

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

REVIEW AND REGULATION LIST

VCAT REFERENCE NO. **Z598/2013**

CATCHWORDS

Review and Regulation List – First Home Owner Grant – Applicant failed to fulfil period of residency – insufficient for spouse to occupy premises instead of applicant – First Home Owner Grant Act 2005 ss.12 and 20.

APPLICANT: Alice Maddineni

RESPONDENT: Commissioner of State Revenue - Legal Services

WHERE HELD: Melbourne

BEFORE: Senior Member Robert Davis

HEARING TYPE: Hearing

DATE OF HEARING: 25 August 2014

DATE OF ORDER: 25 August 2014

DATE OF WRITTEN REASONS: 1 September 2014

CITATION Maddineni v Commissioner of State Revenue (Review and Regulation) [2014] VCAT 1088

ORDER

The decision of the Respondent is confirmed.

SENIOR MEMBER ROBERT DAVIS

APPEARANCES:

For Alice Maddineni: In person

For Commissioner of State Revenue - Legal Services: Ms P Neskovicin, of Counsel

Note: These written reasons consist of an edited transcription of reasons given orally at the conclusion of the hearing.

REASONS FOR DECISION

Referral

- 1 This is an application for review of the respondent's determination dated 4 March 2013 disallowing the applicant's objection dated 20 August 2012 to a decision of the respondent dated 20 June 2012 reversing his earlier decision made on 21 November 2008 to pay the first home owner grant of \$12,000 (which included a bonus of \$5,000) on an application by the applicant. This proceeding was referred to the Tribunal by the respondent at the request of the applicant.
- 2 There was also a penalty imposed but I understand that has been withdrawn.

Background

- 3 The background of this matter is the applicant was married to a gentleman who unfortunately had a mental illness and whose behaviour was violent and sadly he committed suicide on 8 February 2010. A Contract of Sale was entered into by the applicant on 23 September 2008 in respect of the house property at 88 Lynch Street Ardeer in Victoria. The purchase price was \$335,000. The house property consisted of two Units. At all material times, within which the residency requires that the property be occupied, Unit 2 was let to a tenant. The property settled on the 27 November 2008 and Unit 1 was let to a tenant on 13 February 2009.

The Issue

- 4 The applicant said in her evidence today that she and her husband lived in Unit 2 with the tenant in Unit 1. This issue in this matter is whether the property was occupied as the applicant's principal place of residence for a six-month period within the first 12 months after she became entitled to occupation. There are five criteria on which the first home owner grant is paid.

The Legislation

- 5 The criterion that I am concerned with here is Criterion 5 contained in s.12 of the First Home Owner Grant Act 2000 ("the Act") which relevantly reads as follows:

12 Criterion 5 – Residence requirement

- (1) An applicant for a first home owner grant must occupy the home to which the application relates as the applicant's principal place of residence for a continuous period of at least 6 months (or the lesser period approved by the Commissioner) commencing within the 12

month period immediately after completion of the eligible transaction or within a longer period approved by the Commissioner.

- (2) The Commissioner may approve a lesser period of occupation under subsection (1) if the Commissioner is satisfied that there are good reasons why the applicant cannot comply with the requirement to occupy the home for 6 months.
- (3) If an application is made by joint applicants and at least one (but not all) of the applicants complies with the residence requirement, the non-complying applicant or applicants are exempted from compliance with the residence requirement.

6 Accordingly the residence requirement is defined in s.3 of the Act to mean the requirement that an applicant for a first home owner grant must occupy the home to which the application relates as the applicant's principal place of residence for a continuous period of at least six months commencing within the first 12 months immediately after the completion of the eligible transaction or a longer period if approved by the Commissioner.

Conclusion

7 Thus the question that I must decide is whether the applicant occupied the premises for a continuous period of 6 months within the first 12 months to which she became entitled to occupation. That period was between 27 November 2008 and 27 November 2009.

8 The applicant was unsure in her evidence of the times she did occupy the premises. There was great uncertainty in her evidence about that. Also I note that in a letter sent by the applicant's solicitor from Legal Aid it is stated that:

“She (the applicant) lived in another home which she rented for the purposes of a safe house when her husband was abusive or drinking...”

9 Today, for the first time, the applicant said that the statement in that letter was wrong (because her solicitor got it wrong) and she said that she had an email in which she had told the solicitor that (the email was not produced). She was given the opportunity to put written submissions to the Tribunal but she never did so. In my view it is likely that the applicant changed her story between the time the letter was written by her solicitor on 29 August 2012 and the hearing this morning. In between that time the respondent had served and filed written submissions and the quotation from the letter above was emphasised in those submissions. Thus I do not accept what the applicant said that she lived in the premises with her husband. I do accept that she stayed in the premises from time to time and I do accept that she was at the premises catering for her husband and looking after his needs. However she did not live in the premises as one

normally interprets a principal place of residence within what was said in the *Chief Commissioner of State Revenue and Farrington* [2004] 57 ATR 157.

- 10 I also note that a bond was lodged in the Residential Tenancies Organisation in relation to Unit 1 on 13 February 2009. That is within the 12 month period. That bond was not repaid back until about August 2009. I also note that Unit 2 was let from the time that the property was purchased until after the 12 month period had elapsed. Therefore it becomes impossible that the applicant could have occupied the property as per the statutory requirement.
- 11 The applicant said that she and her husband lived in one room with a tenant. I find this very hard to accept. I reject that evidence. It may well be that the husband lived in one room but I do not believe that the applicant would also have lived in that room. This is particularly in light of the fact that her husband had a violent disposition. Further, it should be noted that the police had taken out an Apprehended Violence Order which of course prevented the husband coming within a certain distance of his wife (that is, the applicant). Therefore it is highly unlikely that the applicant would have been living in the same premises.
- 12 I also note that between 6 August 2009 and 12 July 2010 (that is the time after which the tenant in Unit 1 left) there was no electricity consumption whatsoever relating to that unit. That being the case it is highly unlikely that the applicant would have occupied the premises. She gave no explanation how she could have occupied those premises without electricity.
- 13 I note that s.32 of the Act dictates that it is the objector (the applicant in this case) that has the onus of proof. In my view, the applicant has failed to prove that she occupied the home during the relevant period of six months within the first 12 months.
- 14 Therefore I do not have to decide whether the husband's occupation was an occupation of the premises on behalf of the applicant. However, in my view I accept the respondent's submissions that in the circumstances of this case the fact even if the applicant had lived at the premises without the applicant that would not be sufficient for the applicant to qualify under the residence requirement.
- 15 Having made that finding it is clear that the residence requirement has not been fulfilled. In the letter sent by the applicant's solicitor it was asked that the Tribunal should exercise a discretion which is contained in s.12 where it refers to a lesser period approved by the Commissioner. This appears in s.12(1) and is also referred to in s.12 (2). In relation to that matter I also refer to s.20(2) and that states that:

20 Payment in anticipation of compliance with residence requirement

- (2) If a first home owner grant is paid in anticipation of compliance with the residence requirement, the payment is made on condition that, if the residence requirement is not complied with, the applicant must within 14 days after the end of the period allowed for compliance—
 - (a) give written notice of that fact to the Commissioner; and
 - (b) repay the amount of the grant.

16 I take those matters into account as with those stated in S.12(1) of the Act where it refers to a period commencing within a 12 month period immediately after the completion of the eligible transaction. Reading those two sections together the notice must be given to the Commissioner within the 12 month period and possibly plus 14 days of that 12 month period. Clearly no notice was given in that time. The first letter from the applicant asking for the respondent to exercise his discretion was a letter of 20 August 2012. That was outside the period. That being the case there is no discretion to waive the requirement to pay back the grant that had been received. Under those circumstances I must confirm the decision of the respondent and I will do so.

SENIOR MEMBER ROBERT DAVIS