

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 section 42, and the Administrative Penalties Regulation, O. Reg. 192/08, in particular, section 3;

AND IN THE MATTER OF Mr. Hugh Kuang o/a ACME Financial Services;

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

BETWEEN:

MR. HUGH KUANG

Applicant

-and-

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

BEFORE:

Mr. Paul Litner
Member of the Tribunal and Chair of the Panel

Ms. Elizabeth Shilton
Member of the Tribunal and Member of the Panel

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

APPEARANCES:

Mr. Hugh Kuang, Applicant, in person

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

HEARD:

June 10, 2009

REASONS FOR DECISION

Mr. Herman Hugh Kuang (“Kuang”) is the sole proprietor and principal broker of ACME Financial Services (“ACME Financial”). Mr. Kuang (operating as ACME Financial) is the Applicant in this proceeding. The Applicant was issued a mortgage brokerage licence under section 7 of the Act on April 18, 2008.

This hearing was held pursuant to subsections 21(3) and 39(5) of the Act, at the request of Mr. Kuang, in respect of:

1. A Notice of Proposal dated February 17, 2009 (the “Notice of Proposal”), issued by the Superintendent of Financial Services (the “Superintendent”), in which the Superintendent proposed to,
 - a. revoke the mortgage brokerage licence issued to the Applicant, and
 - b. impose an administrative monetary penalty of \$1,000 against the Applicant;
2. An interim order of the Superintendent dated February 17, 2009, made pursuant to subsection 19(3) of the Act, to immediately suspend the Applicant’s mortgage brokerage licence; and
3. An order of the Superintendent dated March 10, 2009, extending the interim order to suspend the Applicant’s mortgage brokerage licence, until such time as the proposed orders in the Notice of Proposal have been finally determined.

Collectively, the foregoing interim orders and proposed orders are referred to herein as the “Proposed Orders”.

We note that our decision to uphold or not uphold the Superintendent’s Proposed Order to revoke the Applicant’s mortgage brokerage licence (paragraph 1.a. above) would, once rendered, effectively obviate the need for the interim order(s) (paragraphs 2 and 3 above). Accordingly, and in view of our decision on the revocation issues, we find that it is not necessary for the Tribunal to rule on the interim orders described in paragraphs 2 and 3 above, and we were not pressed to do so by the parties.

The Proposed Orders arose from the failure of Mr. Kuang to obtain and maintain appropriate errors and omissions liability insurance for ACME Financial, as required pursuant to section 42 of the Mortgage Brokerages: Standards of Practice Regulation, O. Reg. 188/08, made pursuant to the Act (the “Mortgage Brokerages Regulation”).

Background and Relevant Facts

The provisions of the Act requiring persons and entities engaged in certain dealings in mortgages to be licensed came into force on July 1, 2008. The Superintendent was encouraging those who had been engaged prior to that date in activities which thereafter would require an appropriate licence, or who might wish to do so thereafter, to submit applications in advance of that date, to minimize interruptions to these activities resulting from the licence approval process.

An application for a mortgage brokerage licence for a sole proprietor, Hugh Kuang (operating under the registered trade name of ACME Financial Services), was prepared by Mr. Kuang and submitted to the Financial Services Commission of Ontario (“FSCO”) on March 20, 2008. The application form he used (headed in large bold print, “Mortgage Brokerage Licence Application”) was the appropriate form for a brokerage licence under the Act.

In section 12 of this application, Mr. Kuang checked a box indicating that the “...sole proprietor, currently has the required errors and omissions insurance in place”. At the bottom of section 12 of the application, the following statement appears: “Note: Only applicants with the required errors and omissions insurance are licensed on July 1, 2008.” In the application, Mr. Kuang also indicated (at section 3) that he was the principal broker of ACME Financial. Based on this application, mortgage brokerage licence number 10679 was subsequently issued to the Applicant (i.e., Mr. Kuang, operating as ACME Financial) on April 18, 2008, and it was this licence that was the subject of the Proposed Orders which are to be reviewed in this proceeding.

Mr. Kuang also worked as an associate broker at Mortgage Alliance of Canada (“Mortgage Alliance”), a licensed brokerage owned by third parties. According to FSCO’s records, Mr. Kuang has been listed as a mortgage broker working with Mortgage Alliance, at least since May 28, 2008. Mr. Kuang testified that he had worked with Mortgage Alliance since 2007.

Mortgage brokerages are required by section 42 of the Mortgage Brokerages Regulation to maintain errors and omissions 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 approved by the Superintendent.

Mortgage Alliance has in place the E&O Insurance required under section 42 of the Mortgage Brokerages Regulation. As part of his case, Mr. Kuang produced Certificate No. 12, issued to The Mortgage Alliance Company of Canada Inc. by ENCON Group Inc, dated July 1, 2008. Mr. Kuang testified that he paid an annual fee to Mortgage Alliance for the right to act as an associate broker for that company, which included a portion intended to cover his share of the E&O Insurance. The Superintendent conceded that Mr. Kuang, as a licensed mortgage broker, would be covered under Mortgage Alliance’s E&O Insurance, when conducting business on behalf of Mortgage Alliance.

However, Mr. Kuang did not obtain the E&O Insurance required under section 42 of the Mortgage Brokerages Regulation on behalf of ACME Financial, because he was initially under the (mistaken) belief that he was already insured as a mortgage broker under Mortgage Alliance’s insurance, and therefore did not need to be “insured twice” by getting similar insurance coverage for ACME Financial.

FSCO staff discovered, through an audit of policies issued by the insurers approved to issue policies for the purposes of the Act, that an errors and omissions insurance policy had never been issued to the Applicant. A standard-form e-mail message was sent to Mr. Kuang on November 26, 2008, at his email address on FSCO’s records (i.e., the one listed by Mr. Kuang on his application) advising him of the omission. Among other things, the email also advised him of the approved insurers and their issuing brokers, indicated that as principal broker he is responsible for ensuring that his mortgage brokerage complies with all requirements under the

Act, and that insurance was required even if no business was being done under the licence. The email required a reply containing certain specific information by December 3, 2008.

No reply having been received by this date, the Superintendent sent Mr. Kuang a follow-up letter dated December 12, 2008, by registered mail. This letter attached a copy of FSCO's earlier e-mail message and required a written response by December 31, 2008.

Mr. Kuang testified that he did not receive the November 26, 2008 email from FSCO (or, if he did, he did not notice it), notwithstanding that FSCO sent it to the email address provided by Mr. Kuang on his application for a mortgage brokerage licence. But Mr. Kuang did receive the December 12, 2008 letter from FSCO and sent an e-mail message, dated December 17, 2008, to FSCO's Mortgage Broker Audit address, the address provided in all the correspondence, advising:

"I have recently joined the Mortgage Alliance of Canada company as an associated broker, and I am covered by their E & O Insurance policy (attached for your review) and I am told that my name has been submitted along with their E & O Insurance policy."

In the December 17, 2008 e-mail, Mr. Kuang also advised FSCO: "To respond to your inquiry on the volume of my business since July 1, 2008: I had successfully completed several commercial transaction [sic.] on Aug 1, 2008 with fees totalling \$78,000." Mr. Kuang resent the email on December 19, 2008 "just in case" FSCO had missed the first email.

There was no reply from FSCO to Mr. Kuang's December 17, 2008 e-mail.

The next communication to Mr. Kuang from FSCO was another form letter dated January 16, 2009 and headed "Re: Surrender of Mortgage Brokerage Licence". This letter stated:

You have now notified FSCO that, either:

- a) you wish to apply to surrender your brokerage licence; or
- b) you are now working at a different brokerage from the one noted above.

The letter enclosed surrender documentation, and advised the recipient of the procedure to be followed if he was now working for a different brokerage. It also stated:

"Principal brokers, brokers and agents may only work with one licensed brokerage at a time. If you are no longer the principal broker of the brokerage noted above (as "b" above) you have two options. They are:

- 1) advise FSCO of the name of another principal broker who has been designated and taken over your responsibilities as principal broker of the above brokerage; or
- 2) request surrender of the above brokerage license following instructions as noted above for "a".

The letter provided the names of two persons in the Superintendent's office to contact if there were further questions and asked for a reply by January 30, 2009, failing which "your brokerage

will be considered non-compliant with the E&O insurance requirement and FSCO may pursue enforcement action against you and your brokerage.”

Mr. Kuang responded to this letter by email dated January 26, 2009 in which he indicated that he did not understand why it was necessary to surrender his ACME Financial mortgage brokerage licence because he joined Mortgage Alliance and asking FSCO: “May I trouble you to elaborate further, or can we arrange a meeting so we can discuss the details properly”.

Following this correspondence, a telephone call took place between Mr. Kuang and FSCO’s representatives. Ms. Yen Quan Low Sin, a Senior Licensing Officer with FSCO (one of the witnesses called by the Superintendent) testified that she had a telephone conversation with Mr. Kuang on January 28, 2009. During that call, Mr. Kuang asked for an extension of time to consider his options and “understand better” why he had to surrender his mortgage brokerage licence for ACME Financial. He was advised by Ms. Low Sin that an extension would not be granted. She had no other recollection of the details of their conversation.

According to Mr. Kuang, during the January 28, 2009 telephone call he asked Ms Low Sin why his errors and omissions insurance (with Mortgage Alliance) did not also apply to his work as principal broker for ACME Financial, but she did not explain to him what the problem was or why he and/or ACME Financial were non-compliant with the Act. He also asked for a follow-up meeting with FSCO to better understand “what he had done wrong” and to get further explanation of the problem with his working for more than one licensed brokerage and/or why his errors and omissions insurance with Mortgage Alliance was not sufficient, but was told by Ms Low Sin that no further explanation would be provided, nor would he be able to meet with FSCO to discuss his questions.

The Notice of Proposal and interim order(s) referred to above followed, and were sent to Mr. Kuang by email on February 17, 2009. Mr. Kuang responded to FSCO by e-mail on the same day, indicating:

“I have been kept in close communications with the FSCO re this issue (please see my attached documentation), as well, I have provided my E&O insurance (also attached), respectfully, I found your decision to be a bit quick without hearing my end of the story.”

It is clear from this email that even after the issuance of the Notice of Proposal, Mr. Kuang did not understand why his E&O Insurance with Mortgage Alliance did not apply to his work as a principal broker on behalf of ACME Financial.

Mr. Kuang also testified that he was contacted by Ms. Enza Zabonas of FSCO on February 20, 2009. Ms. Zabonas was not called as a witness, but Mr. Kuang testified that she called him on the afternoon of Friday February 20, 2009, while he was out of the office, and left him a voicemail message indicating that he had to contact her by 4:30 p.m. or there would be “dire consequences”. According to Mr. Kuang, he returned Ms. Zabonas’ call at 4:02 p.m., but because he was out of the office and couldn’t hear/understand what she was telling him (due to a poor connection on his cell phone and the location from which he was calling), he asked her for a meeting on Monday morning to discuss her concerns. His request for a meeting was refused.

Following the foregoing correspondence and telephone discussions, a series of communications between Mr. Kuang and FSCO ensued, leading up to this hearing.

We find Mr. Kuang to be a credible witness. The Superintendent did not provide any witnesses or evidence to refute the testimony of Mr. Kuang. It was clear from his testimony that he did not initially understand the difference under the Act between a mortgage brokerage and a mortgage broker, and the insurance requirements applicable to each under the Mortgage Brokerages Regulation, despite FSCO's efforts to make this information publicly available. We find that Mr. Kuang believed that he had the proper errors and omissions insurance when he submitted the application form for a mortgage brokerage licence for ACME Financial, although he was ultimately mistaken in this regard.

Although he was clearly frustrated by FSCO's refusal to answer his questions and/or provide further explanation to him of its decisions regarding ACME Financial, by January 28, 2009, Mr. Kuang knew or ought to have known that if he did not obtain the E&O Insurance, he had to surrender his mortgage brokerage licence for ACME Financial or he could be subject to enforcement actions under the Act.

At the hearing, Mr. Kuang indicated that he now understood that the E&O Insurance required under the Mortgage Brokerages Regulation applied to mortgage brokerages, and not to the individual mortgage brokers, and that separate E&O Insurance was required for ACME Financial. Yet at the date of this hearing ACME Financial still did not have the requisite E&O Insurance. Mr. Kuang's explanation for this was that he would prefer to surrender the mortgage brokerage licence (No. 10679) issued to ACME Financial rather than "pay twice" to obtain the E&O insurance but did not want to take that step until he found out why he needed "double insurance" (with Mortgage Alliance and ACME Financial). By the time he discovered why he needed separate E&O Insurance for Mortgage Alliance and ACME Financial, the Superintendent had already issued the Notice of Proposal.

Decision and Analysis

Revocation of Mortgage Brokerage Licence

The general approach by which this Tribunal had been guided in previous cases is equally applicable in this case. Briefly, the Tribunal must look at the matter as one of first impression and come to its own conclusion, based on the evidence before it, as to whether there are grounds for the revocation of the mortgage brokerage licence or whether some other remedy is more appropriate. In so doing, the Tribunal must balance the policy goal of the Act (to protect the public interest and enhance public confidence in the mortgage industry) against the potentially severe consequences to the licensee of a decision to revoke a licence (which could preclude him or her from earning a livelihood in a chosen line of work).

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) of the Act), in which case the licensee may request a hearing on the proposal before this Tribunal (section 21 of the Act), as 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) of the Act), as also happened in this case.

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 applicable licence.

The Mortgage Brokerages Regulation prescribes standards of practice for every mortgage brokerage licence that is issued under the Act, which include 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.

Ms. Danielle Katic, a Senior Co-ordinator, Communications at FSCO, testified as to FSCO's distribution of information about the Act before its implementation. She identified, among other things, a mortgage broker tool kit, a mortgage broker e-information newsletter, and frequently asked questions about the Act together with the answers posted on FSCO's website, which were distributed to mortgage brokers and brokerages prior to the coming into force of the Act. She also testified that "e-Blasts" were sent to various participants in the mortgage industry both before and after the Act came into force. The information distributed by FSCO included, among other things, specific information on the requirement under the Act that mortgage brokerages maintain E&O Insurance. However, Ms. Katic acknowledged that she had no knowledge of the Applicant's situation and whether or not Mr. Kuang had received or understood any of the numerous communications sent out by FSCO with respect to the licensing requirements under the Act.

The Tribunal notes the large volume of information disseminated by FSCO to regulated persons in the mortgage industry, much of which was general in nature and would not apply to all licensees. It is quite conceivable that regulated persons might have questions about the requirements of the Act and how such requirements apply to their specific licence or activities that are not addressed in FSCO's general communications. While we commend FSCO for its efforts to disseminate information about the requirements of the new Act, we note that the provision of general information to the industry at large is no substitute for responding to specific enquiries by regulated persons.

There is no dispute that the Applicant had not complied with the E&O Insurance requirements at the time of the application, and has not complied with it since. As noted above, we have found

that Mr. Kuang was under the mistaken impression that the insurance he had with Mortgage Alliance satisfied the requirements of the Mortgage Brokerages Regulation, which it does not—a fact which he clearly understood by the time of the hearing.

This statutory requirement for E&O Insurance for each licensed mortgage brokerage is mandatory, and either is or is not factually satisfied. Here, it is not, and there is no evidence of the Applicant having procured some “other form of assurance in a form approved by the Superintendent”. Regardless of Mr. Kuang’s belief and/or intentions as to the requirements of the Act, as the Applicant did not meet the insurance requirements set out in the Mortgage Brokerages Regulation, under the combined provisions of sections 18 and 19 of the Act, the Superintendent was entitled to suspend the Applicant’s brokerage licence and consider whether it should be revoked.

As noted above, the Tribunal found Mr. Kuang to be a candid and credible witness. Yet his belief that he had complied with the Act, however honest, does not cure the fact that ACME Financial did not meet the insurance requirements, and was not exempted from it. But his conduct and that of FSCO staff in trying to address the non-compliance, are relevant when considering what order the Tribunal should make in all the circumstances.

In this case, we have taken the following factors into account in coming to our decision as to the appropriate response to the Applicant’s non-compliance with the Act:

- The extensive information sent out by FSCO to mortgage industry participants which clearly explained the need for licensed mortgage brokerages to have E&O Insurance in place. This put the Applicant on notice that E&O Insurance was required for each brokerage.
- The general information sent out by FSCO, although extensive, did not specifically address (in any one Question and Answer) the question asked of FSCO by Mr. Kuang—why his E&O Insurance with Mortgage Alliance did not also cover him in his work for ACME Financial.
- Once he received actual notice of FSCO’s concerns about the lack of E&O Insurance for ACME Financial (the December 12, 2008 letter) Mr. Kuang promptly contacted FSCO to provide a copy of the insurance he had in place and which he believed satisfied FSCO’s concerns.
- Following receipt of FSCO’s January 16, 2009 letter, Mr. Kuang again responded to FSCO in a timely fashion (email dated January 26, 2009), requesting a meeting to better understand why he needed to surrender the Applicant’s mortgage brokerage licence and to understand how and why he was not compliant with the Act.
- FSCO did not respond to Mr. Kuang’s email request for a meeting and did not provide answers to his questions or agree to explain these requirements to him during a follow up telephone call between Mr. Kuang and Ms. Low Sin.

Nevertheless, by January 28, 2009, Mr. Kuang knew, or ought to have known FSCO’s position—he had to obtain the E&O Insurance, surrender his mortgage brokerage licence for ACME Financial, or he would continue to be non-compliant with the Act. He may not have understood exactly why he was non-compliant, but he knew FSCO’s position and exactly what he had to do in order to comply with FSCO’s position.

We are concerned in this case by the fact that FSCO staff ignored or refused to meet with Mr. Kuang to discuss his particular case and the questions he had about compliance with the Act. While it is clear that the principal broker of a mortgage brokerage is responsible for ensuring that the brokerage complies with all requirements of the Act, we think that the regulator also has a responsibility to properly and fully communicate with the persons it regulates to enable them to understand the requirements of the Act. While FSCO sent extensive broadly based communications to mortgage industry participants, the evidence before us shows that FSCO did not take any steps to communicate or explain why the Applicant was non-compliant with the Act in this case or to respond to his specific enquiries.

It is clear Mr. Kuang (operating as ACME Financial) cannot continue to be registered as a mortgage brokerage under the Act without meeting the E&O Insurance requirement. The Superintendent acted appropriately in suspending the brokerage licence, and in advising Mr. Kuang that unless he acted in a timely fashion to obtain insurance or surrender the licence, the licence would be revoked. In our view, however, FSCO acted with undue haste in issuing the Notice of Proposal to revoke the licence, in view of Mr. Kuang's repeated requests for further information and a meeting with FSCO staff. Mr. Kuang testified that he wished to surrender his licence rather than secure insurance for the brokerage in addition to the insurance he already had as a broker for Mortgage Alliance. Under the circumstance, we have determined that Mr. Kuang should be provided with an additional time-limited opportunity to surrender his licence, failing which the Superintendent shall be directed to revoke the Applicant's brokerage licence.

Administrative Monetary Penalty

The next issue is whether the Superintendent was entitled to levy an administrative monetary penalty on the Applicant. We are of the view that he was so entitled.

The Mortgage Brokerages Regulation clearly requires holders of mortgage brokerage licenses to hold errors and omissions insurance in a prescribed form. The Applicant held such a licence operative from April 18, 2008 until its suspension by the interim orders, and was uninsured throughout that period. Mr. Kuang (ACME Financial) was therefore not in compliance with a requirement under the Act, and the Superintendent was thus entitled to impose an administrative monetary penalty upon him, pursuant to subsection 39(1) of the Act.

Although Mr. Kuang misunderstood the requirements of the Act with respect to (i) E&O Insurance, and (ii) working for more than one brokerage, we note the legal principle that ignorance of the law (or of its provisions) does not excuse a breach of that law. That principle applies to persons regulated under the Act, which is essentially consumer protection legislation, and we find that it applies in this case.

The application of an administrative monetary penalty in a given situation where there has been a breach of the Act is a matter, in the first instance, for the exercise of the Superintendent's discretion. Subsection 38(1) of the Act provides that such a penalty may be imposed:

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

In this case, the Applicant has clearly not complied with a requirement of the Act, namely the requirement to maintain the requisite E&O Insurance, and the imposition of an administrative penalty on Mr. Kuang would serve both statutory purposes. We find, therefore, that this is a proper case to consider the application of an administrative monetary penalty.

However, we clearly have the discretion under subsection 39(6) of the Act to impose an administrative monetary penalty in an amount different than that imposed by the Superintendent in the first instance, should the circumstances warrant it.

Mr. Grant Swanson, the Executive Director Licensing and Market Conduct at FSCO, gave evidence to the effect that administrative monetary penalties in the amount of \$1,000 were uniformly levied by the Superintendent in all cases of non-compliance with the insurance requirements for licensees under the Act, and explained the reasoning behind this policy decision. The amount was set at a level likely to induce compliance across the industry with the insurance requirements. According to Mr. Swanson, FSCO's stated purpose in levying such administrative penalties was to create a "culture of compliance" within the regulated sector and this amount took into account the factors of deterrence and equity (the amount of the fine is roughly equivalent to the typical premium paid for E&O Insurance).

While we accept the evidence of Mr. Swanson, we adopt the reasoning of 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 Corporations v. Superintendent of Financial Services*, FST Decision No. M0365-20009-1, 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.

In determining the amount of an administrative monetary penalty we must be guided by the criteria set forth in the Administrative Penalties Regulation (O. Reg. 192/08), 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 potential harm to others resulting from the contravention or failure.

3. The extent to which a 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 contravention or failure. 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.

In this case, paragraphs 1-4 of Section 3 are relevant and we have taken these factors into consideration in coming to our decision as to the amount of the administrative monetary penalty to be imposed on the Applicant.

In our view, section 3.1 of the Administrative Penalties Regulation is an important criterion to be applied in assessing the quantum of the penalty in the circumstances of this case. As noted by the Tribunal in *Douglas Wong v. Superintendent of Financial Services* (FST Decision No. M0375-2009-1):

“this subsection suggests to us a consideration of the degree of what might be called moral turpitude, running from intentional disobedience of the law at the most severe end, through recklessness as to whether the law is or is not complied with, to mere carelessness in complying with requirements at the least severe end. In the context of the Regulation and the Act which gives it force, we are of the view that “negligent”, as used in the subsection, encompasses a lack of the degree of care and regard for the interests of the members of the public with whom a licence holder may expect to come in contact in the exercise of the privilege sought and enjoyed through the holding of the licence which the public may reasonably expect.”

The most serious transgressions, which point towards higher administrative monetary penalties, will be reserved for those persons who deliberately decide not to comply with the law for reasons of their own advantage, and/or who deliberately seek to avoid and evade the consequences of his non-compliance as long as possible. On the evidence before us, Mr. Kuang is not such a person. We have found that he did not intentionally contravene the requirements of the Act, but his lack of understanding of the Act’s requirements and his refusal to comply with FSCO’s clear directive to obtain the E&O Insurance or surrender the Applicant’s mortgage brokerage licence, we hold constitutes his being “negligent” within the meaning of section 3(1) of the Administrative Penalties Regulation, makes him deserving of a penalty which is neither nominal nor trivial.

With respect to section 3.2, Mr. Kuang testified that ACME Financial did not in fact carry on business as a mortgage brokerage with the public at large during the period his licence was operative. We are, however, troubled by the evidence, reflected in Mr. Kuang’s December 17, 2008 email to FSCO, in which he reported that he had performed work as a mortgage broker since August 1, 2008, with fees totalling \$78,000. On cross-examination by Mr. Nemet, Mr. Kuang testified that these fees were “on paper only” and related to a single real estate transaction where he only represented himself and other members of his family. He testified that he had not reported the transaction to Mortgage Alliance since he had not in fact collected any fee. It was not entirely clear from this evidence whether or not Mr. Kuang saw himself as acting as a broker

for Mortgage Alliance or for ACME Financial in this transaction. It is clear, however, that he reported the transaction to the regulator as an ACME Financial transaction, suggesting that ACME Financial, an uninsured brokerage, was actually operating at least for the purposes of this single transaction during a period in which it was uninsured.

If actionable harm had occurred to a party to that transaction, even if the party was a family member, the party harmed might not have had access to the insurance carried by Mortgage Alliance. In that event, there would have been no insurance available, since Mr. Kuang/ACME Financial had none of his own. Therefore, there was some potential for harm to others flowing from the absence of E&O Insurance for the Applicant's brokerage.

With respect to section 3.3, we believe it should count in the Applicant's favour that he took steps to bring to FSCO's attention the fact that he believed that he had the requisite E&O Insurance. While he was clearly mistaken in his belief that he had the necessary insurance, it does show that Mr. Kuang was not simply ignoring the issue of insurance, and was taking some responsible steps to ascertain his correct legal position. If anything, but for FSCO staff's refusal to meet with Mr. Kuang and/or provide him with direct answers to his questions about his situation and the applicability of his E&O Insurance with Mortgage Alliance, the need for this hearing and the Proposed Orders may have been averted.

We also consider that section 3.4 has some application here. The Applicant was licensed as a mortgage brokerage, and was required to take out E&O Insurance. As noted above, Mr. Kuang did not do so, and accordingly saved the cost of the premium for such insurance, which is an economic benefit to him. In this case, however, we do not give the premium saving a great deal of weight in our assessment of the appropriate penalty, since we do not believe that the possible saving of premium expense played any part in shaping Mr. Kuang's actions, or the lack of them.

In assessing the proper administrative penalty, we also bear in mind that the Superintendent has in fact been assessing penalties of \$1,000 in all cases to date, and that there may be many who have accepted this level of penalty, whatever the nature of their alleged or actual transgression.

With this in mind, we would assess Mr. Kuang with an administrative monetary penalty of \$500.00.

Orders

1. We direct the Superintendent, by order, not to carry out the Proposed Order of revocation in the Notice of Proposal.
2. We direct the Superintendent, by order, to give Mr. Kuang two weeks from the date of this Order to surrender the Applicant's mortgage brokerage licence (No. 10679) in accordance with FSCO's procedures, failing which we direct the Superintendent to revoke the Applicant's mortgage brokerage licence. During such time the Superintendent's interim order to suspend the Applicant's mortgage brokerage licence, as set out in the Notice of Proposal, is extended.

3. We also direct the Superintendent to assess an administrative monetary penalty of \$500.00 against Mr. Kuang.

Dated at Toronto this 10th day of August, 2009.

“Paul Litner”

Mr. Paul Litner
Member of the Tribunal and Chair of the Panel

“Elizabeth Shilton”

Ms. Elizabeth Shilton
Member of the Tribunal and Member of the Panel

“Heather Gavin”

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