

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, 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 Kirpa Nijjar;

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

BETWEEN:

KIRPA NIJJAR

Applicant

-and-

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

BEFORE:

Mr. David Short
Member of the Tribunal and Chair of the Panel

APPEARANCES:

Mr. Kirpa Nijjar, the Applicant

Mr. Joe Nemet, Counsel,
representing the Respondent,
the Superintendent of Financial Services

HEARD:

October 26, 2009

REASONS FOR DECISION

A. Background and Relevant Facts

The Superintendent of Financial Services (the “Superintendent”), the Chief Executive Officer of the Financial Services Commission of Ontario (“FSCO”), is authorized to issue mortgage brokerage licences under the terms of the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, S.O. 2006, c. 29 (the “MBLA Act”), which came into force on July 1, 2008.

Kirpa S. Nijjar applied for a mortgage brokerage licence under the MBLA Act by application dated June 21, 2008 (the “Application”). The Application was signed by Mr. Nijjar in his capacity as sole proprietor, and it identified Mr. Nijjar as the proposed Principal Broker for the brokerage.

The Application contained a printed section that read as follows:

15. Errors and Omissions Insurance: (Check applicable box)

The corporation/partnership/sole proprietor, currently has the required errors and omissions insurance in place. Note: if using an existing policy the applicant must have extended coverage for fraudulent acts in place.

or

The corporation/partnership/sole proprietor, will have by July 1, 2008, the required errors and omissions insurance in place including extended coverage for fraudulent acts.

Note: Only applicants with the required errors and omissions insurance are licensed on July 1, 2008.

The second box was checked in the Application.

In response to the Application, Mr. Nijjar was granted a mortgage brokerage licence with effect on or about July 2, 2008.

Mortgage brokerages are required by section 42 of the *Mortgage Brokerages: Standards of Practice Regulation*, O.Reg. 188/08, which came into effect on July 1, 2008, to maintain E&O insurance in a form approved by the Superintendent, with extended coverage for loss resulting from fraudulent acts and a minimum limit of \$1 million per year and \$500,000 per occurrence (“E&O insurance”). Alternatively, mortgage brokerages must maintain some other form of assurance in a form approved by the Superintendent. The requirement to maintain E&O insurance, or some alternative form of assurance, is a prescribed standard of practice with which licensed mortgage brokerages are required to comply by the terms of subsection 7(4) of the MBLA Act.

Mr. Nijjar held the appropriate registration under the *Real Estate and Business Brokers Act, 2002*, S.O. 2002, c. 30, Sched. C, to enable him to trade in real estate. As a registrant under that Act, he became insured, on payment of the applicable premium, under a group errors and omissions insurance policy issued in the name of the Real Estate Council of Ontario (“RECO”). The policy did not, however, cover any errors or omissions that were fraudulent or any claim in any way relating to or arising out of an insured acting as a mortgage broker.

Mr. Nijjar testified that he initially believed that the RECO errors and omission insurance would satisfy the E&O insurance requirement that applied to mortgage brokerages.

Another of the essential aspects of E&O insurance, besides its acquisition from an approved provider, is that it must cover fraudulent acts. This necessary feature was set out in various communications from FSCO, for instance in a document entitled “Information for Mortgage Brokerages”, which was posted on the FSCO website on December 20, 2007 and handed out, as part of a Mortgage Broker Tool Kit, at various FSCO information sessions on the MBLA Act. Various communications issued by FSCO and/or posted on its website regarding the requirement for E&O insurance in the form and amounts required by section 42 of Ontario Regulation 188/08 were included in the Book of Documents of the Superintendent of Financial Services that was filed at the hearing and admitted in evidence with Mr. Nijjar’s consent.

On November 26, 2008, FSCO sent an urgent, standard form message, addressed to Mr. Nijjar’s e-mail address, directed to the attention of the principal broker. This e-mail message;

- stated that the principal broker was responsible for ensuring that the mortgage brokerage complies with every requirement of the Act,
- advised that the mortgage brokerage was found, as a result of an audit, to have failed to obtain E&O insurance as of October 15, 2008,
- emphasized the importance of the statutory requirement to have E&O insurance and that a failure to obtain such insurance could lead to enforcement action, including an administrative penalty and revocation of licence,
- noted that the only acceptable insurance was specific E&O mortgage broker insurance secured from one of five FSCO-approved insurance providers, which were listed,
- advised that errors and omissions insurance coverage that might be held through RECO only applies to transactions under the *Real Estate and Business Brokers Act, 2002* and does not cover mortgage services, and
- required an e-mail response no later than December 3, 2008, such response to include a detailed description of why E&O insurance was not in place, supporting documentation including any insurance policy/declaration page and a statement of the amount of business conducted since July 1, 2008.

In her evidence Ms. Yen Quan Low Sin, Senior Registration Specialist with FSCO, testified that FSCO received no response from Mr. Nijjar to that e-mail communication. In his evidence, Mr. Nijjar confirmed that he had received the e-mail communication but had not replied to it.

On December 12, 2008, FSCO sent a registered letter to Mr. Nijjar. That letter referred to the lack of a reply to FSCO's November 26, 2008 e-mail communication and stated that FSCO required a written response about his brokerage's E&O insurance and an explanation of his failure to respond to the November 26, 2008 e-mail no later than December 31, 2008. In her evidence Ms. Low Sin testified that FSCO received no response from Mr. Nijjar to that registered letter. In his evidence, Mr. Nijjar confirmed that he had received the letter but had not replied to it.

Ms. Low Sin also referred to a copy of a "Telephone Call Record Log" in FSCO's files which indicated that another member of the FSCO staff had telephoned Mr. Nijjar on January 22, 2009 regarding his failure to respond to the two previous communications. The record log indicated that Mr. Nijjar had confirmed receipt of the registered letter and had apologized for the delay in responding, which he stated was due to a family matter. The record log also indicated that Mr. Nijjar had undertaken to obtain the required E&O insurance coverage and would submit confirmation no later than January 30, 2009.

Ms. Low Sin also referred to a file note written by Ms. Helen Hrebik of FSCO on February 2, 2009. That file note reported that Ms. Hrebik had spoken by telephone to Mr. Nijjar, who had advised that he was unable to obtain E&O insurance from a provider whom he had contacted until he obtained membership in the Canadian Association of Accredited Mortgage Professionals (CAAMP), and that he would be unable to obtain that membership until February 6, 2009. The file note also indicated that Mr. Nijjar had undertaken to provide an explanatory e-mail to FSCO.

Ms. Low Sin also referred to an e-mail submitted by Mr. Nijjar to FSCO on February 24, 2009 advising that he had obtained E&O insurance through Echelon General Insurance Company, to which was attached an e-mail dated February 24, 2009 from LMS ProLink Ltd. to Mr. Nijjar informing him of this coverage and a Certificate of Professional Liability Insurance confirming that the coverage was effective from February 10, 2009. Ms. Low Sin confirmed that the E&O insurance coverage which Mr. Nijjar obtained did meet the requirements of the Act and Regulations.

Meanwhile on February 17, 2009, the Superintendent issued a notice of proposal to revoke Mr. Nijjar's mortgage brokerage licence, a notice of proposal to impose an administrative penalty on Mr. Nijjar in the amount of \$1,000 and an interim order suspending Mr. Nijjar's licence for the 15 day period during which he was entitled, under the MBLA Act, to apply to this Tribunal for a hearing on the proposal to revoke its licence.

Mr. Nijjar filed a request for a hearing with the Tribunal on March 4, 2009.

At the commencement of the hearing the parties advised that Mr. Nijjar had on May 5, 2009 submitted to FSCO a request to surrender his mortgage brokerage licence, and that the surrender was accepted by FSCO on May 13, 2009. Mr. Nijjar's stated reason for surrendering his

brokerage licence was that he had been licensed as a mortgage broker with another licensed mortgage brokerage.

In his evidence, Mr. Nijjar acknowledged his failure to respond within the specified timeframe to FSCO's communications of November 26, 2008 and December 12, 2008. He testified that the "family matter" which had delayed his response related to serious health issues affecting his wife and his brother which preoccupied him at the time. In particular, he frequently had to leave work at short notice to attend to his wife's health issues.

Mr. Nijjar also testified that he had initially been under the incorrect understanding that his E&O Insurance through RECO for his real estate brokerage practice was sufficient and that, once he realized that that was not the case, he had commenced the process of obtaining E&O insurance in the form required.

B. Issues

The Tribunal does not have to consider the Superintendent's proposal to revoke Mr. Nijjar's mortgage brokerage licence as that licence has been surrendered and the surrender has been accepted by the Superintendent.

The issues that remain to be determined in this case are as follows:

1. Is the imposition of an administrative penalty against Mr. Nijjar justified in the circumstances of this case, and
2. If so, what should be the amount of that penalty in those circumstances?

C. Analysis

1. Whether an Administrative Penalty 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 established under the MBLA Act, he may, by order, 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. Nijjar failed to comply with the requirement, established under the MBLA Act, to maintain E&O insurance. That failure continued from July 2, 2008 until February 10, 2009, when Mr. Nijjar obtained E&O insurance coverage in the required form. In these circumstances, the Tribunal has clear discretion to order the Superintendent to impose an administrative penalty on Mr. Nijjar for his failure to maintain E&O insurance.

Mr. Nijjar would like the Tribunal 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 MBLA Act (although there is some question in my mind regarding that belief, as in that event I would have expected Mr. Nijjar to have checked the first box under question 15 of his mortgage brokerage application form referred to earlier in these reasons),
- he was not made aware of the full details of that requirement until he received FSCO's e-mail of November 26, 2008,
- his personal circumstances, and in particular the serious health issues affecting his wife, distracted him from responding promptly to FSCO's communications, and
- he did not in fact conduct any mortgage brokerage business during the period from July 1, 2008 until the surrender of his brokerage licence.

I am not persuaded on the basis of these facts that the Tribunal should refrain from ordering the Superintendent to impose an administrative penalty.

I am satisfied that the imposition of an administrative penalty on Mr. Nijjar 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. The situation in the present case is not unlike that in several previous cases, where the Tribunal concluded that the imposition of an administrative penalty would serve both of the permitted purposes of such a penalty. In particular, Mr. Nijjar's initial failure to obtain the required E&O insurance and his failure to respond at all to FSCO's communications of November 26 and December 12, 2008 warrant the imposition of such a penalty.

2. The Appropriate Amount of the Administrative Penalty

In determining the appropriate amount of the administrative penalty, the Tribunal 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. The Tribunal has concluded that Mr. Nijjar was negligent in failing to obtain and to confirm to FSCO that he had obtained the required E&O insurance before February 17, 2009, when the Superintendent issued his notices of proposal and interim licence suspension order or, alternatively, in not filing a declaration with FSCO requesting the surrender of its mortgage brokerage licence before that date. However, there are mitigating factors that should be taken into account in this case in assessing the degree to which Mr. Nijjar was negligent in failing to comply with the E&O insurance requirement.

First, Mr. Nijjar was, in the Tribunal's view, of the not entirely unreasonable opinion that his RECO insurance would satisfy the E&O insurance requirement under the MBLA Act. Second,

Mr. Nijjar was faced with difficult personal circumstances which, while not justifying his failure to respond to FSCO's communications, render that failure somewhat understandable. Third and most importantly, Mr. Nijjar made real efforts to determine the availability and cost of E&O insurance once he became aware of the requirement, and in fact he did obtain the required E&O insurance coverage expeditiously after he had discussed the situation with FSCO staff. These factors were not present in the earlier case of *Chen v. Superintendent of Financial Services*, (FST Decision No. M0359-2009-1), in which this Tribunal ordered the Superintendent to carry out his proposal to impose an administrative penalty of \$1,000 on a mortgage brokerage for failure to maintain E&O insurance.

The second criterion is the harm or potential harm to others resulting from the failure. There was, in our view, no actual harm resulting from Mr. Nijjar's failure to obtain E&O insurance as 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. Nijjar did not operate a mortgage brokerage business.

The third criterion is the extent to which the person tried to mitigate any loss or take any other remedial action. As noted earlier in these reasons, Mr. Nijjar made real efforts to determine the availability and cost of E&O insurance, commencing early in 2009, when he realized that he didn't have the required E&O insurance through RECO. He did in fact obtain the required insurance effective February 10, 2009 (before the date on which the Superintendent issued his notice of proposal to impose an administrative penalty, although neither Mr. Nijjar nor FSCO were notified of the coverage until shortly after that notice of proposal was issued).

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 Nijjar 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 his required E&O insurance became effective on February 10, 2009.

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.

In previous cases of a similar nature the Executive Director Licensing and Market Conduct for FSCO has testified 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 the Tribunal's 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. There have been several previous cases in which, based on mitigating

circumstances, the Tribunal has determined that a penalty of less than \$1,000 was appropriate (as well as several cases in which the Tribunal sustained a penalty in the amount of \$1,000).

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, the Tribunal is of the opinion that the imposition of an administrative penalty on Mr. Nijjar in the amount of \$500 would be appropriate.

D. Order

For the foregoing reasons, the Tribunal hereby directs the Superintendent, by order, to carry out his proposal to impose an administrative penalty on Mr. Nijjar but with a change in the proposed amount of the penalty from \$1,000 to \$500.

DATED at the City of Toronto, this 3rd day of November, 2009.

“David Short”
David Short, Member of the Tribunal
and Chair of the Panel