

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, S.O. 2006, c. 29 (the “MBLA Act”), in particular sections 7, 18, 19, 21, 29, 38 and 39, and the following Regulations under the Act; the Mortgage Brokerages: Standards of Practice Regulation, O.Reg. 188/08, in particular section 42, and the Administrative Penalties Regulation, O.Reg. 192/08, in particular, section 3;

AND IN THE MATTER OF Veluppillai Vivekananthan;

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

BETWEEN:

VELUPPILLAI VIVEKANANTHAN

Applicant

-and-

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

BEFORE:

Ms. Heather Gavin
Member of the Tribunal and Chair of the Panel

APPEARANCES:

Mr. Velluppillai Vivekananthan, the Applicant, in person.

Mr. Robert Conway,
Counsel for the Respondent, the Superintendent of Financial Services

HEARD:

July 20, 2009

REASONS FOR DECISION

This is a decision upon a hearing held pursuant to s. 21(3) of the *Mortgage Brokerages, Lenders and Administrators Act*, S.O. 2006 (“the Act”) at the request of Mr. Veluppillai Vivekananthan. Mr. Vivekananthan requested that the Tribunal review the Notices of Proposal issued by the Superintendent of Financial Services (“the Superintendent”) proposing to revoke a mortgage brokerage licence issued to Mr. Vivekananthan, also to impose an administrative monetary penalty of \$1000 against him, and an interim order dated February 17, 2009, made pursuant to s.19(3) of the Act, to immediately suspend the said mortgage brokerage licence. The Superintendent’s actions arose out of circumstances surrounding the failure of Mr. Vivekananthan to obtain and maintain appropriate errors and omissions liability insurance as required pursuant to O.Reg.188/08, s.42, made pursuant to the Act. On March 20, 2009, prior to this hearing, the Superintendent accepted a surrender of the mortgage brokerage licence in question, accordingly this hearing proceeded on the matter of the administrative monetary penalty only.

A. Background

The Superintendent is authorized to issue mortgage brokerage licences under the terms of the Act which came into effect July 1, 2008. Mortgage brokerages are required by the Act and the regulations to have errors and omissions insurance in a form approved by the Superintendent and with a minimum level of coverage (“E&O insurance”). In order to avoid requiring brokerages that applied for a licence before July 1, 2008 to pay for E&O insurance for a period in advance of that date, the licence application form, in use at the time, afforded an applicant the option of committing to have such insurance in place by July 1, 2008.

Mr. Vivekananthan applied for a mortgage brokerage licence which was granted on June 16, 2008. In the application completed and signed by Mr. Vivekananthan, the proposed principal broker he asserted in question 15 that “the corporation/partnership/sole proprietor currently has the required errors and omissions insurance in place.”

In October of 2008, the Superintendent began an audit of mortgage brokerages for compliance to the E&O insurance. In an agreed statement from Ms. Yen Quan Low Sin, a Senior Registration Specialist for FSCO the process of the audit was outlined. An initial e-mail blast was sent on November 26, 2008 requesting all brokerages found to be non-compliant with the E&O insurance requirements to respond by December 3, 2008 with a detailed explanation on why they did not have the necessary coverage, or supporting documentation on the amount of business conducted. A database was set up to track the responses received. If a brokerage did not respond by the required date, a registered letter dated December 12, 2008 was sent outlining again the obligation to respond to the request for information and documents from the Superintendent and requesting the brokerage to provide a written response by December 31, 2008. Again the data base was updated according to the responses received. In January 16, 2009 further correspondence was sent structured according to the brokerages responses, either

requesting proof of E&O Insurance for brokerages who indicated they would obtain the coverage or a letter with an attachment of the surrender declaration for brokerages who indicated that they wished to cancel or terminate their licence. A deadline of January 30, 2009 was set for all responses to the January 16, 2009 letters. If there was no reply as of that date, the brokerages were referred to the enforcement phase. Ms. Low Sin testified that if a brokerage had responded by the January 30 date, there was no enforcement action taken. Ms. Low Sin further stated that the only process for surrendering a licence was to fill out the prescribed form and mail it to FSCO.

As noted above, on November 26, 2008 FSCO sent an urgent message, in a standard form to the principal broker for Mr. Vivekananthan's mortgage brokerage advising that the brokerage was found, as a result of an audit, to have failed to obtain the required E&O insurance as of October 15 2008 and requested a response no later than December 3 2008, such response was to include a detailed description of why E&O insurance was not in place or documentation of such insurance. Mr. Vivekananthan responded by email on December 12, 2008 saying:

“I am a real estate broker. I am very sorry that I misunderstood or I assumed my E&O insurance through RECO would cover me. I already replied to your email and I terminated my Mortgage brokerage. I joined as a broker with Bonafide Mortgage Solutions Inc. since December 11, 2008. I swear that I did not have any Mortgage transactions or dollar volume since July 1, 2008. Please accept my explanation”.

Subsequent to this communication, on December 22, 2008 the Licensing and Market Conduct Division of FSCO received a letter from Mr. Vivekananthan, which stated:

“I like to inform you that I want to terminate my brokerage since December 10, 2008. Please confirm my termination”.

There is no evidence in this hearing that Mr. Vivekananthan received the December 12, 2008 register letter from FSCO. This is consistent with the procedure as Mr. Vivekananthan responded to the e-blast, in December of 2008 and the results would have been noted on the FSCO database, and the practice was to wait until the January 16, 2009 surrender letters were processed and sent.

FSCO then sent a letter dated January 16, 2009, setting out the steps required to be taken if Mr. Vivekananthan was working for another mortgage brokerage and/or if the licence issued to his mortgage brokerage was to be surrendered. A copy of the form that had to be completed to surrender the licence was enclosed. The letter also threatened enforcement action against Mr. Vivekananthan and his brokerage unless the required information was provided to FSCO by January 30, 2009.

At the hearing Mr. Vivekananthan gave evidence that when he received the January 16, 2009 letter he contacted a staff member at FSCO who advised him that he was already terminated as a mortgage broker as he had previously gone 'on line' terminated his

brokerage licence and applied to join Bonafide Mortgage Solutions. Mr. Vivekananthan believed that he had complied with the letter as he submitted letters of termination of his brokerage licence and he joined Bonafide Mortgage Solutions as a broker, and informed FSCO of those facts on at least two occasions.

On February 17, 2009, the Superintendent issued two notices of proposal to Mr. Vivekananthan and made an order against him. The first notice proposed that Mr. Vivekananthan's mortgage brokerage licence be revoked because of his failure to maintain E&O insurance in a form approved by the Superintendent, among other grounds. The second notice proposed to impose an administrative penalty of \$1,000 on Mr. Vivekananthan due to the same failure to obtain E&O insurance. The order was to the effect that Mr. Vivekananthan's mortgage brokerage licence was immediately suspended on the basis of the Superintendent's opinion that a delay in the revocation of his licence would adversely affect the public interest since his mortgage brokerage did not have E&O insurance.

Mr. Vivekananthan responded by email on February 23, 2009 saying:

“I like to explain my situation about my Mortgage brokerage licence. I terminated my brokerage licence on December 10, 2008. I joined as a mortgage agent with Bonafide Mortgage Solutions Inc. on December 11, 2008. I informed about this termination to the Mortgage broker audit department and Licensing and Market conduct Division by email and regular mail. I received a letter from FSCO on January 16, 2009 regarding Surrender of Mortgage Brokerage Licence. I immediately called to FSCO and talked to Ms. Karen. She told me everything is okay. I don't need to do anything. I didn't do any transaction or any business with my brokerage licence. Now I received a letter that my brokerage licence is suspended. I don't know what I have to do the next step. Please advise me what to do next”.

Mr. Vivekananthan, testified that during a conversation with Mr. Conway shortly after sending the email he became aware of the process of surrendering his brokerage licence. He then immediately filled out the required form and sent it to FSCO. The required Surrender of Mortgage Brokerage Licence Declaration was received by FSCO on March 4, 2009. Mr. Grant Swanson, Executive Director of the Licensing and Market Conduct Division of FSCO acknowledged Mr. Vivekananthan's Declaration to Surrender form and accepted it to be effective as of March 20, 2009.

On March 1, 2009 Mr. Vivekananthan filed a Request for Hearing before the Tribunal, stating:

“I like to explain my situation about my Mortgage brokerage licence. I terminated my brokerage licence on December 10, 2008. I joined as a mortgage agent with Bonafide Mortgage Solutions Inc. on December 11, 2008”.

During the hearing Mr. Vivekananthan testified that he has held a Real Estate Brokers licence for the last five years. During this time he has held RECO insurance, which he mistakenly assumed would be sufficient for the E&O insurance requirement under the Act. Mr. Vivekananthan testified that he applied for the Mortgage Brokerage Licence in order to avail himself of the grandfathering provisions under the Act. He further indicated that he works as a Real Estate Agent on a part time basis and works full time for a Printing Company. He also indicated that he has not enacted any brokerage business under his brokerage licence or that of Bonafide Mortgage Solutions. The delay in responding to the letters and emails received from FSCO were because he was also distracted by the political situation that was occurring in his home country.

Mr. Vivekananthan further testified that once he learned that the RECO insurance would not be accepted, he took steps to surrender his brokerage licence. He stated that he went on line as instructed by FSCO staff to surrender his mortgage brokerage licence and join another brokerage firm. This testimony was contradicted by Ms. Low Sin where she indicated that there was no facility for surrender via the FSCO web site.

This clear contradiction cannot be ignored. I believe that Mr. Vivekananthan used the web site to apply for a brokers licence with Bonafide Mortgage Solutions, and in doing that reasonably believed that he was also surrendering his licence.

B. Statutory Framework

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 (see 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.

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 the Act. The circumstances in which a licence may be suspended, and therefore the circumstances in which a licence may be revoked, include the

following; “if the licensee contravenes or fails to comply with a requirement established under [the] Act” (subsection 18(1) (d) of the Act).

Before revoking a licence, the Superintendent must first give a notice of proposal to do so to the licensee (subsection 19(2)), in which case the licensee may request a hearing on the proposal before this Tribunal (section 21), as has happened in this case. If the Superintendent is of the opinion that the interests of the public may be adversely affected by any delay in the revocation of a licence as a result of giving a notice of proposal, he may make an interim order suspending the licence (subsection 19(3)), as has also happened in this case.

The Act provides for the imposition of administrative penalties as follows:

38. (1) An administrative penalty may be imposed under section 39 or 40 for either of the following purposes:

1. To promote compliance with the requirements established under this Act.
2. To prevent a person or entity from deriving, directly or indirectly, any economic benefit as a result of contravening or failing to comply with a requirement established under this Act.

(2) An administrative penalty may be imposed alone or in conjunction with any other regulatory measure provided by this Act, including a compliance order or the amendment, suspension or revocation of a licence.

39. (1) If the Superintendent is satisfied that a person is contravening or not complying with or has contravened or not complied with a requirement established under this Act, other than a requirement for which a penalty is provided under section 40 or a requirement prescribed under clause 55(5) (a), the Superintendent may, by order, impose an administrative penalty on the person or entity in accordance with this section and the regulations.

Section 39 goes on to provide that the Superintendent shall give a notice of proposal to impose an administrative penalty, which may be combined with a notice of proposal authorized by any other section of the Act, and that the person on which the penalty would be imposed may request a hearing on the proposal before this Tribunal (subsections (2) and (3)), as has happened in this case.

The Administrative Penalties Regulation, O. Reg. 192/08, provides criteria to govern the amount of an administrative penalty as follows:

3. 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 five preceding years by the person or entity.

Section 41 provides that the maximum administrative penalty that may be imposed for a failure to comply with a requirement of the Act is \$25,000.

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

1. Is the imposition of an administrative penalty against Mr. Vivekananthan's Mortgage brokerage justified in the circumstances of this case, and
2. If the answer to question one is yes, what should be the amount of that penalty in the circumstances.

D. Analysis

1. Whether an Administrative Penalty against Mr. Vivekananthan is justified.

Subsection 39(1) of the MBLA Act provides that if the Superintendent is satisfied that a person has failed to comply with a requirement under the MBLA Act, he may impose an administrative penalty on that person. If a hearing is requested, in respect of a proposal by the Superintendent to make such an order, the Tribunal must be satisfied that there has been such a failure to comply before confirming the proposal, with or without amendments, and directing the Superintendent to carry it out.

I am satisfied that Mr. Vivekananthan failed to comply with the requirement to maintain E&O insurance. That failure continued from July 1, 2008 until March 20, 2009 when the Superintendent accepted the surrender of Mr. Vivekananthan's licence. In these

circumstances, I have clear discretion to order the Superintendent to impose an administrative penalty on Mr. Vivekananthan for his failure to maintain E&O insurance.

Mr. Vivekananthan would like the panel to decline to exercise this discretion on the basis that;

- He believed that his RECO insurance would satisfy the E&O insurance requirement under the Act.
- He believed that once he became aware that the RECO insurance was not sufficient he immediately took steps to surrender his licence and joined another Mortgage Brokerage
- He believed that in discussions with FSCO staff he was advised that he had complied with the Act and therefore did not submit the required Declaration of Surrender to FSCO by January 30, 2009.
- He was under great stress as a result of the political situation in his home country and as a result was not able to give this matter his full attention.

I believe that Mr. Vivekananthan was sincere in his belief that he had taken the necessary steps to surrender his licence, however I am not persuaded that I should refrain from ordering the Superintendent to impose an administrative penalty on the basis of these facts.

I am satisfied that the imposition of an administrative penalty on Mr. Vivekananthan would serve one or both of the purposes for which such a penalty may be imposed as set out in subsection 38(1) of the MBLA Act. Those purposes are to promote compliance with a requirement established under the MBLA Act and to prevent a person from deriving an economic benefit as a result of failing to comply with a requirement established under the MBLA Act.

2. The Appropriate Amount of the Administrative Penalty

In determining the appropriate amount of the administrative penalty, the panel must take into account only those criteria set out in section 3 of the Administrative Penalties Regulation, O.Reg 192/08, just as the Superintendent is obliged to take those criteria into account when proposing a penalty.

The first criterion is the degree to which the failure to comply with a requirement of the MBLA Act was intentional, reckless or negligent. I conclude that Mr. Vivekananthan was negligent in not obtaining the required E&O insurance because he failed to do the due diligence to determine what insurance was required to comply with the MBLA Act when he filled out his application form for a Mortgage Brokerage. However, there are mitigating factors that should be taken into account. Once Mr. Vivekananthan became aware of the E&O insurance requirement he took immediate steps to surrender his brokerage licence after receiving the initial email blast from FSCO. In my view, Mr. Vivekananthan honestly believed that his brokerage licence was surrendered and therefore needed to take no further action. When he received the subsequent

correspondence from FSCO in January of 2009, he again took action by contacting FSCO, and again honestly believed he was in compliance with the MBLA Act. These factors were not present in earlier cases before the FST, such as *Chen v. Superintendent of Financial Services*, where FSCO communications were not answered.

The second criterion is the harm or potential harm to others resulting from the failure. There was, in my opinion, no actual harm resulting from Mr. Vivekananthan's failure to obtain E&O insurance because he never commenced a mortgage brokerage business which would have put clients at risk in the absence of E&O insurance. While there may have been some potential for harm, it was very minimal given the fact that Mr. Vivekananthan took immediate steps to terminate his brokerage licence and join Bonafide Mortgage Solutions in early December 2008.

The third criterion is the extent to which the person tried to mitigate any loss or take any other remedial action. As noted above Mr. Vivekananthan took immediate steps to rectify his non compliance by taking steps to terminate his brokerage licence and join another brokerage in December 2008.

The fourth criterion is the extent to which the person derived or reasonably might have expected to derive any economic benefit from the failure to comply with a requirement of the MBLA Act. Mr. Vivekananthan received a modest economic benefit that he would not otherwise enjoy, were it not offset by an administrative penalty, derived from his holding of a mortgage brokerage licence for the period from early July, 2008 until he correctly surrendered his licence and that surrender was accepted by the Superintendent on March 20, 2009. However, Mr. Vivekananthan, believed that his licence was surrendered in December of 2008 and joined another brokerage, as a result, there would be very minimal economic benefit derived in this case.

The fifth criterion is any other contraventions or failures to comply with a requirement established under the MBLA Act or with any other financial services legislation, of Ontario or another jurisdiction, within the preceding five years. There was no suggestion that there was any such contravention or failure in this case.

Mr. Grant Swanson, Executive Director Licensing and Market Conduct for FSCO, testified through an agreed statement of fact that the rationale for the Superintendent proposing administrative penalties of \$1,000 for failure to maintain E&O insurance was that it was considered to be the minimum amount sufficient to send a signal that non-compliance would be taken seriously and it approximated the amount that a mortgage brokerage would save, on an annual basis, by not paying an E&O insurance premium, which could be expected to range between \$800 and \$1,200. In my view, there may be cases, nonetheless, where on the airing of all of the facts at a hearing (which doesn't happen before the Superintendent proposes the imposition of an administrative penalty), it becomes clear that a penalty of less than or more than \$1,000 is appropriate. *Wong v. Superintendent of Financial Services* (FST Decision No. M0375-2009-1) was one such case. There, the Tribunal ordered the Superintendent to impose an administrative penalty of \$250.

In the present case, taking account of the relevant criteria for determining the amount of an administrative penalty in their application to the circumstances of this case, I am of the opinion that the imposition of an administrative penalty on Mr. Vivekanathan in the amount of \$250 would be appropriate.

E. Order

For the foregoing reasons, I hereby direct the Superintendent, by order, to carry out his proposal to impose an administrative penalty on Mr. Vivekanathan, but with a change in the proposed amount of the penalty from \$1,000 to \$250.

DATED at the City of Toronto, this 31st day of August, 2009.

“Heather Gavin”
Heather Gavin, Member of the Tribunal
and Chair of the Panel