

QCAT

Queensland Civil and Administrative Tribunal

CITATION: Samimi v Queensland Building Services Authority [2013] QCAT 472

PARTIES: Kamran Samimi
(Applicant)
v
Queensland Building Services Authority
(Respondent)

APPLICATION NUMBER: OCR263-12

MATTER TYPE: General administrative review matters

HEARING DATE: 8 May 2013 and 1 August 2013

HEARD AT: Brisbane

DECISION OF: **Michelle Dooley, Sessional Member**

DELIVERED ON: 11 September 2013

DELIVERED AT: Brisbane

ORDERS MADE: **1. The decision of the Queensland Building Services Authority of 12 July 2012 refusing to categorise the Applicant as a permitted individual pursuant to Section 56AD (8) of Queensland Building Services Authority Act 1991, is confirmed.**

CATCHWORDS: Permitted individual, Banking Ombudsman,
Queensland Building Services Authority Act 1991 s 56AD(1)

APPEARANCES and REPRESENTATION (if any):

APPLICANT: Kamran Samimi
represented by Rodney Freeman of Counsel
instructed by Peter Ryan Solicitor of Peter Ryan
Lawyers

RESPONDENT: Queensland Building Services Authority
represented by Malcolm Robinson Solicitor of
Robinson Locke Litigation Lawyers

REASONS FOR DECISION

- [1] In the aftermath of the Global Financial Crisis Mr Samimi's Bank appointed itself as Controller over the property owned by his development company. This was a reflection of both the changes in banking credit availability and the general downturn in the building industry.

As a result of this event Mr Samimi's building licence was cancelled and a decision was made by The Authority not to categorise him as a permitted individual pursuant to Section 56AD(1) of the QBSA Act 1991.

Thus, no longer able to work as a Builder, Mr Samimi comes before the Tribunal seeking a review of this decision.

- [2] As some confusion was evident at the commencement of the hearing, regarding the material in this matter I have set out the material filed or accepted into evidence by each party:-

Mr Samimi material:-

- a) Application to review a decision filed 8 August 2012.
- b) Affidavit of Mr Samimi filed 21 March 2013 together with annexures "KS-1A" to "KS-6".
- c) Amended version of the abovenamed affidavit now with annexures "KS-1A" to "KS-12A" filed 2 May 2013.
- d) Affidavit of Mr Samimi filed 7 May 2013.
- e) Affidavit of Rodney Paul Freeman together with annexures A and B filed 22 July 2013. (This document was accepted into evidence by consent of both parties on the basis that all paragraphs marked with an "X" were to be deleted.)
- f) Affidavit of Michelle Samimi accepted into evidence at the hearing and marked Exhibit 1.
- g) Affidavit of Mr Samimi accepted into evidence at the hearing and marked Exhibit 2.

Respondents material:-

- a) Document headed "Bundle of Documents" (containing inter alia "Statement of Reasons for Decision" filed 11 September 2012.
- b) Statement of evidence of Natasha Dennis filed 22 October 2012
- c) Document headed "Corrected Bundle of Documents" filed 9 May 2013.

- [3] Mr Samimi held a licence pursuant to the QBSA Act in the classes of Builder - low rise, Builder – Medium rise and Builder - open.
- [4] Mr Samimi was also the director, secretary or influential person of Music Corp Pty Ltd.
- [5] In early 2009 Music Corp purchased Lot 34, 3034 Northview, Royal Pines Resort at Benowa for development utilising its own funds and a loan secured by way of Loan Portfolio Facility with the National Australia Bank in the amount of \$679,000.
- [6] On 30 November 2009 the National Australia Bank cancelled the Loan Portfolio Facility with the company for breach of terms.
- [7] At paragraph 14 of his affidavit filed on 2 May 2013 Mr Samimi states that:-
- “I complained on behalf of the Company to the Banking Ombudsman. It took a year (into 2011) before the Banking Ombudsman made a decision on the matter about the middle 2011. The Banking Ombudsman said it was within the NAB’s legal rights to recall the loan. The Banking Ombudsman provided this decision during a teleconference and no written decision was provided.”
- [8] At paragraph 17 of his affidavit filed on 2 May 2013 Mr Samimi states:-
- “On 22 August 2011 after NAB received the decision of the Banking Ombudsman, they appointed themselves as controller over the Property. NAB did this without notice to me.”
- [9] Mr Samimi then paid a substantial lump sum to the Bank to reduce the company's indebtedness and an agreement was reached whereby the bank handed the control of the property back to Music Corp within a matter of days and certainly by the end of August 2011. This is borne out by the letter from the NAB being Exhibit "KS-6".
- [10] On 30 May 2012 The Authority sent Mr Samimi a “Notice of reasons for proposed cancellation of Licence” on the basis that the appointment of the NAB as Controller of the company on 22 August 2011 was a "relevant company event" pursuant to Section 56AC(2)(a) of the QBSA Act. On 27 June 2012 Mr Samimi filed his Application with The Authority seeking to be categorised as a permitted individual pursuant to Section 56AD(1) of the QBSA Act. On 12 July 2012 The Authority delivered its decision not to categorise Mr Samimi as a permitted individual pursuant to Section 56AD(1) of the QBSA Act.
- [11] Due to Section 56AD The Authority may categorise the excluded individual as a permitted individual only if it is satisfied that the individual took all reasonable steps to avoid the appointment of the controller.
- [12] To determine if the individual took all reasonable steps the authority should consider if the individual:-

(a) kept proper books of account and financial records

- (b) sought financial or legal advice where necessary
- (c) reported fraud or theft to the police
- (d) ensured guarantees were only provided if there were sufficient assets
- (e) appropriate credit management procedures
- (f) appropriate provision for Commonwealth and State tax debts.

[13] Section 8(B) allows The Authority to take into regard a matter other than those listed above.

[14] The Authority in dismissing Mr Samimi's application to be categorised as a permitted individual found that Mr Samimi had failed to keep proper books of account and financial records or to adduce evidence that he had sought appropriate financial or legal advice or that appropriate credit management policies existed or that appropriate provision were made for taxation debts.

[15] In response to each of these adverse findings, Mr Samimi in paragraph 35 of his affidavit filed on 2 May 2013 responds

"I say that this is not relevant to the decision or the Relevant Event."

But plainly, upon any reading of Section 56AD(8A) these are relevant matters and in the absence of such evidence The Authority correctly exercised its discretion under that Section to refuse the application.

[16] Before the Tribunal Mr Samimi remedied in part the inadequacy of his case before The Authority by filing an affidavit from a NSW barrister Mr Rodney Freeman. It is apparent that Mr Samimi did seek legal advice from Mr Freeman after the Bank cancelled the loan facility and he had engaged the Banking Ombudsman.

[17] The crux of Mr Freeman's advice appears at paragraphs 41 and 42 of his affidavit, namely:-

41. *The Terms of Reference of the FOS require that the decision be given in writing to enable consideration of a review of any such decision.*

42. *In my opinion unless and until such decision was given in writing the matter had not been finally determined by the FOS.*

[18] The Banking Ombudsman did not give a written decision.

[19] Nevertheless, Mr Samimi was well aware that the Banking Ombudsman supported the Bank's position, viz:-

"The Banking Ombudsman said it was within the NAB's legal rights to recall the loan. The Banking Ombudsman provided this decision during a teleconference and no written decision was provided."

- paragraph 14 of Mr Samimi's affidavit filed 2 May 2013.

- [20] Therefore, the reasonableness or otherwise of Mr Samimi's conduct should be viewed in the context of Mr Samimi knowing in mid 2011 that the Banking Ombudsman supported the Bank's position and that the Bank had already forestalled activating its security for 18 months.
- [21] A further two months elapsed before the Bank activated its security by appointing a Controller to the company. Despite Mr Freeman's advice it ought to have been apparent to Mr Samimi that the Banking Ombudsman could have delivered a written advice at any time during this period without notice and that the Bank might appoint a Controller at any time during this period with or without a written advice from the Banking Ombudsman.
- [22] The Bank appointed a Controller to the company on 22 August 2012 and within days Mr Samimi paid sufficient monies to cause the Bank to cease its control.
- [23] As to Section 56AD(8A)(a) of the QBSA Act an affidavit has been filed by Michelle Samimi, accountant as to the keeping of financial records and The Authority in its final submissions took no issue with the company's compliance with this provision.
- [24] However, the adequacy of Music Corp's financial records produced by Mr Samimi to the Tribunal does impact on the issue as to whether Mr Samimi has demonstrated that he took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event (Section 56AD(8)).
- [25] Mr Samimi in his affidavits and evidence before the Tribunal has detailed his attempts to refinance the loan after 30 November 2009 which the Tribunal finds was a reasonable step but there was no clear evidence before the tribunal as to what steps if any he took to prevent the loan account falling into arrears in the first place.
- [26] Further, there was a lack of financial records or Bank documents which Mr Samimi produced to the Tribunal from which it might be concluded that reasonable steps had been taken to prevent the account falling into arrears. At paragraph 2 of Mr Samimi affidavit dated 31 July 2013 (exhibit 2) Mr Samimi states that "My house ... was flooded in the January 2011 floods causing the loss of most of my business records." Also at paragraph 3 Mr Samimi states "... Annexure "KS-2" hereto are copies of the only documents that the bank has been able to provide to me and that it advises me that it still holds".
- [27] This however appears to be a very inadequate explanation as to the reason why proper Bank records could not be provided. No written explanation has been provided by the bank or what enquiries if any were made to obtain relevant documents.
- [28] Mr Samimi gave evidence during the hearing of a number of accounts in various names and Company names all controlled by Mr Samimi and

held by the NAB. Mr Samimi gave evidence of an arrangement whereby monies could be moved from one account to another by the NAB without the prior approval of Mr Samimi. Therefore even if the subject account was in credit it appears to have been interlinked with other accounts and without knowledge of their balances it is not possible to assess Mr Samimi's overall financial situation.

- [29] Mr Samimi failed to provide evidence of the overall structure of the accounts held by NAB or of his overall financial position. Without this evidence it is very difficult for this tribunal to determine the reasonableness of Mr Samimi's actions in the circumstances leading up to the relevant event.
- [30] In the final analysis the Tribunal finds that Mr Samimi has not demonstrated that he took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the appointment of a Controller to the company on 22 August 2011. In particular, the Tribunal finds that Mr Samimi engaged in financial brinkmanship with the Bank from the time of the teleconference with the Banking Ombudsman in mid 2011 until the appointment of a Controller on 22 August 2011 and that had Mr Samimi acted reasonably he would have made the substantial payment in reduction of the company's debt as soon as possible after the teleconference and prior to 22 August 2013. That he did not do so was reckless and not reasonable.
- [31] For the above reasons, the Tribunal confirms The Authority's decision of 12 July 2012 refusing to categorise Mr Samimi as a permitted individual pursuant to Section 56AD (8) of the QBSA Act 1991.