

CITATION: Fogg v Queensland Building Services Authority
[2010] QCAT 203

PARTIES: Mr Gordon Fogg
v
Queensland Building Services Authority

APPLICATION NUMBER: QR092-09

MATTER TYPE: General administrative review matters

HEARING DATE: 29 March 2010

HEARD AT: BRISBANE

DECISION OF: K O'Callaghan

DELIVERED ON: 10 May 2010

DELIVERED AT: BRISBANE

ORDERS MADE: The decision of the Respondent dated 5 June 2008 refusing to categorise the Applicants as permitted individuals be set aside and substituted with a decision that the applicants be categorised as permitted individuals for the relevant event.

CATCHWORDS : Application to review decision by the Authority not to categorise as permitted individuals.
Queensland Building Services Authority Act 1991
section 56AD

APPEARANCES and REPRESENTATION:

APPLICANT: Mr Gordon Fogg represented by Mr Thompson of Counsel

RESPONDENT: Queensland Building Services Authority represented by Mr Robinson (Solicitor)

Introduction

1. These were applications brought by the Applicants to review a decision of the Queensland Building Services Authority ("The Authority") to refuse to categorise them as "permitted individuals" for a relevant event.
2. The applications were heard concurrently as all three (3) involved the respective Applicants involvement in the company Speedy Build Homes Pty Ltd ("SBH"). At the hearing I ordered that the evidence given in one (1) matter be taken be evidence given in all three (3) applications.
3. The relevant event was the appointment of Jonathon Paul McLeod as voluntary administrator for SBH.
4. Following the placement of SBH into voluntary administration, the Authority gave notice to the Applicants on 5 June 2008 that pursuant section 56C of the Queensland Building Services Authority Act ("QBSA Act") they were considered as excluded individuals.
5. The Applicants applied to become permitted individuals under section 56AD (8) of the QBSA Act. The Authority refused the request and that is the decision being reviewed.

Background

6. It is relevant to set out the background of the establishment and the history of the operation of SBH.
7. The common denominator between the Applicants in the establishment of SBH was a Mr Robert Trask. Mr Trask, together with his brother David Trask, control the Trask Development Corporation. The corporation is engaged in a number of businesses. The establishment of SBH was one (1).
8. The Applicant Mr Hallet is a solicitor and had acted for a person by the name of Mr Mike Veverka (who is also known as Mr Mike Rosch) in the 1990's.
9. Mr Veverka approached Mr Hallet in 2006 indicating he had developed intellectual property concerning tilt slab construction. Mr Hallet introduced Mr Veverka to Mr Trask and together they formulated a venture whereby they would research tilt slab technology and build low cost housing using the technology.
10. The Applicant Mr Vicca had been engaged by the Trask Development Corporation as its external Compliance Accountant. The internal accounting for the company was managed by the Applicant Mr Fogg.
11. Mr Vicca gave evidence that the arrangements for the project were as follows:-
 - (a) PTR License Corporation would hold the intellectual property in the tilt slab technology:

- (b) SBH would hold the QBSA license and undertake the construction of the houses using the tilt slab technology.
 - (c) Mr Trask would contribute \$160,000 and would have a 45% holding in PTR Licence Corporation through his superannuation fund.
 - (d) Mr Veverka would contribute the intellectual property and would have a 45% holding in PTR License Corporation through his family trust.
 - (e) Mr Hallet would assist in formalising intellectual property issues and would have a 10% share holding in PTR License Corporation through a trust:
 - (f) SBH would be a wholly owned subsidiary of PTR License Group.
 - (g) PTR License Group and SBH were both incorporated on 29 June 2007. At the time of incorporation Mr Veverka and Mr Hallet were directors of both companies.
12. The Applicant Mr Fogg was appointed a Director of SBH on 27 August 2007 at the request of Mr Trask, Mr Hallet and Mr Veverka. The reasoning would appear to be two fold
- i) He was the internal accountant working at the office out of which SBH was administered. It made sense to have a director being a long-term trusted employee of Mr Trask in the head office to oversee the financial operations of SBH.
 - ii) SBH intended to apply for a QBSA license at this time. Mr Veverka told the other directors he was registered in NSW and would be able to be registered in Queensland because of the mutual recognition laws. He wanted to resign as director to resolve that position.
13. There was apparently subsequently some concern from the Authority that the directors did this purposely and sought the resignation of Mr Veverka as a director to hide his involvement in the company because he had an unfavourable licensing history with the Authority. This point doesn't appear to be pursued by the Authority and I accept on the evidence, that having made enquiries the other directors had no reason to suspect that Mr Veverka had past unfavourable history with the Authority.
14. The only projects being undertaken by SBH were two (2) stilt homes on property owned by Mr Trask's personal Family Trust.
15. Construction commenced on the homes.
16. It appears to be common ground that around February 2008 relations between Mr Trask and Mr Veverka were becoming strained as the projects were not progressing as well as expected in that Mr Trask felt that Mr Veverka had misrepresented the stage of development of the intellectual property.
17. Mr Hallet and Mr Fogg resigned as directors in February 2008 and Mr Veverka was appointed as director.

18. In March 2008 Mr Veverka as sole director cancelled Mr Fogg's authorities and access to SBH's bank accounts.
19. Mr Fogg raised these concerns with Mr Trask.
20. Mr Trask on advice from the Applicant Mr Vicca, and in order to regain control entered into an agreement with Mr Veverka whereby:
 - (a) Mr Veverka was to arrange to have Mr Fogg reinstated as a co-signatory and authorised access to the company's accounts
 - (b) Mr Veverka would assign his 45% interest in PTR to an entity associated with Trask.
 - (c) Mr Veverka would finish the construction of the two (2) homes. The balance of the funds on completion would be used to repay Mr Trask's capital investment and Mr Veverka would not receive any payment for his consulting services for the project until completion of the homes.
21. Mr Veverka resigned as the director of PTR and Mr Vicca was appointed.
22. In accordance with the agreement Mr Fogg was again given access to the accounts and continued to make payment to contractors and suppliers associated with the project.
23. Subsequently Mr Fogg upon reviewing bank statements ascertained that Mr Veverka was in breach of the agreement of 15 April and had in fact made payment to himself and associated entities from the accounts of SBH. Mr Fogg reported these concerns to Mr Trask.
24. On 6 May 2008 the QBSA wrote to the directors of SBH giving notice of immediate suspension of SBH's license because of Mr Veverka's and his associated entities' history of improper conduct with the Authority. On 30 May 2008 Mr Vicca and Mr Fogg attended a meeting with two (2) officer's of the QBSA Mr Hunter and Mr Nunn to explain their intention with respect to the future of SBH.
25. The relevant outcomes of the meeting were recorded in the memo of Mr Nunn and were that:-
 - A meeting of SBH would be held the following Monday to sack Mr Veverka as director of the company
 - The company would be put into voluntary administration to flush out debts
 - "As Mike Rosch refuses to take himself off the company register and putting the company into administration is the only solution to winding up the company properly and removing traces of Mike Rosch"
26. On 2 June (the following Monday) Mr Veverka was removed as director of SBH and Mr Vicca appointed in his place.
27. As director Mr Vicca signed the appointment of Administrator.

The legislation

28. Accepting the submissions of the Authority:-

Section 56AD of the Act relevantly provides:-

(i) 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 a relevant event, the authority must have regard to 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 provision 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.

29. The Tribunal has jurisdiction to review the authorities decision to refuse to categorise the Applicants as permitted individuals under section 86 of the QBSA Act.

30. Under section 20 of the *Queensland Civil and Administrative Tribunal Act 2009* (“the QCAT Act”)

- (i) The purpose of the review of a reviewable decision is to produce the correct and preferable decision and
- (ii) The Tribunal must hear and decide a review of a reviewable decision by way of a fresh hearing on the merits.

31. Under section 24 of the QCAT Act, in a proceeding for a review the Tribunal may:

- (a) Confirm or amend the decision: or
- (b) Set aside the decision and substitute its own decision:
- (c) Set aside the decision and return the matter for any consideration to the decision maker for the decision, with the direction the Tribunal considers appropriate

32. The authority has produced submissions on the issue of “onus of proof” and concedes “it is not appropriate to speak in terms of onus of proof”. I accept that. I also accept that in any event the Applicants must put forward sufficient material for the Tribunal (standing in the shoes of the authority) to satisfy that the test in section 56AD (8) has been satisfied.

The Issues

33. I accept the authority’s submission that in line with the act and previous decisions of the Commercial and Consumer Tribunal (*DeLonga v QBSA* [2004] QCCTB 26; *Dellaway v QBSA* [2007] QCCT B181;) The issues for determination are:

- (a) Identification of the relevant event
- (b) Identification of the circumstances that resulted in the happening of the relevant event
- (c) An enquiry as to whether the Applicant’s took all reasonable steps to avoid becoming into existence of those circumstances and
- (d) If the threshold issue is satisfied, should the discretion be exercised to classify the Applicants as permitted individuals.

34. This approach has more recently been confirmed by Judge McGill in the District Court decision in *Yunan v QBSA* (22 April 2010).

35. In relation to (d) the Authority concedes that if the threshold issue is satisfied the discretion should be exercised in the Applicant’s favour.

36. I will deal with each issue in turn canvassing the evidence and submissions

37. Written evidence was provided by each Applicant by way of a statement and the Applicant’s also produced a statement of Mr Robert Trask. The authority relies on the evidence of the decision maker Ms Natasha Dennis and its statement of reasons. Each of the Applicants gave oral evidence and were cross-examined at the hearing.

(1) The relevant event

It is uncontested that the relevant event was the company being placed into voluntary administration on 2 June 2008.

(2) The circumstances that resulted in the happening of the relevant event.

38. It is accepted that the circumstances resulting in the happening of the event centred around concern by the shareholders of SBH (PTR) (when they discovered the deception and misrepresentation made by Mr Veverka) that if the company kept trading this may lead to further unauthorised transactions as well as suppliers and contractors not being paid. This was the thrust of the evidence given by the Applicants and Mr Trask.
39. Mr Vicca's evidence was that "I was concerned that claims both legitimate and illegitimate might come through in dribs and drabs. Mr Veverka had control of the bank accounts of SBH and would not relinquish control. As sole director of SBH there was no way to force Mr Veverka to relinquish control".
40. Mr Fogg's oral evidence was to the effect that upon discovery of irregular dealings in the accounts by Mr Veverka after the agreement of 15 April 2008 and subsequent notification from the Authority on 6 May which evidenced misrepresentation by Mr Veverka concerning his licensing situation the circumstances escalated to a point of real concern about Mr Veverka. The principle concern of Mr Trask was to make sure the creditors were looked after and this necessitated the removal of Mr Veverka as sole director of the company.
41. Mr Trask's written evidence was "it was only later that abnormalities began to arrive. Subcontractors were complaining about lack of payment, some invoices being provided by Mr Veverka were questionable, and cheques made out to suppliers were not reaching their destination. At that stage I took advice as to how to end the relationship with Mr Veverka but to still ensure that a legitimate creditors were paid."
42. The authority submitted that this situation arose because:
- (a) Mr Fogg and Mr Hallet resigned as directors leaving Mr Veverka in charge of SBH and
 - (b) Mr Veverka had the ability to use the bank accounts by himself.
43. I accept that this may be the case, however as the Authority points out the circumstances (at the earliest) were in existence in March 2008. At that time the directors had already resigned and had no reason to suspect that the circumstances might arise.

(3) Did the Applicants take all reasonable steps to avoid becoming into existence of those circumstances?

44. Although not expressed in the Authorities statement of reasons and evidence of the decision maker, by the conclusion of the hearing the position of the Authority was limited to a submission that the reasonable steps that reasonable people in the Applicant's position would have taken and did not take from March to May 2008 were:-
- (a) Terminate Mr Veverka's involvement in the company and/or
 - (b) Limit his ability to have access to money and credit.
 - (c) There was no suggestion that the criteria referred to in section 56 (a) had not been met by the Applicant's.
45. The evidence of the Applicants as to what steps were taken was consistent.
46. I accept the evidence of Messrs Hallet and Fogg that there were valid reasons for their resignation of directors of SBH in February 2008 (which left Mr Veverka as sole director)
47. Mr Fogg's evidence was that Mr Veverka had led them to believe he had sorted his mutual recognition of his building license with the QBSA as Mr Veverka was responsible for the construction being carried out he saw no reason for his continued involvement as the director, particularly as part of his employment with Trask companies he would in any event continue to act as the accountant for SBH.
48. His evidence was at the time of his resignation he had no concerns at all about SBH. He was aware that there were concern by Mr Trask as to the development of the intellectual property however as far as the viability of SBH was concerned it was solvent and all creditors were being paid.
49. Mr Hallet's evidence was that by February 2008 he was aware that Mr Trask and Mr Veverka were not working well together because of the problems with the development of the intellectual property. He did not see any future in the project beyond the completion of the two (2) houses for Mr Trask. He felt he had already spent enough time and effort in attempting to get the project going and decided to step back.
50. He said at the time of his resignation there were no significant issues between the parties. To the best of his knowledge there were no creditors claiming outstanding debts.
51. In my view there was nothing unreasonable in Mr Hallet and Mr Fogg's decision to resign as directors leaving Mr Veverka as sole director.
52. As sole director Mr Veverka naturally had control of the accounts however Mr Fogg in his role as employed accountant oversaw that.
53. It was not until March 2008 that Mr Fogg became aware that Mr Veverka had stopped his authority and access to SBH's accounts. As Mr Veverka was sole director he could not force Mr Veverka to hand back authority. Mr Fogg raised these concerns with Mr Trask and says that as a result the agreement of 15 April 2008 was entered into with Mr Veverka whereby Mr Veverka transferred his interest in PTR to Mr Vicca and agreed to reinstate Mr Fogg's access and

authority to the accounts. Mr Vicca had as the external accountant advised Mr Trask to regain control of PTR.

54. Again I do not consider this an unreasonable step to take.
55. The parties were ensuring once again that Mr Fogg oversaw the accounts to enable the houses to be finished at which time the parties had intended to go their separate ways.
56. The Authority suggests that at this point Mr Veverka's directorship should have been terminated and his access to accounts limited.
57. I do not consider that to be a reasonable step that should have been taken by the Applicants at that time. In any event if they had have done that they would have been in the same position that they ended up in May – June 2008.
58. In May when Mr Fogg and Mr Veverka became aware of the suspension of SBH's license they made a decision with Mr Trask that the only way forward to protect the creditors of SBH was to terminate Mr Veverka's directorship and place the company into voluntary administration. As documented by the Authority officer following their meeting on Friday 30 May:
- “As Mike Rosch refuses to take himself off the company register then putting the company into administration is the only solution to winding up the company properly and removing all traces of Rosch.”*
59. It was put to the Applicant's in cross examination that instead of placing the company into voluntary administration they should have replaced Mr Veverka and kept the company operating. I do not accept that this is a reasonable step that should have been taken. The context was that the only business of the company was the construction of two (2) houses for Mr Trask. Mr Trask concern was for the creditors of SBH.
60. As Mr Vicca said in his written evidence “replacing Mr Veverka also seemed fraught with problems because any new director would not know the extent of the company's indebtedness, or which particular suppliers were owed money or what other contracts of legal arrangements had been entered into during Mr Veverka's tenure as sole director. Placing the company in liquidation seemed an unfavourable option because it would not allow Mr Trask to inject funds into SBH to secure payment to all bonafide creditors and in turn any creditors would not be fully paid for their services”.
61. The question must be asked whether any reasonable steps that each individual Applicant should have taken and did not.
62. Mr Hallet's evidence was that he had no involvement with PTR or SBH after his resignation as a director. He was advised of the situation at the end of May and attended by phone the meeting on 2 June to place the company in voluntary administration. Although a director of PTR he had limited involvement in the project and no reason to be concerned as to the solvency of SBH or any other issue prior to be notified of the circumstances existing at the end of May.

63. Mr Fogg gave evidence that following his resignation in February 2008 he remained as the company accountant in his position as employee of the Trask Development Corporation. He continued to check the accounts daily and when it became apparent that his access was denied he raised the issue and concerns with Mr Trask. These concerns culminated with the agreement reached with Mr Veverka on 15 April whereby he relinquished shares in PTR and agreed to reinstall access to Mr Fogg to the company accounts.
64. When irregularities with the accounts resurfaced and when the QBSA became involved he saw the issue as very serious and he consulted the external accountant Mr Vicca and Mr Trask. As employed accountant he met with the Authority to explain the situation.
65. Mr Vicca was up until April 2008 only in the position of external Accountant as far as SBH was concerned.
66. In April 2008 consequential upon his advice to Mr Trask to regain control of the company, shares in PTR were transferred to himself (only because if Mr Trask had controlled it personally it would have been in breach of superannuation rules). He then became director of PTR in Mr Veverka's place.
67. His evidence was that when advised by Mr Fogg about the further irregularities with the accounts and the situation with the Authority he saw the only solution (as set out earlier) was to place the company into voluntary administration ensuring payment of all legitimate creditors. He was prepared to take on the role of director (in place of Mr Veverka) for that sole purpose.
68. Mr Vicca gave credible and strong evidence. When tested in cross examination he reiterated that in the situation, where there is a director breaching the financial control procedure put in place (the April agreement) the option of replacing him as a director and continuing with the company not feasible as it was not known "what other skeletons were in the cupboard". Further the company's license having been suspended meant the company could not continue the construction of the houses which was the only business of the company.
69. He said the option of liquidation was not in the interests of creditors whereas with voluntary administration Mr Trask had intended to pay all legitimate creditors of the company.
70. On the basis of the evidence of the Applicants I accept there were no other reasonable steps that could have been taken by any one of them in their respective positions to avoid coming into existence the relevant circumstances.

Findings

71. I find all Applicants took all reasonable steps to avoid the circumstances that resulted in the company being placed into voluntary administration on 2 June 2008.
72. The Authority has conceded that "there are no factors relevant discretion weighing against any of the Applicants"

73. The Tribunal orders that the Authority's decision be set aside and it be substituted with the decision to categorise the Applicants as permitted individuals for the relevant event.