

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 following Regulations under the Act; 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 Jacob Malkin (“Malkin”);

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

BETWEEN:

JACOB MALKIN

Applicant

- and -

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

BEFORE:

Anne Corbett
Vice Chair of the Tribunal and Chair of the Panel

Patrick Longhurst
Member of the Tribunal and Member of the Panel

David Short
Member of the Tribunal and Member of the Panel

APPEARANCES:

Jacob Malkin, appearing on his own behalf

Larissa Easson, representing the Superintendent of Financial Services

HEARD:

October 11, 2011

REASONS FOR DECISION

This is a decision upon a hearing held pursuant to s. 21(3) and s. 39(5) of the *Mortgage Brokerages, Lenders and Administrators Act, 2006* S.O. 2006 ("the Act") at the request of Jacob Malkin (the "Applicant").

On July 8, 2011, the Superintendent of Financial Services (the "Superintendent") issued Notices of Proposal to revoke the mortgage brokerage licence issued to the Applicant and to impose an administrative monetary penalty of \$3,000 against the Applicant for failing to have errors and omission insurance ("E&O insurance") on two occasions as required by the Act.

A. Background and Relevant Facts

Both the Applicant and the Superintendent have agreed that:

1. The Applicant is a licensed mortgage brokerage under the Act. The Applicant has been licensed since June 19, 2008.
2. The Superintendent has approved providers for providing E&O insurance to licensees under the Act.
3. The Superintendent conducted an audit of mortgage brokerages and determined that the Applicant did not have E&O coverage from one of the approved providers from April 1, 2010 to December 14, 2010.
4. The Superintendent notified the Applicant on December 14, 2010 that the audit had determined that the Applicant did not have E&O insurance. The Applicant replied by email on December 15, indicating that he had not done any business and providing E&O insurance policy for the period December 15, 2010 to April 1, 2011. No verification or proof of insurance was provided for the period April 1 to December 14, 2010 as the brokerage was uninsured in that period.
5. The Applicant filed an Annual Information return for the year 2010 indicating no business was done by the brokerage during that year.
6. This is the second time the Applicant was determined by the Superintendent to be without E&O insurance. In or about October 2008, the Superintendent determined that the Applicant did not have E&O insurance and contacted the brokerage for an explanation in December 2008. In or about January 2009, the Applicant provided an E&O certificate with a start date of January 27, 2009. For the period July 1, 2008 (the date that the Act came into force) to January 26, 2009, the Applicant was without E&O insurance.

Mr. Anatol Monid, the Director of Market Regulation in the Licensing and Market Conduct Division of FSCO, was called as a witness by the Superintendent. Mr. Monid gave evidence about the licensing system generally and about the requirement for insurance and the activities of FSCO with respect to ensuring compliance with licensing requirements.

In particular, Mr. Monid testified that:

- The Act brought all licences under the jurisdiction of the Superintendent to protect the public.
- The obligation is on the brokerage to have E&O insurance.
- When obtaining a licence and on renewal of a licence, the broker is required to provide the policy number and the name of the insurer.
- Annually a broker must file an annual information return referred to as an AIR and must confirm in that return that the brokerage has E&O insurance. These returns are due March 31 for the prior calendar year.
- Two audits were conducted by FSCO to verify compliance with the E&O insurance requirement. The first Audit was conducted in 2008 and at that time approximately 30% of the licensees were without insurance. The second audit was conducted in October 2010 and only 6% of the licensees did not have the required E&O insurance.
- The increase in compliance is attributed to more familiarity with the requirement for insurance as a result of completing the renewal cycle and the AIR, the progressive approach to enforcement adopted by the Superintendent and promotion by industry associations of insurance products.
- The purposes of the imposition of an administrative monetary penalty for failure to have E& O insurance are: to correct behaviour, act as a deterrent to others, and to ensure no economic benefit is derived from non-compliance.
- The administrative monetary penalty is only one tool the Superintendent uses to encourage compliance. Additional tools include: increasing awareness, issuing cautions and revocation of licence.
- In relation to the 2010 compliance audit a brokerage found lacking the appropriate E&O insurance coverage for the first time would be subject to a penalty of \$1,500. But where the brokerage was offside for the second time then the administrative penalty would be set at \$3,000.
- The amounts of penalty imposed in cases of non-compliance identified in the 2010 audit are somewhat higher than was the case in the 2008 audit, when penalties in the amount of \$1,000 were typically imposed. The lower penalties imposed in connection with the 2008 audit were in recognition of the newness of the Act at that time.

The Tribunal also heard from Mr. Steve Yamamoto, a Principal Examiner for FSCO, who testified as to the various publications issued by FSCO in respect of the requirement to have E&O insurance including a January 7, 2010, Newsletter (Issue 16) sent to all principal brokers informing them that the Superintendent was going to conduct an audit of mortgage brokerages to determine compliance with the E&O insurance requirement. Issue 19 dated December 22, 2010, referred to the audit that was underway and noted that FSCO would take enforcement action in response to E&O insurance violations. Earlier newsletters sent by FSCO in April 2009, May

2009, and October 2009 provided information and reminders to principal brokers about the requirement that brokerages have E&O insurance coverage.

The Applicant gave evidence in his own behalf and admitted that he was not in compliance with the requirement to have E&O insurance on two occasions but that this was not intentional on his part. He produced an exchange of e-mails from April and October 2010 with his former insurer. These e-mails include an e-mail dated April 9, 2010 where the Applicant was advised by his insurer that his insurance had lapsed on April 1, 2010. The Applicant responded with an e-mail requesting a recommendation about insurance given that he was not active as a broker. He received in reply a quote for insurance in the amount of \$853.20. In October 2010 he inquired about his coverage and the insurer confirmed that no payment had been made and that there was no coverage in place. The Applicant testified that he has not carried out any mortgage business since obtaining his licence in 2008.

In support of his request that the penalty be reduced or replaced with a caution and that his licence not be revoked Mr Malkin asked that the tribunal consider that he had co-operated with FSCO, tried to comply in a timely manner, placed the insurance within one day of receiving the December 14, 2010 notice from FSCO, never claimed his address was wrong or offered any excuse.

B. Statutory Framework

The Superintendent is authorized to issue mortgage brokerage licences under the terms of the Act which came into effect July 1, 2008. Mortgage brokerages are required by the Act and the regulations to have errors and omissions insurance in a form approved by the Superintendent and with a minimum level of coverage.

The Mortgage Brokerages: Standards of Practice Regulation, O. Reg. 188/08 prescribes standards of practice 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.

The Act provides for the revocation of a licence by the Superintendent in any of the circumstances where the Superintendent may suspend a licence. The relevant provisions of the Act are sub-sections 18 (1) and 19 (1) as follows:

18. (1) The Superintendent may, by order, suspend a licence,

(a) if the licensee ceases to satisfy the prescribed requirements for issuance or renewal, as the case may be, of the licence;

(b) if the Superintendent believes, on reasonable grounds, that the licensee is no longer suitable to be licensed having regard to the circumstances, if any, prescribed for the purposes of subsection 14 (1) or 16 (4), as the case may be, and such other matters as the Superintendent considers appropriate;

(c) if the licensee contravenes or fails to comply with a requirement established under this Act; or

(d) in such other circumstances as may be prescribed.

19. (1) The Superintendent may, by order, revoke a licence in any of the circumstances in which he or she is authorized by clause 18 (1) (a), (b), (c) or (d) to suspend the licence.

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 this 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 this Act.

(2) An administrative penalty may be imposed alone or in conjunction with any other regulatory measure provided by this 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 this 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 this Tribunal (subsections (2) and (3)), 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:

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 preceding five years by the person or entity.

Section 41 of the Act provides that the maximum administrative penalty that may be imposed on a person or entity that is a mortgage brokerage for a failure to comply with a requirement of the Act is \$25,000 and the maximum penalty that may be imposed on an individual who is a mortgage broker is \$10,000.

Upon holding a hearing on a notice of proposal under the provisions of the Act relating to a proposed imposition of an administrative penalty or the suspension or revocation of a licence, 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 issues to be determined in this case are:

- (a) Whether the brokerage licence of the Applicant should be revoked for failure to have E&O insurance on two occasions as required by the Act?
- (b) Whether a penalty should be imposed for a failure to have E&O insurance and, if so, should the amount of that penalty be \$3,000.00?

D. Decision

Both the Applicant and the Superintendent agree that the Applicant was in contravention of the requirement to maintain E&O insurance on two occasions, firstly, for a period of almost 7 months in 2008-2009 and the second time for a period of approximately 8.5 months in 2010.

The Superintendent is seeking both the imposition of an administrative penalty in the amount of \$3,000 and a revocation of the Applicant's licence.

We will deal first with the monetary penalty. The imposition of an administrative monetary penalty serves the two required purposes of promoting compliance with the requirements established under the Act, and the prevention of a person or entity from deriving an economic benefit as a result of contravening or failing to comply with the Act.

The Applicant argued that he does not require the imposition of an administrative monetary penalty to ensure his future compliance. He asserts that he has now complied and has committed in writing to do so in the future.

In the Millennium Mortgage Corporation decision (FST Decision No. M0365-2009-1) the panel stated:

“An administrative penalty may be imposed pursuant to the Act for either of two purposes, namely to promote compliance with a requirement established under the Act and to prevent a person from deriving an economic benefit as a result of failing to comply with a requirement established under the Act. In our view, the promotion-of-compliance purpose relates not just to compliance by the person to whom the order is directed but to compliance by others in the regulated mortgage brokering industry. In other words, there can be a general deterrent element to a penalty; a penalty can be imposed to send a message, as it were, to others who are in a similar position to the person against whom the order is directed or to other industry participants generally.”

The Tribunal has concluded that the imposition of a monetary penalty in this case is appropriate and will serve as a deterrent to others. The maximum penalty under the Act is \$25,000. The Superintendent is proposing a penalty of \$3,000. In his written submission the Applicant requested the penalty be reduced to \$600.

In determining the appropriate amount of the penalty the Tribunal must take into account the five criteria set out in section 3 of the Administrative Penalties Regulation

1. The first criterion is the degree to which the failure to comply with a requirement of the Act was intentional, reckless or negligent. The Applicant has acknowledged that he was negligent in failing to maintain E&O insurance.
2. The second criterion is the harm or potential harm to others resulting from the Applicant's failure to obtain E&O insurance. In our view there is no real or potential harm as the Applicant at no time conducted any mortgage brokerage business.
3. The third criterion is the extent to which the person tried to mitigate any loss or take any other remedial action. While the Applicant immediately placed the insurance after receiving notice from FSCO on December 14, 2010, the Applicant was aware prior to that date that there was no insurance in place. The Applicant had made inquiries of his insurer that confirmed the lack of coverage.

4. 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. The Applicant received an economic benefit in the amount of the insurance premium for the lapsed 8.5 months that he was without coverage but the holder of a licence under the Act.

5. 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 of any other jurisdiction during the preceding five years by the person or entity. Apart from the failure to have insurance in 2008, there was no suggestion that there was any other contravention or failure in this case.

Taking account of the five criteria, we are of the opinion that the administrative monetary penalty stated in the Superintendent's notice of proposal in the amount of \$3,000 is appropriate.

We turn now to whether the licence of the Applicant should be revoked. Counsel for the Superintendent initially took the position that the failure on two occasions to obtain E&O insurance was evidence that the Applicant is ungovernable justifying a revocation of the Applicant's licence. In final argument counsel for the Superintendent suggested an alternative penalty of a licence suspension. The Tribunal accepts that while the failure to have insurance was due to the negligence of the Applicant, no business was conducted. The Applicant appears sincerely to have regretted this lapse. In these circumstances the Tribunal believes it is appropriate to suspend the Applicant's licence for 8 months being the approximate time the Applicant was without insurance the second time.

E. Order

We hereby direct the Superintendent, by order, to carry out his proposal to impose an administrative monetary penalty upon the Applicant in the amount of \$3,000. We further direct the Superintendent to vary the proposal to revoke the licence of the Applicant and we order that the licence of the Applicant be suspended for a period of 8 months effective the date of this decision.

Dated at Toronto, Ontario, this 2nd day of December, 2011

“Anne Corbett”

Anne Corbett
Vice Chair of the Tribunal and Chair of the Panel

“Patrick Longhurst”

Patrick Longhurst
Member of the Tribunal and Member of the Panel

“David Short”

David Short
Member of the Tribunal and Member of the Panel