

CITATION: Spasevski v Queensland Building Services Authority [2010] QCAT 121

PARTIES: LJUBE SPASEVSKI

V

QUEENSLAND BUILDING SERVICES AUTHORITY

APPLICATION NUMBER: QR083-09

MATTER TYPE: General administrative review matters

HEARING DATE: 22 & 23 March 2010

HEARD AT: Brisbane

DECISION OF: S W Sheaffe

DELIVERED ON: 16 April 2010

DELIVERED AT: Brisbane

ORDERS MADE: The decision of the respondent dated 11 March 2009 refusing to categorise the applicant as a permitted individual is confirmed

CATCHWORDS: an application to categorize as a permitted individual and failure to make provision for taxation.

APPEARANCES and REPRESENTATION:

Mr K C Kelso (counsel) for the applicant
Mr Robinson (solicitor) for the respondent

REASONS FOR DECISION

Introduction

1. Ljube Spasevski ("the applicant") seeks an order to set aside the decision of the Queensland Building Services Authority (the respondent) refusing to categorise him as a permitted individual.
2. This application is made pursuant to section 56AD of the *Queensland Building Services Authority Act* ("the Act") and Chapter 2, Part 1, Division 3 of the *Queensland Civil and Administrative Tribunal Act 2009* ("the QCAT Act").
3. The Tribunal has power pursuant to section 24 of the QCAT Act to confirm, set aside or substitute another decision and set aside the decision and return the matter to the state agency with such directions as the Tribunal considers appropriate,

Background

4. The applicant was a director of a building company, Diamond Homes and Marble Importers Pty Ltd ("Diamond Homes") and was the holder of a builders licence.
5. On the 25 January 2008 an administrator was appointed to Diamond Homes and by order of the Federal Court on the 29 February 2008 the company went into liquidation and Mitchell Ball was the appointed liquidator. It was not disputed that the appointment of the administrator was the relevant company event as defined in section 56AC (2) of the Act
6. On the 10 November 2008 the applicant was informed by the respondent that he was classified as an excluded individual pursuant to section 56AC (2) & (4) of the Act.
7. On the 8 December 2008 the applicant applied to the respondent pursuant to section 56AD (1) of the Act that he be characterised as a permitted individual for the relevant company event.
8. On the 12 March 2009 the applicant received a copy of the respondent's decision to refuse to categorize him as a permitted individual.
9. The test to be applied is that set out in section 56AD (8) & (8A), that is, whether the applicant took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the administrators being appointed to Diamond Homes. It is clear the test is not the taking of steps to avoid the administrator being appointed but rather whether reasonable steps were taken to avoid the circumstances that resulted in the administrator being appointed.

Relevant legislation

10. The Act expressly provides, so far as relevant:

Section 56 AD of the QBSA Act provides:

- (1) *An individual may apply to the authority, in the form approved by the Board, to be categorised as a permitted individual for a relevant event if the individual has been advised by the authority, or has otherwise been made aware, that the authority considers the individual to be an excluded individual for the relevant event.*
- (8) *The authority may categorise the individual as a permitted individual for the relevant event only if the authority is satisfied, on the basis of the application, that the individual took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event.*

(8A) In deciding whether an individual took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event, the authority must have regard to the action taken by the individual in relation to the following-

- (a) keeping proper books of account and financial records;*
- (b) seeking appropriate financial or legal advice before entering into financial or business arrangements or conducting business.*
- (c) reporting fraud or theft to the police;*
- (d) ensuring guarantees provided were covered by sufficient assets to cover the liability under the guarantees;*
- (e) putting in place appropriate credit management for amounts owing and taking reasonable steps for recovery of the amounts;*
- (f) making appropriate provisions for Commonwealth and State taxation debts.*

(8B) Nothing in subsection (8A) prevents the authority from having regard to other matters for deciding whether an individual took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of a relevant event.

Applicant's submissions

11. The applicant submitted that the circumstances that resulted in the happening of the event were:
 - a. Between 2003 and 2007 Peter Ristevski ("Ristevski") filed incorrect tax returns on behalf of the company which resulted in the debt to the ATO being overstated by \$191,345.00.
 - b. Regular payments were made to the ATO in order to discharge a payment arrangement for taxation liability.
 - c. From 22 January 2007 until early 2008, whilst the company wasn't trading there began a significant increase in the company's taxation liability as a result of the incorrect taxation returns.
 - d. The ATO served a statutory demand for the ATO debt on Diamond Homes at the office of Ristevski. The company did not comply with the statutory demand and on the 25 November 2007 the ATO served a winding up application again at the office of Ristevski.
 - e. In 25 January 2008 the administrator was appointed and on 25 February the administrator proposed a Deed of Company arrangement that was rejected by the ATO. On the 29 February 2008 the company was placed into liquidation.
12. The applicant submitted that he took reasonable steps to avoid the coming into existence of these circumstances, and broadly he submitted that he was entitled to rely on his accountant and the advice that he gave. He submitted that Ristevski

filed incorrect tax returns on behalf of the company. Further the documentation concerning the ATO debt, the statutory demand and the winding up application were sent to Ristevski offices and were not forwarded to the applicant. He says that Ristevski failed to properly advise the applicant in regards to the action taken by the ATO, what action the applicant could take to settle the ATO debt, the risk or the likelihood of the company being placed into liquidation and what action the applicant could take to prevent the company from being placed into liquidation. Finally, he says that he offered to pay \$40,000 to the company as a part of the deed of arrangement but this was not successful.

13. He submitted that Ristevski said he would fix the problem but failed to do so.

Respondent's submissions

14. The respondent submitted that the circumstances that resulted in the happening of the relevant event were:

- a. The claim by the Commissioner of Taxation for payment of \$70,000 from Diamond Homes, and the failure to pay this debt.
- b. The company was unable to pay the taxation debt for the reasons expressed by the administrator, Mr Kukolovski, of poor strategic management of the company, poor contract and accounts receivable, inability of the company to collect outstanding monies, poor cash flow and ongoing trading losses. These factors lead to the lack of cash flow to pay the tax debt.

15. The respondent says that the applicant failed to take reasonable steps to avoid the circumstances listed above, namely did not change accountants earlier and for failing to make provision for the taxation debt. Further, it was submitted that the applicant did not consult his accountant at any stage for taxation advice, did not try to ascertain the financial position of the company and did not consider whether the company was able to afford the Mercedes Benz motor vehicles it owned.

Observations and findings

16. The parties were not at odds as to the law to be applied by the Tribunal to resolve this matter. The issue is whether the applicant took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the event. The test to be applied is objective having regard to the circumstances of the applicant. Finally, what is a reasonable step involves an investigation of the nature of the harm, the foreseeability and the degree of risk of its happening and the measures reasonably available. The application is by way of a rehearing and the Tribunal must consider all evidence including evidence not presented to the respondent and an exercise of the discretion conferred by s51AD(8). These principles have been highlighted in a number of decisions including: *Hyde v QBSA [2008] QCCTB 30*; *Cats v QBSA [2008] QCCTB 22*; *Steel, B.L. v QBSA [2005] QCCTB 114* and *Delonga v QBSA [2004] QCCTB 26*

17. The relevant issues are considered by a three step process and are:

- a. What are the circumstances that resulted in the happening of the relevant event?

- b. Did the applicant take all reasonable steps to avoid the coming into existence of those circumstances?
 - c. If the threshold issue is satisfied the Tribunal must exercise its discretion.
18. It was not disputed that the relevant event was the appointment of the Administrator on the 25 January 2008. The next step is to determine and analyse the circumstances that resulted in the appointment of the administrator and the parties gave conflicting evidence on this issue. It was not disputed that the Administrator was appointed by reason of Diamond Homes failure to pay its taxation account of \$70,068.69 and the reasons for this failure was the dominant issue raised during the hearing. It was acknowledged that this taxation account was mainly for unpaid GST and PAYG tax.
19. The respondent objected to much of the evidence tendered on the ground that it concerned events that occurred after the relevant event, that is the appointment of the administrator, and had no bearing on the reasonable steps to avoid the circumstances leading up to the relevant event. I accept this submission and find that the evidence relating to events that occurred after the appointment of the administrator were not relevant to the issue, though it may be relevant to the issue of credit and the exercise of the discretion.
20. The applicant is of Macedonian background and English is his second language. He arrived in Australia in 1985 and worked as a painter until 1997. On 28 July 1997 Diamond Homes was registered and from that date until 2007 it traded as a residential building company. After the company ceased trading the applicant continued to build homes under the business name, Ski Constructions.
21. The applicant spoke English with a strong Macedonian accent. He responded to most of the questions asked provided the questioner spoke slowly and he understood what was being asked of him, though there was some hesitation and even confusion when a complex accounting question was asked. I have no doubt that he understood what was being asked. Mr Robinson submitted that a different test should not be applied to the applicant as English was his second language. I accept this submission and note that an objective test having regard to the circumstances of the applicant is applied and his language skills are one of those circumstances. In any event, his daughter was a smart intelligent young lady who spoke English and she participated in many of the important discussions at the time concerning Diamond Homes. If the applicant did not understand anything because of his language skills his daughter was there to help.
22. From around 2003 Diamond Homes engaged Mack Partnerships Pty Ltd to handle the accounts of Diamond Homes and the personal accounts of the applicant and other family members. The accountants were engaged to prepare company financial reports, company and personal taxation returns and BAS documents. The applicant was of the understandable view that he had engaged Peter Ritevski ("Ritevski") to personally undertake the accounting work requested to be performed. He knew Ritevski and Ritevski's father for many years, they were all members of the Macedonian community and Ritevski could speak both English and Macedonian.
23. Mr Bailey is a chartered accountant and in 2008 was instructed by the applicant to review the financial reports of Diamond Homes and recalculate the financial reports and returns for the relevant periods prior to the administrator's

appointment. Unfortunately, all the accounts for the period up to 2007 were not available as the original computer programme that was used had crashed. To recalculate the accounts Mr Bailey was required to re-enter all the accounting figures from the source documents into a new MYOB financial package. After undertaking this exercise, he concluded that the taxation returns prepared by Ritevski and lodged with the ATO contained errors. Mr Bailey amended the returns and re-lodged them for reassessment but the ATO had not responded by the time of the hearing.

24. The respondent agreed that Mr Bailey's evidence was uncontested and should be accepted. I accept his evidence and find that the accounts lodged by Ritevski showed a pattern of unsound accounting practices. Furthermore, Mr Bailey said the 2008 return was lodged by some other person many months after he had received instructions to prepare the taxation returns. He ascertained that these 2008 returns were lodged by Mack Partnership on 29 May 2009. In this 2008 return the income inserted was not a correct figure and did not reflect the actual earnings. It was suggested these returns were lodged at the time the Government was handing out a \$900 bonus payment to individuals who had lodged a tax return and their income was below a specified amount, and the false figures inserted in the returns were for the purpose of claiming the \$900 bonus. Mr Ritevski denied he had any knowledge of the filing of this 2008 return but despite this denial it is clear and I do find that this return was lodged by the Mack Partnership at a time when they did not have instructions to do so.
25. John Kukulovski, a registered liquidator, was a partner with Jirsch Sutherland and previously in partnership with Mitchell Ball as Palladin Partners, and was the appointed liquidator of the company. Mr Kukulovski gave clear and concise evidence as to the conversations that were had between himself and the applicant on the 25 January 2008 at a Sydney Hotel. There was a faint suggestion that the meeting in Sydney was held in April 2008 and not on the 25 January. I am satisfied that the meeting took place on the 25 January 2008 and not April and the evidence is overwhelming in support of this finding. The meeting was arranged in Sydney to discuss the financial position and future of the company, and the applicant, Irena, Ritevski and Kukulovski were in attendance. Kukulovski gave evidence that he advised the applicant of the various options available and these were: the payment of the debt to the ATO, the appointment of an administrator or do nothing and allow the ATO to wind up the company. The advice given was that if the debt could not be paid an administrator should be appointed. Kukulovski said and I accept this evidence that the applicant said that Diamond Homes did not have sufficient funds to pay the taxation debt. Consequently, the applicant signed the necessary documents to appoint Mr Ball as the administrator. He also said they discussed the statutory demand and the outstanding debt and I accept his evidence on this issue.
26. Significantly, Kukulovski contradicted the evidence of Ritevski in one important respect. Ritevski said he was at the hotel at the time but was not present when discussions were held between the applicant and Kukulovski. To the contrary, Kukulovski said that Ritevski was present and provided details of the background of the company and the statutory demand. I found Kukulovski to be a believable witness and I accept his evidence without hesitation. He had no self interest to protect and he gave his evidence honestly and dispassionately. I accept his evidence when it is in conflict with both Ritevski and the applicant.
27. The applicant says he engaged Ritevski because he was a member of the Macedonian community, could speak both languages and he was known by the

applicant's father and his father's friend. The applicant says that Ritevski was a member of the community and this was a factor in his being retained as the accountant. I accept this evidence and find that it was more than reasonable for the applicant to engage Ritevski as his accountant and it was reasonable to accept his advice and retain him as the accountant. The respondent submitted that it was not reasonable to continue to engage him just because he was a friend and a member of the Macedonian community and community gossip was a relevant factor. I accept Ritevski's evidence that he was engaged by the applicant, he completed the financial reports from the computer printouts supplied by the applicant, and it was his office employee's who completed the BAS statements and taxation returns. At the time, Ritevski was a qualified chartered accountant and was a partner or owner of Mack Partnership.

28. Both parties were critical of the financial reports and taxation returns prepared by Mack Partnership Pty Ltd ("Mack Partners"). Mr Ritevski said he prepared the financial reports and these reports were used by other staff in his office as a basis for the preparation of taxation returns and BAS statements. The respondent submitted that with the errors and the poor standard of accounting it was reasonable for Ritevski to be dismissed in 2007. On the other hand, the applicant says it was reasonable for him to retain the accountant because of language and community issues, and it only became apparent after Mr Bailey was engaged that he became aware that he did not get full and complete advice and the reports contained errors. I accept that it was reasonable for the applicant to retain Ritevski as the accountant. At that time the applicant did not appreciate that the financial reports were defective and that he was not getting full and proper advice. This only occurred at a later time when he engaged Mr Bailey. The applicant was not aware of the errors at that time and there was an advantage to have an accountant who could discuss the issues in the Macedonian language. I accept that it was not reasonable for the applicant to change accountants at that time.
29. The applicant also said that Ritevski filed the taxation returns without getting him to sign or approve them. He says he relied on Ritevski and was not shown any of the taxation and BAS statements before they were lodged. He says he spoke to Ritevski regularly regarding the ATO debt (paragraph 24 of his affidavit) and was advised that he would sort it out. He says he never spoke to the accountant between October 2007 until late January 2008 when he received a telephone call from Ritevski advising that the ATO had commenced proceedings for the unpaid taxation and the amount outstanding was around \$70,000 and Ritevski restated that he would work it out. The applicant said he relied on the advice given by Ritevski and this advice was false and the financial accounts and the taxation returns were prepared with significant errors. This he says was obvious as the company ceased trading about Christmas 2006 yet the taxation due and owing continued to rise during the year following. The applicant was very critical of Ritevski and blamed him entirely for the appointment of the administrator and the eventual winding up of the company. He said Ritevski did not give advice and did not even forward the statutory demand to him.
30. As for Ritevski, I considered that he was not completely frank and honest when he gave his evidence. A clear impression was left that his evidence was incomplete, evasive and he was seeking to protect his own interests. He initially refused to give evidence and only attended when ordered to do so, and without a signed statement being tendered. I accept that at or about the time that the Statutory Demand was served on Mack Partners, Ritevski had considerable personal issues, including the matter before the Accountants Disciplinary Board.

He admitted he was found guilty and his licence to practice was suspended. I also do not accept his explanation that he had no knowledge of Mack Partners lodging the 2008 taxation returns when they did not have instructions to do so. I do not accept the evidence of Ritevski when it is in conflict with other witnesses.

31. I accept the submission that the financial returns contained errors and were not of an adequate standard. I also accept that taxation returns were lodged without the applicant signing or otherwise approving them. I also find that Ritevski did not forward the statutory demand to the applicant at the time they were received at the Offices of Mack Partnerships. However, I am not able to ascertain the extent of the errors as the new returns are still with the ATO for reassessment.
32. However, that is not the end of the matter. As the applicant and Irena flew to Sydney for the meeting on the 25 January 2008, they must have known that the statutory demand was issued and the judgment obtained. It was an emergency meeting with the liquidator and the accountant. It is not believable for the applicant to say that he had no knowledge of these issues. The applicant says that Ritevski would fix the problem and the payment of \$40,000 would solve it. I accept the evidence of Kukalovski that he raised the issue of insolvent trading and that the payment of \$40,000 would resolve this insolvent trading issue. I reject the applicant's evidence that the payment of \$40,000 was to be made to the ATO to absolve all liability. I find that the applicant executed the necessary documents on the 25 January 2008 for the administrator to be appointed, and prior to signing he was advised by the liquidator of the various options available and the consequences. He must have known of all these issues otherwise he would not have executed the documents necessary for the administrator to be appointed.
33. The applicant was a builder of ten years experience and he made the important decisions for the company. His suggestion that he relied on the accountant's advice and especially for the retention of money to pay the taxation debts is not believable. The applicant had borrowed money at regular intervals to pay debts and to keep the company afloat. He had entered into payment arrangements with the ATO on previous occasions to pay off earlier taxation debts. It is clear to me that the applicant was well aware of the businesses cash needs, as he regularly borrowed money. He was also well aware that the company was required to pay GST, PAYG and income tax at approximately 30%. It is fanciful to suggest that a business person such as the applicant would not have known the approximate amount of taxation due and owing. He knew he had a future taxation liability, though he may not have known the exact amount, and failed to make provision for it. The applicant was prepared to spend money on new cars and overseas travel but did not make any provision for future taxation.
34. I accept the submission that the applicant did not make any or sufficient provision for taxation during the relevant time. Section 56AD (8A) makes it clear that the provision of taxation is a relevant factor that should be taken into account. This is a decisive factor in this case. The principal debt was a taxation debt and provision had not been made for it. In these circumstances, I am not satisfied that the applicant has taken all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event.

35. I find that the relevant event was the appointment of the administrator on the 25 January 2008; and a circumstance that resulted in the appointment of the administrator was the failure to pay its taxation obligation; and the provision of the tax was a reasonable step that should have been taken to avoid the coming into existence of the failure to pay the taxation obligation.

Order

36. The decision of the respondent dated 11 March 2009 refusing to categorise the applicant as a permitted individual is confirmed.