

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, S.O. 2006, c. 29 (the “MBLA Act”), in particular ss. 7, 18, 19, 21, 29, 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 Cosmopolitan Mortgage Group Inc.;

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

BETWEEN:

COSMOPOLITAN MORTGAGE GROUP INC.

Applicant

-and-

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

BEFORE:

Mr. Colin McNairn
Member of the Tribunal and Chair of the Panel

APPEARANCES:

Mr. Marin Maican, Principal Broker of the Applicant,
representing the Applicant

Mr. Robert Conway, Counsel,
representing the Respondent, the Superintendent of Financial Services

HEARD:

November 30, 2009

REASONS FOR DECISION

This matter arises out of a request for a hearing before this Tribunal that was made by the Applicant, Cosmopolitan Mortgage Group Inc. (“Cosmopolitan”), in respect of a proposal by the Superintendent of Financial Services (the “Superintendent”) to impose an administrative penalty of \$1,000 upon it. The stated basis for the proposal is that Cosmopolitan, as a licensed insurance brokerage, failed to maintain errors and omissions insurance as required under the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, S.O. 2006, c. 29 (the “MBLA Act”).

I have decided, after an oral hearing in respect of the Superintendent’s proposal, to confirm that proposal and to direct the Superintendent to carry it out.

A. The Statutory Background

The MBLA Act came into force on July 1, 2008. It prohibits a person from carrying on the business of dealing or trading in mortgages in Ontario without the benefit of a mortgage brokerage licence (ss. 2(2) and 3(2)). Mortgage brokerage licences are issued by the Superintendent, the Chief Executive Officer of the Financial Services Commission of Ontario (“FSCO”), under the terms of the MBLA Act (ss. 13 and 14).

The Mortgage Brokerages: Licensing Regulation, O. Reg. 408/07, provides that one of the requirements for licensing as a mortgage brokerage is that the proposed licensee have a mailing address in Ontario that is not a post office box and that is suitable to permit service by registered mail (para. 2 of ss. 1(1), 2(1) and 3(1)). An applicant for a licence must submit an application to the Superintendent giving the Superintendent such information as he may require (s. 13(1)). The form of application for a mortgage brokerage licence in use by the Superintendent requires, among other things, that the applicant provide business contact information by way of a mailing address for service in Ontario, a telephone number, a fax number (if applicable), an e-mail address and a website address (if applicable). The Reporting Requirements for Licensees Regulation, O. Reg. 193/08, provides that if a licensee changes its mailing address in Ontario, its e-mail address, phone number or fax number, it shall give the Superintendent particulars of the new address or number no later than five days after the change occurs (ss. 6 and 7).

The Mortgage Brokerages: Standards of Practice Regulation, O. Reg. 188/08, requires licensed mortgage brokerages to maintain errors and omissions insurance with certain minimum coverages and in a form approved by the Superintendent (s. 42). This requirement is a prescribed standard of practice with which licensed mortgage brokerages must comply by the terms of the MBLA Act (s. 7(4)).

The MBLA Act provides that if the Superintendent is satisfied that a person has contravened, or failed to comply with, a requirement established under the MBLA Act, he may, by order, impose an administrative penalty on that person (s. 39(1)). If a hearing is requested in respect of a proposal by the Superintendent to make such an order, this Tribunal may, upon hearing the matter, direct the Superintendent to carry out the

proposal, with or without changes, or substitute its opinion for that of the Superintendent (s. 39(6)).

The MBLA Act authorizes the imposition of an administrative penalty for either of two purposes: to promote compliance with the requirements of the Act and to prevent a person from deriving any economic benefit as a result of contravening, or failing to comply with, such a requirement (s. 38(1)). The Administrative Penalties Regulation, O. Reg. 192/08, limits the criteria that the Superintendent may take into account in determining the amount of an administrative penalty, imposed for one of these purposes, to the following;

- the degree to which the contravention or failure was intentional, reckless or negligent;
- the extent of the harm or potential harm to others resulting from the contravention or failure;
- the extent to which the person tried to mitigate any loss or take any other remedial action;
- the extent to which the person derived, or reasonably might be expected to derive, any economic benefit from the contravention or failure; and
- any other contravention or failure by the person to comply with a requirement established under the MBLA Act or any other financial services legislation that occurred during the preceding five years (s. 3).

B. The Relevant Facts

Cosmopolitan had been registered as a mortgage broker under the *Mortgage Brokers Act*, R.S.O. 1990, c. M.39, the predecessor statute to the MBLA Act. It submitted an application, dated March 27, 2008, for a mortgage brokerage licence under the MBLA Act, which was received by the Licensing and Market Conduct Division of FSCO on March 31, 2008. The application was signed by Mr. Marin Maican (“Mr. Maican”) in his capacity as owner/principal broker of Cosmopolitan. A mortgage brokerage licence was issued to Cosmopolitan on April 18, 2008.

The completed licence application indicated, among other things, that;

- the proposed principal broker for the mortgage brokerage was Mr. Maican;
- the required E&O insurance would be in place by July 1, 2008; and
- Mr. Maican, the signing officer of Cosmopolitan who signed the application, was familiar with the laws of Ontario relating to the licensing of mortgage brokerages and promised to abide by those laws and regulations, this being set out by way of a printed form of attestation on the application.

The completed form also set out a mailing address, an e-mail address, a phone number and a fax number for Cosmopolitan, as well as an e-mail address for the proposed principal broker, Mr. Maican, which was the same as the e-mail address for Cosmopolitan.

On November 26, 2008, FSCO sent an urgent e-mail to the e-mail address set out in Cosmopolitan's application for a mortgage brokerage licence. This e-mail was directed to the attention of the principal broker and was in the standard form used to communicate with all licensed mortgage brokerages that were found, by virtue of an October 15, 2008 audit, to be without errors and omissions insurance. The e-mail set out the statutory basis for the requirement that mortgage brokerages maintain errors and omissions insurance and stated, among other things, that;

- the only acceptable insurance was errors and omissions insurance for mortgage brokers secured from one of five FSCO-approved insurance providers, which were listed;
- errors and omission insurance was still required even if no mortgage brokerage business had been conducted (this statement was part of the section on "additional questions and answers" that appeared at the end of the e-mail); and
- a response to the e-mail was required no later than December 3, 2008, such response to include a detailed description of why errors and omissions 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.

FSCO received an immediate notification that its e-mail of November 26, 2008 sent to Mr. Maican's and Cosmopolitan's e-mail address was undeliverable. The notice said that the "host or domain name not found" and suggested that the sender try again. Mr. Maican testified that the business e-mail account was supposed to be transferred to his residence when he bought a house in September, 2008 but it was cancelled and a new account was opened. He only realized the problem with his e-mail in January, 2009. Some time after that, the problem was corrected.

On December 12, 2008, FSCO sent a registered letter to Mr. Maican, in his capacity as principal broker of Cosmopolitan, noting that FSCO had received no response to its e-mail of November 26, 2008, a copy of which was enclosed with the letter, and requiring a written response by December 31, 2008 along with an explanation for the failure to respond to the e-mail. This letter was addressed to Mr. Maican at the mailing address for Cosmopolitan that was shown in its application for a mortgage brokerage licence. However, Canada Post returned the letter to FSCO noting that the letter had been redirected, on December 17, 2008, to three named members of the Maican family, including Marin Maican, at an address in Maple, Ontario but that it was unclaimed. The Maple address was, apparently, the address of the house in Vaughan, Ontario that Mr. Maican had bought, along with his wife and son, in September of 2008. Mr. Maican

testified that the house was in a new subdivision where Canada Post did not make registered mail deliveries, but would simply put a delivery notice in the mail to the effect that a registered letter was available for pick-up at a specified postal outlet. He filed in evidence a copy of a Canada Post delivery notice, dated December 18, which he testified was received in his household mail and would, he suggested, have related to FSCO's December 12, 2008 registered letter. However, this delivery notice was addressed to Felix Maican, Mr. Maican's adult son. Mr. Maican testified that his son thought the item of registered mail, to which the notice related, was intended for him but that he did not pick it up because he thought it was likely to be unimportant.

Ms. Helen Hrebik, an employee of FSCO, testified that she had responsibility for telephoning some of those mortgage brokerages from which there had been no response to FSCO's communications arising from the results of the audit, showing the brokerages to be without errors and omissions insurance. Her evidence was that she had phoned Cosmopolitan on January 22, 2009 at its telephone number as shown on its application for a mortgage brokerage licence and left a message with someone at that number but had received no call back. The fact of the call was supported by her written entries in a Telephone Call Record Log, which was received in evidence. In his evidence, Mr. Maican denied knowledge of this call and said that no one else in his house would have answered the business line for Cosmopolitan but would have let any calls go to voice mail.

On February 17, 2009, the Superintendent issued a notice of proposal to revoke Cosmopolitan's mortgage brokerage licence, a notice of proposal to impose an administrative penalty on Cosmopolitan in the amount of \$1,000 and an interim order suspending Cosmopolitan's licence for the 15 day period during which it was entitled, under the MBLA Act, to apply to this Tribunal for a hearing on the proposal to revoke its licence. These documents were received by Mr. Maican and on March 4, 2009, he filed a request for a hearing before the Tribunal on behalf of Cosmopolitan. The Superintendent then extended the interim order of licence suspension, by a further order of March 10, 2009, until such time as the notice of proposal to revoke Cosmopolitan's mortgage brokerage licence is finally determined by the Tribunal.

On March 4, 2009, Mr. Maican wrote to the Superintendent explaining why he had not received e-mail and registered mail communications from FSCO (much as he would later testify in this Tribunal proceeding) and stating that;

- he had been in contact with "insurance companies recommended by FSCO" in order to get errors and omissions insurance but that because of financial limitations it was impossible to pay the premium of approximately \$800;
- he had made arrangements to start errors and omissions insurance in the next few days; and
- since July 1, 2008, Cosmopolitan "basically had no activity" except for the closing of one private deal for a construction loan that was supposed to be closed prior to July 1, 2008.

Cosmopolitan applied for errors and omissions insurance, by application dated March 4, 2009, and a policy meeting the requirements under the MBLA Act was issued to Cosmopolitan. A certificate evidencing this insurance was sent to FSCO on March 11, 2009. The Superintendent, therefore, revoked the interim order to suspend Cosmopolitan's mortgage brokerage licence and withdrew the proposal to revoke that licence, leaving only the notice of proposal to impose an administrative penalty to be dealt with by the Tribunal.

On March 17, 2009, Mr. Maican gave written advice to FSCO that the mailing address for Cosmopolitan had been changed to his Vaughan (Maple) home address and that all correspondence should be sent by regular mail since registered mail was not delivered in the area.

Mr Maican explained the failure of Cosmopolitan to obtain errors and omission insurance before February 17, 2009 on the basis of his non-receipt of the various communications from FSCO and his difficult financial situation, which meant that he couldn't afford to pay the insurance premium at the time. He said that he had an expectation of income from the mortgage brokerage business when, in March of 2008, he had submitted Cosmopolitan's application for a mortgage brokerage licence, so as to continue its authority to conduct its business. Indeed, he had placed some newspaper ads for the business and he had continued to maintain a business office for Cosmopolitan until the summer of 2008, when he gave up the office because the rent was no longer affordable. He said that he had another potential source of income, unrelated to the business, that didn't materialize and was hoping that the contract job that he had with a government call centre would become permanent, which didn't happen until June or July of this year.

C. Issues

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

1. Is the imposition of an administrative penalty on Cosmopolitan justified in the circumstances of this case; and
2. If so, what should be the amount of that penalty in those circumstances.

D. Analysis

1. Whether an Administrative Penalty is Justified

Before confirming a proposal by the Superintendent to impose an administrative penalty under the MBLA Act and directing the Superintendent to carry out the proposal, I must be satisfied that there has been a contravention of, or a failure to comply with, a requirement established under that Act. In this case, I am satisfied that there was a failure by Cosmopolitan to comply with the requirement under the MBLA Act to maintain errors and omissions insurance in respect of its mortgage brokerage, which continued from July 1, 2008, the effective date of the requirement to maintain errors and omission insurance,

at least until February 17, 2009, when the Superintendent issued his notices of proposal and made an order suspending Cosmopolitan's mortgage brokerage licence. Therefore, I have the discretion to order the imposition of an administrative penalty on Cosmopolitan. The question, then, is whether there is any basis for my declining to exercise that discretion in this case.

There are no circumstances of this case that lead me to conclude that an administrative penalty should not be imposed on Cosmopolitan. Mr. Maican did not deny knowledge of the errors and omission insurance requirement for licensed mortgage brokerages. His and Cosmopolitan's non-receipt of the various communications from FSCO about Cosmopolitan's failure to maintain such insurance was not FSCO's fault. It had used the e-mail address, the mailing address and the telephone number in Cosmopolitan's application for a mortgage brokerage licence in order to communicate with Cosmopolitan. Cosmopolitan failed in its obligation, under the regulations pursuant to the MBLA Act, to advise FSCO of the change in its mailing address. That advice did not come until March 17, 2009, although the change had occurred in the summer of 2008.

I am not satisfied that the financial situation of Maican and Cosmopolitan before February 17, 2009 was such as to preclude the payment of the fairly modest amount of the premium for errors and omission insurance, in the order of \$800, especially as Cosmopolitan managed to pay such a premium in early March of 2009, shortly after receipt of the Superintendent's notices of proposal and interim suspension of licence.

I am satisfied that the imposition of an administrative penalty on Cosmopolitan would serve one or both of the purposes for which such a penalty may be imposed under the MBLA Act (s. 38(1)). Those purposes are to promote compliance with a requirement established under the MBLA Act and to prevent a person from deriving an economic benefit as a result of contravening, or failing to comply with, such a requirement. The situation in the present case is not unlike that in *Chen v. Superintendent of Financial Services* (FST Decision No. M0359-2009-1) and other previous decisions where this Tribunal concluded that the imposition of an administrative penalty would serve both of the permitted purposes of such a penalty.

2. The Appropriate Amount of the Administrative Penalty

In determining the appropriate amount of the administrative penalty, I must take into account only those criteria that the Superintendent is obliged to apply when proposing a penalty (the criteria and their source are set out at the end of section A of these reasons for decision).

The first criterion is the degree to which the contravention of, or failure to comply with, a requirement established under the MBLA Act was intentional, reckless or negligent. In the present case, it appears that Cosmopolitan's failure to comply with the requirement to maintain errors and omissions insurance was intentional. Its non-receipt of FSCO's reminders about that requirement does not make the failure unintentional.

The second criterion is the harm or potential harm to others resulting from the contravention or failure. There was potential for harm as a result of Cosmopolitan's failure to maintain errors and omission insurance since it continued to hold itself out after July 1, 2008 as carrying on a mortgage brokerage business and, in fact, completed one mortgage transaction after that date.

The third criterion is the extent to which the person tried to mitigate any loss or take any other remedial action. Cosmopolitan did not take any remedial action until March of 2009 when it obtained errors and omissions insurance. This was, of course, too late to remedy the failure to maintain errors and omission insurance before February 17, 2009, which was the basis for the Superintendent's proposal to impose an administrative penalty of \$1,000.

The fourth criterion is the extent to which the person derived or reasonably might be expected to derive any economic benefit from the contravention or failure. Cosmopolitan received an economic benefit that it would not otherwise enjoy, if not offset by an administrative penalty, derived from its holding of a mortgage brokerage licence after July 1, 2008 and concluding one mortgage transaction while, at the same time, avoiding payment of a premium for errors and omission insurance coverage for the brokerage during that period.

The fifth criterion is any other contravention or failure by the person to comply with a requirement established under the MBLA Act or with any other financial services legislation that occurred within the preceding five years. There was no suggestion that there was any such contravention or failure in this case.

I have come to the conclusion, after taking account of the relevant criteria for determining the amount of an administrative penalty in their application to the circumstances of this case, that the imposition of an administrative penalty on Cosmopolitan in the amount of \$1,000 would be appropriate and should be confirmed.

E. Order

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

DATED at the City of Toronto, this 15th day of December, 2009.

“Colin McNairn”
Colin McNairn, Member of the Tribunal
and Chair of the Panel