

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 the 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, section 3;

AND IN THE MATTER OF Realty Executives Supreme Inc.;

AND IN THE MATTER OF a request for hearing pursuant to subsections 21(3) and 39(5) of the Act.

BETWEEN:

REALTY EXECUTIVES SUPREME INC. Applicant

-and-

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

BEFORE:

Ms. Florence Holden
Vice Chair of the Tribunal and Chair of the Panel

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

Mr. David Short
Member of the Tribunal and of the Panel

APPEARANCES:

Mrs. Rose Mary Morris, Director and Principal Broker for Realty Executives Supreme Inc., for the Applicant

Mr. Joe Nemet, counsel,
representing the respondent the Superintendent of Financial Services

HEARD:

July 13, 2009

REASONS FOR DECISION

A. Background and Relevant Facts

The Superintendent of Financial Services (the “Superintendent”), the chief executive officer of the Financial Services Commission of Ontario (“FSCO”), is authorized to issue mortgage brokerage licences under the terms of the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, S.O. 2006, c. 29 (the “Act”), which came into force on July 1, 2008. Mrs. Rose Mary Morris applied, as a partner and Principal Broker for such a licence on behalf of Realty Executives Supreme Inc. (“Supreme”) by completing an application form, on May 23, 2008, which was received by FSCO on June 2, 2008 (the “Application Form”). She named herself as the proposed principal broker of Supreme on the Application Form and marked a box on the Form to indicate that her brokerage would have the required errors and omissions insurance (“E&O insurance”) in place by July 1, 2008. The Application Form contained a note that read “Only applicants with the required errors and omissions insurance are licensed on July 1, 2008.”

The Application Form also contained an attestation by the signatory, as to the truth, correctness and completeness of the statements, declarations and answers to the questions in the form and to the signatory’s familiarity with the laws of Ontario relating to the licensing of mortgage brokerages. We find on the evidence presented by Mr. Grant Swanson, Executive Director of the Licensing and Market Conduct Division of FSCO and by Danielle Katic, Senior Co-ordinator, Communications of the Public Affairs Unit of FSCO, both witnesses for the Superintendent, that FSCO engaged in extensive industry outreach prior to the introduction of the new regulations and afterwards, and that the need for E&O insurance was plainly communicated to the industry generally in information that was available on FSCO’s website and specifically on the Application Form.

The Superintendent issued a mortgage brokerage licence to Realty Executives Supreme Inc. on June 10, 2008. We accept the evidence of Ms. Yen Quan Low Sin, an employee in the Licencing and Market Conduct division of FSCO, that as of July 10, 2009, Mrs. Morris remains listed as the Principal Broker of Realty Executives Supreme Inc., with no other brokers listed on file.

On November 26, 2008 FSCO sent an urgent message, in a standard form email, to Mrs. Morris advising that the brokerage was found, as a result of an audit, to have failed to obtain E&O insurance as of October 15, 2008 and requiring an e-mail response no later than December 3, 2008, such response to include a detailed description of why E&O insurance was not in place or supporting documentation of such insurance and the amount of business that the brokerage had conducted since July 1, 2008. Mrs. Morris responded by e-mail on December 3, 2008, in part as follows:

“I was aware that I had to register myself as a mortgage broker with FSCO to keep my designation but unfortunately did not understand “I had to be insured if I was not practising”...”

Mrs. Morris’ response further indicated she was in the process of seeking E&O insurance quotes and at that time, we find, did not appear to want to give up Supreme’s licence.

We note that the November 26, 2008 email to which Mrs. Morris was responding in a Q&A section specifically said 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.

Q: I have not done any business under the MBLAA and want to cancel my licence. Does this exempt me from possible enforcement action?

A: You are subject to possible enforcement action even if you now elect to cancel your licence since you declared on your application that you would have the insurance in place for July 1, 2008 and on that basis you were issued a licence.”

The notice also made clear that any E&O coverage that an applicant may “have through the Real Estate Council of Ontario (RECO) in conjunction with (your) RECO registration only applies to transactions under the *Real Estate and Business Brokers Act, 2002*, and does not cover mortgage services.”

Mrs. Morris wrote to FSCO on at least two further occasions, on January 26, 2009 and on February 10, 2009, expressing dismay over the process and necessity and cost of E&O insurance. In her February 10, 2009 letter she concluded by asking a FSCO staffer (identified in testimony as H. Hrebik) that “I have no alternative but to tell you I cannot

afford these insurance premiums at this time so please cancel my mortgage brokers licence!” She made a similar comment in an email sent to FSCO on the same date.

FSCO responded in an email dated February 12, 2009 setting out the steps required to be taken if Supreme wanted to surrender its mortgage brokerage licence. A copy of the surrender declaration form that had to be completed to surrender the licence was referred to as an attachment. The FSCO letter also threatened enforcement action against Mrs. Morris and her brokerage unless the required information was provided to FSCO by February 13, 2009. In the evidence before us it was not clear that in fact the surrender declaration form was attached to FSCO’s reply email, and we accept Mrs. Morris’ evidence that she did not ultimately receive the form until sometime in March. FSCO subsequently issued an Interim Order to Suspend Licence as well as a Notice of Proposal to revoke Licence and a Notice of Proposal to Impose Administrative Monetary Penalty of \$1,000 on March 5, 2009.

Mrs. Morris filed a Request for Hearing before the Tribunal on behalf of Supreme on March 18, 2009.

Supreme subsequently filed a Surrender of Mortgage Brokerage Licence form signed by Mrs. Morris on April 3, 2009 as provided to this Tribunal. We note that, at the hearing, counsel for the Superintendent provided the Panel with a copy of an Order of the Superintendent terminating the Interim Order to Suspend Licence, which Order also referred to a further Extension of Interim Order to Suspend Licence issued by the Superintendent on March 24, 2009. The Termination Order indicated that the Applicant had on March 26, 2009, “tendered a declaration surrendering its brokerage licence which has been accepted by the Superintendent.” We were not offered any explanation for the discrepancy in the date but accept that at the time of this hearing that the brokerage licence was surrendered.

We have considered all of the evidence before us and also find as a fact, and on the agreement of the Applicant, that neither Supreme nor Mrs. Morris engaged in the business of a mortgage brokerage or mortgage lending during the period from July 1, 2008 to the date of this hearing.

The date for a hearing in the matter was set for July 13, 2009 and a Notice of Hearing to that effect was sent by the Registrar of the Tribunal to the parties wherein only the Notice of Proposal to Impose an Administrative Monetary Penalty was at issue.

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 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 which 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. Issues

The only issue to be determined in this case is as follows:

Is the imposition of an administrative penalty against Supreme appropriate given its failure to obtain E&O insurance in the circumstances of the case and, if so, what should be the amount of that penalty in those circumstances?

D. Analysis

As a matter of evidence and on the agreement of the parties, it is clear that Supreme did not secure the necessary E&O insurance required to be licenced as a mortgage brokerage agency. As Principal Broker, Mrs. Morris must have been aware of the requirement as it was referred to in the Application Form that she completed on behalf of Supreme. Regardless of any personal circumstances that may have delayed her efforts to obtain the necessary E&O insurance, in fact she ultimately decided not to obtain the insurance and surrendered Supreme's licence.

Consequently, there is a basis for imposing an administrative penalty upon Supreme under subsection 39(1) of the Act. We are 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. Our 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 Supreme 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 Supreme did not carry on any mortgage brokerage business, pursuant to its 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 Supreme actually enjoyed from holding a mortgage brokerage licence for 8 months (from July 1 2008 to March 5 2009) without having paid any of the premiums for the required E&O insurance. We have 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. We believe that it is appropriate in those circumstances to impose such a penalty.

In determining the appropriate amount of the penalty, we 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 Mrs. Morris' evidence is that she did contact a few insurers in December 2008 and January 2009, to secure E&O insurance on

behalf of Supreme, she decided largely on the basis of cost that she 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. Any belief that she had about sufficient insurance coverage under RECO was disavowed in FSCO communications. We can only conclude that her failure to secure the required E&O insurance on behalf of Supreme was negligent at a minimum.

The second criterion is the harm or potential harm to others resulting from the failure. There was, in our view, no demonstrated real harm to others resulting from Supreme's failure to obtain E&O insurance as it appears not to have engaged in any mortgage brokerage business. The potential harm arises from having the potential of holding itself out with the ability to engage in mortgage activities given its licence.

The third criterion is the extent to which the person tried to mitigate any loss or take any other remedial action. Supreme did not initiate any action to obtain insurance coverage until December 2008 and ultimately surrendered its mortgage brokerage licence, which 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. Supreme received a modest economic benefit by virtue of retaining a licence to carry on a mortgage brokerage business (although she did not, as Principal Broker, apparently broker any mortgage deals), while avoiding payment of an E&O insurance premium for the period from July 1, 2008 until March 5, 2009, when Supreme's licence was suspended.

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, we are 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 Supreme from deriving an economic benefit from its failure to pay premiums for eight months.

E. Orders

We hereby direct the Superintendent, by order, to carry out his proposal to impose an administrative penalty upon Supreme in the amount of \$1000.

DATED at the City of Toronto, the 24th day of July, 2009.

“Florence Holden”

Florence A. Holden,
Vice Chair of the Tribunal and Chair of the Panel

“Denis Boivin”

Denis Boivin
Member of the Tribunal and of the Panel

“David Short”

David Short
Member of the Tribunal and of the Panel