

FINANCIAL SERVICES TRIBUNAL

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

AND IN THE MATTER OF 2123513 Ontario Inc. O/A Way2save Financial Services;

AND IN THE MATTER OF a request for hearing pursuant to subsection 39(5) of the Act.

B E T W E E N:

2123513 ONTARIO INC. O/A WAY2SAVE FINANCIAL SERVICES

Applicant

- and -

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

BEFORE:

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

APPEARANCES:

Mr. Jack Nasarzewski, Principal Broker for 2123513 Ontario Inc. O/A Way2save Financial Services,
representing the Applicant

Mr. Robert Conway,
representing the Respondent

HEARD:

August 10, 2009

REASONS FOR DECISION

A. Background

This is a decision upon a hearing held pursuant to subsections 21(3) and 39(5) of the *Mortgage Brokerages, Lenders and Administrators Act, 2006* (the “Act”) at the request of the Applicant. Initially the Applicant requested the Tribunal to review Notices of Proposal issued by the Superintendent of Financial Services (the “Superintendent”) proposing to revoke a mortgage brokerage licence and an interim order dated February 17, 2009, made pursuant to subsection 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 the Applicant to obtain and maintain appropriate errors and omissions liability insurance as required pursuant to O. Reg. 188/08, section 42, made pursuant to the Act. On June 4, 2009, the Applicant filed, and the Superintendent accepted, a surrender of the mortgage brokerage licence in question. Accordingly, the hearing proceeded only on the matter of the \$1,000 administrative monetary penalty proposed by the Superintendent.

B. Withdrawal of a Request for Hearing

Late in the afternoon of Friday, August 7, Mr. Nasarzewski on behalf the Applicant, sent an email to counsel for the Superintendent confirming that “I am not planning to challenge any of the evidence provided by FSCO”. The email also stated that “I believe my presence during hearing will not change the outcome. Please advise chair about my decision. If my presence despite this decision is required can make myself available for hearing.” A copy of that email was forwarded by Mr. Conway after 4:00 p.m. on August 7, 2009 in an email to the Registrar in which he stated his understanding that Mr. Nasarzewski was confirming he no longer opposed the Notice of Proposal to impose an administrative monetary penalty.

The Registrar appropriately was not satisfied that the email from Mr. Nasarzewski to Mr. Conway constituted a withdrawal of the request for hearing, and that the email made it sufficiently clear whether Mr. Nasarzewski was prepared to accept the imposition of the administrative monetary penalty without requiring the Superintendent to provide satisfactory evidence to support its position and without subsequent consideration by the Tribunal. Accordingly the hearing proceeded.

Mr. Conway requested input in these reasons regarding the appropriate procedure to be followed in the future in the event that other applicants who have applied for a hearing to oppose a Notice of Proposal to impose an administrative monetary penalty under the Act wish to withdraw an application and accept the amount of administrative monetary penalty set out in the Superintendent’s Notice of Proposal. I advised Mr. Conway that an appropriate future process would be to have the applicant’s request sent by the applicant directly to the Tribunal or

forwarded by the Superintendent to the Tribunal at the request of the applicant. However, the request in either case should make it clear that the applicant is withdrawing the request for hearing opposing the Superintendent's Notice of Proposal and is prepared to accept the proposed administrative monetary penalty.

C. RECO Insurance Not Sufficient

Mr. Nasarzewski confirmed at the hearing that the Applicant accepted the "will say" statements of the Superintendent's proposed witnesses as filed with the Tribunal. He also confirmed the Applicant accepted the administrative monetary penalty of \$1,000 and that he was prepared to withdraw the request for this hearing. Accordingly these reasons are being issued primarily to confirm the Tribunal's order made on consent of the parties and to provide guidance for future applications to the Tribunal based on similar facts.

The Notice of Proposal indicated that Mr. Nasarzewski was employed by the Applicant where he acted as a real estate agent or a broker. It also indicated that the application for a mortgage brokerage licence was submitted by the Applicant naming Mr. Nasarzewski as the Principal Broker under that licence. The Applicant checked the box in the application indicating that it understood it was required under the Act to have errors and omissions insurance ("E&O insurance") in place by July 1, 2008. A mortgage brokerage licence was subsequently issued to the Applicant. It was this licence that was the subject of the revocation proceedings and the interim order suspending that licence which were originally intended to be reviewed pursuant to the application for a hearing by the Tribunal.

The Applicant never obtained the required insurance. Accordingly, the Superintendent issued the Notices of Proposal and the interim order referred to above.

Mr. Nasarzewski acknowledged at the hearing that the only E&O insurance coverage that the Applicant ever had after July 1, 2008 was the insurance relating to its real estate brokerage business through the Real Estate Council of Ontario ("RECO"). He also acknowledged that he had reviewed decisions issued by the Tribunal in 2009 included in a Book of Authorities given to him by the Superintendent and filed with the Tribunal. He confirmed that having reviewed those cases he understood that, as noted in previous communications issued by the Superintendent, the E&O insurance coverage held through RECO clearly only applied to transactions under the *Real Estate and Business Brokers Act, 2002* and specifically does not cover mortgage services. Accordingly the Applicant did not have in place the E&O coverage for mortgage brokerage activities required under the MBLAA (including the related regulation). In view of the decisions in those cases he had decided on behalf of the Applicant to accept as appropriate the imposition by the Superintendent of the proposed \$1,000 administrative monetary penalty relating to the failure to obtain the requisite E&O insurance.

Copies of decisions of the Tribunal on the amount of administrative monetary penalty in circumstances in which a mortgage brokerage only had coverage under the RECO policy rather than the E&O coverage required under the MBLAA, are available on the Tribunal's website. As noted in those decisions, in all cases of initial non-compliance with the E&O insurance requirement for licensees under the Act, the Superintendent was proposing to levy an administrative monetary penalty of \$1,000. The decisions also indicate the appropriate amount of the penalty depends upon the circumstances in each case. As noted in the decision issued by the Tribunal in Douglas Wong v. Superintendent of Financial Services (FST Decision No. M0375-2009-1):

... the arguments for a standardized penalty for all transgressors may have validity when applied to penalties applied by the Superintendent at first instance. The Tribunal, however, does not operate under the same practical constraints, and accordingly it is not and should not be bound by the same considerations when a standardized penalty imposed by the Superintendent comes before it for review. The Tribunal affords opportunity for oral hearing, cross-examination and argument to a degree that is not practicably available when a penalty is being assessed originally. A person or entity invoking review of an administrative monetary penalty by this Tribunal opens up all aspects of the propriety of the penalty, and must accept the risk of increase as well as entertaining the hope of decrease or cancellation thereof: see Millenium Mortgage Corporation v. Superintendent of Financial Services, FST Decision No. M0365-2009-1, May 11, 2009. Parenthetically, we see no reason that the Superintendent might not, after the evidence at a hearing unfolds, see fit to argue for a greater, or consent to a lower penalty than was originally imposed.

That decision of the Tribunal also noted that in determining the amount of an administrative monetary penalty the Tribunal, like the Superintendent, must be guided by the criteria set forth in the Administrative Penalties Regulation (O. Reg. 192/8), made pursuant to the Act. Section 3 of the Administrative Penalties Regulation provides:

- 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 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 jurisdiction during the preceding five years by the person or entity.

D. Order

The Superintendent is hereby directed, by order, to carry out his proposal to impose an administrative monetary penalty upon the Applicant in the amount of \$1,000.

DATED at the City of Toronto, this 17th day of August, 2009.

“John M. Solursh”

John M. Solursh
Chair of the Tribunal and of the Panel