

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, S.O. 2006, c. 29 (the “*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 1523500 Ontario Ltd. o/a Across Country Mortgages;

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

BETWEEN:

1523500 ONTARIO LTD. O/A ACROSS COUNTRY MORTGAGES

Applicant

-and-

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

BEFORE:

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

APPEARANCES:

Mr. Stephen Scharbach,
Representing the Superintendent of Financial Services

Mr. Herbert Egbeocha
Representing the Applicant, 1523500 Ontario Ltd. o/a Across Country Mortgages

HEARD:

December 1, 2009

REASONS FOR DECISION

This is a decision upon a hearing held pursuant to s.39(5) of the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, S.O. 2006, c.29 (the *Act*) at the request of 1523500 Ontario Ltd., carrying on business as Across Country Mortgages (the Company). The Superintendent of Financial Services (“the Superintendent”) originally issued Notices of Proposal to revoke a mortgage brokerage licence issued to the Company, and to impose an administrative monetary penalty of \$1000 against it, and made an interim order, dated February 17, 2009, pursuant to s. 19(3) of the *Act*, to immediately suspend the said mortgage brokerage licence. The Superintendent’s actions arose out of the failure of the Company to obtain and maintain errors and omissions liability insurance as required pursuant to s.7(4) of the *Act* and *O.Reg. 188/08*, s.42, made pursuant to the *Act*. Subsequently, the Company obtained the required insurance, effective February 24, 2009. By a settlement, the interim order suspending the licence was terminated by an order of March 4, 2009, and the Notice of Proposal to revoke the mortgage brokerage licence was withdrawn. This request for hearing was made only with respect to the administrative monetary penalty proposed to be levied against the Company.

Background

The *Act* requires persons and entities engaged in certain dealings in mortgages to be licensed as provided therein. These provisions came into force on July 1, 2008. The Superintendent encouraged those who had been engaged in mortgage activities which would require a licence under the *Act*, or who wished to do so after that date, to submit applications in advance of that date, to minimize interruptions or delays to those activities resulting from the licence approval process. The Company applied to be licensed as a mortgage brokerage by an application dated February 27, 2008, and received by the Financial Services Commission of Ontario (FSCO) on March 13, 2008. The proposed principal broker under the licence sought was Mr. Herbert Egbeocha, who signed the application form. In that form, the Company stated that it would have the required Errors and Omissions (E.&O.) insurance in place by July 1, 2008. The Company was granted a mortgage brokerage licence effective July 1, 2008

The Superintendent subsequently caused an audit of the insurers approved by him to issue the insurance required by the *Act*, to ascertain any mortgage brokerages licensed under the *Act* which did not in fact have the necessary insurance. A substantial number of these were discovered, including the Company. On November 26, 2008, a lengthy e-mail message was sent by FSCO to all of these apparent defaulters, advising that the recipient appeared to be in default, reminding of the requirements, and requesting a response, to include certain explanations and information, by December 3, 2008. The e-mail also contained a question and answer section, to deal with frequently asked questions. The first question and answer supplied 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*.

In his evidence, Mr. Egbeocha acknowledged receipt of this e-mail.

On December 1, 2008, FSCO received a telephone call from Mr. Egbeocha, requesting an extension from the December 3, 2008 date specified by FSCO in its November 26, 2008 e-mail, and advising that E.&O. insurance would be in place by the end of December, 2008. On December 12, 2008, FSCO sent a registered letter to the Company asking for a response to the e-mail message of November 26, 2008, by December 31, 2008. The parties agree that this letter was delivered on December 22, 2008.

On December 15, 2008, the Company sent a letter, signed by Mr. Egbeocha, to FSCO, advising of a series of deaths in his family, commencing five years previously, and of a serious illness of his mother, and requesting “a little time” to “get up again”. On January 16, 2009, FSCO e-mailed the Company to advise that it had not received evidence of E.&O. coverage, and asked that evidence of such coverage be sent to FSCO by January 30, 2009. This e-mail referred to a notification from the Company on December 31, 2008 that it did not have E.&O. insurance but was obtaining it. No such evidence was sent to FSCO by January 30, 2009. On February 17, 2009, FSCO issued and served on the Company the Interim Order to suspend the mortgage brokerage licence and the Notices of Proposal to revoke the licence and to impose an administrative monetary penalty in the amount of \$1000. Subsequently, on February 26, 2009, the Company sent proof to FSCO that it had obtained the required E.&O. insurance, effective as of February 24, 2009.

Mr. Ebeocha’s principal argument in support of mitigation of the administrative monetary penalty imposed upon the Company was that a series of six deaths in his family, commencing with the death of his daughter in 2004, and ending with the death of his mother at the end of December, 2008, seriously affected his ability to function effectively in his business. Shortly after filing the application for the mortgage brokerage licence, the death of a senior member of his family in his home country in Africa required him to go to Africa to deal with affairs there, and he did not return to Ontario until September, 2008. After his return, although he describes himself as “only half functioning” due to the cumulation of his personal difficulties, he made some effort to try to get the Company active again. He looked for office space, and did some advertising. He acknowledges that he had always been aware that the Company required E.& O. insurance to operate, and he made some enquiries among approved insurers. However, he lacked funds to pay the premium. He did have one “client” who was seeking mortgage funds, and he referred her to a company in the business of advancing such funds, in the hope of receiving a referral fee which he could then use to pay the insurance premium. (Counsel for the Superintendent advised the Tribunal that the Superintendent did not consider that the Company’s or Mr. Egbeocha’s activities in this instance were sufficient to constitute mortgage brokering under the *Act*.) In fact, the hoped-for transaction did not take place. There was no evidence that he engaged in any other activities which could be related to mortgage brokering before FSCO issued the Notices of Proposal referred to above. As

mentioned above, the Company obtained the required insurance approximately one week later.

Decision

The first question is whether the Superintendent was entitled to levy any administrative monetary penalty. By s.39(1) of the *Act*, the Superintendent is entitled to impose such a penalty upon a person or entity who “is contravening or not complying with or has contravened or not complied with a requirement established under this Act...” *O.Reg. 188/08*, s.42 requires holders of mortgage brokerage licenses to hold errors and omissions insurance in a prescribed form. The Company held such a licence from the date of its grant on July 1, 2008 until it was suspended by the interim order of February 17, 2009, and does not dispute that it was without the prescribed insurance throughout this period. The Superintendent clearly met this threshold test.

Subject to meeting the requirement of s.39(1) of the *Act*, the imposition of an administrative monetary penalty is a matter within the discretion of the Superintendent, exercised within the directions and limits of the *Act* and its regulations. 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 personfrom 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. The Superintendent was, and this Tribunal is entitled to proceed to examine the circumstances to determine whether to impose such a penalty, and if so, in what amount.

The Tribunal finds that, notwithstanding the matters raised in the Company’s communications to FSCO described above and the evidence given before the Tribunal by Mr. Egbeocha, an administrative monetary penalty is justified. It is clear that the Company, through its principal broker, Mr. Egbeocha, was fully aware of the requirements for E.& O. insurance, and however psychologically damaged by events in his family Mr. Egbeocha may have been, the Tribunal finds that he was not sufficiently affected to excuse him from following through with enquiries he had made of insurers. His problems no doubt also contributed to financial difficulties for the Company, but impecuniosity is not a factor which either the Superintendent or the Tribunal is entitled to consider when determining the proper amount of an administrative monetary penalty.

The considerations in assessing an administrative monetary penalty are governed by *O.Reg. 192/08*, made pursuant to the *Act*. S.3 of that Regulation provides:

3. The Superintendent shall consider only the following criteria when determining

the amount of an administrative penalty to be imposed under s.39 of the *Act* for a purpose set out in s.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 the person or entity tried to mitigate any loss or 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.

With respect to #1, the failure to obtain the required insurance was intentional. The Company's proposed principal broker knew the requirement from the time he submitted the application on its behalf. It was a combination of lack of money and lassitude, however caused, which resulted in the failure to obtain it.

With respect to #2, although the Company did not carry out any activities of a mortgage broker during the relevant period, at times it hovered on the brink of doing so. It made some investigations as to office space, it did some advertising, and on one occasion, referred to above, it referred a prospective borrower to a lender. There was certainly some potential for harm to others had an opportunity arisen.

With respect to #3, there was no serious attempt to follow through with an insurer to obtain coverage until FSCO lost patience and issued the Notices of Proposal and Interim Order referred to above. These generated a quick response in the form of the Company obtaining and submitting proof of a policy, notwithstanding Mr. Egbeocha's personal difficulties.

With respect to #4, the Company saved the premiums on a required policy from the date the Company was originally licensed in July, 2008 until a policy was issued in February, 2009.

There is no suggestion that #5 is relevant here.

An affidavit of Mr. Grant Swanson, the Executive Director, Licensing and Market Conduct of FSCO, dated November 30, 2009, filed in these proceedings, establishes that FSCO has been applying an administrative monetary penalty of \$1000, as it did here, as a

standard penalty in cases where mortgage brokerages did not in fact maintain the required insurance. Previous decisions of this Tribunal have established that, while the Tribunal does not defer to the Superintendent's views in these matters, it does recognize, in fairness to others who may have paid a penalty assessed against them without appeal, that a penalty at the \$1000 level may be regarded as a mean from which to judge appropriate variations in particular cases. The Tribunal finds that no sufficient reason to assess a penalty below this mean has been shown. The Superintendent has not sought an increased penalty, and, given Mr. Egbeocha's evidence as to his personal difficulties, the Tribunal sees no sufficient reason to increase it.

Order

The Superintendent is directed to carry out the Notice of Proposal and impose the proposed administrative monetary penalty of \$1000.

Dated at Toronto this 14th day of December, 2009.

"Ralph Scane"
Ralph Scane
Member of the Tribunal and Chair of the Panel