

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, O. Reg. 409/07, as amended (the “Regulation”), in particular, section 10;

AND IN THE MATTER OF Ms. Maria De Masi:

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

BETWEEN:

MARIA DE MASI

Applicant

-and-

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

BEFORE:

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

Ms. Florence Holden
Vice Chair of the Tribunal and Member of the Panel

Mr. Shiraz Bharmal
Member of the Tribunal and of the Panel

APPEARANCES:

Mr. Michael Figol for the Applicant, Ms. Maria De Masi

Ms. Larissa Easson for the
Superintendent of Financial Services

HEARD:

April 28, 2009

REASONS FOR DECISION

A. Background

The Superintendent of Financial Services (the “Superintendent”) is authorized to issue mortgage agent licences under the terms of the *Mortgage Brokerages, Lenders and Administrators Act, 2006* (the “Act”). On June 13, 2008, the applicant, Ms. Maria De Masi (“Ms. De Masi”) applied to the Superintendent for such a licence. This was done electronically, the only way such an application can be submitted. The name of the applicant was entered on the application as Maria De Masi and her birth date was shown as July 25 followed by the year of her birth. In answer to a question posed of the applicant during the application process, Ms. De Masi indicated that she had never pleaded guilty to, or been found guilty of, any offence.

The application process is such that the applicant is clearly advised, in the course thereof, that;

- giving false, misleading or incomplete information is an offence and could lead to denial of the application,
- criminal offences, including those under the *Criminal Code*, must be disclosed,
- by completing the form, the applicant is authorizing the conduct of a criminal record check against him or her, and
- a criminal record check is part of the regular licence screening process.

In Step VI in the application process, the applicant is asked to declare, among other things, that the statements and answers to the questions in the application are true, correct and complete and that the applicant understands that any licence issued may be revoked if the applicant has provided false or misleading information in the application. In Step VII, the final step in the application process, the applicant is asked to confirm, or correct and confirm, the answers given to various questions previously asked of him or her, including a question as to whether the applicant has ever pleaded guilty to, or been found guilty of

an offence. The application will only be complete if the applicant clicks in the appropriate boxes so as to provide these declarations and this confirmation.

Ms. De Masi's licence application specified that she intended to work for Zidner Real Estate Limited ("ZRE"), which carries on a real estate brokerage business and a mortgage brokerage business. In fact, she was working for ZRE as a mortgage agent at the time of her application. Her employment with ZRE had commenced sometime in 2004. Initially, she assumed administrative duties on the real estate brokerage side of the business. ZRE has indicated that it continues to have a position open for Ms. De Masi as a mortgage agent should she receive a mortgage agent's licence.

No licence was required in order to engage in the activity of a mortgage agent in Ontario until July 1, 2008, when the Act came into force. However, in accordance with a predecessor Act, a prescribed form had been completed, under date of January 8, 2007, and filed with the Financial Services Commission of Ontario ("FSCO"), of which the Superintendent is the chief executive officer, notifying FSCO of ZRE's retention of Ms. De Masi as a new mortgage agent (the "Notification Form"). The completed Notification Form identified the new agent as Mary De Masi, whose birth date was entered as July 24 followed by the year of her birth. A question on the form, directed to the new agent, as to whether the agent had ever been convicted of an offence was answered in the negative. The Notification Form was signed, as required, by Ms. De Masi and a representative of ZRE.

FSCO proceeded to review Ms. De Masi's June 13, 2008 application for a mortgage agent's licence and, in that connection, did a criminal record check against her which revealed that she had been convicted on April 12, 1999 of three offences, under the *Criminal Code*, of possession of property with a value over \$5,000 that was obtained by crime, and sentenced to 12 days of presentence custody (already served) and given a one year conditional sentence, the sentence on all three counts to run concurrently.

A representative of FSCO wrote to Ms. De Masi, on July 10, 2008, pointing out the discrepancy between the results of FSCO's criminal record check and the answer she had given in her licence application in response to the question about offences. The letter asked Ms. De Masi for an explanation of her reasons for failing to disclose her criminal convictions in her licence application. Ms. De Masi responded, by e-mail, on July 28, 2008 stating, among other things, that;

- she answered the question about offences in the application the way she did because she was under the impression, at the time, that she had received a pardon in respect of her conviction and, therefore, didn't have to disclose it,
- the same response to the same or a similar question was given in the earlier Notification Form filed with FSCO and "nothing came back to the contrary",
- she was only convicted of one offence and not three offences,
- she couldn't afford proper legal representation when she pleaded guilty to the charge against her,

- sometime after the conviction, she approached a solicitor to obtain a pardon for her and, on numerous subsequent occasions, he indicated to her that everything was taken care of and that she was not to worry, and
- she had discovered, upon making inquiries, after receipt of FSCO's correspondence, that this solicitor was now deceased.

Ms. De Masi subsequently wrote to the Law Society of Upper Canada for assistance in tracking the status of her pardon application but was advised that all the stored files of the deceased solicitor had been destroyed. In the proceeding before this Tribunal, there was no evidence that the pardon application was ever submitted to the appropriate authorities or that it was granted or refused.

By notice of proposal dated November 27, 2008, the Superintendent indicated to Ms. De Masi that he proposed to refuse her licence application. The stated basis for the refusal was that she had made a false statement or provided false information to the Superintendent with respect to her application for a mortgage agent's licence. The reasons for proposal that accompanied the notice set out the particulars. Those reasons and the arguments put by counsel for the Superintendent in the course of the hearing before the Tribunal in this matter indicate that the Superintendent is relying upon the following circumstances as a basis for his belief that Ms. De Masi is unsuitable to be licensed as a mortgage agent because of a false statement made, or false information provided, with respect to her application for such a licence:

- Ms. De Masi had indicated in the application form that she not been found guilty of any offence, which was untrue, as revealed by the results of the criminal record check conducted by FSCO, disclosing that she had been convicted of three indictable offences of possession of property, exceeding \$5000, obtained by crime;
- When asked to explain the circumstances of the offences uncovered by the criminal record check and to provide an explanation of her failure to disclose those offences, Ms. De Masi had responded to the effect that she had only been found guilty of one offence rather than three offences, which was untrue, as revealed by the court records copies of which were received in evidence at the hearing before this Tribunal;
- In completing her application for a mortgage agent's licence, Ms. De Masi had given her name as Maria De Masi and shown her birth date as July 25, which was inconsistent with the court records and the earlier Notification Form, filed with FSCO.; the Notification Form showed her name as Mary De Masi and both the court records and the Notification Form showed her birth date as July 24.

On or about December 8, 2008, Ms. De Masi submitted a request to this Tribunal, pursuant to the Act, for a hearing in respect of the Superintendent's proposal to refuse her application for a mortgage agent's licence. In that request, Ms. De Masi asked the Tribunal for relief by way of the issue to her of such a licence.

B. Relevant Legislation and Regulations

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.

C. Issue

The only issue to be determined in this case is as follows:

Are there reasonable grounds to believe that De Masi is not suitable to be licensed as a mortgage agent within the meaning of section 14 of the Act and section 10 of the Regulation having regard to a false statement made or false information provided to the Superintendent with respect to her application for a mortgage agent's licence, in particular a statement to the effect that she had no criminal convictions at the time of her application.

D. Evidence of Ms. De Masi

Ms. De Masi explained her use of Mary and Maria as her Christian or first name. Her birth certificate, a copy of which was received in evidence, shows her name as Maria. She said that this name was that of an Italian saint for whom she was named. However, it was not the name that she habitually used. Rather she used Mary, the English equivalent of Maria, as her first name. This is the name that appears on her driver's licence.

Ms. De Masi testified that there was some confusion about her actual birth date. The date that appears on her birth certificate, a copy of which was received in evidence, shows a birth date of July 25, followed by the year of her birth, with the number 25 superimposed over another number which is not legible. Ms. De Masi's belief, derived from her mother's advice, is that she was actually born on July 24, which is something for which she is now attempting to get confirmation from the records of the hospital where she was born. During the course of her life, she had generally used July 24 when called upon to provide her birth date. For example, that's the birth date that appears on her driver's licence.

As to her convictions, Ms. De Masi testified that she was very reluctant to plead guilty to the criminal charges that she faced in court on April 12, 1999. She stated that her lawyer told her that if she pleaded guilty to one of the charges she would get probation (or, as she now understands it, a conditional sentence) and that otherwise she was looking at serving time. She thought she was found guilty of but one offence when she entered a guilty plea. She stated that she didn't have the benefit of independent counsel but was represented by the lawyer for another individual, who faced related charges. There was no discussion with this lawyer about an ultimate pardon in respect of her conviction.

Ms. De Masi's evidence with respect to her application for a pardon was that, in late 2003, she attended the office of a solicitor whom she engaged to make a pardon application in respect of her conviction of April 12, 1999, paying him \$500 for his

services. The solicitor advised her that the pardon process was an easy one, that he had done many pardon applications and that it would take between six to twelve months to get the pardon. An application for a pardon was duly completed with the solicitor's help and signed and dated. Ms. De Masi left the solicitor's office with a copy but hasn't been able to find that copy although she has searched for it. She subsequently phoned the lawyer on several occasions about the progress of the pardon application, but didn't follow up with further inquiries after the six month period which he had described as the minimum time for getting a pardon. She never received a document evidencing the grant of a pardon (and never thought about getting such a document) nor did she receive any other confirmation that a pardon had been granted. Ms. De Masi testified that she had recently completed a new application for a pardon and that this application had been submitted.

Ms. De Masi described the circumstances in which her application for a mortgage agent's licence was completed as follows:

She sat with Mrs. Gillian Zidner of ZRE, the mortgage brokerage for which she worked and proposed to continue working, before a computer terminal in the ZRE office with Mrs. Zidner inputting the relevant information and answers into the electronic application form. Mrs. Zidner would show Ms. De Masi the screens as they came up and/or pose the questions to Ms. De Masi that needed to be answered. At some point there was a discussion about the date that should be shown as the applicant's birth date. Ms. De Masi explained that the date that appeared on her birth certificate was in error. Mrs. Zidner advised that she should go by what is in her birth registration and, therefore, July 25 was inserted as Ms. De Masi's birth date and Maria De Masi as the name of the applicant. There was, Ms. De Masi told the Tribunal, no intention to mislead in completing the application in this manner.

The fact of Ms. De Masi's conviction and the pardon, which she believed she had, were already known to Mrs. Zidner at this time. Ms. De Masi had openly disclosed the conviction to Mrs. Zidner and Mrs. Zidner's husband and business associate, Mr. Tuffy Zidner, earlier on in her employment with ZRE. Mr. Zidner had had a specific discussion with Ms. De Masi about the effect of her conviction when he was filling out the earlier Notification Form, with Ms. De Masi supplying the relevant information and answers. At that time, Mr. Zidner had told her that there was no problem in answering "no" to the question on the Form about convictions for offences if she had a pardon. Therefore, Ms. De Masi indicated, there was no issue about how the similar question should be answered in the application for a mortgage agent's licence.

Mr. Renato Fellin, who was also a mortgage agent with ZRE, appeared as a witness for Ms. De Masi. He confirmed the discussions, to which he was privy, that took place in the office when Ms. De Masi's licence application was being completed, particularly the discussion about the proper birth date to be inserted in the application.

Both Ms. De Masi and Mr. Fellin testified that there were no complaints about Ms. De Masi's work as a mortgage agent.

We found the testimony of Ms. De Masi and Mr. Fellin to be credible.

E. Analysis

In our analysis of this case, we have been guided by several principles that have been recognized in prior decisions of this Tribunal following hearing requests, under the Act, in respect of licence refusal proposals.

- (1) The Tribunal must make its own determination about the suitability of an applicant to hold a mortgage agent's licence having regard to the criteria for the granting or withholding of a licence set out in the Act and Regulation. 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 licence application or in the reasons supporting that proposal. In other words, the Tribunal must look at the matter afresh, as one of first impression, and come to its own conclusion, based on the evidence before it, as to the applicant's suitability to hold a mortgage agent's licence.
- (2) In applying the licensing provisions of the Act and Regulation, the Tribunal must be mindful of two important factors, 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 refuse a licence which can be financially severe for the applicant in that such a decision will preclude him or her from earning a livelihood in a chosen line of work.

These factors must be balanced by the Tribunal.

- (3) A number of considerations should be taken into account in determining whether any false statement made, or false information provided, with respect to an application for a mortgage agent's licence justifies the refusal of such a licence. The considerations that may be relevant in assessing any such statement or information are set out in the Tribunal's decision in *Alves v. Superintendent of Financial Services* (FST Decision No. M0315-2008-1).
- (4) The fact that a false statement has been made, or false information provided, with respect to an application for a mortgage agent's licence does not necessarily mean that the applicant is not suitable to hold such a licence. For example, an innocent misstatement of the applicant's phone number in an application ought not to lead to a conclusion that the applicant is unsuitable.

We do not regard the fact that Ms. De Masi completed her licence application using her first name and birth date in the manner in which they appear on her birth certificate as involving the provision of false information to the Superintendent even though that name and birth date were not normally used by her and were, therefore, inconsistent with what appeared on the court's record of her conviction on April 12, 1999. Information of this kind that accurately reflects what's shown on a birth certificate wouldn't be understood by the average person to be false, which is an appropriate test for determining whether information is, in fact, false. Of course, it would be different if an application asked for the name by which the applicant was commonly known and the applicant responded by providing his or her birth name although that was not the name by which he or she was usually identified.

We will now review the background facts and evidence in this case in light of the considerations listed in the *Alves* decision, which we think are the relevant considerations for present purposes. That decision says that we should have regard to;

- (a) the nature of the false statement or information,
- (b) the advertent or inadvertent nature of the falsehood,
- (c) any explanation provided by the applicant for the falsehood, and
- (d) the circumstances in which the false statement was made or the false information provided, including any unusual and severe pressure the applicant was under at the time.

(a) *The Nature of the False Statement or Information.*

Ms. De Masi made a statement in her licence application to the effect that she had never been charged with, or found guilty of, any offences, which turned out to be false as she had not, apparently, received a pardon in respect of three offences of which she had been convicted. The conduct of Ms. De Masi that led to those convictions might have proven to be material to the Superintendent's determination of whether she was suitable to hold a mortgage agent's licence. It might have afforded reasonable grounds for belief that she would not trade in mortgages in accordance with the law and with integrity and honesty, one of the circumstances to which the Superintendent is to have regard, under the Act (subsection 14(1)) as read with the Regulation (section 10, paragraph 1), in deciding on the suitability of an applicant to be licensed as a mortgage agent. We do not need to decide (nor do we have sufficient evidence to decide) whether Ms. De Masi's conduct would provide such grounds since the Superintendent did not rely on such a belief in refusing her application for a licence. We attach no particular significance to the fact that there was no such reliance by the Superintendent either in issuing his notice of proposal to refuse a licence to Ms. De Masi or in argument at the hearing before this Tribunal.

Ms. De Masi's statement to the effect that she had only been convicted of one offence, which was made to the Superintendent through correspondence with the representative of FSCO who had confronted her with the results of the criminal record check, also turned out to be false as she had been convicted of three offences. We do not regard this false statement as material because it was not likely to mislead the Superintendent in

evaluating any past conduct of Ms. De Masi that might provide reasonable grounds for a belief that she would not trade in mortgages in accordance with law and with integrity and honesty. At the time the false statement was made, the Superintendent already had official confirmation, through the results of the criminal record check, that Ms. De Masi had been convicted of three offences.

(b) The Advertent or Inadvertent Nature of the Falsehood.

We accept the testimony of Ms. De Masi to the effect that she believed she had been pardoned for any offence for which she had been convicted on April 12, 1999. Had that been the situation, her answer in the application to the effect that she not been charged with, or found guilty of, any offence would have been true in that she would have been justified in giving that answer in the circumstances. The information provided in the application material confirms that this would be the case. As it was, the answer was false. In our view, the falsehood was inadvertent. We have also concluded that Ms. De Masi's statement to a representative of FSCO that she had only been convicted of one offence was innocently made, in the belief that it was true.

The situation in the present case is similar to that in *Edwards v. Superintendent of Financial Services* (FST Decision No. M332-2008-1) where the applicant for a mortgage agent's licence also responded in the negative to the question about offences in the application. There, it was in the belief that having applied for a pardon for a criminal offence he had committed (in that case, the applicant made his own pardon application without legal assistance), he did not have to disclose the offence. In fact, given the timing of the application in relation to the date of his conviction, he was ineligible for a pardon when he applied. In *Edwards*, the Tribunal ordered the Superintendent to issue a mortgage agent's licence to the applicant.

(c) Any Explanation Provided by the Applicant for the Falsehood.

This consideration leads us to make an assessment of whether Ms. De Masi's explanation of any false statements made to the Superintendent with respect to her licence application were plausible. As in *Edwards*, that means, principally, considering whether the explanation given for the assumption that a pardon for any criminal convictions had been obtained was a plausible one. We think it was. She had no personal training or experience in the process of obtaining pardons, she put her faith in a solicitor who purported to be professionally experienced in this kind of matter and she had some evidence to support her belief that a pardon would have been granted within a year or so, both in the form of her solicitor's assurances that everything was taken care of and there was nothing to worry about and in the fact that she had received no feedback from FSCO in respect of her negative answer to the question about criminal convictions on the Notification Form filed with FSCO in January of 2007. There was no evidence to suggest that Ms. De Masi interpreted FSCO's silence as signifying that it had missed her convictions once and could be expected to do so again. Rather, she said in evidence that she was fully aware of the fact that FSCO would be doing a criminal record check against her, when it processed her licence application, which is inconsistent with a "fooled them once, I can fool them

again” approach on her part. We also consider that it was plausible for Ms. De Masi, in the circumstances of her appearance in court, to have thought that she had only been convicted of one offence, which is what she reported to a representative of FSCO in response to an inquiry about the information provided in her licence application.

Counsel for the Superintendent urged us to take the view that it is not enough for an applicant for a mortgage agent’s licence to have a plausible or reasonable belief in the truth of a statement made, or information provided, to the Superintendent with respect to his or her licence application. She argued that an applicant is subject to an obligation, reflected by the terms of the Act and the regulations under it, to exercise diligence by verifying any such statement or information before making or providing it to the Superintendent. She maintained that Ms. De Masi had not exercised adequate diligence in this case, especially because she failed to continue to follow up actively with the solicitor she had retained to submit her pardon application, in order to determine its status, or to inquire of the relevant federal authorities whether her pardon had been granted or to ask FSCO about how she could determine whether the pardon had been granted. We do not think that this degree of diligence was required of Ms. De Masi in the circumstances of this case, given her understandable reliance on a legal professional. We believe that Ms. De Masi should have taken more care in checking the facts when she completed the licence application. However, her failure in first confirming the grant of her pardon does not, in our view, reach the level of reckless or wilful blindness that would cause us to question the plausibility of the explanation she gave of her false statement about offences of which she had been found guilty.

(d) The Circumstances in which the False Statement was Made or the False Information Provided, Including any Unusual or Severe Pressure the Applicant was under at the Time.

There was nothing particularly special about the circumstances in which Ms. De Masi made false statements to the Superintendent with respect to her licence application. She was assisted by others, particularly Mrs. Gillian Zidner, in the completion of the application and was not, at the time, subject to any unusual distractions or pressures of which we were made aware.

After weighing these considerations, we have concluded that the false statements made by Ms. De Masi with respect to her licence application do not afford reasonable grounds for a belief that she is not suitable to be licensed as a mortgage agent. Therefore, she should not be disqualified on this basis from receiving a mortgage agent’s licence.

F. Order

In light of the reasons set out above, we direct the Superintendent, by order, to issue a mortgage agent's licence to Ms. De Masi without conditions.

DATED at the City of Toronto, this 11th day of May, 2009.

"Colin McNairn"

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

"Florence Holden"

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

"Shiraz Bharmal"

Shiraz Bharmal, Member of the Tribunal
and of the Panel