



Administrative
Appeals Tribunal

DECISION AND
REASONS FOR DECISION

[2016] AATA 583

Division GENERAL DIVISION

File Numbers **2015/5447**
 2015/5588

Re **Shiv Sahay**

 APPLICANT

And **Australian Securities and Investments Commission**

 RESPONDENT

DECISION

Tribunal **Deputy President J W Constance**

Date **9 August 2016**

Place **Sydney**

1. The decision of the Delegate of the Australian Securities and Investments Commission, made 24 September 2015, permanently banning Shiv Prakash Sahay from engaging in any credit activities within the meaning of the *National Consumer Credit Protection Act 2009* (Cth), is affirmed.
2. The decision of the Delegate of the Australian Securities and Investments Commission, made 24 September 2015, permanently banning Shiv Prakash Sahay from providing any financial services within the meaning of the *Corporations Act 2001* (Cth), is affirmed.

.....[sgd].....
J W Constance
Deputy President



CATCHWORDS

CORPORATIONS - banning order permanently prohibiting applicant from engaging in "credit activities" – fraud convictions - serious fraud - power to impose banning order enlivened - whether banning order should be imposed – appropriate period of banning order – decision under review affirmed

CORPORATIONS - banning order permanently prohibiting applicant from providing "financial services" – fraud convictions - serious fraud - power to impose banning order enlivened - whether banning order should be imposed – appropriate period of banning order – decision under review affirmed

LEGISLATION

Corporations Act 2001 (Cth) ss 9, 920A, 920B

National Consumer Credit Protection Act 2009 (Cth) ss 5, 80, 81

CASES

Howarth and Australian Securities and Investment Commission (2008) 101 ALD 602

SECONDARY MATERIALS

Australian Securities & Investments Commission Regulatory Guide 204, 'Licensing: Administrative action against persons engaging in credit activities'

Australian Securities & Investments Commission Regulatory Guide 98, 'Licensing: Administrative action against financial services providers'

REASONS FOR DECISION

Deputy President J W Constance

9 August 2016

INTRODUCTION

1. Prior to 24 September 2015 Mr Sahay was assisting clients, mostly first-home buyers, to obtain mortgage finance.

2. On 24 September 2015 a delegate of the Australian Securities Investment Commission made two orders against Mr Sahay:
 - a banning order permanently prohibiting him from engaging in any credit activity pursuant to sections 80 and 81 of the *National Consumer Credit Protection Act 2009* (Cth);
 - a banning order permanently prohibiting him from providing any financial services pursuant to sections 920A and 920B of the *Corporations Act 2001* (Cth).
3. Mr Sahay has applied to the Tribunal to review the decisions.
4. For the reasons which follow the decision to make the banning orders in the terms set out will be affirmed.

BACKGROUND

5. The facts set out in the following seven paragraphs are taken from the Commission's Statement of Facts, Issues and Contentions lodged in the Tribunal on 17 December 2015. These facts are agreed by both parties and I am satisfied that the agreement is in accord with the evidence before me.
6. On 5 March 2009, Ask Consultancy Services Pty Ltd was incorporated with Mr Sahay as the sole director and secretary. At all times, Mr Sahay and his wife have been the only shareholders of the company.
7. On 2 July 2009, Mr Sahay was appointed as a financial services representative of AMP Life Ltd.
8. On 1 July 2010, Ask Consultancy Services Pty Ltd and Mr Sahay were appointed as credit representatives of AHL Investments Pty Ltd trading as Aussie Home Loans. Both remained credit representatives of this company until 12 August 2013.
9. Between 14 November 2011 and 6 August 2013, 17 borrowers sought credit assistance from Ask Consultancy Services Pty Ltd to obtain consumer loans to purchase residential property. Mr Sahay, in his capacity as a director of Ask Consultancy Pty Ltd, provided assistance to the borrowers by preparing 19 separate loan applications to Bankwest (a

division of Commonwealth Bank of Australia) or Suncorp-Metway Ltd. He made false statements in a number of the applications.

10. Mr Sahay used Microsoft Paint, a computer program, to create digitally altered bank statements to falsely demonstrate applicants' savings. Mr Sahay then submitted the false documents and false statements in support of the applications to Bankwest or Suncorp-Metway Ltd.
11. During this period Mr Sahay engaged in the following conduct:
 - (a) he made 13 false statements, contained in the application notes of loan applications to Bankwest and Suncorp-Metway Ltd;
 - (b) he created 23 false documents in support of the false statements;
 - (c) he used 26 false documents by submitting them to Bankwest or Suncorp-Metway Ltd.
12. The total of the loan amounts applied for on behalf of the applicants by Mr Sahay through Ask Consultancy Pty Ltd was \$7,057,350.00. Ask Consultancy Pty Ltd received \$5,519.84 in commissions.
13. On 7 July 2015 Mr Sahay was convicted of three offences in the New South Wales Local Court. The convictions were for intending to defraud by false or misleading statement, making false documents and using false documents. Community Service Orders totalling 350 hours were imposed by way of penalty.¹

EVIDENCE OF MR SAHAY

14. Mr Sahay provided a statement made 3 February 2016² and gave evidence.
15. Mr Sahay and his family arrived in Australia in 1992. Initially he found it difficult to obtain work as an accountant, his chosen profession. He undertook further study and became an Associate Member of the Certified Practising Accountants.

¹ Exhibit R1 pp.82-84.

² Exhibit A1.

16. In 2009 Mr Sahay successfully completed a Certificate IV course in mortgage broking. He started writing loans under the supervision of a mentor/ sales manager from July 2009.
17. By early 2012 Mr Sahay's business was running successfully and he was able to service all his financial needs.
18. Mr Sahay described his subsequent conduct as follows:

in early November 2011, I met [new clients] who were seeking a loan. I performed due diligence and formed the opinion that they could afford the repayments on the loan they sought. However, they did not have the necessary track record of savings. On 14 November 2011, I reconstructed a bank statement to show they had the required savings history using Microsoft Paint. I also falsely wrote a representation in the application form that they had sufficient savings. I submitted the loan application.

I repeated a similar process to a similar effect on 18 further occasions. Loans were approved on 12 of those occasions which resulted in Ask Consultancy Pty Ltd being paid \$5519.84 in broking commission.

The last fraudulent loan application I submitted was on 6 August 2013.³

19. Most of the borrowers in respect of whom Mr Sahay submitted false applications were first-time home buyers. Many could not provide evidence of genuine savings, *i.e.* savings made by an applicant from his or her own resources over a period of three months.
20. In cross-examination Mr Sahay agreed that his fraud placed borrowers at risk, entitled the lenders to terminate loan arrangements and possibly have resulted in foreclosures. His offending only stopped once the authorities became aware of the situation. He said that he thought he would "*get away with it*".⁴ Had all of the fraudulent applications been processed, Ask Consultancy Pty Ltd would have received higher commission payments, from which Mr Sahay would have benefitted.
21. Following Mr Sahay's conviction, all his accreditations were terminated and he was expelled from the Mortgage and Finance Association of Australia.
22. Mr Sahay completed his community service. He has continued to do community work on a voluntary basis. Since he was charged with the offences he has not been engaged in any

³ Exhibit A1 paras 18-20.

⁴ Transcript 16/05/16 at p.25.

paid employment which has put considerable strain on his family both financially and emotionally.

23. A friend of Mr Sahay, a mortgage broker, has offered him work as a referrer/spotter/assistant should he be able to work in the financial services industry. The friend is aware of Mr Sahay's current situation. Mr Sahay is proposing to undertake further studies in the financial services field.

NATIONAL CONSUMER CREDIT PROTECTION ACT 2009 (CTH)

24. Section 80 provides in part:

(1) ASIC may make a banning order against a person:

...

(c) for a natural person--if the person is convicted of fraud; or

...

(f) if ASIC has reason to believe that the person is not a fit and proper person to engage in credit activities; ...

25. Section 81 provides in part:

(1) A **banning order** is a written order that prohibits a person from engaging in any credit activities or specified credit activities in specified circumstances or capacities.

(2) The order may prohibit the person against whom it is made from engaging in a credit activity:

(a) permanently; or

(b) for a specified period.

(3) A banning order may include a provision allowing the person against whom it was made, subject to any specified conditions:

(a) to do specified acts; or

(b) to do specified acts in specified circumstances;

that the order would otherwise prohibit them from doing.

(4) A banning order is not a legislative instrument.

26. "Fraud" is not defined in the Credit Act however section 5 of the Act does define "serious fraud" as follows:

"serious fraud" means an offence involving fraud or dishonesty, being an offence:

(a) against a law of the Commonwealth, or of a State or Territory, or any other law; and

- (b) *punishable by imprisonment for life or for a period, or maximum period, of at least 3 months.*

CORPORATIONS ACT 2001 (CTH)

27. Section 920A provides in part:

- (1) *ASIC may make a banning order against a person, by giving written notice to the person, if:*

...

- (c) *the person is convicted of fraud; ...*

28. Section 920B provides in part:

- (1) *A **banning order** is a written order that prohibits a person from providing any financial services or specified financial services in specified circumstances or capacities.*

- (2) *The order may prohibit the person against whom it is made from providing a financial service:*

- (a) *permanently; or*

- (b) *for a specified period, unless ASIC has reason to believe that the person is not of good fame or character.*

- (3) *A banning order may include a provision allowing the person against whom it was made, subject to any specified conditions:*

- (a) *to do specified acts; or*

- (b) *to do specified acts in specified circumstances;*

that the order would otherwise prohibit them from doing.

29. Again, "fraud" is not defined but "serious fraud" is defined in section 9:

"serious fraud" *means an offence involving fraud or dishonesty, being an offence:*

- (a) *against an Australian law or any other law; and*

- (b) *punishable by imprisonment for life or for a period, or maximum period, of at least 3 months.*

THE ISSUES

30. Mr Sahay concedes that he has been convicted of fraud and that as a consequence, the power to make banning orders under both Acts is enlivened. He agrees that the appropriate course is that such orders should be made. I am satisfied on the evidence that these are appropriate concessions.

31. The following issues arise.

(1) What is the appropriate period of a banning order under the *Credit Act*?

(2) What is the appropriate period of a banning order under the *Corporations Act*?

CONSIDERATION OF ISSUE 1: WHAT IS THE APPROPRIATE PERIOD OF A BANNING ORDER UNDER THE *CREDIT ACT*?

32. Each of the offences of which Mr Sahay has been convicted carry a penalty of imprisonment for a period in excess of three months and therefore he has been convicted of “*serious fraud*”.

33. The Commission’s Regulatory Guide 204 provides assistance in deciding the appropriate period of a ban under the Credit Act. At RG204.177 it states:

To be a fit and proper person to engage in credit activities means that the person:

- (a) is competent to operate a credit business (as demonstrated by the person’s knowledge, skills and experience);*
- (b) has the attributes of good character, diligence, honesty, integrity and judgement;*
- (c) is not disqualified by law from performing their role in your credit business; and*
- (d) either has no conflict of interest in performing their role in your credit business, or any conflict that exists will not create a material risk that the person will fail to properly perform their role in your credit business.*

34. It was argued on behalf of Mr Sahay that “*the subject conduct and the totality of [his] circumstances, including the criminal sanctions to which he has now been subject, do not warrant a conclusion that he should now be permanently banned from engaging in credit activities.*”⁵ It was put that relevant matters include:

- (i) the non-custodial penalty imposed in the criminal proceedings, as determined by the learned sentencing magistrate;*
- (ii) the fact that there is a complete overlap between the conduct for which the applicant has been sanctioned in the criminal proceedings and the conduct said to justify banning order;*
- (iii) the applicant’s subsequent remedial measures and rehabilitation; and*

⁵ Applicants Statement of Facts, Issues and Contentions para 8.

(iv) *the applicant's age, antecedents and professional history.*⁶

35. While I agree that the sentence imposed indicates that the Court considered Mr Sahay's offences were towards the lower end of the scale of seriousness, different considerations apply in this application. Included in the matters I must take into consideration are the need to protect the public from the harm which can be occasioned by conduct such as that engaged in by Mr Sahay and the need to maintain public confidence in the system which governs the provision of credit in this country. That involves consideration also being given to the need to deter others from engaging in activity such as that being considered in this matter. It is not the purpose of a banning order to punish – this is the province of the Courts.
36. In *Howarth and Australian Securities and Investment Commission*⁷ the Tribunal emphasised the importance of the protection of the public and the reinforcement of the integrity of the financial services industry by the imposition of banning orders. These principles are equally applicable to the credit industry.
37. In accordance with the definition in the Act, Mr Sahay's fraud was serious and, in my view, will generally be regarded in the Australian community as serious conduct. It involved deliberate and repeated action by him to provide false information to lending authorities including the creation of false documents to support the applications lodged by him. This conduct continued until his fraud was discovered by the authorities.
38. In acting as he did, Mr Sahay breached the trust placed in him by his clients. Unbeknown to them, he placed them in a position of being at risk of their credit facilities being withdrawn and possible foreclosure on their mortgages. He also breached the trust placed in him by the lending authorities who were entitled to rely on his honesty in preparing and submitting applications for credit.
39. Mr Sahay says that his business was running successfully and he was able to service all his financial needs before he embarked on the fraudulent course of action. However I do not accept that he acted only out of concern for his clients and I am satisfied that he gained financially from his conduct and stood to make further significant gains had his

⁶ Applicant Statement of Facts, Issues and Contentions para 11.

⁷ (2008) 101 ALD 602 at [152]- [180].

fraud not been discovered. As he said, he thought he would “*get away with it*”. Clearly Mr Sahay would have continued his fraudulent conduct had he been able to do so. The remorse expressed by Mr Sahay has to be considered in the context that he only ceased his criminal behaviour when it was discovered. It did not cease because he came to realise the nature of his wrongdoing.

40. At the time he started offending, Mr Satay was 50 years old. He was an experienced operator in the credit field. In my view, neither his age nor professional background assist him; rather they indicate that he should have known better than to act as he did.
41. The Regulatory Guide indicates the attributes which are required of a person to engage in credit activities. These are “*good character, diligence, honesty, integrity and judgement*”. Mr Sahay’s criminal activity has shown that he did not possess these attributes at the time of his offending. On the evidence before me, I cannot be satisfied that he has developed these attributes since.
42. Although Mr Sahay has been engaged only in volunteer work since the banning order took effect, the continuation of such an order does not prevent his working in other fields for which his experience qualifies him.
43. For these reasons Mr Sahay should be prohibited from engaging in credit activity permanently.
44. Consideration of issue 2: what is the appropriate period of a banning order under the *corporations Act*? The fraud committed by Mr Sahay is also to be regarded as “serious fraud” for the purposes of the *Corporations Act*.
45. Regulatory Guide 98.45⁸ provides:

Whether administrative action will be taken will turn on the facts of each matter. While it is not possible to identify all factors relevant to that decision, Table 1 sets out factors that may be taken into account. Table 2 provides examples of conduct and indicates the potential consequences that may follow from engaging in that conduct.

⁸ Regulatory Guide 98 ‘*Licensing: Administrative action against financial services providers*’.

46. Table 2 provides a number of indicative factors which may have the outcome of banning for 10 or more years or permanent banning. The factors listed are:

- *dishonesty or intent to defraud*
- *continued, knowing and wilful contraventions of the law, including market integrity rules and disregard of legal obligations*
- *previous contraventions of the law*
- *serious incompetence and irresponsibility*
- *a likelihood that the person will engage in contravening conduct in the future*
- *significant adverse impact on confidence in or the integrity of a financial market*
- *conduct significantly inconsistent with the orderly operation of a financial market*
- *any dishonest conduct involving clients.*

47. Mr Sahay was dishonest and intended to defraud over a significant period of time. This only ceased because his actions were discovered. His conduct was irresponsible and significantly inconsistent with the orderly operation of the financial market. His dishonest conduct involved his clients to the point that they may have found themselves in serious financial difficulty.

48. For the same reasons as I have set out in relation to the order under the *Credit Act*, as well as the reasons referred to above, Mr Sahay should be prohibited from providing any financial services in accordance with the *Corporations Act* permanently.

CONCLUSION

49. The decision of the Delegate of the Australian Securities and Investments Commission, made 24 September 2015, permanently banning Shiv Prakash Sahay from engaging in any credit activities within the meaning of the *National Consumer Credit Protection Act 2009* (Cth) will be affirmed.

50. The decision of the Delegate of the Australian Securities and Investments Commission, made 24 September 2015, permanently banning Shiv Prakash Sahay from providing any financial services within the meaning of the *Corporations Act 2001* (Cth) will be affirmed.

I certify that the preceding 50 (fifty) paragraphs are a true copy of the reasons for the decision herein of Deputy President J W Constance.

.....[sgd].....

Associate

Dated 9 August 2016

Date of hearing	16 May 2016
Date final submissions received	16 May 2016
Counsel for the Applicant	Mr D Randle
Solicitors for the Applicant	Mr J Sutton; Armstrong Legal
Counsel for the Respondent	Mr D Hume
Solicitors for the Respondent	Mr N Goodstone; Australian Securities & Investments Commission