. Although Mr. Babbar did not carry on any mortgage brokerage business, pursuant to his licence, after July 1, 2008, this fact does not eliminate the need for the Superintendent to deter other mortgage brokerages from engaging in similar conduct. Likewise, this fact does not eliminate the modest economic benefits that Mr. Babbar actually enjoyed from holding a mortgage brokerage licence for over eight months (from July 1, 2008 to March 20, 2009) without having paid any of the premiums for the required E&O insurance. The Tribunal has the

discretion, therefore, to impose an administrative penalty, in the circumstances of this case, just as the Superintendent had that discretion in the first instance. It is appropriate in those circumstances to impose such a penalty.

In determining the appropriate amount of the penalty, the Tribunal 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. While Mr. Babbar's evidence is that he did contact insurers in July, 2008 and October, 2008 about the possibility of securing E&O insurance, he decided primarily on the basis of cost that he would not obtain the coverage. We were not provided with any evidence that any application was in fact completed and/or denied by any qualified insurer. Mr. Babbar clearly acknowledged that he knew throughout that E&O insurance was required under the Act and, as indicated in various correspondence from FSCO, his insurance coverage as a real estate broker was not applicable to meet the requirements of the Act. His failure to secure the requisite E&O insurance was intentional.

The second criterion is the harm or potential harm to others resulting from the failure. There was no demonstrated real harm to others resulting from Mr. Babbar's failure to obtain E&O insurance based on his uncontradicted testimony that he did not engage in any mortgage brokerage business. The potential harm arises from having the potential of holding himself out with the ability to engage in mortgage activities given his licence.

The third criterion is the extent to which the person tried to mitigate any loss or take any other remedial action. Mr. Babbar obtained quotes regarding insurance coverage in July and October, 2008. He consciously decided on the basis of cost not to obtain that insurance. He ultimately surrendered his mortgage brokerage licence, which he had obtained by July 1, 2008 so as to qualify for the exemption given to real estate brokers from the educational requirement under the Act. The surrender of the mortgage brokerage licence eliminated the need for E&O insurance going forward.

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. Mr. Babbar received a modest economic benefit by virtue of retaining a licence to carry on a mortgage brokerage business (although he did not apparently broker any mortgage deals), while avoiding payment of an E&O insurance premium for the period from July 1, 2008 until March 20, 2009, when his licence was terminated.

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.

Taking account of these criteria in their application to the circumstances of this case, the Tribunal is of the opinion that an administrative penalty of \$1,000 is appropriate to achieve the

dual objectives of securing compliance with the Act and preventing Mr. Babbar from deriving an economic benefit from his failure to pay premiums for eight months.

**E. Order**

The Tribunal directs the Superintendent to carry out his proposal to impose an administrative penalty on Mr. Babbar of \$1,000.

**DATED** at the City of Toronto, this 27<sup>th</sup> day of November, 2009.

“John M. Solursh”  
John M. Solursh  
Chair of the Tribunal and Chair of the Panel