

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, 38 and 39; the Mortgage Brokerages: Standards of Practice Regulation, O. Reg. 188/08, in particular section 42; and the Administrative Penalties Regulation, O. Reg. 192/08, in particular section 3;

AND IN THE MATTER OF a Notice of Proposal to impose an Administrative Monetary Penalty on John Cabral Silva, dated March 5, 2009;

AND IN THE MATTER OF John Cabral Silva’s Request for a Hearing before the Financial Services Tribunal (the “Tribunal”) pursuant to subsection 39(5) of the Act.

BETWEEN:

JOHN CABRAL SILVA

Applicant

- and -

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

BEFORE:

Mr. Denis Boivin
Member of the Tribunal and Chair of the Panel

APPEARANCES:

Mr. John Silva
Principal Broker for John Cabral Silva, representing the Applicant

Mr. Stephen Scharbach
representing the Superintendent of Financial Services

HEARD:

September 25, 2009

REASONS FOR DECISION

A. BACKGROUND

On June 23, 2008, Mr. John Silva applied for a mortgage brokerage licence on behalf of John Cabral Silva (“JCS”). In this application, Mr. Silva was identified as the Sole Proprietor of JCS. Among other things, he declared that his brokerage would have by July 1st, 2008, the required errors and omissions insurance in place.

The Superintendent of Financial Services (the “Superintendent”) issued a brokerage licence to JCS with an effective date of July 1, 2008. However, during the course of an audit conducted on October 15, 2008, it was determined that this brokerage did not have the liability insurance that was required by the *Mortgage Brokerages, Lenders and Administrators Act* 2006, S.O. 2006, c. 29 (the “Act”) and its regulations.

Compliance officers with the Financial Services Commission of Ontario (the “Commission”) informed Mr. Silva of this deficiency by email on November 26, 2008, by registered mail on December 12, 2008, and by telephone on January 22, 2009. During each of these communications, Mr. Silva was asked to provide proof of liability insurance on behalf of his brokerage JCS.

As early as the telephone conversation of January 22nd, Mr. Silva indicated to the Commission his intention to surrender the brokerage licence of JCS. However, Mr. Silva did not take the required steps to complete an official surrender of JCS’s licence until March 10, 2009, five days after the Superintendent issued an Interim Order suspending the brokerage licence of JCS, a Notice of Proposal to revoke its licence, and a Notice of Proposal to impose an administrative monetary penalty of \$1,000 on JCS. As discussed below, the main explanation offered by Mr. Silva for this delay relates to his belief that a transfer of his personal broker’s licence, which took place in February of 2009, amounted to a surrender of JCS’ brokerage licence, and that additional steps were not required to secure the latter.

On March 12, 2009, Mr. Silva requested a hearing before the Tribunal with respect to the two Notices issued by the Superintendent. During a pre-hearing teleconference, counsel for the Superintendent confirmed that the Notice of Proposal to revoke the brokerage licence of JCS had been withdrawn and that the Interim Order suspending this licence had not been extended following Mr. Silva’s request for a hearing. Accordingly, the Hearing held in this matter only dealt with the Superintendent’s proposal to impose an administrative monetary penalty on JCS.

B. ISSUE

During the course of the Hearing, Mr. Silva indicated that he was not challenging the appropriateness of a monetary penalty *per se*, but only the amount of said penalty. Thus, the only issue before the Tribunal is whether a penalty of \$1,000 is justified in the circumstances of this case.

C. STATUTORY FRAMEWORK

Subsection 2(2) of the Act prohibits a person or entity such as JCS from carrying on the business of dealing in mortgages in Ontario without a mortgage brokerage licence, unless this person or entity is exempt from the requirement to have such a licence. Likewise, subsection 2(3) of the Act prohibits an individual such as Mr. Silva from dealing in mortgages in Ontario for remuneration unless he or she has a mortgage broker's or agent's licence and is acting on behalf of a mortgage brokerage or is exempted from the requirement to have such a licence. In this case, there is no suggestion that either JCS or Mr. Silva benefited from any of the current licensing exemptions.

Mortgage brokerage licences (such as the one issued to JCS) are governed by section 7 of the Act, whereas mortgage broker's licences (such as the one issued to Mr. Silva) are governed by section 8 of the Act. For present purposes, it is sufficient to note two requirements associated with brokerage licences. First, according to subsection 7(4), brokerages licensed under the Act are required to comply with such "standards of practice" as may be prescribed for the licence. Second, according to subsection 7(6), brokerages licensed under the Act must designate a "principal broker" to exercise such powers and perform such duties as may be prescribed, and provides that this person shall carry out his or her powers and duties in accordance with any regulations. In this case, it is not disputed that Mr. Silva was the principal broker for his brokerage JCS.

Standards of practice for mortgage brokerages have been prescribed by O. Reg. 188/08, the "Standards of Practice Regulation". According to section 42 of this regulation, every brokerage licensed under the Act shall maintain errors and omissions insurance of at least \$500,000 per occurrence and \$1 million per policy period in a form approved by the Superintendent, with extended coverage for loss resulting from fraudulent acts, or shall have some other form of assurance approved by the Superintendent. Of significance, section 42 creates no distinction whatsoever on the basis of whether the licensed brokerage actually conducts any business with respect to mortgages. On the contrary, according to section 4 of the Standards of Practice Regulation, the requirement to maintain liability insurance is a standard of practice that applies to "every brokerage licence that is issued under the Act". Moreover, because of the circumstances of this case, it should be emphasised that the requirement to maintain errors and omission insurance is imposed on brokerages (such as JCS) and not on individual brokers (such as Mr. Silva).

Although it was not specifically raised in argument, section 20 of the Act appears quite relevant for present purposes. Paragraph 20(1) provides that a licensee "may apply to the Superintendent for permission to surrender his, her or its licence". Paragraph 20(2) provides that in order to surrender a licence, the licensee "shall submit the application to the Superintendent in the manner required by the Superintendent and shall give the Superintendent such information and documents as he or she may require". Of significance, the Superintendent is not obliged to accept an application made under section 20 of the Act. Indeed, according to paragraph 20(3), the Superintendent has the authority to refuse to allow the surrender of a licence if he or she is of the opinion that the surrender is not in the public interest. With respect to brokerage licences, such as the one issued to JCS, the criteria that the Superintendent must apply to determine whether the

public interest would be compromised by a surrender of a brokerage licence are prescribed by section 4.1 of O. Reg. 408/07.

When they are read together, sections 38 and 39 of the Act provide that a general administrative penalty may be imposed on a mortgage brokerage such as JCS if three conditions are met:

- 1) The brokerage 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 subsection 55(5)(a).
- 2) The penalty is aimed at promoting compliance with the requirements of the Act or at preventing the brokerage from deriving an economic benefit from not complying with said requirements.
- 3) The Superintendent has followed the procedural steps prescribed by section 39, in particular the requirements to give written notice of the proposal to impose a monetary penalty to the brokerage and to inform the brokerage of its right to request a hearing before the Tribunal.

With respect to the amount of the administrative penalty, section 41 of the Act provides a maximum penalty of \$25,000 for a brokerage such as JCS and O. Reg. 192/08, the “Administrative Penalties Regulation”, provides that the Superintendent is authorised to determine the amount of the penalty up to this limit (section 2) having regard only to the five criteria listed in section 3 of the regulation. These criteria are discussed below under the heading “Analysis”.

Lastly, according to subsection 39(6) of the Act, when the Tribunal has held a hearing following a notice of proposal to impose an administrative penalty, the Tribunal may, by order, direct the Superintendent to carry out the proposal, with or without changes, or substitute its opinion for that of the Superintendent.

D. EVIDENCE

The evidence presented to the Tribunal during the Hearing was straightforward and, with one exception, un-contradicted. The parties jointly filed an Agreed Statement of Facts (“ASF” – Exhibit A) setting-out the timeline of events in this matter, in particular, with reference to the numerous written and telephone exchanges between Mr. Silva and the Commission which occurred between June 23, 2008 (the date he submitted an application for a brokerage licence on behalf of JCS) and April 3, 2009 (the date his application to surrender the licence was granted). Counsel for the Superintendent also filed a Book of Documents containing written evidence supporting each of the statements made in the eighteen paragraphs of the ASF (“BOD” – Exhibit B). During the Hearing, Mr. Silva confirmed that he had read the documents contained in the BOD and accepted that they be introduced as evidence for the truth of their contents. Counsel for the Superintendent also presented an Affidavit sworn by Grant Swanson, Executive Director Licensing and Market Conduct, in which he describes the rationale for compulsory liability insurance

and for administrative monetary penalties (Exhibit C). Lastly, Mr. Silva presented the Tribunal with a package of documents containing a letter dated September 23, 2009, an application for liability insurance dated July 3, 2008, and a response from an insurance broker dated July 8, 2008 (Exhibit D).

The relevant facts contained in this documentary evidence can be summarised as follows. Mr. Silva applied for a brokerage licence on behalf of JCS in June of 2008 (BOD T1), his brokerage was granted a licence with an effective date of July 1st, he made one inquiry from an insurance broker on July 3rd (Exhibit D at pp. 1-4), but never followed-up on the response received from this broker on July 8th (Exhibit D at pp. 6-7). Approximately five months later, the Commission advised Mr. Silva on two distinct occasions that JCS had been identified during an audit as being an uninsured brokerage, by an email sent on November 26th (BOD T2) and by a registered letter sent on December 12th (BOD T3), and asked him to provide evidence of coverage without delay. There is no documentary evidence suggesting that Mr. Silva responded to either written communications, although he testified during the Hearing that he telephoned someone at the Commission (Ms. Hrebik) on December 12th to determine if he could put the brokerage licence “on hold” and, in his words, was told that he could do this for up to two years. Ms. Hrebik testified during the hearing and denied making this statement, noting that she has no record of such a conversation and that there is no statutory basis for putting a brokerage licence “on hold”, whatever this expression means. Moreover, according to the document contained in Tab 3 of the BOD, the registered letter was only received by Mr. Silva on December 19. Even though he may have made a mistake during his testimony with respect to the date of his alleged telephone conversation with Ms. Hrebik, the Tribunal is more convinced by the testimony of Ms. Hrebik on this issue given the implausible nature of the statements being attributed to her.

The first documented exchange between Mr. Silva and the Commission, with respect to the uninsured status of JDS, occurred on January 22, 2009. A staff person with the Commission called him on that day in order to follow-up on the registered letter sent the previous month. During their conversation, he indicated his intention to send “something in writing to terminate [the] licence” (BOD T4). Accordingly, on February 5, 2009, Mr. Silva sent a letter to the Commission stating that JCS had not done any business in mortgages and that he wished to put its brokerage licence “on hold” until further notice (BOD T5).

On February 10, 2009, Mr. Silva was telephoned by Ms. Low Sin of the Commission and was told that placing the brokerage licence “on hold” was not an option available to him; he would either have to surrender the licence of JCS or obtain the required liability insurance (BOD T5). Ms. Low Sin testified during the Hearing and confirmed the substance of this conversation, as well as the substance of her subsequent telephone conversation with Mr. Silva which occurred on February 20, 2009. During this second conversation, Mr. Silva indicated his intention to surrender the brokerage licence and join another brokerage as an agent (BOD T5; testimony of Mr. Silva). Accordingly, the same day, Mr. Silva was sent a follow-up email by Ms. Low Sin in which she attached a form entitled “Surrender of Mortgage Brokerage Licence Declaration” (BOD T6). As stated on the form itself, this is a document that must be completed by a licensee to support an

application for surrender made under section 20 of the Act. Ms. Sin Low's email stated that Mr. Silva needed to "complete and return" the Surrender Declaration "in order to terminate the licence for your mortgage brokerage".

On February 20, 2009, Mr. Silva completed and signed the Surrender Declaration. However, instead of sending it to the Commission, he faxed the document to the principal broker of the brokerage he was joining and asked him to "sign my declaration"; presumably as a witness, since he had already signed the declaration as principal broker for JCS (BOD T10 at pp. 3-5). He also asked the principal broker to fax the signed document to the attention of Ms. Low Sin. There is no evidence before the Tribunal to suggest that either of Mr. Silva's requests were fulfilled.

On February 25, 2009, Mr. Silva completed an online application on the website of the Commission requesting a transfer of his personal licence (#M08008440) from JCS to the brokerage 6401473 Canada (a.k.a. Matrix Mortgage) and a change in the status of this licence from a broker's licence to an agent's licence. On the same day, two emails were sent to Mr. Silva by the Commission. In these emails, the transfer of Mr. Silva's licence and change in his status are acknowledged by the Commission (BOD T10 at pp. 7-9). During his testimony and submissions, Mr. Silva placed considerable reliance on these emails. In essence, he argued that the emails of February 25th were evidence that the brokerage licence of JCS had been cancelled by the Commission or, at the very least, were evidence that any further steps on his part were not required to complete the surrender of this licence.

During her testimony, Ms. Low Sin explained the difference between a change in the status of a broker's licence and a surrender of a brokerage licence. She testified that both licences are separate and distinct, and that the emails of February 25th relate to Mr. Silva's licence as a broker (#M08008440) and not to the brokerage licence of JCS (#11357). She testified that individual brokers and agents can go online and make changes to the status of their licences, as Mr. Silva did on February 20th. However, she testified that brokerages (such as JCS) could not simply abandon their licences; they had to apply to surrender their licences and the Superintendent had the duty to determine whether the application raised any concerns with respect to the public. Ms. Low Sin also testified that brokers could not be associated with more than one brokerage and that, since Mr. Silva was principal broker for JCS, his licence would normally not have been transferred to another brokerage before the surrender of JCS's licence – because this would leave JCS without a principal broker. However, she added that the online application process followed by Mr. Silva on February 20th is not currently designed to identify or flag this potential problem.

On March 10, 2009, five days after the Superintendent issued the Notice of Proposal currently in issue, Mr. Silva and Ms. Low Sin had a third telephone conversation. During this call, he was informed that the Surrender Declaration completed by him on February 20th had never been received by the Commission. Accordingly, on the same day, he faxed a signed and witnessed Surrender Declaration with respect to the brokerage licence of JCS (BOD T8 & T9). On April 3, 2009, the Superintendent granted the request to surrender this licence pursuant to subsection 20(3) of the Act (BOD T11).

E. ANALYSIS

1. *Basis for Imposing an Administrative Penalty*

Mr. Silva did not contest the appropriateness of imposing an administrative monetary penalty upon JCS under subsection 39(1) of the Act. Indeed, given the evidence adduced during the Hearing, it is clear that both of the substantive conditions outlined in sections 38 and 39 are present in the circumstances of this case.

- a) *Contravention with a requirement established under the Act:* For a period of ten months (1 July 2008 to 3 April 2009), JCS was in contravention of the requirement imposed by subsection 7(4) of the Act, namely, the requirement to comply with the standards of practice prescribed for brokerage licences. Liability insurance is a standard prescribed by section 42 of the Standards of Practice Regulation and Mr. Silva, as principal broker for JCS, had the statutory obligation to carry out his powers and duties in accordance with said regulation (subsection 7(6) of the Act). During his testimony, Mr. Silva did not allege that he was unaware that brokerages licensed under the new Act needed errors and omissions insurance. On the contrary, he presented the Tribunal with an application for liability insurance that he submitted on behalf of JCS on July 3, 2008, and a response from an insurance broker dated July 8, 2008, in which he is given a premium quote of \$750 per year (Exhibit D). Given this documentary evidence, the Tribunal has no difficulty inferring that Mr. Silva knew about the requirement for errors and omissions insurance when he submitted the licence application on behalf of JCS on June 23, 2008, or very shortly thereafter.
- b) *Purposes of an administrative penalty:* The imposition of a monetary penalty on JCS would serve both of the purposes for which a penalty may be imposed under the Act. First, even though the brokerage JCS ultimately surrendered its own licence, a penalty has the potential of deterring other mortgage brokerages from contravening the requirement for liability insurance, a standard of practice primarily designed to protect the public from the financial consequences of negligence and fraud by a brokerage or its authorised agents and brokers (Exhibit C). A penalty could also promote compliance from Mr. Silva himself if and when he decides to reactivate his own brokerage or becomes principal broker for another brokerage and is thereby reinvested with the duties imposed by subsection 7(6) of the Act. Second, a monetary penalty would prevent JCS from deriving an economic benefit as a result of having failed to comply with the requirement for liability insurance for ten months, that is, the period of time between July 1, 2008 (the effective date of the licence) and April 3, 2009 (the date on which JCS's request to surrender its licence was granted). According to the insurance quotation produced by Mr. Silva (Exhibit D), he could have secured errors and omissions insurance for an annual premium of \$750. Although the benefit derived from not paying this premium for ten months is modest, it remains undeniable.

2. *Criteria for Determining Amount of Penalty*

The crux of the matter is whether a penalty of \$1,000 is justified in the circumstances of this case. In determining the amount of an administrative penalty to be imposed under section 39 of the Act for a purpose set out in section 38, the Tribunal must take into account only the five criteria listed in section 3 of the Administrative Penalties Regulation, just as the Superintendent was obliged to limit himself to those criteria in the first instance. Having reviewed the evidence and submissions of both parties, the Tribunal makes the following findings with respect to the application of these criteria to the circumstances of this case:

- a) *The degree to which JCS's contravention was intentional, reckless or negligent:* In a letter dated September 23, 2009, Mr. Silva explains to counsel for the Superintendent that he “had good intentions to get the necessary insurance to comply with the Act” and that his failure to secure said insurance was neither intentional nor a result of recklessness or negligence on his part (Exhibit D). Mr. Silva echoed these submissions during the Hearing, adding that the delay involved in requesting a surrender of JCS's licence was, in essence, the result of a misunderstanding between himself and the Commission. The Tribunal cannot endorse this interpretation of the facts. To begin with, the contravention in this case is not the delay involved in applying for a surrender of JCS's licence, but the failure of Mr. Silva to secure liability insurance for his brokerage. On this point, Mr. Silva may have initially wanted to comply with the requirement for compulsory insurance, as evidenced by his application for coverage dated July 3, 2008, he nevertheless rejected the insurance quotation that was provided to him on July 8th. Leaving aside the fact that JCS was, at that point in time, already in contravention of the Act, the only reasonable inference that can be drawn from Mr. Silva's omission to follow-up on the premium quote provided to him on July 8th is that he took a deliberate decision to not insure his mortgage brokerage. As suggested during his testimony and by his letter to the Commission dated February 5, 2009 (BOD T5), this decision was not motivated by any mistaken understanding about the necessity to secure insurance, but by economic considerations, namely, by the fact that JCS was not conducting any mortgage business at the relevant time. Accordingly, regardless of any misunderstandings or miscommunications that may have arisen in February and March of 2009 with respect to the steps required to surrender the brokerage licence of JCS, the decision that was previously made in July of 2008 to not secure liability insurance was, at worst, intentional and, at best, reckless.
- b) *The extent of the harm or potential harm to others resulting from JCS's contravention:* There is no evidence before the Tribunal to suggest that JCS solicited or engaged in any regulated mortgage activities from July 1, 2008 to April 3, 2009. Indeed, the statement made by Mr. Silva in his letter to the Commission dated February 5, 2009 (BOD T5), was not contradicted by any evidence adduced on behalf of the Superintendent. Accordingly, there is no evidentiary basis upon which the Tribunal could reasonably conclude that the harm or potential harm resulting from JCS's contravention was anything beyond minimal.

- c) *The extent to which Mr. Silva took any remedial action on behalf of JCS:* There is no evidence before the Tribunal of any remedial measures taken by Mr. Silva on behalf of JCS during the period between July 1, 2008, and the telephone conversation between himself and a staff person of the Commission on January 22, 2009, during which he indicated his intention to send “something in writing to terminate [the] licence” (BOD T4). To be sure, Mr. Silva did complete an application for liability insurance on July 3, 2008, and requested a premium quotation. However, for present purposes, this action cannot reasonably be described as “remedial” within the meaning of the third criterion found in section 3 of the Administrative Penalties Regulation. As principal broker for JCS, Mr. Silva was required to ensure that his brokerage complied with the Act and regulations, and the insurance application sent on July 3rd was simply a step taken in furtherance of this statutory obligation. Accordingly, to the extent that Mr. Silva took any remedial action to mitigate JCS’s failure to have the required liability insurance, the relevant timeframe is the period between January 22, 2009 (his first documented exchange with the Commission regarding this contravention) and April 3, 2009 (the date his application to surrender the licence of JCS was granted) – a timeframe that begins almost two months after he received the November 26th email advising him of the contravention in question. What steps were taken by Mr. Silva during this period? As demonstrated by the evidence, it took approximately one month for him to clarify his intentions with respect to the future of JCS: he began by expressing a desire to surrender the licence (January 22nd), then expressed a desire to place the licence “on hold” (February 5), then returned to his initial position (February 20th). Once his intentions were determined, he completed the required Surrender Declaration to support his application to terminate the licence of JCS, but he never returned this document to the Commission as requested by Ms. Low Sin and as required by subsection 20(2) of the Act. Instead, he sent the Surrender Declaration to the principal broker of the brokerage he was about to join, presumably under the mistaken belief that the surrender of JCS’s brokerage licence was, from a regulatory point of view, related to the transfer of his individual broker’s licence. Accordingly, the Commission did not receive a signed and witnessed Surrender Declaration until March 10, 2009, five days after the Superintendent issued the Notice of Proposal and 3½ months after the email of November 26th. In light of this evidence, there is no doubt that Mr. Silva took some remedial steps on behalf of JCS to mitigate its failure to have the required liability insurance. However, considering the intentional or reckless nature of the decision taken in July of 2008 to not purchase insurance and the fact that he was advised by the Commission of this contravention as early as November 26th, the remedial action taken by Mr. Silva can reasonably be qualified as belated in nature. Furthermore, even if one accepts his explanation for the delay between February 20th (the first Surrender Declaration) and March 10th (the second Surrender Declaration), the fact remains that he was mistaken about the relationship between his broker’s licence and the brokerage licence of JCS. As principal broker for JCS, Mr. Silva had the statutory obligation to exercise his powers in accordance with the Act and regulations, including the duty to submit his application for the surrender of JCS’s licence to the Superintendent himself (subsections 7(6) and 20(2) of the Act) – a duty that the email of Ms. Low Sin dated February 20th made clear.

- d) *The extent to which JCS derived any economic benefit from its contravention:* The evidence with respect to this factor is unquestionable. Mr. Silva submitted an application for insurance on behalf of JCS on July 3, 2008 and was given a premium quotation of \$750 on July 8th of the same year. This figure represents the costs that would have been assumed by JCS if Mr. Silva had ensured that his brokerage complied with the requirement for compulsory errors and omissions insurance. Conversely, this figure represents the economic benefit derived by JCS from his failure to do so.
- e) *Any other contraventions by JCS during the preceding five years:* This factor has no application in the circumstances of this case. There was no suggestion that either JCS or Mr. Silva has, in the past, failed to comply with any other requirement under the Act or with any other legislation.

In view of these findings, the Tribunal concludes that an administrative penalty of \$1,000 is appropriate in the circumstances of this case. Since the Superintendent has not urged the Tribunal to increase the proposed penalty, it is decided that a penalty of \$1,000 should be imposed in this case.

F. ORDER

The Tribunal orders the Superintendent to carry out his Notice of Proposal to impose an administrative monetary penalty of \$1,000 on JCS.

DATED at the City of Toronto, this 25th day of November, 2009.

“Denis Boivin”
Denis Boivin
Member of the Tribunal and Chair of the Panel