

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

**AND IN THE MATTER OF** Ms. Judy Chen;

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

**BETWEEN:**

**MS. JUDY CHEN**

Applicant

-and-

**SUPERINTENDENT OF FINANCIAL SERVICES**

Respondent

**BEFORE:**

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

Mr. Martin Brown  
Member of the Tribunal and of the Panel

Mr. Ralph Scane  
Member of the Tribunal and of the Panel

**APPEARANCES:**

Ms. Judy Chen, acting in her own behalf as applicant

Mr. Joe Nemet, counsel,  
representing the respondent,  
the Superintendent of Financial Services

**HEARD:**

May 29, 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 “Act”, sometimes called the “*MBLAA*”), which came into force on July 1, 2008.

Ms. Judy Chen, the applicant in this proceeding, is a real estate broker registered as such under the *Real Estate and Business Brokers Act, 2002*, S.O. 2002, c. 30, Sched. C. On June 26, 2008, she applied for a mortgage brokerage licence under the Act to be held by her personally as sole proprietor of a proposed mortgage brokerage business. The application form contained a section that read as follows:

12. 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.

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

In the application form as completed and signed on behalf of Ms. Chen (the “Application”), the first box in the errors and omissions insurance section is checked. The Application names Ms. Chen as the proposed principal broker for the mortgage brokerage. In response to the Application, Ms. Chen was granted a mortgage brokerage licence on July 4, 2008.

Mortgage brokerages are required by section 42 of the Mortgage Brokerages: Standards of Practice Regulation 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. This Regulation came into effect at the same time as the Act, on July 1, 2008. The requirement to maintain E&O insurance, or some alternative form of insurance, is a prescribed standard of practice with which licensed mortgage brokerages are required to comply by the terms of subsection 7(4) of the Act.

On November 26, 2008, FSCO sent an urgent e-mail to Ms. Chen, at her e-mail address as set out in the Application;

- stating that the principal broker was responsible for ensuring that the mortgage brokerage complies with every requirement of the Act,
- advising 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,
- emphasizing the importance of the requirement, in the regulations under the Act, 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,
- noting that the only acceptable insurance was specific E&O mortgage broker insurance secured from one of five FSCO –approved insurance providers,
- advising that errors and omissions insurance coverage that might be held through the Real Estate Council of Ontario (“RECO”) only applies to transactions under the *Real Estate and Business Brokers Act, 2002* and does not cover mortgage services, and
- requiring 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.

This e-mail also included a series of additional questions and answers (“Q and A’s”). The first Q and A was as follows:

**Q: I have not done any business under the MBLAA and/or got my licence just in case I wanted to do business in the future. Do I still need coverage and am I still in violation of the MBLAA?**

A: Yes you still require coverage and are in violation of the MBLAA.

On December 12, 2008, FSCO sent a registered letter to Ms. Chen;

- reminding her of her responsibilities as a principal broker and her obligation to respond to requests for information and documents from the Superintendent, under the terms of the Act,
- noting that she had not responded to the e-mail of November 26, 2008, a copy of which was attached, and
- requiring a written response by December 31, 2008 about her E&O insurance, as directed by the e-mail, and including an explanation of her failure to respond to the e-mail.

On January 22, 2009, Ms. Chen spoke with an employee of FSCO by phone confirming that she had received the registered letter and that she did not have E&O insurance. She further advised that she would be transferring to another brokerage and would send a letter by fax no later than January 31, 2009. In a faxed letter to FSCO on January 22, 2009, Ms. Chen confirmed in writing that she had received FSCO's registered letter and that she had spoken with a FSCO representative. She also stated, in her letter, that she had not conducted any mortgage brokerage business and would not be operating such a business but would become a mortgage broker with another mortgage brokerage.

On January 28, 2009, FSCO sent a letter to Ms. Chen providing information about the process of surrendering a mortgage brokerage licence and supplying a copy of the requisite form of declaration to be completed and submitted to FSCO to this end. The letter asked Ms. Chen to complete the declaration by February 6, 2009, failing which her mortgage brokerage would be considered to be non-compliant with the E&O insurance requirement and FSCO might then pursue enforcement action against her.

On February 17, 2009, the Superintendent issued a notice of proposal to revoke Ms. Chen's mortgage brokerage licence, a notice of proposal to impose an administrative penalty against her in the amount of \$1,000 and an interim order suspending her licence for the 15 day period during which Ms. Chen was entitled, under the Act, to apply to this Tribunal for a hearing on the proposal to revoke her licence. On February 25, 2009, Ms. Chen filed a request for hearing with the Tribunal in respect of the two notices of proposal issued by the Superintendent. On March 5, 2009, the Superintendent extended his interim order of February 17, 2009 until such time as the proposal to revoke Ms. Chen's licence was finally determined.

At the commencement of the hearing before the Tribunal, the parties advised that Ms. Chen had filed a declaration with FSCO to effect a surrender of her mortgage brokerage licence and that this declaration had been accepted and approved by the Superintendent. Therefore, Ms. Chen wished to withdraw her request for a hearing in respect of the notice of proposal to revoke her mortgage brokerage licence. The Tribunal accepted that withdrawal.

## **B. Issue**

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

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

## **C. Analysis**

Ms. Chen testified before the Tribunal that;

- until January 22, 2009, she thought the errors and omissions insurance that she had, as a real estate broker, through RECO would be sufficient to cover any mortgage brokerage activities in which she might engage,
- she never carried on business as a mortgage brokerage as she was not set up to provide such a service and she had no source of mortgage lenders and didn't know how to secure such lenders; she intended to hold her mortgage brokerage licence as "a financial option", any mortgage brokerage business being "on paper" only,
- she thought that her communications with FSCO following its January 22 letter were sufficient,
- she eventually decided that she didn't want to be part of the mortgage brokerage industry as it might taint her reputation as a real estate broker, and
- she had already suffered losses, as a result of obtaining a mortgage brokerage licence, by way of the \$482 fee she had paid for her licence and the negative publicity associated with these proceedings and conveyed on the FSCO Website.

The only errors and omissions insurance coverage that Ms Chen ever had after July 1, 2008 was under the RECO policy. A copy of that policy, as in force during the period September 1, 2007 to September 1, 2008, was admitted in evidence at the hearing. It is clear from the terms of that policy that it was not issued by an insurance provider that was approved, as at the beginning of July, 2008, by FSCO, it did not have extended coverage for fraudulent acts and it didn't cover any activities while an insured was acting as a mortgage broker rather than as a real estate broker or salesperson. Therefore, for each of these reasons, it did not qualify, for the purposes of section 42 of the Mortgage Brokerages: Standards of Practice Regulation, as E&O insurance. There was no suggestion before us that the RECO policy had been approved as an alternative form of insurance under that section. Indeed, FSCO's e-mail to Ms. Chen of November 26, 2008 makes it clear any insurance that a real estate broker or salesperson might have from RECO does not cover mortgage services.

Subsection 39(1) of the Act provides that if the Superintendent is satisfied that a person has failed to comply with a requirement established under the 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 and directing the Superintendent to carry it out.

We are satisfied that Ms. Chen failed to comply with the requirement, established under the Act, to maintain E&O insurance. That failure continued for the period from July 4, 2008, when Ms. Chen was issued a mortgage brokerage licence, until shortly before the hearing in this case, when Ms. Chen filed a declaration of surrender of her mortgage brokerage licence and that surrender was accepted by the Superintendent, obviating the need for E&O insurance. Therefore, we have the discretion to impose an administrative penalty upon Ms. Chen on the basis of her failure to maintain E&O insurance.

We are not persuaded that we should decline to exercise that discretion because of either of the excuses given by Ms. Chen, in her evidence, for her failure to maintain E&O insurance – that she thought she had the required E&O insurance under the RECO policy and that she didn't think she needed such insurance so long as she wasn't carrying on a mortgage brokerage business. There were no reasonable grounds for those perceptions on her part. The first flies in the face of the clear direction in FSCO's November 26, 2008 e-mail to Ms. Chen that insurance coverage through RECO only applies to transactions under the *Real Estate and Business Brokers Act, 2002* and does not cover mortgage services. The second is not consistent with the first Q and A in that same e-mail, which indicates quite clearly that E&O insurance is required even if no mortgage brokerage business has been conducted under a mortgage brokerage licence and even if such a licence was simply obtained in the event that the licensee might want to carry on such a business in the future.

Therefore, we believe that, in the circumstances, the imposition of an administrative penalty against Ms. Chen is justified on the basis of her failure to maintain E&O insurance while holding a mortgage brokerage licence under the Act.

Subsection 38(1) of the Act provides that an administrative penalty may be imposed for either of two purposes, namely to promote compliance with a requirement established under the Act and to prevent a person from deriving an economic benefit as a result of failing to comply with a requirement established under the Act. We have concluded that the imposition of an administrative penalty on Ms. Chen would satisfy both of these purposes (a similar conclusion was reached by the Tribunal in *Millennium Mortgage Corporation v. Superintendent of Financial Services* (FST Decision No. M0365-2009-1) and in *Mortgage Magician Inc. v. Superintendent of Financial Services* (FST Decision No. M0396-2009-1). Such a penalty would promote compliance by other persons with the requirements of the Act including, in particular, the requirement to maintain E&O insurance. It would also prevent Ms. Chen from realizing a modest economic benefit that she would otherwise enjoy, were it not offset by an administrative penalty, derived from

her holding of a mortgage brokerage licence for the period from July 4, 2008 until she surrendered her licence and that surrender was accepted by the Superintendent. Of course, she didn't exploit that benefit as she never got a mortgage brokerage business up and running.

In determining the appropriate amount of the penalty, we must take into account only those criteria set out in section 3 of the Administrative Penalties Regulation, just as the Superintendent was obliged to take into account those criteria in the first instance.

The first criterion is the degree to which the failure to comply with a requirement of the Act was intentional, reckless or negligent. It appears to us that Ms Chen was negligent in the sense that she was seriously careless in not informing herself of the scope of the requirement, established under the Act, to maintain E&O insurance and in not obtaining that insurance.

The second criterion is the harm or potential harm to others resulting from the failure. There was, in our view, no actual harm to others resulting from Ms. Chen's failure to obtain E&O insurance as she 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 to others, it was very minimal given the fact that Ms. Chen was not set up to operate a mortgage brokerage business and had little knowledge of how to find mortgage lenders to match with mortgage borrowers.

The third criterion is the extent to which the person tried to mitigate any loss or take any other remedial action. Ms. Chen did not take serious and timely action to remedy the situation until shortly before the hearing in this matter when she completed a declaration of surrender of her mortgage brokerage licence.

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 Act. As we have already concluded, Ms. Chen received a modest economic benefit as a result of her failure to maintain E&O insurance.

The fifth criterion is any other contraventions or failures to comply with a requirement established under the 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.

Taking account of these criteria in their application to the circumstances of this case, we are of the opinion that an administrative penalty upon Ms. Chen of \$1,000 would be appropriate. This is not out of line with penalties imposed by this Tribunal in other similar cases (see *Millennium Mortgage Corporation v. Superintendent of Financial Services* (FST Decision No. M0365-2009-1), *Airi v. Superintendent of Financial Services* (FST Decision No. M0353-2009-1) and *Mortgage Magician Inc. v. Superintendent of Financial Services* (FST Decision No. M0396-2009-1)).

**D. Order**

For the foregoing reasons, we hereby direct the Superintendent, by order, to carry out his proposal to impose an administrative penalty upon Ms. Chen in the amount of \$1,000.

**DATED** at the City of Toronto, this 10<sup>th</sup> day of June, 2009.

“Colin McNairn”

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

“Martin Brown”

\_\_\_\_\_  
Martin Brown, Member of the Tribunal  
and of the Panel

“Ralph Scane”

\_\_\_\_\_  
Ralph Scane, Member of the Tribunal  
and of the Panel