

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF the *Mortgage Brokers Act*,
R.S.O. 1990, CHAPTER M. 39 as amended by the
Financial Services Commission of Ontario Act, 1997,
S.O. 1997, c.28 (the “Act”);

AND IN THE MATTER OF The Registration of
Sussman Mortgage Funding Inc. o/a Mortgage Funding;

AND IN THE MATTER OF a request for hearing
pursuant to subsection 7(2) of the Act

BETWEEN:

SUSSMAN MORTGAGE FUNDING INC.

Applicant

-and-

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

BEFORE:

David E. Wires
Chair of the Panel and Member of the Tribunal

Martha Milczynski
Chair of the Tribunal and Member of the Panel

Judith E. Robinson
Member of the Tribunal and Panel

APPEARANCES:

Sussman Mortgage Funding Inc.
Henry G. Blumberg

For the Superintendent of Financial Services:
Robert Conway

MOTION HEARD: November 29, 2000
Toronto, Ontario

REASONS

The Superintendent issued a Notice of Proposal to Revoke Registration of Sussman Mortgage Funding Inc. operating as Mortgage Funding dated August 24, 1999. The Notice of Proposal proposes to revoke the SMF registration under the Mortgage Brokers Act. The grounds for the proposed revocation are contained in the Notice. The Notice states that further or other particulars in respect of any matter or in respect of any other matter including further grounds to revoke registration may be furnished later.

The Superintendent moved for an interim order by Notice of Motion dated October 28, 1999. The motion was resolved by a consent order attaching minutes of settlement of the motion for interim relief. The consent order, among other things, facilitated the Superintendent examining SMF's business operations, pending the disposition of the hearing on the merits with respect to the Proposal to Revoke Registration.

The Superintendent provided a Notice of Further and Other Particulars #1 dated January 4, 2000. The nine pages of particulars detail the allegations of fact and law the Superintendent proposed to establish in the proceedings.

On February 8, 2000 counsel for the Superintendent indicated at the proceedings that the Superintendent thought suspension of registration for an unspecified period rather than revocation of registration may be an appropriate disposition of the proceedings if the Superintendent's allegations were established. The facts and allegations relied on in respect of the claim for a suspension took into account events between August 24 and December 10, 1999. Superintendent's counsel stated:

"The submission that the appropriate penalty now would be a suspension rather than revocation is predicated on the assumption that these monitoring visits show that the misconduct which is the basis of the original Notice of Proposal has been rectified"

and

"But if the monitoring visits disclose that there has not been sufficient rectification so that there is timely compliance with the accounting and disclosure requirements, then the Superintendent would have to reconsider whether revocation would be the sanction requested."

Superintendent's counsel indicated that he proposed to lead evidence at the hearing in respect of events occurring on or after August 24, 1999 and on or before December 10, 1999.

The Superintendent served a Notice of Further and Other Particulars #2 dated October 2, 2000. In the Notice the Superintendent implies that new information had come to the attention of the Superintendent that substantiated the Superintendent's claims. The particulars cover the period after December 10, 1999. The particulars relate to the provision of information or the failure to provide information to the Superintendent after December 10, 1999 and the alleged failure of the registrant to provide trust listings and reconciliations. The particulars refer to the terms of the consent order and attached minutes of settlement of the motion for interim relief.

The applicant presented a motion for an order that the Superintendent's Notice of Further and Other Particulars #2 be struck from the record and not be considered in the within proceedings and that the Hearing proceed on the basis that the penalty being sought by the Superintendent be restricted to the suspension of registration of Sussman Mortgage Funding Inc. and not the revocation of registration. The applicant asserts that the original Notice of Proposal alleges that the past conduct of SMF's officers and directors afforded reasonable ground for belief that its business would not be carried on in accordance with law and with honesty and integrity. Thus the good character, propriety of conduct or competence of SMF and its officers and directors was an issue in the proceedings. The applicant asserts that section 8 of the Statutory Powers Procedures Act applies.

"Where the good character, propriety of conduct or competence of a party is an issue in a proceeding, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto."

A similar provision is found in the Rules of Procedure of this Tribunal.

SMF asserts that the hearing commenced on February 8, 2000; that the Superintendent limited its case to suspension of registration of Sussman Mortgage Funding Inc. and that all the allegations to be dealt with at the hearing were to relate to events that occurred before December 10, 1999. Based on this representation, the Tribunal decided that documents requested by SMF relating to the ongoing monitoring after December 10, 1999 were irrelevant and would not be ordered produced, and declined to order the Superintendent to provide further particulars of its case. SMF asserts that the Superintendent cannot lead evidence in respect of allegations after December 10, 1999 in the pending proceeding, rather the Superintendent must issue a new proposal in respect of post December 10, 1999 allegations in respect of acts or omissions arising during the course of implementation of the consent order.

Counsel for SMF referred to *Re; Takahashi and College of Physicians and Surgeons of Ontario* (1979), 26 O.R. (2d) 353 (Div. Ct.); *Assn. Of Professional Engineers of Ontario v. Smith* (1989), 38 Admin. L.R. 212 (Ont. H.C.) *Aamco Automatic Transmission Inc. v. Simpson* (1980), 29 O.R. (2d) 565 (Div. Ct.) and *Gaw v. Canada* (1986), 19 Admin. L.R. 137. Those cases make it clear that where a person is charged with misconduct a person charged must be given reasonable notice of the allegations that are made, so that the person may prepare a full and adequate defence. In the context of professional misconduct cases, fairness requires timely and adequate notice of the particular acts or conduct said to be disgraceful, dishonourable or unprofessional. Prior to the hearing, full particulars of

the evidence to be called should be given. A party should be able to ascertain the allegations being made against him or her to enable him or her to decide whether to require a hearing and determine what order might be made or sought.

Clearly the Superintendent has provided volumes of documents, statements, affidavits and allegations in respect of the period August, 1999 to December, 1999. The Superintendent has now provided disclosure in respect of the period December, 1999 to October, 2000 arising from the monitoring activities and implementation of the consent interim order. SMF however asserts that all of the information had to be furnished prior to the hearing on February 8, 2000. In respect of events occurring after that date, because particulars could not be provided in the time-frame asserted, the only alternative it is contended is to commence new proceedings.

The Superintendent's statement that it would limit the relief sought in the proceedings to suspension of SMF's registration was clearly subject to the pre-condition that monitoring visits showed that the misconduct which is the basis of the original Notice of Proposal had been rectified. The Superintendent is not restrained from asserting that monitoring visits showed that the misconduct described in the original Notice of Proposal was not rectified and that the evidence justifies a revocation of registration. SMF could not reasonably have concluded that the relief sought in these proceedings was unaffected by its response to implementation of the interim consent order.

The motion for an order that this proceeding proceed on the basis that only a suspension of registration, and not revocation, is dismissed.

The motion to strike the Notice of Further and Other Particulars #2 is allowed in part. It is beyond dispute that SMF is entitled to reasonable information in respect of allegations against its character, propriety of conduct or competence. It is clear that the information must be given with sufficient time to allow SMF's counsel to prepare to respond to the allegations. Clearly, character, conduct and competence were put in issue in the original Notice of Proposal to Revoke Registration of August, 1999 and in the January, 2000 Notice of Further Particulars, and information was provided in respect of the allegations.

The SPPA Section 8 provides that information must be provided prior to the hearing (as opposed to the proceeding or the commencement of the hearing). Section 8 does not say that information acquired after a proceeding has started is inadmissible. The section does not state that information acquired after a proceeding has started or indeed after a hearing has started is inadmissible, nor does it suggest that a tribunal loses jurisdiction in respect of the information by admitting the information in the proper circumstances. The tribunal must give a party affected by the information an opportunity to respond and address the arguments and lead their own evidence after having an opportunity to prepare. Section 2 of the SPPA states that the SPPA is remedial and that the SPPA and any rule made by a tribunal must be liberally construed so as to "secure the just, most expeditious and cost-effective determination" of the proceeding on its merits. Section 8 must be read in the context of section 2.

The motion to strike the Notice of Further and Other Particulars is dismissed as it relates to the relief

claimed. It is allowed to the extent that SMF is entitled to particulars of all allegations advanced, immediate production of all documents relevant to those allegations and time for its counsel to prepare to respond.

Cost are reserved to the completion of the proceeding.

DATED at Toronto this 30th day of November, 2000.

“David Wires”

David Wires
Chair of the Panel

“Martha Milczynski”

Martha Milczynski
Member of the Panel

“Judy Robinson”

Judy Robinson
Member of the Panel