

**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, 21, 38, 39 and 41 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** Mi Tierra Realty Inc.;

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

**BETWEEN:**

**MI TIERRA REALTY INC.**

Applicant

-and-

**SUPERINTENDENT OF FINANCIAL SERVICES**

Respondent

**BEFORE:**

Ms. Anne Corbett  
Vice Chair of the Tribunal and Chair of the Panel

**APPEARANCES:**

Mr. Julio Manfrini, for the Applicant, Mi Tierra Realty Inc.

Mr. Stephen Scharbach,  
Counsel for the Respondent, the Superintendent of Financial Services

**HEARD:**

August 27, 2009

## REASONS FOR DECISION

This is a decision upon a hearing held pursuant to s. 21(3) of the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, S.O. 2006, c.29 ("the Act") at the request of Mi Tierra Realty Inc. with respect to the imposition of an administrative monetary penalty by the Superintendent of Financial Services (the "Superintendent") pursuant to a Notice of Proposal dated February 17, 2009 proposing to impose an administrative monetary penalty of \$1,000.00 for failure to obtain and maintain appropriate errors and omissions liability insurance as required pursuant to O.Reg. 188/08, s.42, made pursuant to the Act.

### A. BACKGROUND

The Superintendent is authorized to issue mortgage brokerage licences under the terms of the Act which came into effect July 1, 2008. Mortgage brokerages are required by the Act and the regulations to have errors and omissions insurance in a form approved by the Superintendent and with a minimum level of coverage ("E&O insurance").

Mi Tierra Realty Inc. applied for a mortgage brokerage licence which was granted on June 23, 2008, effective July 1, 2008. In the application completed and signed by Mr. Julio Manfrini, the proposed principal broker he asserted in question 15 that: "The corporation/partnership/sole proprietor currently has the required errors and omissions insurance in place".

In October of 2008, the Superintendent began an audit of mortgage brokerages for compliance with the E&O insurance requirement. As a result of that audit process Mi Tierra Realty Inc. was determined not to have insurance as required.

On November 26, 2008, the Financial Services Commission of Ontario (the "Commission") sent an e-mail to Mi Tierra Realty Inc. stating that the brokerage was found, as a result of an audit, to have failed to obtain the required E&O insurance as of October 15, 2008 and requested a response no later than December 3, 2008, such response was to include a detailed description of why E&O insurance was not in place or documentation of such insurance.

The Commission sent a letter dated December 12, 2008 to Mi Tierra Realty Inc. stating that no response was received to the November 26, 2008 e-mail and requesting a written response by December 31, 2008.

The Commission received no word from Mi Tierra Realty Inc. On January 22, 2009, a Commission staff person telephoned Mi Tierra Realty Inc.'s principal broker, Mr. Julio Manfrini, who stated that he would be arranging for E&O coverage.

Despite that assurance the Commission received no confirmation of coverage. On February 17, 2009 Mi Tierra Realty Inc. was served with an Interim Order to Suspend Licence, a Notice of Proposal to Revoke Licence and a Notice of Proposal to Impose an Administrative Monetary Penalty.

On February 23, 2009, Mi Tierra Realty Inc. provided the Commission with documentary evidence which satisfied the Commission that Mi Tierra Realty Inc. had E&O insurance in place as of January 29, 2009.

The Interim Order Suspending Licence and a Notice of Proposal to Revoke License were resolved by way of Minutes of Settlement.

During the hearing, Mr. Manfrini testified that Mi Tierra Realty Inc. has a real estate brokers licence and has E&O coverage through the Real Estate Council of Ontario ("RECO"), which he mistakenly assumed would be sufficient for the E&O insurance requirement under the Act. He also indicated that Mi Tierra Realty Inc. had not enacted any brokerage business during the time it did not have insurance. The delay in responding to the letters and e-mails received from the Commission were because he was out of the country on a matter related to the health of a close family member. Mr. Manfrini further testified that once he returned to Canada and learned that the RECO insurance would not be accepted, he took steps to acquire the necessary insurance.

## **B. STATUTORY FRAMEWORK**

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 unless the person or entity is exempt from the requirement to have such a 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 the particular licence issued. The Mortgage Brokerages: Standards of Practice Regulation, O.Reg 188/08 prescribes standards of practice (see section 4) for every mortgage brokerage licence that is issued under the Act, including 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 \$500,000.00 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.

The Act provides for the imposition of administrative penalties as follows:

38.(1) An administrative penalty may be imposed under section 39 or 40 for either of the following purposes:

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

(2) An administrative penalty may be imposed alone or in conjunction with any other regulatory measure provided by this Act, including a compliance order or the amendment, suspension or revocation of a licence.

39.(1) If the Superintendent is satisfied that a person is contravening or not complying with or has contravened or not complied with a requirement established under this Act, other than a requirement for which a penalty is provided under section 40 or a requirement prescribed under clause 55(5)(a), the Superintendent may, by order, impose an administrative penalty on the person or entity in accordance with this section and the regulations.

Section 39 goes on to provide that the Superintendent shall give a notice of proposal to impose an administrative penalty, which may be combined with a notice of proposal authorized by any other section of the Act, and that the person on which the penalty would be imposed may request a hearing on the proposal before this Tribunal (subsections (2) and (3)), as has happened in this case.

The Administrative Penalties Regulation, O. Reg. 192/08, provides criteria to govern the amount of an administrative penalty as follows:

3. The Superintendent shall consider only the following criteria when determining the amount of an administrative penalty to be imposed under section 39 of the Act for a purpose set out in section 38 of the Act:
  1. The degree to which the contravention or failure was intentional, reckless or negligent.
  2. The extent of the harm or potential harm to others resulting from the contravention or failure.
  3. The extent to which the person or entity tried to mitigate any loss or to take any other remedial action.
  4. The extent to which the person or entity derived or reasonably might have expected to derive, directly or indirectly, any economic benefit from the contravention or failure.
  5. Any other contraventions or failures to comply with a requirement established under the Act or with any other financial services legislation of Ontario or of any other jurisdiction during the five preceding years by the person or entity.

Section 41 of the Act provides that the maximum administrative penalty that may be imposed for a failure to comply with a requirement of the Act is \$25,000.00.

Upon holding a hearing on a notice of proposal under the provisions of the Act relating to a proposed imposition of an administrative penalty, the Tribunal may direct the Superintendent to carry out the proposal, with or without changes, or substitute its opinion for that of the Superintendent (subsection 39(6)).

### **C. ISSUES**

The issues to be determined in this case are:

1. Is the imposition of an administrative penalty against Mi Tierra Realty Inc. justified in the circumstances of this case, and
2. If the answer to question one is yes, what should be the amount of that penalty in the circumstances.

## **D. ANALYSIS**

### **1. Whether an Administrative Penalty against Mi Tierra Realty Inc. 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 under the MBLA Act, he may 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 Mi Tierra Realty Inc. failed to comply with the requirement to maintain E&O insurance. That failure continued from July 1, 2008 until January 29, 2009 when the necessary insurance was obtained. In these circumstances, I have clear discretion to order the Superintendent to impose an administrative penalty on Mi Tierra Realty Inc. for failure to maintain E&O insurance.

I am satisfied that the imposition of an administrative penalty on Mi Tierra Realty Inc. 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.

Mr. Manfrini, on behalf of Mi Tierra Realty Inc., made submissions and explanation of his delay in obtaining the required insurance:

- He believed that his RECO insurance would satisfy the E&O insurance requirement under the Act.
- Once he became aware that the RECO insurance was not sufficient he took steps to obtain the required insurance.
- He was out of the country and dealing with a personal family matter and as a result was not able to give this matter his full attention.

I believe that Mr. Manfrini was sincere in his belief that his RECO insurance was sufficient. I am also satisfied that the delay in responding to the Commission was the result of personal circumstances and these circumstances merit some consideration in considering the appropriate penalty to be imposed.

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

In determining the appropriate amount of the administrative penalty, the panel 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 Act was intentional, reckless or negligent. I conclude that Mi Tierra Realty Inc. was negligent in not obtaining the required E&O insurance because of a failure to do the due diligence to determine what insurance was required to comply with the MBLA Act when completing the application form for a Mortgage Brokerage Licence. However, there are mitigating factors that should be taken into account. As in the case of *Abe Gitalis Real Estate Limited v. Superintendent of Financial Services* (FST Decision No. M0360-2009-1) Mr. Manfrini was of the mistaken view

that the RECO insurance held by Mi Tierra Realty Inc. was sufficient. This case is distinguishable from other cases before the FST where the applicant chose not to get the insurance because of the cost of the premiums. See *Continental Capital Inc. v. Superintendent of Financial Services* (FST Decision No. M0369-2009-1).

Counsel for the Superintendent called Danielle Katic, an employee of the Commission, who had responsibilities in connection with the materials used to communicate the requirements for applying for and obtaining a licence under the Act. In her testimony, she confirmed that the Commission knew that real estate brokers would apply for mortgage brokerage licences under the Act and she acknowledged that the information provided by the Commission did not make it clear that RECO insurance would not satisfy the requirements for E&O insurance required to obtain a mortgage brokerage licence under the Act.

She further acknowledged that the forms were confusing for some people and it would have helped if the forms had specified that RECO insurance was not sufficient. I note that in the November 26, 2008 e-mail to Mr. Manfrini, the Commission did expressly state that RECO insurance would not cover mortgage transactions.

Accordingly, I am of the view that Mi Tierra Realty Inc. made an honest and not unreasonable mistake in concluding that RECO insurance was sufficient. Mr. Manfrini acknowledges that he now realizes he should have undertaken further inquiries at the time of his application.

I have also considered the fact that Mr. Manfrini was out of the country until late December 2008 and while he confirmed he had access to e-mail he was consumed with a family health matter and did not appreciate the issues with respect to the inadequacy of the RECO insurance until he spoke with a Commission representative on January 22, 2009. The insurance was obtained seven (7) days later but the Commission was not made aware that such insurance was in place until February 23, 2009. Mr. Manfrini admits that he should have taken steps to advise the Commission that he had placed the necessary insurance and he was negligent in not doing so.

The second criterion is the harm or potential harm to others resulting from the failure. There was, in my opinion, no actual harm resulting from the failure to obtain E&O insurance because no mortgage brokerage business was conducted 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. Manfrini was out of the country.

The third criterion is the extent to which the person tried to mitigate any loss or take any other remedial action. As noted above steps to rectify non-compliance were taken following the January 22, 2009 conversation with the Commission.

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. Mi Tierra Realty Inc. received a modest economic benefit that it would not otherwise enjoy, were it not offset by an administrative penalty, derived from the holding of a mortgage brokerage licence for the period from July 2008.

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 the Commission, testified through an affidavit that the rationale for the Superintendent proposing

administrative penalties of \$1,000.00 for failure to maintain E&O insurance was that it was considered to be the minimum amount sufficient to send a signal that noncompliance 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 \$800.00 and \$1,200.00.

The Tribunal has recognized that there may be cases where the application of the relevant criteria for determining the amount of an administrative penalty to the facts before the Tribunal warrant a penalty of less than or more than \$1,000.00. *Wong v. Superintendent of Financial Services* (FST Decision No. M0375-2009-1), *Dawson Pereira v Superintendent of Financial Services* (FST Decision No. M0352-2009-1), and *Abe Gitalis Real Estate Limited v. Superintendent of Financial Services* are such cases.

In the present case, taking account of the relevant criteria for determining the amount of an administrative penalty, and the circumstances of this case, I am of the opinion that the imposition of an administrative penalty on Mi Tierra Realty Inc. in the amount of \$500.00 would be appropriate.

#### **E. ORDER**

For the foregoing reasons, I hereby direct the Superintendent, by order, to carry out his proposal to impose an administrative penalty on Mi Tierra Realty Inc., but with a change in the proposed amount of the penalty from \$1,000.00 to \$500.00.

Dated at the City of Toronto this 2<sup>nd</sup> day of November 2009.

“Anne Corbett”

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Anne Corbett, Vice Chair of the Tribunal  
and Chair of the Panel