



Civil and Administrative Tribunal
New South Wales

Case Name: Singh v Building Commission NSW

Medium Neutral Citation: [2024] NSWCATOD 7

Hearing Date(s): 15 January 2024

Date of Orders: 19 January 2024

Decision Date: 19 January 2024

Jurisdiction: Occupational Division

Before: T Simon, Principal Member

Decision:

1. The decision of the respondent dated 7 December 2023 to take disciplinary action against Gurdeep Singh (Certificate of Registration Number BDC0377) is stayed until 29 January 2024 on the following conditions:
 - i. The stay is only allowed to the extent that it permits the applicant to be replaced on projects which he is currently the registered certifier.
 - ii. The applicant is otherwise not authorised to undertake any other functions as a registered certifier.
2. The application for a stay on the respondent's decision is otherwise dismissed.

Catchwords: REVIEW OF DECISION BY EXTERNAL DECISION-MAKER — decision to cancel registration as a certifiers pursuant to section 48 of the Building Professionals Certifiers Act 2018 (NSW)

PRACTICE AND PROCEDURE — INTERLOCUTORY ORDER – application for stay— factors relevant to exercise of the power to stay decision under section 60 of the Administrative Decisions Review Act 1997 (NSW)

Legislation Cited: Administrative Decisions Review Act 1997
Building and Development Certifiers Act 2018
Building Professionals Act 2005

Environment Planning and Assessment Regulation
2000

Cases Cited: QLD Protection Security Pty Ltd v Commissioner of Police, NSW Police Force [2018] NSWCATAP 113

Category: Principal judgment

Parties: Gurdeep Singh (Applicant)
Building Commission NSW (Respondent)

Representation: Counsel:
M Swanson (Applicant)

Solicitors:
Legal, Corporate Services, Department of Customer Services (Respondent)

File Number(s): 2023/00453126

Publication Restriction: None

REASONS FOR DECISION

- 1 Gurdeep Singh, a building certifier, is seeking administrative review of a decision made by a delegate of the respondent, Building Commission NSW, on 7 December 2023 pursuant to *Building and Development Certifiers Act* 2018 (NSW).
- 2 The decision is for the following disciplinary action to be taken against Mr Singh:
 - (i) Cancel Mr Singh's certificate of registration as a registered certifier; and
 - (ii) Disqualify Mr Singh from being a registered certifier for a period of 3 years.
- 3 In the reasons for decision the respondent found that Mr Singh had engaged in unsatisfactory professional conduct as defined by the *Building Professionals Act* 2005 (NSW), failed to comply with a statutory duty (s 45(d), *Building and Development Certifiers Act*) and had fallen short of the standard of competence, diligence and integrity that a member of the public is entitled to expect of a reasonably competent registered certifier (s45(a), *Building and Development Certifiers Act*).

- 4 On 14 December 2023, Mr Singh made an application for stay of the respondent's decision pursuant to s 60(2) of the *Administrative Decisions Review Act* 1997 (NSW).
- 5 On 14 December 2023, I made an order temporarily staying the decision until the stay could be heard and for the exchange of documents in relation to the stay application. I also allowed leave for the application to proceed in the absence of an internal review on the basis that it is necessary to do so to protect the applicant's interests and the application was made within a reasonable time (s 55(4), *Administrative Decisions Review Act*). An internal review has not yet been completed. On 15 January 2024, I made a further order staying the decision pending determination of this stay application.
- 6 The respondent opposes the stay of the respondent's decision.
- 7 Despite the orders made by me on 14 December 2023, neither party provided the Tribunal with any further documents in relation to the stay application. The only documents provided to the Tribunal were:
- (1) The administrative review application form.
 - (2) The application for stay or interim order which included:
 - (i) Grounds for the application or order, which was in effect a statement from the applicant.
 - (ii) A covering letter and notice of the respondent decision dated 7 December 2023
 - (iii) Reasons for the respondent's decision dated 7 December 2023. The reasons include an index of schedule of attachments A- E. Those attachments included the Notice to Show Cause, Mr Singh's response to the notice and a history of disciplinary action taken against Mr Singh. The Tribunal informed Counsel for the applicant, at the hearing, that the documents had not been provided to the Tribunal and Counsel for the applicant stated that the hearing could proceed in the absence of that material.
- 8 The parties made oral submissions regarding the stay application at the hearing.

Legal principles governing the exercise of the discretion to stay a decision.

- 9 Pursuant to s 60 (2) of the *Administrative Decisions Review Act*, the Tribunal has power to make an order;

... staying or otherwise affecting the operation of the decision under review as it considers appropriate to secure the effectiveness of the determination of the application.

- 10 Section 60(3) of the *Administrative Decisions Review Act* empowers the Tribunal to make orders, if it considers that it is desirable to do so after considering:

- (a) the interests of any persons who may be affected by the determination of the application, and
- (b) any submission made by or on behalf of the administrator who made the decision to which the application relates, and
- (c) the public interest.

- 11 In *QLD Protection Security Pty Ltd v Commissioner of Police, NSW Police Force* [2018] NSWCATAP 113, the Appeal Panel of this Tribunal summarised the considerations which should be applied when considering a stay in matters such as this as including (at [31] - [33]);

31 The Tribunal recently considered the power under s 60 of the *Administrative Decisions Review Act* in *Loveday v Commissioner for Fair Trading* [2018] NSWCATAD 80 (Loveday). In that decision it was held at [8]:

"... Section 60(2) and (3) give the Tribunal a single discretionary power to make a stay order or to refuse to make such an order taking into account all relevant considerations. Secondly, the words "to secure the effectiveness of the hearing" include a situation where the applicant will suffer irreparable loss in the sense that no recompense for it can be obtained if the application is ultimately successful: *Re Pelling and Secretary, Department of Aviation* [1984] AATA 179; (1984) 5 ALD 638 at 639. It is not confined to the situation where a hearing would be pointless because the applicant will go out of business if a stay is refused. ..."

32 The relevant considerations in deciding whether to make an order under s 60(2) include:

(1) whether the order is appropriate to secure the effectiveness of the determination of the application for review: s 60(2), ADR Act.

(2) whether the order is desirable taking into account:

(a) the interests of any persons who may be affected by the determination of the application for review: s 60(3)(a), *Administrative Decisions Review Act*, *Loveday v Commissioner for Fair Trading* [2018] NSWCATAD 80 (Loveday) at [10], *Re Scott and Australian Securities and Investments Commission* [2009] AATA 798 (Re Scott) at [4];

(b) any submission made by or on behalf of the administrator who made the decision to which the application relates: s 60(3)(b), Administrative Decisions Review Act, Loveday at [10], Re Scott at [4];

(c) the public interest: s 60(3)(c), Administrative Decisions Review Act, Loveday at [10], Re Scott at [4];

33 The circumstances that are relevant in any particular case to the considerations identified above may well overlap or be interrelated.

Consideration

- 12 Having considered the evidence and submissions of the parties, I have decided not to make the order for a stay until finalisation of the hearing. I have instead made an order for a stay for 7 working days on a conditional basis. I am satisfied that several factors weigh against the exercise of the discretion to stay the operation of the decision pending final determination of the review proceedings.
- 13 In his application Mr Singh states that he has been practising as a private accredited certifier for approximately 18 years and carries on his business under the legal entity Mailsi Pty Ltd t/as Express Approvals. He states that Mailsi Pty Ltd currently employs two full time employees and an additional part time employee and that he is currently involved in, through Mailsi Pty Ltd, between 60 to 100 active residential dwellings projects for building class 1 and 10.
- 14 Mr Singh submits that he provided a response to the respondent's Notice to Show Cause, on 18 April 2023 and that it took the Respondent over eight months to deliver the decision and that he was allowed less than one week to consider his options and notify his existing clients of the respondent's decision, before his registration was cancelled. He submits there will be limited (if any) opportunity for his exiting clients to secure services of an alternative certifier (noting the requirements of the *Environmental Planning & Assessment Act* 1979 (NSW) provides that a building site must always remain under the supervision of a Principal Certifier).
- 15 Mr Singh submits that the cancellation and disqualification will have a significant, sudden and severe effect on his professional activities as an accredited certifier, not least because the bulk of his current practice involves

the issuing of Complying Development Certificates. The effects of the disciplinary action will have a sudden and severe impact on the activities of the company and his ability to earn a livelihood to provide for his family, for whom he is the primary earner.

- 16 While I accept that there may be financial loss to Mr Singh in the period in which he will not be able to work as a building certifier, there is no indication that the applicant could not recommence working as a building certifier if his application for review is successful. Despite being given the opportunity to provide documents, Mr Singh provided no supporting evidence of his present financial circumstances. It is unclear if Mr Singh is the director of the company Mailsi Pty Ltd and his legal representatives were unable to confirm if he was at the hearing. There is no evidence before the Tribunal as to what steps could be taken in the meantime to replace Mr Singh.
- 17 I accept that the applicant's role as a building certifier will be affected in the absence of a stay until the matter is finalised. However, there is no supporting evidence beyond the assertions made in the grounds to the stay application as to the extent of the impact. There is no definitive indication in relation to his financial circumstances or the steps that clients will be required to take as a result of the cancellation. There is otherwise no supporting evidence as to the availability of other registered certifiers to do the work, or enquiries which have been made with clients in that regard. There is a mechanism in the Environment Planning and Assessment Regulation 2000 (EPA) to replace a Principal Certifying Authority if necessary.
- 18 Mr Singh has not established that he will suffer irreparable loss, in the sense that no recompense for it can be obtained if the application is ultimately successful and I am not satisfied that a stay of the decision is required to secure the effectiveness of the determination of the application for review.
- 19 I also find that the granting of a stay until finalisation of the review proceedings will prejudice the public interest.
- 20 The disciplinary action taken against Mr Singh relates to two separate residential developments.

21 The first was a residential dwelling development in Wahroonga. Mr Singh had received an application for the development on 11 October 2019 and issued a complying development certificate for the development on 12 November 2019. In summary, the respondent found the following contraventions by Mr Singh.

- (1) That Mr Singh issued a complying development certificate in circumstances where a complying development could not be carried out on the subject land since the land was in an E4 zone and that by issuing the complying development certificate Mr Singh had breached s85(1)(a) of the *Building Professionals Act* as the development was not a complying development under the *Codes State Environmental Planning Policy (Exempt and Complying Development Code)* 2008.
- (2) That a complying development could not be conducted on the subject land since it was identified as “Biodiversity” within the meaning under the Ku-ring-gai Local Environmental Plan 2015.
- (3) That Mr Singh was not authorised to issue the complying developments certificate because as of 12 November 2019, no provision had been made in the plans for smoke alarms as was required by the relevant legislation. In oral submissions at the hearing, submissions were made on behalf of Mr Singh, that smoke alarms were later found to be installed pursuant to a smoke alarm certification and were tested by an electrician on 6 July 2022. The delegate in his reasons for decision addresses that submissions and notes that even though the certification may indicate that the smoke alarms were subsequently installed, that does not detract from the fact that the complying development certificate should not have been issued as at 12 November 2019 without provision for smoke alarms.
- (4) That the breaches in relation to the Wahroonga development amounted to a failure to comply with the Code of Conduct for Accredited Certifiers and the conduct amounted to Professional Misconduct.

22 The second residential development was in North Ryde. In summary, the respondent found that:

- (1) Mr Singh should not have issued a complying development certificate in circumstances in which the plans and specifications depicted a rear level balcony that exceeded the height allowed and could not be a complying development.
- (2) Mr Singh did not ensure appropriate checks were conducted in relation to flooding prior to issuing a complying development certificate.

23 Mr Singh disputes that he is guilty of unsatisfactory professional conduct in relation to allegations contained in the Notice to Show Cause dated 28 February 2023. Mr Singh submits that the disciplinary action imposed is severe and disproportionate to the disputed conduct and on that basis the stay should

be granted until the administrative review of the decision has been determined. In the alternative Mr Singh submits that the stay should be granted with condition that he does not take on any further clients or issue complying development certificates until an internal review has been completed. While Mr Singh broadly challenges the decision in the grounds for the application, Mr Singh has provided little supporting detail as to what those challenges are. In oral submissions, Counsel for Mr Singh did refer to an issue regarding the subsequent certification regarding smoke alarms as raised above.

24 The reasons for the respondent's decision also state that on 20 April 2017, the NSW Civil and Administrative Tribunal affirmed a decision of the Building Professional Board to impose a fine of \$40,000 and reprimand Mr Singh for issuing complying development certificates for three non-complying developments. Previous to that action the following disciplinary action had been taken:

- On 26 November 2015, the Building Professional Board imposed a fine of \$5,000 and reprimanded Mr Singh for issuing a complying development certificate for non-complying developments.
- On 17 September 2014, the Building Professional Board imposed a fine of \$8,000 and reprimanded Mr Singh for issuing a complying development certificate for non-complying developments.
- On 25 August 2011, the Building Professional Board imposed a fine of \$2,500 and reprimanded Mr Singh for issuing a complying development certificate for non-complying developments and approving plans that were deficient; and
- On 2 July 2009, the Building Professional Board cautioned Mr Singh for failing to obtain the consent of a property owner before applying for a construction certificate.

25 While I do not have before me to the Notice to Show Cause or Mr Singh's response, I have read what is contained in the reasons for decision for the respondent's decision and what has been recorded as Mr Singh's response to the Notice to Show Cause. The Tribunal proceedings are administrative review proceedings, where the Tribunal's power is conferred by s 63 of the Administrative Decisions Review Act. The task of the Tribunal will be to decide what is the "correct and preferable decision" having regard to any relevant factual material and the applicable law.

- 26 Certifiers are a part of the quality assurance process for the construction industry. The issuing of a complying development certificates in circumstances where the development is not compliant in key respects may have safety consequences, in particular in relation to matters such as smoke alarms and flooding requirements. Given the nature of the breaches found and the applicant's previous disciplinary history, I find that the public interest in protecting the general community is significant and outweighs the inconvenience caused to Mr Singh, his employees and any clients.
- 27 While I accept that some of the matters raised by the applicant may prove arguable, I am not satisfied on a preliminary basis of the limited information before me that there are strong prospects of success in respect of the administrative review. The respondent provided Mr Singh with an opportunity to respond to the Notice to Show Cause in relation to the allegation. An overall assessment of the reasons for the decision presently before me indicate that there is a basis for the same outcome on review of the decision. Parties will have a further opportunity to provide documents and submissions in the substantive application. Balancing the prospects of success against the other factors raised above, in particular the public interest and the effect that the decision will have, I am not satisfied that a stay should be allowed until the outcome of the substantive review decision.
- 28 I accept that replacing the applicant as a registered certifier on projects may require some facilitation and on that basis I will allow the stay to continue for 7 working days on condition that it is only to facilitate Mr Singh's replacement as the Principal Certifier only.
- 29 I make the following orders:
- (1) The decision of the respondent dated 7 December 2023 to take disciplinary action against Gurdeep Singh (Certificate of Registration Number BDC0377) is stayed until 29 January 2024 on the following conditions:
 - (i) The stay is only allowed to the extent that it permits the applicant to be replaced on projects which he is currently the Principal Certifier.
 - (ii) The applicant is otherwise not authorised to undertake any other functions as a building certifier.

(2) The application for a stay is otherwise dismissed.

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar

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