

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 IN THE MATTER OF Gavriel Yacubov;

AND IN THE MATTER OF a request for hearing pursuant to subsection 21(3) of the Act.

BETWEEN:

GAVRIEL YACUBOV

Applicant

- and -

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

BEFORE:

Mr. John M. Solursh
Chair of the Tribunal and Chair of the panel

APPEARANCES:

Mr. Gavriel Yacubov, Applicant
Mr. Joe Nemet, counsel, representing the Respondent, the Superintendent of Financial Services

HEARD:

December 2, 2009

REASONS FOR DECISION

A. Background and Relevant Facts

The Act requires persons and entities engaged in certain dealings and mortgages to be registered as provided therein. These provisions came in to force on July 1, 2008.

The following summary of facts is based on the testimony of Ms. Yen Quan Low Sin, Senior Registration Specialist, Licensing Registration and Analysis Unit of the Financial Services Commission of Ontario (“FSCO”), the book of documents filed by the Superintendent with the consent of Mr. Yacubov and identified during Ms. Yen Quan Low Sin’s testimony and the testimony by Mr. Yacubov including his responses to questions put to him during cross examination by the Superintendent’s counsel.

Mr. Yacubov accepted as accurate the book of documents filed by the Superintendent. It is clear from the documents and Mr. Yacubov’s testimony that he submitted an application as a sole proprietor for a mortgage brokerage licence under the Act. In his application Mr. Yacubov stated that he would have in place by July 1, 2008 the required errors and omissions insurance (“E&O Insurance”) in accordance with the Act and related regulations. That application was received by FSCO on May 28, 2008 and Mr. Yacubov was granted a brokerage licence effective on July 1, 2008.

Mr. Yacubov testified that he was a licensed real estate broker. The business of his real estate brokerage declined significantly due to the economic downturn after the date of the application for his mortgage brokerage licence. He had intended to become active in the mortgage brokerage business but eventually decided to defer activity in that business until economic circumstances improved. He did not do any mortgage brokerage transactions on or after July 1, 2008 until the date of the hearing and he does not have any current plans to do any such deals.

Mr. Yacubov was aware as a real estate broker that obtaining a mortgage brokerage licence by July 1, 2008 would enable him to qualify for an initial exemption from the educational requirements under the Act and related regulations granted to licensed real estate brokers. He was not focused on making long term use of that exemption and instead took a course required to meet the educational requirements under the Act sometime following July 1, 2008 at a cost of approximately \$400.00.

Mr. Yacubov acknowledged that he was aware of the need to obtain the requisite E&O insurance. He obtained an estimate prior to November 1, 2008 as to the potential cost of that insurance in the range of \$700.00. However, he did not intend to do any mortgage brokerage business due to the economic slow down. He had concluded that in view of the low level of activity in his real estate brokerage he lacked sufficient income or other assets to pay the premium required to obtain the requisite E&O insurance. Accordingly, he decided to defer purchasing the insurance until he had sufficient cash to cover that estimated cost. He also decided to defer incurring what he anticipated were other costs required to start up a mortgage brokerage business.

Mr. Yacubov stressed that he never intended to carry on a mortgage brokerage business prior to obtaining the requisite E&O insurance. He still hoped to get into the business at a future date.

On November 26, 2008 FSCO sent an urgent, standard form message addressed to Mr. Yacubov's email address. This email message stated that:

- the principal broker was responsible for insuring that the mortgage brokerage complies with every requirement of the Act,
- advised that the mortgage brokerage was found, as a result of an audit to have failed to obtain E&O insurance as of October 15, 2008,
- emphasized the importance of the requirement to have E&O insurance and that a failure to obtain such insurance could lead to enforcement action, including an administrative penalty and revocation of licence,
- noted that the only acceptable insurance was specific E&O mortgage broker insurance secured from one of five FSCO-approved insurance providers, which were listed,
- advised that E&O insurance coverage that might be held through RECO only applied to transactions under the Real Estate and Business Brokerage Act, 2002 and does not cover mortgage services, and
- required an email response by no later than December 3, 2008, such response to include a detailed description of why E&O 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.

Ms. Low Sin testified that there was no "bounce back" or "error" message indicating that the email was not received by Mr. Yacubov and that FSCO had no record of any written or oral response from Mr. Yacubov. As a result of the lack of response FSCO sent to Mr. Yacubov a registered letter on December 12, 2008 referring to the November 26, 2008 email (a copy of which was enclosed), noting that no response had been received and requiring a response by December 31, 2008 along with an explanation of the failure to respond by the due date, to the original email.

Mr. Yacubov responded on December 30, stating that he was out of the country for a very long time and did not have time to acquire the E&O insurance. His email reply also indicated that he had not done any deals that year and he asked FSCO to let him have a few more months before he acquired his E&O insurance because he lacked the monies to pay the premium. He noted that he was in the real estate business and the business "was not going very good", he would like to know what will happen with his licence and what he can do about it and he would like to keep his licence. He suggested that FSCO could call him if it wanted him to explain further.

On February 9, 2009, FSCO sent a further email to Mr. Yacubov noting that they required a response (either a declaration page from the E&O insurance or a completed Surrender Declaration) by February 13, 2009 and explained how he could obtain a copy of the Surrender Declaration. The email stated that FSCO must be in receipt of a confirmed response by no later than 5:00 p.m. Friday, February 13, 2009.

Subsequently on March 11, 2009 FSCO Licensing and Market Conduct Division received a formal surrender of Mortgage Brokerage Licence Declaration from Mr. Yacubov. The declaration included a statement that “I am not working as a Broker Mortgage and I don’t have the money to pay for “Error & Omissions”. The declaration also included a statement that “real estate market is very bad and I don’t have the investment to do mortgages.”

Mr. Yacubov testified that he was in Israel from approximately November 1, 2008 to December 26, 2008. He only had access to a computer twice during the period of his absence which would enable him to obtain emails including the email from FSCO which was addressed to his Yahoo account. He does not remember whether he logged into his email before he returned on December 26, although he acknowledged that he could have used a computer in Israel more frequently to log into his Yahoo email account. He confirmed that he saw the FSCO email after he returned from Israel on or shortly after December 26 which led to his reply email dated December 30. He also testified that he thought he had spoken to someone at FSCO on or before December 30 to request “more time” to acquire the E&O insurance, presumably on a basis similar to the comments made in his December 30 email. He has no recollection of receiving any indication that he would be granted additional time to acquire E&O insurance and in any event indicated that he continued to lack the financial resources to pay for the insurance as well as to cover other costs required to start up a mortgage brokerage business.

The parties have agreed that as a result of the surrender of Mr. Yacubov’s brokerage licence to FSCO the only issues outstanding for the hearing are whether an administrative monetary penalty should be imposed and if so, the appropriate amount of that penalty.

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 Act provides for such licences and, in subsection (4) thereof, requires any licensee to comply with such standards of practice as may be prescribed, by regulation, for such a 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 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 whom 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. Issue

Mr. Yacubov’s mortgage brokerage licence was surrendered as previously noted on March 11, 2009. He acknowledged at the hearing on December 2, 2009 that he took responsibility for not arranging the requisite E&O insurance and stated that taking his financial circumstances into account he hoped that the Administrative Monetary Penalty under the Act would be waived or reduced. Accordingly, the only issues to be determined in this case are should an administrative penalty be imposed and if so, what is the amount of such a penalty which should be levied against Mr. Yacubov given his failure to obtain E&O insurance in the circumstances of the case.

D. Analysis

It is clear from the evidence, including the testimony of Mr. Yacubov, that when he submitted his application for a mortgage brokerage licence he knew he was required to obtain the necessary E&O insurance in order to be licensed as a mortgage brokerage. He made inquiries regarding the potential cost of such insurance and decided to defer purchasing the insurance having regard to the economic circumstances he was facing (including the lack of any mortgage brokerage business and the significant reduction in his real estate brokerage business), the potential cost of such insurance coverage (estimated by him to be over \$700.00) and the other costs he would have to incur in order to start up a mortgage brokerage. Mr. Yacubov acknowledged that his decision not to purchase E&O insurance was motivated by the desire to avoid incurring the cost of that insurance, recognizing that he was not yet carrying on a mortgage brokerage business. He was not seeking to shelter under the exemption granted to real estate brokers from the educational requirements under the Act and in fact, incurred a cost of \$400.00 to participate in a course intended to satisfy the educational requirement. He ultimately decided due to the economic circumstances and lack of business not to obtain the E&O insurance and surrendered his mortgage brokerage licence.

Consequently, there is a basis for imposing an administrative penalty upon Mr. Yacubov under subsection 39(1) of the Act. The Tribunal is 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. The Tribunal's 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, imposing an administrative penalty on Mr. Yacubov 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 Mr. Yacubov did not carry on any mortgage brokerage business pursuant to his 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 Mr. Yacubov actually enjoyed from holding a mortgage brokerage licence for over eight months without having paid any of the premiums for the required E&O insurance. The Tribunal has 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. It is appropriate in those circumstances to impose such a penalty.

In determining the appropriate amount of the penalty, the Tribunal 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 only those criteria in the first instance.

The first criterion is the degree to which the failure to comply with the requirement of the Act was intentional, reckless or negligent. While Mr. Yacubov's evidence is that he did contact at least one insurer prior to November 2008 about the possibility of securing E&O insurance, he decided on the basis of cost and the lack of business that he would not obtain the coverage. Mr. Yacubov knew that E&O insurance was required under the Act and his insurance coverage

as a real estate broker was not applicable to meet the requirements of the Act. His failure to secure the requisite E&O insurance was intentional.

The second criterion is the harm or potential harm to others resulting from the failure. There was no demonstrated real harm to others resulting from Mr. Yacubov's failure to obtain E&O insurance based on his uncontradicted testimony that he did not engage in any mortgage brokerage business. The potential harm arises from having the potential of holding himself out with the ability to engage in mortgage activities given his licence.

The third criterion is the extent to which the person tried to mitigate any loss or take any other remedial action. Mr. Yacubov obtained an estimate of insurance coverage prior to November 2009. He consciously decided on the basis of cost and his financial circumstances not to obtain that insurance. He ultimately surrendered his mortgage brokerage licence, which he had obtained effective July 1, 2008. The surrender of the mortgage brokerage licence 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. Mr. Yacubov received the modest economic benefit by virtue of retaining a licence to carry on a mortgage brokerage business (although he did not broker any mortgage deals) while avoiding payment of an E&O insurance premium for the period from July 1, 2008 until late March 2009 when his licence was terminated.

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, the Tribunal is 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 Mr. Yacubov from deriving an economic benefit from his failure to pay premiums for eight months.

E. Order

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

DATED at the City of Toronto, this 17th day of December, 2009.

"John M. Solursh"
John M. Solursh
Chair of the Tribunal and Chair of the Panel