

**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** Easy Way Financing Inc.;

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

**BETWEEN:**

**EASY WAY FINANCING INC.**

Applicant

-and-

**SUPERINTENDENT OF FINANCIAL SERVICES**

Respondent

**BEFORE:**

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

**APPEARANCES:**

Mr. Moh’d-Said Al-Kayyali, president of Easy Way Financing Inc.,  
representing the Applicant, Easy Way Financing Inc.

Mr. Robert Conway, counsel,  
representing the Respondent,  
the Superintendent of Financial Services

**HEARD:**

July 6, 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.

Easy Way Financing Inc. (“EWF”), applied for a mortgage brokerage licence under the MBLA Act by application dated May 13, 2008 (the “Application”). EWF was, at the time, registered as a mortgage broker under the predecessor statute, namely the *Mortgage Brokers Act*, R.S.O. 1990, c. M.39, which was scheduled to be replaced by the MBLA Act on July 1, 2008.

The Application was completed and signed by Mr. Moh’d-Said Al-Kayyali, the proposed principal broker for EWF, in his capacity as “broker/owner” of EWF. Mr. Al-Kayyali also carried on a real estate brokerage business through his company Homelife Pioneers Realty Inc., for which he was the broker of record

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 second box was checked by Mr. Al-Kayyali in the Application. In response to the Application, EWF was granted a mortgage brokerage licence on May 26, 2008. Mr. Al-Kayyali has been the only employee of EWF.

Mortgage brokerages are required by section 42 of the Mortgage Brokerages: Standards of Practice Regulation, 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.

On November 26, 2008, FSCO sent a standard form message to Mr. Al-Kayyali’s e-mail address as indicated on the Application opposite his name where it appeared as the proposed principal broker for EWL. The Application also contained a different e-mail address under the heading “Business Contact Information”, which was not used by FSCO. The November 26 e-mail was marked as urgent and directed to the attention of the principal broker. It stated, among other things, 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 and advised that any errors and omissions insurance held through the Real Estate Council of Ontario (“RECO”) does not cover mortgage services. The e-mail required a response, by e-mail, 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 by the brokerage since July 1, 2008.

On December 12, 2008, FSCO sent a registered letter to Mr. Al-Kayyali;

- reminding him of his responsibilities as a principal broker and his obligation to respond to requests for information and documents from the Superintendent, under the terms of the MBLA Act,
- noting that he had not responded to FSCO’s e-mail of November 26, 2008 which, the letter says, was attached (although counsel for the Superintendent told the Tribunal that the e-mail was not, in fact, enclosed with the letter), and
- requiring a written response about his brokerage’s E&O insurance, as directed by the e-mail, by December 31, 2008, and including an explanation for his failure to respond to the e-mail.

On December 18, 2008, Mr. Al-Kayyali responded by e-mail to this letter from FSCO;

- indicating that it was the only letter he had received from FSCO regarding E&O insurance,
- asking that his e-mail address be updated to a new e-mail address that he provided, which was different from either of the e-mail addresses that appeared on the Application,

- recognizing that he needed E&O insurance and acknowledging that he didn't have it, but explaining that he was having financial difficulties, and
- asking for "some few months" in order to be able to arrange E&O insurance.

Mr. Al-Kayyali testified that FSCO's e-mail of November 26, 2008 had not come to his attention, his explanation being that the address that was used was a personal e-mail address and the e-mail had probably gone to his junk mail file and, therefore, he hadn't opened it.

FSCO responded by e-mail to Mr. Al-Kayyali's e-mail a month later, on January 16, 2009, saying that it had not yet received any evidence of E&O insurance having been obtained and asking for the declaration page of a policy of such insurance no later than January 30, 2009. Mr. Al-Kayyali testified that he made several phone calls to FSCO during the period after he received FSCO's December 12, 2008 letter and before he received the January 16, 2009 e-mail. He was never able to talk to anyone about the E&O insurance requirement and left voice mail messages for a couple of officials, but his calls were not returned. It was not clear from the evidence whether the voice mail messages went beyond requesting a call back and providing the appropriate phone number and also identified the purpose of the call. Mr. Al-Kayyali did not respond to FSCO's e-mail of January 16, 2009, although he did not deny that he received it.

Mr. Al-Kayyali also testified that until he received FSCO's December 12, 2008 letter, he was under the impression that the E&O insurance coverage that he had, as a real estate broker, through RECO's insurance program would satisfy the requirement for E&O insurance under the MBLA Act. However, that is inconsistent with the fact that, in completing the Application, he marked the second box in the section headed "Errors and Omissions Insurance", indicating that EWF would have the required insurance in place by July 1, 2008. Had he believed that his RECO insurance would be adequate, he should logically have marked the first box to indicate that EWF currently had the required insurance in place. Mr. Al-Kayyali's testimony is also inconsistent with the fact that he did not mention any misunderstanding about the acceptability of RECO insurance, in his e-mail of December 18, 2008 to FSCO, as a reason for his failure to obtain E&O insurance. Rather, he simply cited his financial difficulties, in that e-mail, as an explanation for his failure to secure such insurance. In any case, it is not reasonable for Mr. Al-Kayyali to expect that any insurance that he had, personally, as a real estate broker would extend to cover the entity EWF, which carried on a mortgage brokerage business rather than a real estate brokerage business. On balance, I find that Mr. Al-Kayyali's claim that he was under the misconception that his RECO insurance would meet the requirement, under the MBLA Act, that EWF maintain E&O insurance to be lacking in credibility.

Only after Mr. Al-Kayyali received FSCO's letter of December 12, 2008 did he inquire about obtaining E&O insurance. He then discovered that the annual premium for that insurance would be in the order of \$700 to \$800.

On February 17, 2009, the Superintendent issued a notice of proposal to revoke EWF's mortgage brokerage licence, a notice of proposal to impose an administrative penalty on EWF in the amount of \$1,000 and an interim order suspending EWF'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.

EWF filed a request for a hearing, in respect of the proposed administrative penalty, with the Tribunal on March 5, 2009. At the same time, EWF filed a declaration with FSCO requesting the surrender of its mortgage brokerage licence. That declaration stated, among other things, that the reason for requesting surrender was that there was no business to cover expenses and that four mortgage transactions had been conducted since July 1, 2008, with a dollar value of \$1,074,112.50. In his testimony, Mr. Al-Kayyali said that these transactions only generated in the order of \$7,000 to \$8,000 in revenue for EWF. By letter of March 20, 2009, the Superintendent, through his delegate, granted the request for surrender of licence effective as of the date of the letter.

With the consent of EWF, the Superintendent filed with the Tribunal the written evidence of three FSCO officials; Ms. Yen Quan Low Sin, Senior Registration Specialist, Ms. Danielle Katic, Senior Co-ordinator of Strategic Communications, and Mr. Grant Swanson, Executive Director Licensing and Market Conduct. That evidence described, respectively;

- the process followed by FSCO in auditing mortgage brokerages for compliance with the E&O insurance requirement and the follow-up that was carried out with those brokerages found to be non-compliant,
- the extensive initiatives that were undertaken by FSCO to communicate the requirements of the MBLA Act to members of the mortgage brokerage community both before and after the MBLA Act came into effect on July 1, 2008 (I also received evidence of the messages conveyed through some of these initiatives), and
- the rationale for the Superintendent proposing and imposing administrative penalties of \$1,000 for failure to maintain E&O insurance, i.e. 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 \$1200.

## **B. Issues**

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

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

## **C. Analysis**

### *1. Whether an Administrative Penalty is Justified*

Subsection 39(1) of the MBLA Act provides that if the Superintendent is satisfied that a person has failed to comply with a requirement established under the MBLA Act, he may, by order, impose an administrative penalty on that person. If a hearing is requested, in respect of a proposal by the Superintendent to make such an order, the Tribunal must be satisfied that there has been such a failure to comply before confirming the proposal, with or without amendments, and directing the Superintendent to carry it out.

I am satisfied that EWF failed to comply with the requirement, established under the MBLA Act, to maintain E&O insurance. That failure continued from July 1, 2008 until March 20, 2009, with the possible exception of the 15 day period during which EWF's licence was suspended by order of the Superintendent, preventing it from using the licence as a matter of law. In these circumstances, I have clear discretion to order the Superintendent to impose an administrative penalty on EWF on the basis of its failure to maintain E&O insurance.

I am not persuaded that I should decline to exercise this discretion simply because FSCO's e-mail of November 26, 2008 did not come to Mr. Al-Kayyali's attention until he became aware of it when he received FSCO's follow-up letter of December 12, 2008. The e-mail contained a message for the attention of the principal broker and Mr. Al-Kayyali was the principal broker for EWF. The message was sent to the e-mail address for Mr. Al-Kayyali that he provided in the Application next to the entry of his name as principal broker for EWL. There was no suggestion that the e-mail delivery system advised the sender, FSCO, that the e-mail was undeliverable. At the relevant time, Mr. Al-Kayyali had not advised FSCO of any change in his e-mail address, for the purpose of FSCO's communications to him. Indeed, Mr. Al-Kayyali said that the e-mail address that he provided with the Application remained active to the date of the hearing in this matter.

In any event, Mr. Al-Kayyali must have known, or should have known, before he became aware of the November 26, 2008 e-mail, that EWF would require E&O insurance, from July 1, 2008, given his indication in the Application that it would have E&O insurance in place by that date and given the extensive communications about the requirements of the MBLA Act that FSCO put out to the mortgage brokerage community, of which EWF was a part. Even if Mr. Al-Kayyali was not aware of the requirement that EWF maintain E&O

insurance until he received FSCO's letter of December 12, 2008, he failed to obtain that insurance during the two-month period between such receipt and February 17, 2009 when the Superintendent issued his notices of proposal and interim order of licence suspension.

Nor am I persuaded that I should decline to exercise my discretion to order the Superintendent to impose an administrative penalty on EWF because of Mr. Al-Kayyali's claim to have been under the misconception, until December 12, 2008, that his errors and omissions insurance through RECO would satisfy the E&O insurance requirement to which EWF was subject under the MBLA Act. I have already found that this claim is not credible.

Finally, I do not consider the difficult financial circumstances of EWF and Mr. Al-Kayyali to be sufficient reason for refraining from ordering the Superintendent to impose an administrative penalty on EWF.

I am satisfied that the imposition of an administrative penalty on EWF 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 decisions 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 Penalty*

In determining the appropriate amount of the penalty, I 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 MBLA Act was intentional, reckless or negligent. It appears to me that EWF, acting through Mr. Al-Kayyali, acted recklessly as evidenced by the following combination of circumstances;

- it did not inform itself, before or shortly after it received its mortgage brokerage licence, of the nature of the requirements imposed on mortgage brokerages, under the terms of the MBLA Act,
- it did not take the necessary steps to ensure that it would receive any e-mail communications from FSCO about those requirements that were directed to Mr. Al-Kayyali, its principal broker, by providing FSCO with an active business e-mail address, by way of amendment to the information it provided in its Application (except that it did so belatedly on December 18, 2008), and

- it was not active in pursuing the E&O insurance that it was required to have even after Mr. Al-Kayyali was fully aware of that requirement and it did not refrain from undertaking mortgage transactions while it was without E&O insurance.

The second criterion is the harm or potential harm to others resulting from the failure. In this case, there was certainly potential for harm as EWF conducted several mortgage transactions after July 1, 2008, when the E&O insurance requirement came into effect. It did so without the benefit of that insurance, thereby exposing its clients to potential harm for lack of any insurance that might provide them with reimbursement for any losses incurred through its fault.

The third criterion is the extent to which the person tried to mitigate any loss or take any other remedial action. EWF did not take any action until March 5, 2009, when it filed a declaration of surrender of its mortgage brokerage licence with FSCO, to remedy its non-compliance, going forward, with the requirements of the MBLA Act.

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. EWF received an economic benefit as a result of its failure to maintain E&O insurance in that it saved the expense of that insurance while, nonetheless, carrying on a mortgage brokerage business after July 1, 2008. That kind of expense would have been a cost of doing business for other mortgage brokerages.

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.

I note that the financial circumstances of the person on whom an administrative penalty is to be imposed is not a factor that can be considered in determining the appropriate amount of the penalty.

Taking account of the relevant criteria in their application to the circumstances of this case, I am of the opinion that the imposition of an administrative penalty on EWF of at least \$1,000 would be appropriate. As the Superintendent's counsel did not urge me to increase the proposed penalty of \$1,000, I have decided that an administrative penalty in that amount should be imposed in this case.

**D. Order**

For the foregoing reasons, I hereby direct the Superintendent, by order, to carry out his proposal to impose an administrative penalty on EWF in the amount of \$1,000.

**DATED** at the City of Toronto, this 14th day of July, 2009.

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