QCAT

Queensland Civil and Administrative Tribunal

CITATION:	Raptis v Queensland Building Services Authority [2013] QCAT 279
PARTIES:	James Raptis (Applicant) V Queensland Building Services Authority (Respondent)
APPLICATION NUMBER:	GAR006-13
MATTER TYPE:	General administrative review matters
HEARING DATE:	2 May 2013
HEARD AT:	Brisbane
DECISION OF:	**Richard Oliver, Senior Member**
DELIVERED ON:	19 June 2013
DELIVERED AT:	Brisbane
ORDERS MADE:	**Application for an extension of time is dismissed**
CATCHWORDS:	Extension of time – whether financier breached the terms of the finance facility in appointing an administrator to a company of which the applicant was a director – whether the appointment of the administrator was unlawful – whether the Tribunal has jurisdiction to consider the validity of the appointment in determining whether there has been a "company event" – whether an application about the validity of the appointment should be made to a court under the Corporations Law – consideration of whether the decision maker can consider the validity of the appointment. *Queensland Civil and Administrative Tribunal Act 2009* ss 17, 20, 24, 33 and 61 *Queensland Building Services Authority Act 1991* ss 56AC, 86 and 77 *Corporations Act 2001* (Cth) s 418A

APPEARANCES and REPRESENTATION (if any):

APPLICANT:	The applicant was represented by Mr Sweeney of counsel instructed by Michael Sing, Lawyers.
RESPONDENT:	The respondent was represented by Mr Andreatidis of counsel instructed by Robinson Locke, Lawyers.

REASONS FOR DECISION

[1] Mr Raptis holds a Building Services Authority licence as a registered builder. In 2008, he was a director of Lindanning Pty Ltd. On 9 September 2008, Receivers and Managers were appointed to Lindanning by its financier, Capital Finance Australia Ltd ("CFAL"). As a consequence of the appointment of Receivers and Managers and the operation of section 56AC of the *Queensland Building Services Authority Act 1991,* Mr Raptis was automatically categorised as an excluded individual. This means that he cannot hold a Building Services Authority contractor's license for a period of five years.

[2] He received notice of the proposed cancellation of his license in a letter from the Authority on 12 September 2008. The decision to categorise him as an excluded individual resulting in the cancellation of his builders licence is a reviewable decision under s 86 of the QBSA Act. He could have applied to the then Commercial and Consumer Tribunal to review that decision but he chose not to at that time. Instead, Mr Raptis applied to the Authority to be categorised as a permitted individual, which if he was so categorised, would enable him to retain his builders licence. However, the Authority rejected his application. Therefore in March 2010 he filed an application to review the Authority's decision not to categorise him as a permitted individual. That application is yet to be determined. This history is relevant when considering prejudice in this application to extend time.

[3] Much later, on 14 December 2012, he filed an application to review the Authority's decision of 12 September 2008 to categorise him as an excluded individual. Because the application is out of time[1] he has also filed an application for an extension of time.[2] The Tribunal can extend the time for filing an application if it is satisfied that there is a reasonable explanation for the delay; there has not been any prejudice suffered as a result of the delay in filing the application; whether the proposed review

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1 *Queensland Civil andAdministrative Tribunal Act 2009* s 33.

2 Ibid s 61(1)(a).

application has merit; and whether it would be fair and equitable in all the circumstances to extend time.[3]

[4] The application for the extension of time is opposed by the Authority. It says there has been no satisfactory explanation for delay but more importantly, it says the application lacks merit and cannot succeed in any event because the applicant is asking the Tribunal to make a determination as to the validity or otherwise of the appointment of the receivers to Lindanning Pty Ltd.

[5] Therefore the central issue in the substantive application is whether, even accepting the facts as contended for by the applicant, the Tribunal can go behind the appointment of the receivers and managers to make a finding that their appointment was, in the circumstances, unlawful. It is submitted that if the Tribunal found that the appointment was unlawful having regard to the rights conferred on CFAL under its security documents then there was no "relevant company event" for the purposes of section 56AC of the QBSA Act.

[6] However, it is not necessary for the purposes of this application to make an actual determination as to the lawfulness or otherwise of the appointment but to decide if there is an arguable case for the Tribunal to consider in the substantive review application.

[7] Lindaning Pty Ltd is one of a number of companies that fell under the umbrella of Raptis Group Ltd ("RGL"). In 2004 RGL embarked on a program to construct high rise residential towers on the Gold Coast. The first tower is described as SPC Tower 1. The cost of this tower was about $125 million and was financed by Capital Finance Australia Ltd. Sufficient units in SPC Tower 1 were pre-sold for construction to commence. RGL then proceeded to market SPC Tower 2 with off the plan sales being undertaken throughout 2005 and 2006. There were sufficient sales for the company to proceed with the construction of SPC Tower 2 which, on valuation in October 2007, had a commercial component value of $46 million and a retail component of $13.5 million.

[8] With the successful presales of SPC Tower 2, RGL decided to proceed with SPC Tower 3 as a home unit tower development of approximately 30 stories. Valuations obtained by RGL supported the finance facility provided by CFAL to about $122 million. Construction commenced in early 2007 with the due completion date of 11 October 2008. Lindaning Pty Ltd's role in the overall project was as the owner of the land upon which SPC Tower 3 was to be constructed.

[9] It is now a historical fact that the global financial crisis had devastating effects in mid 2008. As SPC Tower 3 was nearing completion, RGL required a further finance facility to complete the project. There were negotiations between representatives of CFAL and RGL, the result of

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[3] *Hunter Valley Developments Pty Ltd v The Honourable Barry Cohen, Minister for Home Affairs* (1984) 3 FLR 344.

which was that CFAL would provide a further working capital facility of $25 million to complete the project however the security for this and other loans was to include a Fixed and Floating Charge over all of the assets and undertaking of RGL, not just SPC Tower 3.

[10] The security documents signed by RGL not only made provision for the fixed and floating charges but also specified specific events which would constitute default under the finance facility.[4] It is not necessary to recite all of those specific events but it is contended by the applicant that on a proper interpretation of clauses 7 and 8 of each of the SPC Tower Entity Charges that:-

(a) The mere occurrence of one or other of the events listed in clause 7 (that is to say, events which CFAL could elect to treat as an event of default) did not of itself amount to an event of default;

(b) For there to be an event of default, CFAL must have elected to treat such occurrence as an event of default and notify the chargee of that election;

(c) Only when those three things had happened could CFAL lawfully exercise its rights under clause 8 to appoint a receiver over a chargee;

(d) Such appointment could only be made "to recover the Secured Money and deal with the Secured Assets";

(e) Such appointment could not be made so as to relieve CFAL of the obligation to make further advances.[5]

[11] It is also contended, unsurprisingly, that CFAL would not act arbitrarily or capriciously; act with intention to cause harm; and with due respect for the intent of the funding bargain as a matter of substance and not form.

[12] After executing the finance facility documents, meetings were conducted between CFAL representatives and RGL representatives on 5 September 2008. There were discussions about: the presales of SPC Tower 3 which had reached $73 million; the projected sales as the building neared completion; and the percentage of the CFAL loan balance to unconditional presales of 67%. CFAL did not assert at that meeting any act of default and I am prepared to accept this assertion for the purposes of the application. It was suggested at that meeting by the representatives of CFAL, that Korda Mentha, accountants, who were subsequently appointed as Receivers and Managers, would work with RGL in the application of the further funds provided and towards the completion of SPC Tower 3.

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4 The transaction documents are set out in paragraph 38 of the applicant's statements of facts and contentions.

5 The applicants submissions paragraph 46.

[13] Quite unexpectedly, on 9 September 2008, and without warning, CFAL appointed Korda Mentha as receivers to all of the SPC Tower entities pursuant to clause 4 of the security documents which stated:-

> "The security has become enforceable and the Lender wishes to appoint receivers in respect of secured assets."

[14] The applicant contends that there was no act of default under the security documents and CFAL had no grounds to have a reasonable and honest belief that there was an event of default. There had been no neglect on the part of RGL in its observance of any obligations under the security documents. In the applicant's submissions, he sets out a motive for CFAL taking the action it did under the security documents[6] which is not particularly relevant for the purposes of this application.

[15] The applicant contends that if, at a hearing of the review application, the Tribunal made findings of facts consistent with the submissions made above, the Tribunal could conclude that there is no valid or lawful basis for the appointment of the Korda Mentha under the security documents. At the very least, it is contended that there is an arguable case to support such a conclusion.

[16] The Tribunal's review jurisdiction is governed by s 17 of the *Queensland Civil and Administrative Triubnal Act 2009* ("QCAT Act"). Jurisdiction is conferred on the Tribunal by an enabling Act, here, the *Queensland Building Services Authority Act 1991* ("QBSA Act"). The function of the Tribunal on a review application is to produce the correct and preferable decision by way of a fresh hearing on the merits[7]. It doing so the Tribunal must consider all of the evidence that was not only put before the decision maker, but also any further evidence relevant to the decision under review. The Tribunal can, in deciding the review application, exercise all of the powers of the decision maker and confirm or amend the decision, set aside the decision and substitute its own decision, or return the matter to the Authority for reconsideration.[8]

[17] Section 56AC of the QBSA Act applies when a company, for the benefit of a creditor, has an administrator or controller appointed. It also provides that where an individual, here Mr Raptis was, when the administrator or controller was appointed for the relevant company event, was a director of the company the individual is an excluded individual for the relevant company event.

[18] The decision to exclude Mr Raptis is a decision made because of the operation of s56AC. Mr Raptis was a director of the company and the company had "an administrator" appointed to it[9]. In the circumstances, the Authority had no choice but to categorise Mr Raptis as an excluded individual. It is not for the Authority to examine or challenge the validity or

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6 Applicants submissions paragraph 55.
7 *Queensland Civil andAdministrative Tribunal Act 2009* s 20.
8 Ibid s 24.
9 *Queensland Building Services Authority Act 1991* s 56AC(2)(a).

otherwise the appointment of the Korda Mentha. That is properly the responsibility of the applicant to challenge such appointment.

[19] Similarly, the Tribunal standing in the shoes of the Authority is not in a position to consider the validity or otherwise of the appointment. Section 56AC is mandatory in its terms, it does not permit an inquiry into or consideration of the lawfulness of the appointment. The section does not use the word "lawful" in subsection (2)(a)(i). The only criteria that needs to be satisfied by the decision maker is whether the appointment of the Receivers and Managers is for the "benefit of a creditor". There is no challenge here to the appointment on that basis. It is difficult to envisage a situation where the Authority's decision maker could undertake a consideration of whether the appointment of a receiver, or for that matter a liquidator, was lawful and therefore not categorise an individual who fell within s 56AC as an excluded individual. The applicant could not point me to any authority to support this proposition nor did my researches reveal any.

[20] Mr Raptis, if he wants to challenge the appointment, is not without a remedy. Section 418A of the *Corporations Act* (Cth) 2001 specifically permits a challenge to the appointment of a receiver of property to determine if the appointment is valid. Subsection 2 provides that the Court may make an order declaring whether or not the purported appointment is valid. Clearly, the Tribunal does not have the power to make a declaration of the type referred to in section 418A of the *Corporations Act* even if it formed the view that the appointment was not lawful. It has no power to set aside the appointment, nor can it declare that there was no "relevant company event". It is clearly preferable, that if there is any challenge to the validity of the appointment of receivers that challenge be taken elsewhere.

[21] I have come to the conclusion that the application for review does not have sufficient prospects of success to warrant an extension of time.

[22] Although this is sufficient to dispose of the application I will briefly say something with respect to the other important matter for consideration in an extension of time application. Although there has been a long delay in filing the application to review the excluded individual decision, it is difficult to see how this delay has caused any prejudice to the respondent. The mere fact of delay itself is not enough to dismiss the application.

[23] In 2010 the applicant filed an application to review the decision not to categorise him as a permitted individual decision.[10] This proceeding also deals with all of the facts associated with development of the residential towers, corporate governance and steps taken by the applicant to prevent the appointment of the receivers. This evidence is much the same as that relied upon in this application. Therefore the only consequence of delay is the prejudice if this application was brought in a timely fashion and the applicant was successful. In that case a considerable amount of time,

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[10] *Gogolka and Anor v Queensland Building Services Authority* [2012] QCAT 308.

effort and costs would have been wasted in the permitted individual application. However, this could have been remedied with a costs order against the applicant despite s 100 of the QCAT Act.[11]

[24] The Authority has been appraised of the applicant's position in respect of this application since September 2011. There has been ongoing correspondence between the parties. It seems open on the submissions made that there was always an understanding between the parties that the application would be made and therefore there seemed to be no urgency to bring the application. Matters were also complicated by the applications for disclosure of documents from CFAL in the permitted individual review application. The delay is not sufficient of itself to warrant a dismissal of the application. There can be no suggestion that the Authority has been taken by surprise by this application.

[25] Because I have come to the view that the substantive application lacks merit for the reasons stated, the application for an extension of time to commence a proceeding is dismissed.

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[11] Also see QBSA Act s 77 permitting an order for costs.