

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, S.O. 2006, c. 29 (the “*Act*”), in particular s. 7, 19, 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 6874843 Canada Ltd;

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

BETWEEN:

6874843 CANADA LTD

Applicant

and

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

BEFORE:

Mr. Shiraz Bharmal
Member of the Tribunal and Chair of the Panel

APPEARANCES:

Mrs. Bimal Natasha Niles
Principal Broker, 6874843 Canada Ltd, representing the Applicant

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

HEARD:

October 19, 2009

REASONS FOR DECISION

This is a decision upon a hearing held pursuant to s. 39(5) of the *Act* at the request of 6874843 Canada Ltd (the “Company”).

On February 17, 2009, the Superintendent of Financial Services (the “Superintendent”) issued Notices of Proposal to revoke a mortgage brokerage licence issued to the Company, and to impose an administrative penalty of \$1000 against it and made an Interim Order, pursuant to s. 19(3) of the *Act*, to immediately suspend the 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. Subsequently, the Company obtained the required insurance, effective February 25, 2009, and the Interim Order suspending the licence was terminated by an order of the Superintendent dated March 5, 2009.

On March 11, 2009, Mrs. Bimal Niles (“Mrs. Niles”), acting on behalf of the Company, filed a request for hearing. The request was filed after the expiry of the 15 day time period provided under s. 39(5) of the *Act* for making such a request. However, the parties consented to the waiver of the time limit as did the Tribunal. Therefore, at the beginning of the hearing in this matter, the Tribunal made the following orders, similar to those made in *Justin Edwards v. Superintendent of Financial Services* (FST File No. M0332-2008)

- (a) The 15 day period under s. 39(5) of the *Act* is waived with the result that the request for hearing delivered by the Company to the Tribunal on March 11, 2009 shall be treated as an adequate notice requiring a hearing in this matter for the purpose of the s. 39(5) of the *Act*.
- (b) The 15 day period incorporated by reference under Rule 15.02 of the Tribunal’s Rules of Practice and Procedure is hereby extended, retroactively, to March 11, 2009, pursuant to Rule 5.01, with the result that the request for hearing delivered to the Tribunal on March 11, 2009 shall be treated as properly served in accordance with Rule 15.02.

According to the parties, the only remaining matter in this case is that pertaining to the administrative penalty proposed to be levied against the Company and the request for hearing was made only with respect to that issue.

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.

According to the agreed statement of the facts and other evidence produced at the hearing, the Company, which was a licensed real estate broker, submitted an application dated May 5, 2008, for a mortgage brokerage licence in the Company’s name. The application was prepared and signed by Mrs. Niles on behalf of the Company and she was named the proposed principal broker.

The Company stated, by checking the appropriate box in the application, that the Company would have the required errors and omissions insurance including extended coverage from fraudulent acts (“E&O insurance”) in place by July 1, 2008. The Company was granted a mortgage brokerage licence effective July 1, 2008.

In fact, the Company did not have the required insurance in place by July 1, 2008, nor afterward until February 25, 2009, following the issuance of the Notices of Proposal and Interim Order referred to above.

Based on enquiries made by it in October 2008, the Financial Services Commission of Ontario (“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 insurance, in fact did not obtain that coverage. The Company was one of those brokerages.

On November 26, 2008, a lengthy e-mail message was sent by FSCO to the attention of Mrs. Niles as the principal broker of the Company, at the e-mail address shown in the Company’s application, stating that according to FSCO-approved E&O insurance providers, the Company did not have E&O insurance in place as of October 15, 2008. The e-mail included reminders regarding the E&O insurance requirements and asked the Company to either confirm that coverage was in place or obtain coverage and provide supporting documentation. FSCO asked for a response by December 3, 2008.

The e-mail also stated that E&O coverage the Company might have through the Real Estate Council of Ontario (“RECO”) does not cover mortgage services.

In addition, the e-mail contained a question and answer section, to deal with frequently asked questions. Two of the questions and answers supplied were as follows:

Q: I have not done any business under the *MBLAA* [i.e. the *Act*] 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*.

Q: I have assumed my E&O insurance through RECO would cover me and since you tell me this is not sufficient, what do I do now?

A: Your brokerage is in breach of the *MBLAA*. You should obtain the insurance immediately and provide proof of coverage to FSCO along with a listing of all business conducted while non-compliant.

Mrs. Niles did not respond to the e-mail.

On December 12, 2008, FSCO sent a registered letter to Mrs. Niles asking for a response to the November 26, 2008 e-mail by December 31, 2008. Mrs. Niles did not respond to that letter either. This led to the Superintendent serving the Notices of Proposal and Interim Order by facsimile, registered

mail, and regular mail on February 17, 2009; the placing of E&O insurance as of February 25, 2009; the Termination of the Interim Order as of March 5, 2009; and the request for this hearing filed on March 11, 2009.

In her testimony, which was forthright and honest, Mrs. Niles stated the following:

- Mrs. Niles and Mr. Martinez, the owner of the Company, are business associates in a real estate business. When the *Act* was about to come into force, they decided that it would be useful to obtain a mortgage brokerage licence given Mrs. Niles' status as a registered mortgage broker under the predecessor law. Mr. Martinez agreed to provide financial help with the costs of establishing the mortgage brokerage through the Company as Mrs. Niles did not have the necessary finances. The Company then proceeded to obtain the mortgage brokerage licence in May 2008.
- Soon after the licence was obtained, Mr. Martinez suffered a personal tragedy which culminated in his leaving Canada and going to El Salvador.
- Since the mortgage brokerage was not operational – the Company has not conducted any mortgage business to date – Mrs. Niles believed that the existing coverage under the errors and omissions insurance policy through RECO would be sufficient. She now realizes that this was a mistaken belief.
- Although the FSCO e-mail of November 26, 2008 was addressed to the e-mail address provided in the application, it was an address Mrs. Niles had set up specifically for the mortgage business. Since that business was not operational, she did not regularly check its inbox (she had another e-mail address she used for her normal activities). She would have reacted if she had read the FSCO e-mail, but she did not.
- Mrs. Niles did receive the FSCO registered letter dated December 12, 2008 which was addressed to the mailing address provided in the application. This happens to be her home address. However, because the mortgage business was not operational, she did not pay any attention to the registered letter – she had blocked everything related to mortgage business out of her mind.
- It was when she received the Notices of Proposal and Interim Order in February and talked to the FSCO counsel who had signed the cover letter that she realized the seriousness of the matter and also realized that she should have been paying more attention. She at once contacted Mr. Martinez in El Salvador and took steps to put in place the required E&O insurance, which was done effective February 25, 2009.

Mrs. Niles asked the Tribunal to take account of the fact that a penalty of \$1,000 would be a substantial burden to the Company.

Analysis

The first question is whether the Superintendent was entitled to levy any administrative 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....” Section 42 of O. Reg. 188/08 requires holders of mortgage brokerage licences to maintain errors and omissions insurance in a prescribed form. The Company has held such a licence from the date of its grant effective July 1, 2008 and did not place the required insurance until February 25, 2009. The Superintendent clearly met the threshold test under s. 42 of O. Reg. 188/08 for imposing an administrative penalty.

Subject to meeting the requirement of s. 39(1) of the *Act*, the imposition of an administrative penalty is a matter within the discretion of the Superintendent, exercised within the directions and limits of the *Act* and its regulations. Section 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 in what amount. The Tribunal holds that an administrative penalty is warranted in this case.

The considerations in assessing an administrative penalty are governed by O. Reg. 192/08, made pursuant to the *Act*. Section 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 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 Tribunal finds that the Company knew of the requirements for insurance at the time of the application. It undertook in its application to obtain such insurance by July 1, 2008. The actions of its principal broker Mrs. Niles were unintentional and motivated by a mistaken belief that the E&O insurance would not be required while the Company was not conducting any mortgage business and while it had the RECO insurance. She was also hampered by the absence of her business associate from the country. Nonetheless, issuance of a licence under the *Act* carries with it the obligation to understand and comply with all the regulatory requirements. The Company was negligent in this respect.

With respect to #2, the Company did not deal in mortgages as a brokerage while it was uninsured and no actual harm to anyone resulted. Potential for harm did exist, however. The Company was in a position to deal in mortgages carrying with it the risk that an injured party could have been jeopardized by the absence of insurance coverage, especially given the limited liability status of the Company.

With respect to #3, Mrs. Niles did, as soon as she realized the seriousness of the situation – which was late in the game – take immediate action to obtain the necessary insurance. However, earlier she did not pay due attention, albeit unintentionally, to the previous communications from FSCO.

With respect to #4, the Company did gain an economic benefit from the absence of insurance premiums it would have had to pay from July 1, 2008 through February 25, 2009, had it complied with the *Act*. The Company saved almost eight months of premiums. According to certificates of insurance issued to the Company and produced at the hearing, the annual premium for the E&O insurance amounts to \$725. The estimated premium savings to the Company would therefore be just under \$500.

Criterion #5 has no relevance to this case.

Mr. Grant Swanson, the Executive Director Licensing and Market Conduct at FSCO, stated in an affidavit produced for the hearing that an effective regulatory system requires penalties that are fair and understandable by brokerages, which tend to be small businesses. Therefore a standard, easily explained penalty would have the desired outcome. FSCO recommended a standard penalty at the lowest level that would likely achieve the outcomes (\$1,000). Had graduated penalties been considered appropriate, FSCO would have started at \$1,000 and would have increased from there. “Penalties below \$1,000 send a signal that non compliance is not taken very seriously. . . . In particular while each case in some way [is] unique, the distinctions are not sufficiently large to warrant a difference in penalty.”

Previous panels of this Tribunal have pointed out that the Tribunal does not afford deference to decisions of the Superintendent regarding administrative penalties under s.39 of the *Act*. As the Superintendent allowed at the hearing, the Tribunal has assessed administrative

penalties lower than \$1,000, where the unique circumstances of the case justified such action. Indeed, fairness and the criteria set out in the *Act* would require taking account of specific circumstances. For example a blatant, deliberate breach of the *Act* should call for a higher penalty than an unintentional one and a higher penalty would be called for when there was potential for a considerable harm to someone than would be the case where there was a minimal risk of harm. Nonetheless, applying the criteria to the circumstances of this case, and bearing in mind penalties imposed in similar cases (see *Judy Chen v. Superintendent of Financial Services* (FST Decision No. M0359-2009-1) and other cases cited therein) the Tribunal holds that an administrative penalty against the Company of \$1,000 would be appropriate.

Order

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

Dated at Toronto this 30th day of October, 2009.

“Shiraz Bharmal”

Shiraz Bharmal
Member of the Tribunal and Chair of the Panel