

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 9, 14 and 21, and the Mortgage Brokers and Agents Licensing Regulation, SOR 409/07 (the “Regulation”), in particular, section 10;

AND IN THE MATTER OF Mr. Ian Douglas Knoll Henderson:

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

BETWEEN:

IAN DOUGLAS KNOLL HENDERSON

Applicant

-and-

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

BEFORE:

Mr. Colin McNairn
Member of the Tribunal and Chair of the Panel

Mr. John Solursh
Chair of the Tribunal and Member of the Panel

Ms. Anne Corbett
Vice Chair of the Tribunal and Member of the Panel

APPEARANCES:

Mr. Ian Henderson, the Applicant, in person

Ms. Larissa Easson for the
Superintendent of Financial Services

HEARD:

September 15, 2008

REASONS FOR DECISION

A. The Background

On May 21, 2008, the Applicant, Mr. Ian Henderson, made an application to the Superintendent of Financial Services (the "Superintendent"), pursuant to the *Mortgage Brokerages, Lenders and Administrators Act, 2006* (the "Act"), for a mortgage agent's licence. Mortgage Brokers of Canada Inc. ("MBC") was specified, in the application, as the mortgage brokerage for which the Applicant proposed to work. The Applicant is a former Ontario lawyer who had a large real estate law practice.

This case arises out of a notice of proposal, dated July 11, 2008, issued by the Superintendent of Financial Services (the "Superintendent"), to refuse the Applicant's licence application. On July 28, 2008, the Applicant made a request to the Tribunal, as he was entitled to do under the Act, for a hearing in respect of that proposal asking, by way of relief, that the Tribunal make an order for the issuance of a mortgage agent's licence to him. The Tribunal has the authority, under subsection 21(4) of the Act, to order the Superintendent to carry out a particular proposal, with or without changes, or to substitute its opinion for that of the Superintendent and to impose such conditions as it considers appropriate in the circumstances. At the hearing, the Applicant urged the Tribunal to consider, as an alternative to ordering the Superintendent to carry out his proposal, ordering the Superintendent to grant the mortgage agent's licence applied for with conditions attached to the licence. He suggested that those conditions impose a requirement that his mortgage agent activities be supervised by the principal broker of MBC substantially in the manner proposed by MBC in a letter dated September 10, 2008 that was filed as an exhibit in this proceeding.

The basis for the notice of proposal, as stated therein, is that the Superintendent believes that the Applicant is not suitable to be licensed because:

- (a) his past conduct affords reasonable grounds for the belief that he will not deal in mortgages in accordance with the law and with integrity and honesty; and
- (b) he made a false statement or provided false information in his licence application.

Subsection 2(3) of the Act prohibits an individual from dealing in mortgages in Ontario without a mortgage broker's licence or a mortgage agent's licence. The Act provides for

mortgage agent's licences in the following terms:

9. (1) An individual may apply for a mortgage agent's licence.

(2) A mortgage agent's licence authorizes the licensee to deal in mortgages in Ontario or trade in mortgages in Ontario on behalf of one specified brokerage by engaging in the activities permitted under the licence issued to the licensee.

(3) A mortgage agent's licence is subject to such conditions as may be imposed by the Superintendent or the Tribunal.

(4) The licensee shall comply with such standards of practice as may be prescribed for the licence issued to the licensee.

(5) A person who has a mortgage agent's licence shall not deal in mortgages in Ontario or trade in mortgages in Ontario except under the supervision of a mortgage broker.

The Act directs the Superintendent as to when licences are to be issued and withheld, as follows:

14. (1) The Superintendent shall issue a licence to an applicant who satisfies the prescribed requirements for a licence unless the Superintendent believes, on reasonable grounds, that the applicant is not suitable to be licensed having regard to such circumstances as may be prescribed and such other matters as the Superintendent considers appropriate.

The circumstances to which the Superintendent may have regard, in coming to the view that an applicant is unsuitable to receive a mortgage agent's licence, are prescribed in the following terms by the Mortgage Brokers and Agents Licensing Regulation, SOR 409/07 (the "Regulation"):

10. In determining whether an individual is not suitable to be licensed as a mortgage ... agent, the Superintendent is required by subsection 14(1) ... of the Act to have regard to the following prescribed circumstances:

1. Whether the individual's past conduct affords reasonable grounds for belief that he or she will not deal or trade in mortgages in accordance with the law and with integrity and honesty.
2. Whether the individual is carrying on activities that contravene or will contravene the Act or the regulation if he or she is licensed.
3. Whether the individual has made a false statement or has provided false information to the Superintendent with respect to the application for the licence.

It is clear from the Superintendent's notice of proposal that his proposal to refuse a mortgage agent's licence to the Applicant is founded on his belief that the Applicant is not suitable to be licensed having regard to the circumstances set out in paragraphs 1 and 3 of section 10 of the Regulation.

The factual basis for the Superintendent arriving at this belief is set out in separate reasons for proposal that were issued by the Superintendent along with the notice of proposal. The Superintendent relies on:

- (a) the past conduct of the Applicant that constituted grounds for disciplinary measures taken by the Law Society of Upper Canada (the "Law Society") against the Applicant as a member, or as a licensee, of the Law Society; and
- (b) the Applicant's failure to disclose, in his application for a mortgage agent's licence, some of the disciplinary proceedings that led to those measures being imposed and to disclose certain complaints about his conduct made to the Law Society.

B. The Facts

1. Past Conduct

The Applicant's licence to practice law was revoked by the Law Society on November 9, 2007 for engaging in professional misconduct contrary to subsection 33(1) of the *Law Society Act*, R.S.O. 1990, c. L.8. The misconduct in question took place in the context of 15 real estate transactions, on six properties, that occurred between July of 1999 and February of 2002 (the "Transactions"). The disciplinary action followed a hearing before a three member Law Society panel that took place over four days in July of 2007. The Law Society and the Applicant were represented by counsel at that hearing; the Applicant did not attend in person. The panel delivered unanimous written reasons for its decision, which were received in evidence by this Tribunal on the agreement of the parties to this proceeding (the reasons for decision are reported at 2007 ONLSHP 108 (CanLII)). It is evident from those reasons that there were a number of actions surrounding the Transactions that resulted in the value of the properties being artificially inflated to the detriment of the Applicant's lender clients who provided mortgage financing to the purchasers of the properties. It was not alleged in the Law Society proceeding or in this proceeding that the Applicant received any improper benefit from the Transactions.

The Law Society panel found that four particulars of professional misconduct on the part of the Applicant had been made out with the result that, in respect of each particular, the panel was satisfied that specific Rules of Professional Conduct, proscribing various kinds of professional misconduct, had been breached. The findings in respect of those particulars are set out below.

(a) Assisting Dishonest or Fraudulent Conduct

The Applicant, who had provided the legal assistance necessary to close the Transactions and obtain mortgage funds, knowingly (by way of being willfully blind to a number of “red flags” of fraud) assisted in dishonest and fraudulent conduct to obtain mortgage funds under false pretences in connection with the purchase, sale and mortgage transactions on the six properties.

(b) Failing to be Honest and Candid When Advising Client

The Applicant failed to be honest and candid when advising his lender clients in connection with the Transactions and, in particular, failed to inform those clients of certain material facts or misrepresented those facts to them. Those material facts included the following:

- That the Applicant acted for the vendor and purchaser in several of the Transactions;
- That the properties had recently been sold or that there had been an agreement to sell the properties at a significantly lower price;
- That, in respect of some of the Transactions, there were surplus mortgage proceeds, that some portions of those proceeds were paid out to persons with no entitlement thereto and that purchasers did not contribute any of their own funds to their purchases;
- That the purchaser clients of the Applicant had not satisfied the mortgage conditions and that he had not followed instructions from his lender clients;
- That the Applicant altered, or caused to be altered, deeds of transfer and, in one case, an agreement of purchase and sale relating to the properties;
- That, in respect of some of the Transactions, there was a discrepancy between the actual price for the property and that stated in the relevant agreement of purchase and sale or between the price stated in the deed of transfer and the relevant affidavit of value;
- That the actual purchase price for properties was reduced by non-payment of deposits or by credits for the waiver or re-direction of real estate commissions; and
- That the Applicant had prepared and accepted statements of adjustment that were inconsistent with the relevant agreements of purchase and sale.

(c) Acting Despite Conflicting Interest Without Disclosure, Consent or Independent Legal Advice

As admitted by the Applicant and found by the panel, the Applicant had acted for multiple persons in the Transactions when there was, or was likely to be, a

conflicting interest and he had not disclosed all material facts to his lender clients and had failed to obtain the consent of those lender clients.

(d) Failing to Serve Client to the Standard of a Competent Lawyer

As admitted by the Applicant and found by the panel, the Applicant failed to serve his lender clients in a conscientious and diligent manner, or to the standard of a competent lawyer by, among other things, failing to disclose material facts, failing to confirm the identity of clients, failing to follow clients' instructions and failing to make reasonable inquiries regarding the Transactions or, if he did make such inquiries, failing to disclose the results of those inquiries and advise of the risks.

The Law Society panel concluded that the agreed facts, the supporting record of the disciplinary proceeding and certain reports from an expert in the area of real estate practice provided cogent evidence of misconduct, meeting the clear and convincing standard required for a finding of misconduct.

As to penalty, the panel noted that in a case, such as that before it, where a licensed lawyer knowingly participates in a fraudulent scheme – including participation through willful blindness – the appropriate penalty is generally revocation (or historically disbarment, a penalty that has now been replaced in the current *Law Society Act* by revocation of licence). The panel further stated that revocation of licence was appropriate in this case to, among other things, protect the public by deterring others from similar conduct. The panel considered and rejected the option of allowing the Applicant to surrender his licence to practice law. Finally, the panel made an order of costs against the Applicant.

The Applicant was also the subject of an earlier disciplinary proceeding before the Law Society, at which he was represented by counsel, that led to the imposition, on February 23, 1995, of a two month suspension from legal practice. This penalty was the result of a conclusion of a three member panel of the Discipline Committee of the Law Society that the Applicant who was the solicitor for a co-tenancy of which he was also a member, had, within the period 1988 to 1990:

- breached his duty as solicitor to the other members of the co-tenancy by failing to disclose that he had divested himself of a significant personal asset; and
- improperly provided his personal guarantee on a mortgage in which one of the other members of the co-tenancy was involved.

An order of costs in respect of the proceeding was also made against the Applicant.

This 1995 decision of the Law Society was referred to in the later 2007 decision of the Law Society revoking the Applicant's licence to practice law.

On December 11, 1991, the Applicant was reprimanded by the Law Society for practicing law while under suspension for (inadvertent) non-payment of dues. This decision was referred to in the later 2005 decision of the Law Society imposing a two month suspension from practice.

2. Failure to Disclose

The form of application for a mortgage agent's licence that the Applicant completed, electronically, asked:

- whether the applicant had ever held a licence required by legislation to deal with the public in any capacity and been the subject of a disciplinary proceeding (e.g. suspension, termination, reprimand, surrender, etc.); and
- whether the applicant had ever been the subject of a complaint to a regulatory body that was based on fraud, theft, deceit, misrepresentation, forgery, or similar conduct or was based, in whole or in part, on professional negligence or misconduct.

The form contained a warning that providing false, misleading or incomplete information in the application is an offense under the Act and that doing so may be sufficient grounds for rejecting the application.

The Applicant responded to the first question, about disciplinary proceedings, by simply noting the "LSUC licence revocation in November, 2007". He answered "no" to the second question, which asked whether there had been any complaints about his professional conduct. In fact, the Real Estate Council of Ontario had written to the Investigations Department of the Law Society, on June 19, 2002, indicating that the Applicant had been identified, in documentation that it had uncovered in an investigation of a real estate broker, as having represented transferees and mortgagors in what appeared to be fraudulent conduct. CIBC Mortgages had also written to the Investigative Counsel for the Law Society, on November 6, 2002, to request an investigation into a particular mortgage transaction on which the Applicant had acted on behalf of CIBC Mortgages but he had not responded to its request for information about the transaction. The reasons of the Law Society panel for its decision of November 9, 2007, to revoke the Applicant's licence to practice law, refer to the fact that the Law Society had received a "written complaint" about the Applicant from each of the Real Estate Council of Ontario and CIBC Mortgages in 2002.

C. The Issue

The issue in this case, broadly stated, is whether the reasons advanced by the Superintendent for his proposal to refuse the application of the Applicant for a mortgage agent's licence are sufficient to justify the refusal of that licence application under the terms of the Act and the Regulation.

D. The Analysis

In coming to its conclusion in this case, the Tribunal need not show any deference to the Superintendent's opinion about the suitability of the Applicant as reflected in his proposal to refuse the Applicant's licence application. Rather, the Tribunal must look afresh, as a matter of first impression, at the question of whether there are reasonable grounds to believe that the Applicant is not suitable to be licensed as a mortgage agent having regard to its assessment of his past conduct and of the accuracy of the information he provided on his licence application. This approach to the Tribunal's task follows that adopted by the Tribunal in its decision, dated August 10, 2007, in *Walter Muroff and Company v. Superintendent of Financial Services* (FST File No. M0280-2006, Decision No. M0280-2006-1) (see at p. 7). That case involved proposed disciplinary action against a mortgage broker registered under the *Mortgage Brokers Act*, R.S.O. 1990, c. M.39, a predecessor statute to the Act, on the basis of past conduct of the registrant that the Superintendent determined constituted reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. While the *Muroff* decision was successfully appealed to the Divisional Court, that court simply disagreed with the sanction imposed by the Tribunal on the mortgage broker (a nine month suspension) and substituted another sanction (a two month suspension) (see the Divisional Court's decision dated April 14, 2008, by way of endorsement of the record, in *Re Muroff and Company Limited and Superintendent of Financial Services*).

In applying the licensing provisions of the Act, as supplemented by the Regulation, we must be mindful of the fact that the Act is designed to protect the public interest. This public interest purpose is implicit in the terms of the Act, including the fact that a public official, the Superintendent, is given responsibility for supervising the mortgage brokering industry. It is significant that the statutory purposes of the Financial Services Commission of Ontario, of which the Superintendent is the chief executive officer, include providing "regulatory services that protect the public interest and enhance public confidence in the regulated sectors", which includes the sector consisting of all mortgage brokers, mortgage agents and mortgage administrators licensed under the Act (see sections 1 and 3(a) of the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28).

At the same time, we must keep in mind that the denial of a licence or the revocation or suspension of a licence under the Act can have severe consequences for the applicant or licensee as it will preclude or limit an individual's ability to earn, or to continue to earn, a living in his or her chosen line of work. Given those serious consequences, the quality of evidence required to support disciplinary action against a licensee is enhanced; the evidence should be "clear, convincing and cogent" (see *Law Society of Upper Canada v. Neinstein*, [2007] O.J. No. 958, at pp. 9-10 (Ont. Div. Ct.)). The serious consequences of the denial of a licence to carry on the business of a mortgage agent would seem to suggest that the same quality of evidence should be required in the context of a licence denial as in the context of a licence suspension or revocation. However, we don't need to

decide that point as we conclude below that the evidence in this case, in the form of agreed facts and documents, satisfies the clear, convincing and cogent standard were that standard to be applicable.

The Applicant did not contest the findings of fact made by the Law Society panel in the disciplinary proceeding that resulted in the revocation of his licence to practice law nor did he question the appropriateness of that sanction. But the fact that a serious disciplinary sanction has previously been imposed on an individual who has applied for a mortgage agent's licence does not mean, automatically, that there are reasonable grounds for believing that the individual, if licensed under the Act, could not be expected to deal or trade in mortgages in accordance with the law and with integrity and honesty.

There are a number of considerations that should be taken into account in determining whether the conduct of an individual, established through an earlier disciplinary proceeding against him or her, affords reasonable grounds for belief that the individual will not deal or trade in mortgages in accordance with the law and with integrity and honesty. These considerations are as follows:

- (i) the time that has elapsed since the conduct occurred;
- (ii) the prolonged or repetitive nature of the conduct;
- (iii) the advertent or inadvertent nature of the conduct;
- (iv) the extent to which the conduct can be taken to call into question the integrity, honesty or law abiding nature of the individual;
- (v) the closeness of the context of the conduct to the context of activities in which the individual would be engaged as a mortgage agent;
- (vi) the fairness of the process followed in the disciplinary proceeding;
- (vii) the seriousness with which the disciplinary body treated the conduct as reflected in the severity of the sanction it imposed;
- (viii) any unusual and severe pressure the individual was under at the time of the conduct that would explain the conduct but is unlikely to reoccur;
- (ix) any consistent and prolonged pattern of reformed or redeeming behaviour on the part of the individual since the conduct occurred.

This is not meant to be an exhaustive list of considerations nor to suggest that the application of all or any particular number of these considerations must favour the conclusion that the individual should be disqualified from holding a mortgage agent's licence, on the basis of past conduct, before such a conclusion can be reached.

We now examine the conduct of the Applicant as disclosed by the reasons for the November 9, 2007 decision of the Law Society panel in light of these considerations.

- (i) A relatively short period of time – six and a half years – elapsed between the end of the conduct that gave rise to the Law Society proceeding and the Superintendent's notice of proposal to refuse the Applicant's application for a mortgage agent's licence.

- (ii) The conduct persisted over a period of at least two and a half years and involved 15 transactions.
- (iii) The finding of the Law Society panel with respect to the first allegation of professional misconduct by the Applicant (see paragraph B1(a) above) is that the Applicant's conduct was advertent in that he knowingly assisted in dishonest and fraudulent conduct to obtain mortgage funds under false pretences. The knowing assistance occurred by virtue of the fact that the Applicant was willfully blind to a number of "red flags" of fraud. The reasons for decision of the Law Society panel point out (at para 51) that the courts have decided that "knowledge" encompasses actual knowledge, recklessness and willful blindness.
- (iv) The finding of the Law Society with respect to the second allegation of professional misconduct calls into question the integrity and honesty of the Applicant in that the Applicant was found to have failed to be honest and candid, in various respects, when advising his lender clients about the Transactions (see paragraph B1(b) above). The findings with respect to the totality of the particulars, call into question the law abiding nature of the Applicant as the overall conclusion of the Law Society panel was that the Applicant was in breach of the *Law Society Act* by engaging in professional misconduct. Therefore, he was found to have been engaged in conduct that was not in accordance with the law applicable to him as a solicitor.
- (v) The conduct of the Applicant, as exposed in the Law Society decision, took place in the context of real estate transactions and the mortgage financing of those transactions. As a mortgage agent, the Applicant would be engaged in dealing and trading in mortgages. The relevance of the earlier conduct to the mortgage agent licensing decision is particularly strong.
- (vi) The hearing before the three member Law Society panel took several days, the Applicant was represented by counsel and the panel delivered a reasoned decision. Therefore, there is no basis for questioning the fairness of that proceeding.
- (vii) The Law Society treated the Applicant's conduct as involving a serious breach of his obligations as a solicitor as is evident from the fact that his licence to practice law was revoked and he was denied the opportunity that he requested to surrender his licence to practice voluntarily.
- (viii) There was no evidence before the Tribunal that the Applicant was under any unusual and severe pressures at the time of the conduct that formed the basis for the decision of the Law Society panel. The panel noted, in its reasons for decision, that the Applicant had filed a medical report on his health condition. It concluded, however, that the health condition of the Applicant, in the circumstances, did not have any relevance to the issue of whether his licence to practice should be revoked or whether he should be permitted to surrender that licence (at para 66).
- (ix) The Applicant stated in argument before the Tribunal that his conduct, which gave rise to the Law Society proceeding, was an aberration. He filed four letters of reference with the Tribunal suggesting that he was deserving of the chance to work as a mortgage agent despite that earlier conduct. The letters

are fairly general and do not provide any specifics of reformed or redeeming behaviour.

We conclude from this examination that there is clear, convincing and cogent evidence that the Applicant's past conduct, as set out in the findings of the Law Society panel in its decision of November 9, 2007, affords reasonable grounds for a belief that the Applicant will not deal or trade in mortgages in accordance with the law and with integrity and honesty. The Superintendent has satisfied its burden of proving, on a balance of probabilities, that the Applicant is not suitable, in the sense of the Act and Regulation, to be licensed as a mortgage agent, having regard to the November 9, 2007 decision. It is unnecessary for us, therefore, to consider the circumstances surrounding the Applicant's suspension from practice in 1995 or his reprimand in 1991 for practicing while under suspension for non-payment of dues. Nor do we need to deal with the question of whether there were any failures of disclosure or incomplete disclosures by the Applicant in his application for a mortgage agent's licence that were sufficient to justify the refusal of that application.

E. The Order

There was no sufficient evidence presented that would indicate that the public interest would be adequately protected in this case if a mortgage agent's licence were to be issued to the Applicant with restrictive conditions attached. We, therefore, order the Superintendent to carry out his notice of proposal to refuse to issue a mortgage agent's licence to the Applicant.

DATED at the City of Toronto, this 26th day of September, 2008.

"Colin McNairn"

Colin McNairn, Member of the Tribunal
and Chair of the Panel

"John Solursh"

John Solursh, Chair of the Tribunal
and Member of the Panel

"Anne Corbett"

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