

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, 19, 21, 38 and 39, and the following Regulations under the Act; the *Mortgages Brokerages: Licensing Regulation*, O. Reg. 408/07, as amended, in particular s. 1, the *Mortgages Brokerages: Licensing Regulation*, O. Reg. 410/07, as amended, in particular s. 2, the *Mortgages Brokerages: Standards of Practice Regulation*, O. Reg. 188/08, in particular ss. 4 and 42, and the *Administrative Penalties Regulation*, O. Reg. 192/08, in particular, section 3; and the *Reporting Requirements for Licensees*, O. Reg. 193/08, in particular sections 13 and 15;

AND IN THE MATTER OF Reliance Mortgage Company Ltd. (“**Reliance**”);

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

BETWEEN:

RELIANCE MORTGAGE COMPANY LTD.

APPLICANT

and

SUPERINTENDENT OF FINANCIAL SERVICES

RESPONDENT

BEFORE:

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

Shiraz Bharmal,
Member of the Tribunal and Member of the Panel

Heather Gavin,
Member of the Tribunal and Member of the Panel

APPEARANCES:

Hari Raj S. Ghumman for the Applicant
Larissa Easson for the Respondent

HEARD:

January 10, 2012

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 Mr. Hari Raj S. Ghumman on behalf of Reliance Mortgage Company Ltd. (the "Applicant" or "Reliance").

On August 23, 2011, the Superintendent of Financial Services ("Superintendent") issued an Interim Order to Suspend Licence pursuant to section 19(3) of the Act, suspending the Applicant's mortgage brokerage licence. The Interim Order, which took immediate effect, provided that Reliance Mortgage Company Ltd. is not authorized to deal or trade in mortgages, or carry on the business of dealing or trading in mortgages. On the same day, the Superintendent issued a Notice of Proposal to Revoke the Applicants' mortgage brokerage licence and a Notice of Proposal to impose administrative penalties pursuant to sections 38 and 39 of the Act.

On September 1, 2011 the Applicant requested a hearing before the Financial Services Tribunal ("Tribunal") in respect of the Superintendent's Notices of Proposal. The Superintendent subsequently issued an Extension of the Interim Order to Suspend Licence until the Notice of Proposal to revoke the licence is finally determined.

A. BACKGROUND AND FACTS:

With the consent of both parties, the Tribunal accepted and considered an agreed statement of facts and an agreed book of documents ("ABD") filed with the Tribunal at the commencement of the hearing. In addition, the Tribunal considered the testimony of Mr. Ghumman, the principal broker of the Applicant who gave evidence on behalf of the Applicant. We find as follows:

1. Reliance Mortgage Company Ltd. ("Reliance") is a licensed mortgage brokerage under the Act. Reliance has been licensed since April 23, 2008. Mr. Ghumman was listed as the principal broker of Reliance effective July 1, 2008.
2. The Superintendent has approved providers for providing errors and omissions ("E&O") insurance to licensees under the Act.
3. The Superintendent conducted an audit of mortgage brokerages in 2010 and determined that Reliance did not have E&O insurance coverage from one of the approved providers from April 2009 to the present.
4. The Superintendent requested information from Reliance regarding the brokerage's E&O coverage by email sent on December 14, 2010. All contacts with the brokerage or its representatives were to an email address or mailing address provided by the brokerage or its representatives and on file. The email stated that a response was required by December 21, 2010. The response was to include a detailed explanation of the reasons for the lack of E&O coverage; supporting insurance or other documentation, if any; and the amount of business conducted by the brokerage in 2010.

5. When there was no response, the Superintendent sent a registered letter and another email requesting further information between January 12 and April 12, 2011. A representative of the Financial Services Commission of Ontario (“FSCO”) telephoned the brokerage on February 7, 2011 and was informed by a contact person that the principal broker was out of town, but would return on February 10, 2011. On April 2, 2011 another FSCO representative telephoned the brokerage and reached the principal broker’s wife (Mrs. Ghumman) who indicated that the principal broker, Mr. Ghumman, had left for India the day before. While Mr. Ghumman provided the Tribunal with some evidence of his travels, he provided no documentation of any absence in January or February of 2011. He did provide some evidence of travel to India during the period April 11, 2011 to May 16, 2011 and subsequent travel to India in October 2011. However, we find that he was certainly in Canada for long periods of time in 2010 and 2011.
6. We accept the evidence of the Respondent that no communication from Reliance was received by the Licensing and Market Conduct Division of FSCO in respect of its enquiries and no insurance certificate has been provided. While Mr. Ghumman testified that he attempted to send an email from India in April 2011 indicating that he was in India and would reply on his return, he did not provide the Tribunal with any related documentation and acknowledged that he did not further contact FSCO regarding his insurance on his return. We have given Mr. Ghumman’s testimony that he emailed a staffer at FSCO in October 2011 no weight as the individual identified did not work for the Licensing and Market Conduct Division of FSCO. He also testified that he in fact did not arrange for E&O insurance during the relevant period.
7. Although the Applicant filed a mandatory Annual Information Return (“AIR”) for the year 2009, indicating no business was conducted, no AIR was filed for the year 2010.
8. The only evidence before the Tribunal that the Applicant failed to conduct business during the period June 1, 2008 to present is that of Mr. Ghumman’s verbal testimony.
9. On July 27, 2011, the Superintendent issued an administrative monetary penalty against Reliance pursuant to section 40 of the Act for failure to file the 2010 AIR. We note that this administrative monetary penalty is not a matter before the Tribunal.
10. This is the second time that Reliance has failed to maintain E&O insurance in connection with its brokerage licence under the Act. In or about October 2008, the Superintendent determined that Reliance did not have E&O insurance and contacted the brokerage for an explanation. In or about December 2008, Reliance provided an E&O certificate with a start date of December 2, 2008. For the period July 1, 2008 (the date that the Act came into force) to November 30, 2008, Reliance was without E&O insurance. Mr. Ghumman’s testimony confirmed the lack of coverage. He offered no rationale for this breach or for his failure to respond to FSCO’s multiple enquiries in respect of the subsequent breach, apart from his sporadic absences from the country.

In addition, the Tribunal heard and has considered the testimony of Mr. Anatol Monid, the Director of Market Regulations in the Licensing and Market Conduct Division of FSCO who

was called as a witness by the Superintendent. Mr. Monid testified as to the general operation of the licensing system and its enforcement activities. In particular, we accept his testimony that:

- a) The Act imposed certain requirements, including the need for E&O insurance on mortgage brokers, and imposed standards of conduct on mortgage brokers and agents.
- b) There are no exemptions under the Act from the requirement to have E&O insurance which is the sole responsibility of the brokerage.
- c) When applying for a licence or licence renewal, the applicant must provide the insurance policy number and name of insurer.
- d) The annual information return (“AIR”) is due March 31st. Effective with the 2010 AIR it also requires confirmation of E&O insurance coverage.
- e) The failure to do business is not a basis of any insurance exemption.
- f) The Superintendent has taken a progressive approach to enforcement, adopting various tools to increase awareness (via website newsletters and email communications to the industry); issuing cautions, licence suspensions or revocations, and administrative monetary penalties. In relation to the 2008 compliance audit, Mr. Monid testified that no or lower monetary penalties were sometimes applied, as the focus was on education and the large number of non-compliance brokerages (about 30%) supported a progressive approach. The 2010 audit revealed a higher level of compliance (about 94%) but a trend to higher penalties to encourage compliance, particularly for repeat offenders.
- g) Mr. Monid indicated that on average, the cost of E&O insurance is approximately \$1000 per annum. In the absence of other evidence, we accept his testimony in this regard.

B. STATUTORY FRAMEWORK

The Act, which came into effect July 1, 2008, authorizes the Superintendent to issue a mortgage brokerage licence. 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), 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 (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.

Section 2 of Ontario Regulation 410/07, Principal Brokers: Eligibility, Powers and Duties, O. Reg. 86/09, requires the principal broker of a brokerage to take “reasonable steps to ensure that the brokerage and each broker and agent authorized to deal or trade in mortgages on its behalf, complies with every requirement established under the Act” and “to deal with any contravention”. Mr. Ghumman is the principal broker and director of Reliance and, as such, should have had knowledge of its compliance requirements. He did not deny knowledge of the requirement for E&O insurance.

Further, subsection 1 (1)(3) of Ontario Regulation 408/07, Mortgage Brokerages: Licensing, imposes a requirement for errors and omissions insurance as a condition of the issuance of a brokerage licence and subsection 1 (2) outlines prescribed circumstances to which the Superintendent is required by subsection 14 (1) of the Act to have regard, including:

1. (2) 2. Whether the past conduct of any director or officer of the corporation affords reasonable grounds for belief that the business of the corporation will not be carried on in accordance with the law and with integrity and honesty.
3. Whether the corporation is carrying on activities that contravene or will contravene the Act or the regulations if the corporation is licensed.

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 to suspend such a licence under section 18 of the Act. 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.

In addition section 29 of the Act provides that:

29. (1) Every licensee shall give the Superintendent such information and documents as may be prescribed and shall do so in the prescribed manner and within the prescribed period.

(2) A licensee shall give the Superintendent such additional information and documents as the Superintendent may request and shall do so in the manner and within the period specified by the Superintendent.

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, in section 3 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.

As well under Ontario Regulation 193/08, Reporting Requirements for Licensees, in section 13, there is a requirement on the brokerage to immediately notify the Superintendent if errors and omission insurance is cancelled or is not renewed.

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 Tribunal considered the following issues:

1. Should the Applicant have its mortgage brokerage licence revoked?
2. Should the Superintendent impose an administrative monetary penalty upon the Applicant for failure to have E&O insurance? If so is the amount of \$3500 as proposed by the Superintendent appropriate?
3. Should the Superintendent impose an administrative monetary penalty upon the Applicant for failure to respond to the Superintendent? If so, is the amount proposed by the Superintendent of \$1500 appropriate?

At the hearing, Mr. Ghumman offered to surrender the Applicant's licence and asked that no monetary penalty be imposed. For reasons outlined below the Tribunal declines to make an order with respect to the licence suspension and upholds the Superintendent's decision to immediately revoke the licence of Reliance Mortgage Company Ltd., and to impose the proposed administrative monetary penalties on the Applicant of \$3500 and \$1500 respectively under the second and third issues. Our reasons follow.

D. Decision

a) *Licence Revocation*

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 five (5) months in 2008 and the second time for a period of approximately thirty-three and a third (33 1/3) months in 2009-11. The licensing requirement and the obligation to maintain E&O insurance applies to all mortgage brokerages without exception. Consequently, we find as a matter of fact that the Applicant has contravened the Act and related standards of practice by failing to obtain E&O insurance coverage.

Moreover the Applicant did not provide a timely response to FSCO's enquiries, did not advise them of his lack of coverage, did not file a 2010 AIR, and did not provide any evidence of attempts to rectify the lack of insurance in the second instance. Further we find that although Mr. Ghumman now seems prepared to give up his brokerage licence entirely, he has not undertaken the proper steps to voluntarily surrender his brokerage licence and there has not been any actual decision by the Superintendent to accept or reject such surrender. Consequently the Tribunal does not feel obligated to consider further Mr. Ghumman's last minute request to surrender his brokerage licence as an alternative to revocation, since in our opinion reasonable grounds exist for believing the Applicant is not suitable to be licensed.

Counsel for the Superintendent took the position that the Applicant's licence could be revoked for one or both of the following bases, namely that the failure of the Applicant to obtain E&O insurance on two occasions demonstrates a lack of compliance and governability and in the alternative a continuing public risk. The approach of the Tribunal in these matters is well established. We find that on the facts of this case, the revocation of the Applicant's licence is justified under section 19(1) of the Act, as read with subsection 18(1) (c) of the Act. In coming to this conclusion, we are mindful of the guidance of previous cases before this Tribunal, notably *Millennium Mortgage Corporation and the Superintendent of Financial Services* (FST Decision No. M365-2009-1) which stated:

“The Tribunal must be mindful, in deciding whether to revoke a mortgage brokerage licence, of two considerations, namely:

- (i) The underlying rationale of the Act in that it is designed to protect the public interest and enhance public confidence in the mortgage industry; and
- (ii) The consequences of a decision to revoke a licence which can be financially severe for the licensee in that such a decision will preclude him or her from earning a livelihood in a chosen line of work.”

The Act and requirement for E&O insurance provides the public with protection. Its requirements and the attendant duties to maintain and advise FSCO of any changes in coverage and to respond to requests by FSCO for information cannot simply be ignored without consequences. To do so would undermine public confidence in the mortgage industry and in the regulator. This order is against the Applicant, not Mr. Ghumman personally; he has indicated that his income is derived from real estate sales, not mortgage brokerage. Therefore on the first

issue, we order that the mortgage brokerage licence of Reliance Mortgage Company Ltd. be immediately revoked as outlined in the Superintendent's notice of proposal.

b) The Appropriateness of an Administrative Penalty and the Appropriate Amount of such Penalty for failure to have E&O insurance

On the second issue, we find that the Superintendent's request for an administrative monetary penalty is reasonable under subsection 39 (1) of the Act. As indicated earlier, such penalty may be imposed under subsection 38 (1) of 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. Its usefulness also can be a general deterrent element to others in the industry. We have concluded that such penalty would serve both of the purposes outlined above. The Applicant's economic benefits results from the premiums which would otherwise have had to be paid for the 33 1/3 months that he was without coverage but the holder of a brokerage licence under the Act.

The failure to obtain E&O insurance is an offence under the Act and therefore a basis for imposing an administrative penalty upon the Applicant under both purposes of subsection 39(1) of the Act.

As to the amount of penalty, we have decided that the amount of \$3500 for failure to have E&O insurance is appropriate. In coming to this conclusion, we were mindful of the following:

1. The degree to which the contravention or failure was intentional, reckless or negligent. We find the failure to comply with the Act in this circumstance was both intentional and reckless.
2. The extent of the harm or potential harm to others resulting from the contravention or failure. In our view we lacked evidence as to the amount of mortgage brokerage business conducted, if any. If in fact it was none as the principal broker alleges, then potential harm would still have existed by the fact of lack of insurance.
3. The extent to which the person or entity tried to mitigate any loss or to take any other remedial action. We find that the Applicant took no action to remedy the breach although he knew he was in breach of the Act and had sufficiently long periods of time in between his travel absences in which to obtain coverage before this hearing and failed to do so.
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. The Applicant received an economic benefit in the amount of the insurance premium for the second breach of 33 1/3 months which may be estimated to be a little under \$2,800 based on the average annual premium information provided by Mr. Monid.
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. We note that this

is the Applicant's second breach regarding E&O coverage: he received no penalty in the first instance.

On the facts of this case and taking account all of the above criteria we have decided that the administrative penalty outlined in the Superintendent's notice of proposal in the amount of \$3500 is appropriate.

c) The Appropriateness of an Administrative Penalty and the Appropriate Amount of such Penalty for failure to respond to the regulator

We are satisfied based on the evidence before us that the Applicant failed to respond to FSCO's enquires pursuant to its responsibilities under section 29(2) of the Act and an administrative penalty is appropriate under section 39 (1) of the Act in order to promote compliance with the Act and as a general deterrent to others in the industry. While we were not directed by counsel to any other decisions of the Tribunal as to similar administrative monetary penalties for this kind of breach, we are prepared to find that the proposed administrative monetary penalty of \$1500 is reasonable and in keeping with FSCO's progressive regulatory approach. In determining this amount we have considered the criteria set out below:

1. The degree to which the contravention or failure was intentional, reckless or negligent. We find the failure to comply with the Act in this circumstance was intentional and reckless.
2. The extent of the harm or potential harm to others resulting from the contravention or failure. In our view we lacked evidence as to potential harm to others so make no finding on this item.
3. The extent to which the person or entity tried to mitigate any loss or to take any other remedial action. We find that the Applicant took no action to remedy the breach although he knew he was in breach of the Act and had sufficiently long periods of time in between his travel absences in which to respond before this hearing.
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. The Superintendent offered no evidence with respect to this criterion so we give it no weight.
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. We note that the failure to respond is inextricably linked to the Applicant's second breach regarding E&O coverage: he received no penalty in the first instance. We also note that he breached the Act by failing to file the 2010 AIR.

Weighing all of the above factors, we find a penalty of \$1500 appropriate and see no reason to alter the amount in the Superintendent's notice of proposal.

E. ORDER

We hereby direct the Superintendent, by order to carry out his proposals to revoke the mortgage brokerage licence of Reliance Mortgage Corporation Ltd., and to impose administrative monetary penalties upon Reliance in the total amount of \$5,000.

Dated at Toronto, Ontario this 26th day of January, 2012.

“Florence Holden”

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

“Shiraz Bharmal”

Shiraz Bharmal
Member of the Tribunal and Member of the Panel

“Heather Gavin”

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