

**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** Abe Gitalis Real Estate Limited;

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

**BETWEEN:**

**ABE GITALIS REAL ESTATE LIMITED**

Applicant

-and-

**SUPERINTENDENT OF FINANCIAL SERVICES**

Respondent

**BEFORE:**

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

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

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

## **APPEARANCES:**

Mr. Simon Gitalis, a real estate salesperson employed by the Applicant, Abe Gitalis Real Estate Limited, acting as the representative of the Applicant

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

## **HEARD:**

July 3, 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.

Abe Gitalis Real Estate Limited (“AGR”), applied for a mortgage brokerage licence under the MBLA Act by application dated May 12, 2008 (the “Application”). AGR was never registered as a mortgage broker under the *Mortgage Brokers Act*, R.S.O. 1990, c. M.39, which was replaced by the MBLA Act on July 1, 2008, and did not, therefore, engage in any mortgage brokerage transactions when the *Mortgage Brokers Act* was in effect.

The Application was signed by Mr. Abe Gitalis (“Mr. A. Gitalis”) in his capacity as President of AGR. The form of application had been previously completed by Mr. Simon Gitalis (“Mr. S. Gitalis”), the brother of Mr. A. Gitalis and a real estate salesperson employed by AGR. Mr. S. Gitalis had prior experience as a mortgage broker before he joined AGR as a salesperson. The Tribunal received in evidence several testimonial letters, written during the period 1992 to 1994, commending Mr. S. Gitalis on his excellent service in his role as a mortgage broker.

The purpose of AGR applying for a mortgage brokerage licence was, according to the evidence of Mr. A. Gitalis, to take advantage of his brother’s experience as a mortgage broker, to preserve the right to broker mortgages that AGR had before the MBLA Act came into effect (although it did not exercise that right) and to benefit from the exemption from the requirement that any mortgage brokers employed by a mortgage

brokerage complete an approved education program, which exemption was available if AGR applied for a mortgage brokerage licence before July 1, 2008.

The Application contained a printed 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.

The first box was checked in the Application.

In response to the Application, AGR was granted a mortgage brokerage licence with effect on or about July 1, 2008. Counsel for the Superintendent told us that the licence was issued before July 1 to have effect on that date, but the document that sets out the Superintendent's notices of proposal and interim order in this case, referred to later in these reasons, recites that the licence was issued on July 11, 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. A. Gitalis and Mr. S. Gitalis held the appropriate registrations under the *Real Estate and Business Brokers Act, 2002*, S.O. 2002, c. 30, Sched. C, to enable them to trade in real estate. As registrants under that Act, they 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"). AGR was also covered under that policy in respect of actions or omissions giving rise to claims against the Gitalises and any other registered real estate brokers or salespersons associated with AGR. A copy of the policy, as in effect during the period September 1, 2007 to September 1, 2008, was received in evidence at the hearing in this matter. The limits of coverage under that policy

were \$3 million per year and \$1 million per claim. 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.

Both of the Gitalises testified that they believed that the RECO errors and omission insurance would satisfy the E&O insurance requirement that applied to mortgage brokerages. Mr. S. Gitalis maintained that at the time the Application was completed, FSCO had not adequately communicated the details of the insurance that would satisfy the E&O insurance requirement, particularly the names of the approved insurance providers from which the insurance had to be obtained.

Ms. Danielle Katic, the Senior Co-ordinator, Strategic Communications, in the Corporate Policy and Public Affairs Branch of FSCO, a witness for the Superintendent, said on cross-examination that the first listing of those providers to be posted on the FSCO website appeared, in a document entitled “Errors and Omissions Insurance”, on May 1, 2008, which was only 11 days before AGR submitted its Application. This posting listed four such insurance company providers and their contact insurance brokers (a fifth was added later on) and two industry associations through which approved insurance could be obtained.

The listing was not sent out to mortgage brokerages, although a Mortgage Broker e-Info Newsletter (issue 6), mailed by FSCO on March 12, 2008 to those who had asked to be on the mailing list, noted that FSCO would be e-mailing a list of approved insurance providers to mortgage brokerages within the next few weeks. This Newsletter was also posted on the FSCO website. The list of approved insurance company providers and their brokers was ultimately included, with one addition to the list, in FSCO’s e-mail of November 26, 2008, referred to later in these reasons.

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 earlier 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.

Mr. S. Gitalis testified that he had checked the FSCO website two or three months before completing the Application and had attended a FSCO information session on May 26, 2008 but was not aware, as a result, of the details of the E&O insurance requirement.

FSCO sent an “E-blast”, on September 29, 2008, to all licensed mortgage brokerages advising them that it would be auditing all such brokerages for compliance with the E&O insurance requirement and, for this purpose, would be collecting information from insurance providers offering E&O insurance in the approved form.

On November 26, 2008, FSCO sent an urgent, standard form message, addressed to Mr. A. Gitalis' 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.

On December 3, 2008, Mr. S. Gitalis sent an e-mail to FSCO, which was copied to Mr. A. Gitalis;

- stating that in completing the Application, AGR had indicated that it had the proper E&O insurance on the assumption that the RECO errors and omissions insurance policy provided the necessary coverage,
- indicating that he now realized after FSCO's e-mail and further review of the matter, that specific E&O insurance for the mortgage business must be acquired to comply with the MBLA Act,
- advising that AGR had not performed any mortgage business while non-compliant and had requested applications for quotes from the approved providers on FSCO's list, and

- stating that AGR would forward confirmation of its insurance details as soon as they were received in the next few days and refrain from mortgage transactions until compliant.

Mr. S. Gitalis testified that while he sought quotes on the required E&O insurance from three of the five approved insurance providers, after receipt of FSCO's November 26 e-mail, the process of obtaining quotes took quite awhile. He also approached the two industry associations through which approved insurance might be provided (as per the document entitled "Errors and Omissions Insurance").

On January 16, 2009, FSCO sent an e-mail to Mr. A. Gitalis;

- reciting the fact that FSCO had communicated earlier about E&O insurance and that this was responded to on December 3, 2008, at which time AGR had indicated that it didn't have E&O insurance but that it was obtaining such insurance from one of the approved FSCO providers,
- noting that it had no evidence of E&O insurance having been obtained, and
- requesting that the declaration page for AGR's E&O insurance policy be forwarded to FSCO no later than January 30, 2009.

Mr. A. Gitalis testified that he was out of the country, without contact with his e-mail, through most of December, 2008 and all of January 2009, returning around February 1, 2009. While his assistant was relaying important e-mail messages to him, FSCO's January 16 e-mail message was not included among those messages. Mr. S. Gitalis testified that he was also out of the country for most of the time that his brother was away. FSCO's January 16 e-mail did not, therefore, come to the attention of the Gitalises until some time in early February, 2009.

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

AGR filed a request for a hearing with the Tribunal on February 25, 2009, confining the request to the proposed administrative penalty. It then filed a declaration with FSCO requesting the surrender of its mortgage brokerage licence, which was dated the same date but was not received by FSCO until March 25, 2009.

The declaration stated, among other things, that the reason for requesting surrender was that the brokerage licence was too expensive to maintain. Mr. A. Gitalis testified that when Mr. S. Gitalis inquired about the cost of E&O insurance, sometime after FSCO's e-mail of November 26, 2008, he discovered that the premium would be more than \$1,000 and, in some cases, membership in an industry association would be required, which

would mean that a further cost (the membership fee) would have to be incurred. Had these costs been evident at the start, Mr. A. Gitalis maintained, AGR wouldn't have applied for a mortgage brokerage licence.

The declaration requesting a surrender of licence also stated that AGR had not conducted any mortgage transactions. Mr. A. Gitalis testified before this Tribunal that AGR had never even advertised the fact that it could provide mortgage brokerage services.

The request for surrender was accepted by the Superintendent by letter of April 3, 2009.

## **B. Issues**

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

1. Is the imposition of an administrative penalty against AGR 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.

We are satisfied that AGR failed to comply with the requirement, established under the MBLA Act, to maintain E&O insurance. That failure continued from July 1, 2008 or July 11, 2008 (if the licence was issued on that date) until April 3, 2009, when the Superintendent accepted the surrender of AGR's licence. The only possible exception from this continuous failure was the 15 day period during which AGR's licence was suspended by order of the Superintendent, preventing it from using the licence as a matter of law. In these circumstances, we have clear discretion to order the Superintendent to impose an administrative penalty on AGR for its failure to maintain E&O insurance.

The Gitalises would like us to decline to exercise this discretion on the basis that;

- they believed that their RECO insurance would satisfy the E&O insurance requirement under the MBLA Act,
- they were not made aware of the full details of that requirement until Mr. A. Gitalis received FSCO's e-mail of November 26, 2008, and

- they did not have the opportunity to read FSCO's January 16, 2009 e-mail, due to their absences from the country, until early February, 2009.

We are not persuaded that we should refrain from ordering the Superintendent to impose an administrative penalty on the basis of these facts.

We are satisfied that the imposition of an administrative penalty on AGR 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 *Chen v. Superintendent of Financial Services* (FST Decision No. M0359-2009-1) and other previous cases, where the Tribunal concluded that the imposition of an administrative penalty would serve both of the permitted purposes of such a penalty.

## 2. *The Appropriate Amount of the Administrative Penalty*

In determining the appropriate amount of the administrative penalty, we 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. We have concluded that AGR, acting through the Gitalises, was negligent in not obtaining 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 AGR was negligent in failing to comply with the E&O insurance requirement. First, the Gitalises were, in our view, of the honest, and not entirely unreasonable, opinion that their RECO insurance would satisfy the E&O insurance requirement under the MBLA Act. Second, given their absence from the country during a significant part of the period of December, 2008 and January, 2009, they had a relatively short window of opportunity, after receipt of FSCO's November 26, 2008 e-mail, to meet the E&O insurance requirement or to assess the true cost of meeting it and, if too expensive, to proceed to surrender AGR's licence. Third, they made real efforts to determine the availability and cost of E&O insurance, commencing after November 26, 2008. These factors were not present in the earlier case of *Chen v. Superintendent of Financial Services*, 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 AGR's failure to obtain E&O

insurance as it 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 AGR did not operate a mortgage brokerage business or advertise the existence of such a business.

The third criterion is the extent to which the person tried to mitigate any loss or take any other remedial action. As we noted previously in these reasons, the Gitalises, acting on behalf of AGR, made real efforts to determine the availability and cost of E&O insurance, commencing after November 26, 2008, when they realized that AGR didn't have the required E&O insurance through RECO.

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. AGR received a modest economic benefit that it would not otherwise enjoy, were it not offset by an administrative penalty, derived from its holding of a mortgage brokerage licence for the period from early July, 2008 until it surrendered its licence and that surrender was accepted by the Superintendent on April 3, 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.

Mr. Grant Swanson, Executive Director Licensing and Market Conduct for FSCO, 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 our 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, we are of the opinion that the imposition of an administrative penalty on AGR in the amount of \$500 would be appropriate.

**D. Order**

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

**DATED** at the City of Toronto, this 21<sup>st</sup> day of July, 2009.

“Colin McNairn”

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

“Heather Gavin”

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Heather Gavin, Member of the Tribunal  
and of the Panel

“David Short”

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David Short, Member of the Tribunal  
and of the Panel