

**CITATION:** Vuu v Queensland Building Services Authority  
[2010] QCAT 335

**PARTIES:** Hong T (Michael) Vuu  
v  
Queensland Building Services Authority

**APPLICATION NUMBER:** QR184-09

**MATTER TYPE:** General administrative review matters

**HEARING DATE:** 1 April 2010

**HEARD AT:** Brisbane

**DECISION OF:** M Howard

**DELIVERED ON:** 30 June 2010

**DELIVERED AT:** Brisbane

**ORDERS MADE:** The reviewable decision to refuse to categorise the Applicant as a permitted individual is confirmed.

**CATCHWORDS :** PERMITTED INDIVIDUAL-Whether applicant took all reasonable steps to avoid the coming into existence of the circumstances leading to the relevant event - *Queensland Building Services Authority Act 1991 s56AD*

**APPEARANCES and REPRESENTATION (if any):**

**APPLICANT :** Hong T (Michael) Vuu represented by Mr Jonathon Hitchcock, Rudkin Hitchcock Lawyers

**RESPONDENT:** Queensland Building Services Authority represented by Mr Malcolm Robinson, Forbes Dowling Lawyers, instructed by Ms Natasha Dennis, Queensland Building Services Authority

## REASONS FOR DECISION

1. The applicant was a director of Archicad Design Pty Ltd (the Company or Archicad) when it was placed in liquidation on 15 April 2009 on the application of Queensland Sheet Metal Roofing. The Queensland Building Services Authority (QBSA or the Authority) notified the applicant that it considered him to be an excluded individual for a relevant company event, that is, the appointment of liquidators of Archicad for the benefit of a creditor while the applicant was a director.
2. An excluded individual may apply to the QBSA to be categorised as a permitted individual for the relevant event.
3. The applicant made application to the QBSA seeking to be categorised as a permitted individual. His application was refused. He filed an application to review the decision of the QBSA in the Commercial and Consumer Tribunal (CCT).

### Applicable Law

4. On 1 December 2009, the CCT was abolished and the Queensland Civil and Administrative Tribunal (QCAT) became responsible for dealing with the matter. By virtue of the transitional provisions of the *Queensland Civil and Administrative Tribunal Act 2009* (the QCAT Act), for this purpose QCAT has the powers and functions of the former tribunal. The decision reviewed is a reviewable decision for applying the QCAT Act to the proceeding.
5. The CCT's functions and powers were set out in Part 6 of the *Commercial and Consumer Tribunal Act 2003*, especially sections 101 and 104. The CCT was empowered to review a decision under an empowering Act, in this case the *Queensland Building Services Authority Act 1991* (the QBSA Act), and in deciding the review was empowered to confirm the decision; set the decision aside and substitute another decision within QBSA powers; or set the decision aside and return the matter to the QBSA with directions. The accepted function of the CCT, and its predecessors, when reviewing such a decision was to conduct a fresh hearing on the merits,<sup>1</sup> in effect, standing in the shoes of the decision-maker. The CCT considered it was entitled to have regard to all of the evidence available to it.<sup>2</sup> I accept this as the correct approach.

### Part 3 A of the QBSA Act

6. The respondent made submissions on the law with which the applicant agreed.
7. Part 3A of the QBSA Act deals with excluded and permitted individuals.

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<sup>1</sup> *R v Gaffney, Ex parte Builders registration Board of Queensland* [1987] 1 Qd R 90; *QBSA v Carey* (decision of 20 June 1997 District Court of Queensland Appeal No 1209 Brabazon DCJ); *Hyde v QBSA* [2003] QBT 30 (20 February 2003); *Nation v QBSA* [2006] QCCTB 114 (30 June 2006) [58]; *Eliaba v QBSA* [2009] QCCTB 23 [28-41].

<sup>2</sup> *Delonga, Jakov v QBSA* [2004] QCCTB 26 (29 October 2004) [36]; *Nation v QBSA* [2006] QCCTB 114 (30 June 2006) [58]; *Eliaba v QBSA* [2009] QCCTB 23 [28-41].

8. An individual may apply to the QBSA to be categorised as a permitted individual for a relevant event under section 56 AD(1). An application must include the reasons why the individual should be categorised as a permitted individual for the relevant event: section 56AD(3). By virtue of section 56AD(8), QBSA may categorise the individual as a permitted individual

*...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.*<sup>3</sup>

9. These provisions were considered by predecessor tribunals to QCAT. It was considered that subsection 56AD(8) may be broken into 3 parts namely: the taking of all reasonable steps to avoid; the coming into existence of the circumstances; and that resulted in the happening of the relevant event.<sup>4</sup> In *Hyde v QBSA*<sup>5</sup> it was considered that a two-stage process is involved in reaching the decision. The first stage of the enquiry is whether the applicant has taken all reasonable steps to avoid the coming in to existence of the circumstances resulting in the happening of the relevant event. Secondly, if so, should the discretion be exercised to classify the person as a permitted individual.
10. The respondent submits that there are four steps. Firstly, identifying the 'relevant event'; secondly, identifying the circumstances that resulted in the happening of the relevant event; thirdly considering whether the applicant took all reasonable steps to avoid the coming in to existence of those circumstances; and fourthly, if the threshold issue has been satisfied, whether the discretion should be exercised to classify the applicant as a permitted individual. The first step for which the respondent argues is the pivotal point around which the consideration occurs. I accept that this is a necessary step in the consideration of an application to be categorised as a permitted individual. Further, the respondent's articulation of the necessary steps is generally consistent with those earlier cases and a more detailed description of it and I accept it. Since the hearing of this proceeding, the District Court of Queensland delivered a judgment considering the operation and effect of the relevant provisions of Part 3 of the QBSA Act in *Younen v Queensland Building Services Authority*.<sup>6</sup> The four steps articulated by the respondent were adopted by the District Court.
11. 'All reasonable steps' does not mean all possible steps.<sup>7</sup> Relevant steps are those taken to avoid the coming in to existence of the circumstances that resulted in the relevant event, but not the relevant event itself.<sup>8</sup> The test of reasonableness has been considered an objective one to be applied having regard to the actual circumstances of the applicant.<sup>9</sup> A wide enquiry is appropriate which includes the

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<sup>3</sup> QBSA Act s56AD(8).

<sup>4</sup> *Dellaway v QBSA* [2007] QCCTB 181 (12 December 2007) [6].

<sup>5</sup> [2003] QBT Q72-02. Applied for example, in *Delonga v QBSA* [2004] QCCTB 26 (29 October 2004); and *Laghai v QBSA* [2008] QCCTB 246 (28 November 2008).

<sup>6</sup> [2010] QDC 158 (McGill DCJ) [26].

<sup>7</sup> *Hyde v QBSA* [2003] QBT Q72-02 [52-53].

<sup>8</sup> *Hyde v QBSA* [2003] QBT Q72-02 [38-40].

<sup>9</sup> *Delonga, Jakov v QBSA* [2004] QCCTB 26 (29 October 2004) [33].

manner in which the applicant conducted the business.<sup>10</sup> In *Younen v Queensland Building Services Authority*,<sup>11</sup> the Court confirmed that approach:

*What were reasonable steps depended on what was reasonable for the individual concerned in the circumstances in which he found himself, with such information as he then had. It is not a question of whether he did everything possible to prevent these circumstances from arising, or whether they would not have arisen if he had acted differently. The reasonableness of his behaviour must be assessed by reference to what was known by him at the time, without the benefit of hindsight.*<sup>12</sup>

As the Court observed, the focus of section 56AD is concerned with the prudent management of a company as an ongoing business, or prevention, rather than dealing with problems after they have arisen.<sup>13</sup>

### Matters to be considered

12. Section 56AD(8A) sets out matters to which the Authority, and therefore the Tribunal on review, must have regard in deciding whether an individual took 'all reasonable steps'. The matters set out in section 56AD(8A) are as follows:

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

13. Section 56AD(8B) provides in essence for other matters to be considered for deciding the question.

### Information an Applicant must give the Tribunal

14. The respondent submitted that although there is not an onus of proof, sufficient evidentiary material must be provided by an applicant to demonstrate that he/she should be categorised as a permitted individual having regard to the test prescribed by section 56AD(8).

15. I accept that there is generally no onus of proof in the review jurisdiction.<sup>14</sup> However, in the absence of sufficient information from an applicant, a decision-maker will be unable to make a decision to categorise the person as a permitted individual.

### Role of the QBSA in Review Proceedings

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<sup>10</sup> *Dellaway v QBSA* [2007] QCCTB 181 (12 December 2007) [7].

<sup>11</sup> [2010] QDC 158 (McGill DCJ) .

<sup>12</sup> [2010] QDC 158 (McGill DCJ) [26].

<sup>13</sup> [2010] QDC 158 (McGill DCJ) [23-25].

<sup>14</sup> See discussion in *Laidlaw v QBSA* [2010] QCAT 70.

16. Section 21(1) of the QCAT Act, provides that in a proceeding for the review of a reviewable decision, the decision-maker must use his or her best endeavours to help the tribunal so that it can make its decision on the review. Section 20(1) of the QCAT Act provides that the purpose of the review is to reach the correct or preferable decision. The respondent submitted that the role of the decision-maker is to assist the tribunal to reach the correct and preferable decision. Accordingly, the respondent adopts a model litigant role and does not adopt an adversarial approach.

17. I accept this interpretation of the responsibilities of the decision-maker in the tribunal's review jurisdiction.

### **The Issues**

Accordingly, the issues for consideration by the tribunal are as follows:

- (1) The identification of the relevant event;
- (2) The identification of the circumstances that resulted in the happening of the relevant event;
- (3) A consideration of whether the applicant took all reasonable steps to avoid those circumstances coming into existence;
- (4) And if satisfied in relation to (3), a decision about whether to exercise the discretion to categorise the individual as a permitted individual

### **The Evidence**

18. The applicant provided two written statements to the tribunal and was cross-examined at the hearing. The second statement was stated to be for the purpose of clarification. This evidence was sometimes confusing and apparently contradictory. The respondent provided a bundle of documents and filed a statement by Natasha Dennis, a Senior Compliance Officer employed by the QBSA, who was also cross-examined briefly. Relevant evidence given is recorded under broad subject areas.

### Background Information and Corporate History

19. The applicant has been in business since 2001. He has held a BSA licence in Queensland since November 2003.

20. Archicad was established in May 2007. It was not licensed through the BSA to conduct building work. The applicant asserted in his first written statement that it had a turnover of \$600,000 in 2007 and was profitable until January 2009, when due to the failure of clients, John and Louise Rendon (the Rendons or the Homeowners), to make progress payments of approximately \$110,000 it suffered from problems for lack of cashflow.

21. He is also a director of Construction Design Pty Ltd (Construction Design) which was established on 19 February 2007. He asserted that the contract with John and Louise Rendon was Construction Design's first and only contract.

22. The applicant was previously a director of HT Design and Construction Pty Ltd for which a liquidator was appointed and in respect of which he was categorised as a permitted individual.

### The Evidence about Contracts included the following

23. The evidence about contracts with the Homeowners included the following:
- In late April 2007, the applicant met with the Rendons at their property at Holland Park. They wanted to demolish an existing house and construct a new dwelling.
  - In May 2007, the applicant provided a detailed tender to the Rendons which he says John Rendon (Rendon) verbally accepted. Rendon asked him to have the contract signed by Construction Design.
  - The applicant did so and then presented the contract for signing by the Homeowners.
  - In a written statement the applicant says that Rendon told him that he and his wife would look at the contract, sign it and return it by mail.
  - He made a variety of assertions about his reminders to the Rendons to return the contract; his attempts to have the contract returned; and why despite the progress of numerous months he continued to believe the Rendons intended to sign and return the contract.
  - He gave evidence that he accepted over a period of months a variety of reassurances that it would be signed soon. These assurances were accepted, he said, because of the apparent keenness of the Homeowners to build the house, and payments of some amounts of money to himself and others for various purposes related to the construction. Also, he stated that the Rendons did not say they would not sign it. At times, they told him they would sign it when a certain step was completed, for example, the footings.
  - The applicant now considers that Rendon deliberately misled him and created the situation whereby the 'substantial amount' could not be enforced because he did not have a contract.
  - The applicant asserted in some of his evidence that there was an oral contract between Archicad and the Rendons. It was asserted that it did not request a written contract as it did not have a BSA licence and was not entitled to do so. The absence of a licence was asserted not to be a bar for doing the work for several reasons at different points in the evidence including that it was only doing temporary work rather than planning to do the building works and because Archicad was just construction site supervisor, not the builder.
  - In other instances in cross examination, the applicant's evidence was to the effect that Archicad performed the work under the authority of Construction Design. He said that Archicad was a temporary sub-contractor while Construction Design was awaiting the contract.
  - The applicant stated that when he took the risk of doing the work, he wasn't aware what kind of person Rendon was. He alleged that he had subsequently become aware that the Rendons had done similar things on 3 other occasions.
  - The applicant said that he was aware of the requirements of the *Domestic Building Contracts Act 2000* for the contract to be in writing and acknowledged that to comply with it a contract would need to identify the parties, the builder's BSA licence number, the date for completion, the scope of works, and prices and stages when amounts fall due for payment.

#### The Role of Archicad and the Applicant

24. In relation to the role of Archicad and the applicant, the evidence included the following:

- The applicant asserted that because the Rendons were keen to begin work, in the absence of an executed written contract with Construction Design, Archicad stepped in to facilitate progress on the project.
- He asserted that it was not his 'fault' that work began. Rendon started it by instructing demolition work and 'dragged' him into this situation by starting work, paying subcontractors direct and instructing work himself.
- The applicant elected to be on-site as requested by Rendon rather than walk away from the job.
- The applicant considered that Archicad took on the role to back up Construction Design which would benefit from it.
- Apart from Archicad's role, the applicant's evidence appears to be that he personally (as opposed to Archicad) took on the role of acting as site supervisor for the site works after demolition to remove rubbish and level the site.
- Despite this evidence, the applicant's evidence in cross-examination was to the effect that Construction Design retained a concreting contractor Ryan to undertake the slab works.
- The applicant asserted that there was no confusion for Rendons, or any sub-contractors about who they were contracting with at any time.

### The Demolition Work

25. The evidence about demolition work for the Homeowners included:

- In a written statement, the applicant stated that he organised the consents and permits for demolition as part of the normal preparation work before commencement.
- Under cross-examination, he variously asserted that Construction Design and Archicad, or Archicad already had demolition approval. A copy of the approval from a private certifier was in the respondent's documents. Archicad is the named applicant.
- It was variously asserted that Rendon went to the demolisher and that Archicad engaged a sub-contractor to do the demolition work although the applicant asserted that Archicad had no liability to pay for it.
- The applicant asserted that the arrangement was for Rendon to pay the demolisher the demolition costs of about \$20000 directly.
- Later, he asserted that he used Archicad's name to hire the demolishers, who did not want to deal with the Rendons.
- There was no written contract with the demolisher. There was some confusing evidence about why this was so relating to the applicant's assertion that it was a 'cash' contract and the demolisher did not want it in writing so that GST would not be payable, but the available correspondence and receipts from the demolisher clearly include GST.
- Rendon made two of three payments directly to the demolisher. When Rendon failed to make the other payment, the demolisher pursued Archicad which did subsequently pay it in September 2007.
- The applicant said that at this stage, he also says he realised that the Rendons had difficulty meeting the payment and realised that he was in trouble.
- In cross-examination, the applicant stated that the demolisher asserted that Archicad had engaged him and he had to step in to pay the demolisher so as to release his liability to Archicad.
- The applicant later recovered the amount of the payment from the Rendons.

26. The respondent's material provided to the Tribunal includes several letters dated between July and September 2009 from the demolishers to Archicad and one from Archicad to the demolisher regarding the arrangements to demolish the home and the costs quoted by them to complete the work. This correspondence does not acknowledge or suggest any arrangement directly between the demolisher and the Rendons.

### The Construction Works

27. According to the applicant, the building approval was obtained by Construction Design after the demolition was completed. The evidence is that construction work was commenced by Archicad in about October 2007 following completion of the site works after demolition.

28. Construction Design did not do the work, because another director of that company, Pravi Singh (Singh), refused to commence work until there was an executed contract in place.

29. Archicad continued to do work, largely without payment until at least June 2008, when the applicant reported the situation to the QBSA and a stop on-site occurred.

### The Payments made by Rendons

30. The evidence about what was paid by the Rendons and when it was paid is confusing. The applicant's evidence included:

- From the written statements it appears that \$11,000 was paid to Archicad for the work done by it. However, various other amounts were paid for outlays, including about \$5K for the purposes of seeking building approval and two payments made to direct to the demolisher and the final payment for the demolition work paid initially by Archicad and later reimbursed by the Homeowners.
- When Rendon, who was a cleaning contractor for building companies, was asked for payments, he said he was waiting for funds to come through. The applicant says he 'took his promise' essentially because he knew what it was like to be in business.
- However, at some point the applicant told Rendon if he was not paid he would take legal action. It is not clear when this occurred. Rendon asked for a few days and apparently did then pay a further \$5000. It appears this payment was made during the foundations work.
- From the evidence, it appears that the last payment of \$1000 was made to Archicad by the Rendons on 9 May 2008.

### Monies Alleged to be owed to and liabilities incurred by Archicad

31. The evidence about monies owed by the Homeowners included:

- As noted earlier, in his written evidence, the applicant had asserted that there were 'progress payments' of about \$110,000 owed by the Rendons to Archicad leading to cashflow problems for the company. In cross-examination he also referred to a total of \$110,000 as being owing.
- In cross-examination, the applicant asserted that at one point that Archicad was owed some \$60,000 by the Rendons. The evidence seems to be that



this was shortly after the demolition works, although of the demolition costs, the Rendons paid the first two payments and Archicad paid only \$5000 which was later reimbursed.

- He said that the amount would have to appear in the financial statements as owing by Rendons. Under cross-examination, when shown financial statements as at 30 June 2008 prepared by accountants for Archicad, the applicant was unable to identify any entries to indicate either \$60000 or \$110,000 was owed to Archicad by the Rendons.
- He also stated that the liability for the \$12000 owing to Queensland Sheet Metal Roofing arose for steel reinforcing during the foundations work.
- Despite this, the applicant asserts that between about June 2008 and December 2008 Archicad had committed to liability to various creditors and continued to make progress payments. The applicant gave evidence that he continued to incur liability for the Rendons until 2009, and perhaps into 2010. His evidence in relation to this issue was confusing. However, the applicant stated that money was owed to various creditors by Archicad and they were all incurred on this project as follows:

Powercrete 1/7/08 to 1/12/09 for concrete pumping \$2244;  
Smartskip Bin Hire 1/7/08 to 1/06/09 \$980;  
CAD Accounting 1/7/08-1/12/09 Loan refund \$2000;  
Fuji Xerox Pty Ltd 1/07/08 to date existing machine contract \$6520;  
Reed Constructions Data 27/7/08 to 26/7/09 Subscription agreement \$935;  
Centenary Hire 1/7/08 to 15/2/2010 Planks hire \$765.50;  
Lyndons 1/7/08 to 1/12/09 Building materials \$2800;  
S H Sabdia & Co 27/11/08 to 3/12/08 Independent review report \$550;  
Queensland Sheet 18/3/09 to 25/03/09 Building materials \$1000; and  
Awesome Water 1/7/08 to 1/10/09 Cold water supply \$1125.

32. The applicant continued to make payments and extinguished these outstanding amounts. The evidence seems to be that the funds to do this came from the applicant doing extra work, getting help from his family and also getting some money from Singh. The applicant conceded that the amounts owing from Archicad to him were not reflected in the available financial statements. The applicant stated that he told his accountant, but said it was a complicated arrangement.

33. The respondent's documents included a letter to the BSA from NR Consulting Pty Ltd, Specialist Business Consultants who acted for Archicad in the weeks leading up to the Liquidation. This correspondence states that Archicad spent \$200000 of its own funds building the Rendon's home and only received about \$90000 from them.

#### Why Archicad continued to act

34. The evidence appears to be that sometime soon after the demolition, some \$60000, which included the \$12000 liability to Queensland Sheet Metal Roofing, was owed although it was acknowledged that this was not a precise figure. The applicant considered Archicad had to continue as it had put its own money into the project for materials and was 'stuck' or 'trapped' in effect if it wanted to recover the monies. He indicated that he considered that this was the only way

to try to ensure Archicad was later paid. The applicant asserts he decided to take the risk of Archicad doing so because he hoped that Construction Design would soon have the written contract.

35. At one stage, in cross-examination he asserted that the work done by Archicad was done under the authority of Construction Design.
36. In re-examination, he qualified what he said about the risk he took, stating that he didn't realise how risky it was, his decision to do it was more about supporting Construction Design and getting the work done.

#### Legal Proceedings commenced by Concreter

37. Legal proceedings were commenced by Les Ryan, a concreter, for some \$21000 alleged to be payable as a result of work on the Rendons property. The Rendons were first respondent, and the applicant and Archicad were also named as respondents.
38. The applicant stated that he was merely a witness, at the request of the concreter, to the agreements for concreting services between the Rendons and the concreter.
39. The respondent provided to the tribunal copies of some relevant correspondence. The agreements which purport to be between the Rendons and the concreter have hand-written notations signed by the applicant personally stating 'Agreed to stage one only 10/4/08' and 'Agreed to stage two 15/5/08'. Correspondence from the applicant to the former CCT asserts that he was at the request of Les Ryan, merely witnessing Ryans engagement by the Rendons. In this correspondence, statements are also made by the applicant that he personally was employed as Project Manager assisting Rendon to purchase building materials, introduce and engage tradesmen, and organise works on behalf of the owner. Correspondence from John Rendon to L & B Ryan states that 'Construction Design/Archicad' was contracted to build the dwelling at Kneale Street and that he understands Ryan is owed money by Construction Design/Archicad.

#### Financial records and statements and advice

40. The applicant's written statements assert that in the conduct of his business, he understood the importance of maintaining sound financial records and undertook 'this important task' himself and also engaged an external accountant to prepare the accounting records for Archicad. He stated that he kept the financial records until he was forced to leave the site.
41. In cross-examination, the applicant stated that he did not personally do any book-keeping: he prepared some documents and kept a list of expenses, but he had an independent accountant do the book-keeping. He stated however that he did watch cashflow.
42. He also took and followed advice from Singh from time to time during the construction.

43. Sabdia & Co prepared some financial statements to 30 June 2008 and the respondent provided copies of these to the tribunal. They indicated at 30 June 2008, that Archicad had assets totalling about \$83990 (cash of \$2958; current tax assets of \$34500; and plant and equipment of \$46534); liabilities totalling about \$52174 resulting in net equity of \$31818 being retained profits.

44. According to the applicant, all other company records and documents had been taken by the liquidator.

### Legal Advice

45. The applicant states that he took legal advice regarding the matters which led to the liquidation, and estimates he spent about \$30000 in legal fees. It appears he understood from his advisor that recovery would be difficult because there was no written contract and that he couldn't recover the 'substantial amount' owing.

46. His written statements state that he instructed lawyers to represent Archicad in 'the dispute', including a 'counterclaim' against the Rendons but he did not take action against them due to lack of cashflow.

47. In his supplementary statement, he says that Rendon offered him a deal and tried to force him through physical threats of harm to sign a Deed which involved him giving up the claims which, at that time at least, it is asserted he intended to pursue.

48. In cross-examination, he asserted that another reason for not taking action against them was because he needed to spend money on the other permitted individual application.

### The Liquidation Proceedings

49. The applicant instructed lawyers to negotiate with the creditor before a liquidation order was made and also engaged specialist business consultants and requested that they endeavour to arrange a payment plan with the petitioning creditor, but an arrangement could not be made.

50. On 15 April, 2009 when a liquidator was appointed on application of Queensland Sheet Metal Roofing, there was approximately \$12000 owing to creditors.

51. The applicant agreed under cross-examination that cashflow problems had caused the liquidation and that there wouldn't have been a cashflow problem if there had been a contract in place.

52. The applicant stated that \$8000 was owed to Archicad at the time of the liquidation by one debtor. He did not include an amount as owing from the Homeowners. He said he did not include the \$110,000 which he said was separate although it was a debt owed by the Rendons, it appears because it was not something he had put into the project.

### **Submissions**

## Applicant's submissions

53. The Applicant's submissions were to the effect that, on the facts, Archicad was a volunteer overseeing work on the site. It was not anticipated at any time that it would do the work. Once liabilities were incurred, it had to either withdraw and lose money or keep going on the basis that the contract would be signed and payment of the amounts would become the responsibility of the company contracted to do the work which would remunerate Archicad.
54. The problem, the applicant says, was with the Homeowners who were playing 'ducks and drakes.' The applicant always understood that the contract would be signed and was induced on this basis to undertake the work. The interim period was initially expected to be brief, but went on for an acknowledged period in excess of a year until the stop on-site, although liability continued to be incurred until at least 2009 and perhaps into 2010. Archicad had an ABN Number and was therefore a useful interim vehicle pending the receipt of the contract, as contractors were prepared to contract with it on the basis of the Homeowners paying them direct. The homeowners were involved in the construction industry. The applicant has heard of three other occasions on which they have done similar things to builders. He was caught by a difficult and deceptive client. The liquidation was for a modest amount and other creditors have been paid. The applicant is a fit and proper person.
55. It was submitted that the reasonable steps taken by the applicant to avoid the circumstances which led to the liquidation were, as the tribunal understands the submissions, as follows:
- The contract was prepared by the builder with a licence and presented to the owners who were requested to sign it;
  - The owners were asked if they were happy with it and they said they were going to sign it;
  - It is irrelevant that this was actually done by Construction Design as the applicant was a director of both it and Archicad and had full knowledge of what each company was doing;
  - Requests were made for the signed contract and when it would be returned;
  - As there was no indication that it would not be signed and the Homeowners made payments (including a payment of \$5000 to cover consent fees), he took their assurances;
  - Archicad came in 'sideways' and took the risk of starting work in the expectation of the signed contract;
  - Once Archicad incurred liability it became ensnared: it stayed involved to try to mitigate its loss;
  - He put in money; he paid debts and as far as possible pursued remedies where he could.
  - There is clear, unequivocal and uncontested evidence of fraud by the Homeowners.
  - It was anticipated that once the contract was signed with Construction Design, payment would be from Construction Design to Archicad. Apart from the demolition costs, the money was to go to Construction Design which would then pay Archicad. The Rendons were not to pay Archicad direct.
56. Regarding whether it would have been a reasonable step for Archicad to ask the Homeowners to enter into a written contract with it, it was submitted that

Archicad was not intended to be part of the contractual matrix and it provides services that are not building activity. It was only a volunteer.

### Respondent's Submissions

57. The respondent's primary submission was that the reviewable decision should be confirmed. The submissions included the following:
- the usual standard of a reasonable builder applies irrespective of cultural background.
  - Because the contract with Rendons was not in writing, the scope and terms were not clear and Rendons were able to avoid payment under the arrangement.
  - A finding of fraud by the Homeowners is not available on the evidence.
  - Archicad was allowed to incur expenses without clear contractual obligations for payment in place, resulting in cashflow problems.
  - Steps taken in the liquidation are logically irrelevant to the circumstances that resulted in the liquidation.
  - Advice taken from the accountant Singh was not followed for Archicad, although it was for Construction Design.
  - Reasonable steps that should have been taken included a written contract setting out a payment schedule; not undertaking building work through an unlicensed company; not allowing the owner to pace the commencement of the project by engaging contractors which it appears the applicant was responsible for paying; credit management through projecting cashflow and making provision for payment of creditors.
  - Steps taken by Construction Design, including presenting a contract and requesting it be signed are not steps taken by Archicad to avoid the circumstances which led to the liquidation. The circumstances that led to the happening of the event were Archicad 'coming in sideways': the applicant did not identify reasonable steps taken by Archicad.
  - It was open to Archicad to take recovery action before the liquidation, to recover some monies under section 42 of the QBSA Act.
58. Even if the tribunal is satisfied in the threshold matter, the respondent submitted that it should not exercise its discretion having regard to the previous corporate failure of the applicant although it was acknowledged that he was a permitted individual in respect of this event; unlicensed building work; and degree of knowledge of financial matters displayed in the conduct of matters with the Homeowners which led to Archicad's liquidation.

### **Consideration and Decision**

#### **Discussion of the Evidence and Findings of Fact**

59. As I have indicated, some of the evidence was contradictory and confusing.
60. At all relevant times, the applicant was a director of both Archicad and Construction Design.
61. He knew that his co-director in Construction Design was not prepared to undertake any work for the Homeowners in the absence of a written contract, which did not eventuate.

62. The applicant asserts that the Rendons began withholding progress payments for the construction project, but this is inconsistent with other evidence given by the applicant to the effect that the Rendons 'dragged' him in, knowing he could not recover the 'substantial amount', and that he took a 'risk,' electing to be there in the hope that Construction Design would benefit once the written contract was signed. This assertion can not sit with the assertions that Archicad's role was a temporary one, pending the execution of the written agreement with Construction Design. Nor can it be reconciled with the assertion that Archicad was acting under the instruction of Construction Design which would then it seems be responsible to pay Archicad.
63. Whatever arrangements were discussed from time to time between the applicant and the Homeowners or Rendon and whatever agreements were reached about what would happen next, the balance of the applicant's own evidence does not support his assertion that there was an oral contract under which defined progress payments were agreed to be made.
64. The applicant acknowledged that Archicad and the applicant each personally performed some work at the site; the applicant's personal work was limited to supervising the site works following demolition. Archicad performed the balance of the work.
65. Although Archicad's involvement was expected by the applicant to be a brief arrangement pending the receipt of the signed contract, the applicant allowed this situation to persist for the period from about May 2007 until June 2008 when the situation was reported to the QBSA and a stop onsite requested. His initial willingness to accept assurances from the Homeowners about returning the executed contract may have been reasonable. However, it is clear that by September 2007 when the Rendons failed to pay the third instalment to the demolisher, he had realised that he was in trouble and that they had difficulty paying.
66. Accordingly, I do not accept the applicant's evidence that he continued to believe they would return the contract from this point, or that he had no reason to consider they would not. Had Archicad ceased work at that point, at worst it appears it could have been some \$5000 out of pocket had the monies paid to the demolisher by Archicad not been recovered from the Homeowners.
67. The applicant asserted that shortly afterwards about \$60000 was owing to Archicad and that by June 2008, some \$110,000 was owed by the Homeowners. The evidence does not reveal the components of these amounts. Regarding the \$60000 estimate, the applicant was unable to say how it was made up, other than that it included the \$12000 owing to Queensland Sheet Metal Roofing, which ultimately made an application for the appointment of a liquidator for Archicad, and that these were rough figures. In the context of apparently substantial work being undertaken on the Rendons property, irregular and small payments from the Rendons totalling, as far as the evidence revealed, only \$11000 plus some amounts for outlays were received over a period of 12 months. No amount owing by the Homeowners is revealed in the financial statements. The amounts asserted to have been incurred post June 2008 cannot logically all be owed in respect of work undertaken for the Homeowners. Some of them

appear to be business administration expenses, for example, for a photocopier and subscription expenses.

68. I accept that the applicant kept a record of expenses, but did not undertake any bookkeeping. The financial statements in evidence do not reveal any amount owing to Archicad by the Homeowners. In the liquidation proceedings, the applicant stated that \$8000 was owed to Archicad. No amount from the Homeowners was included.
69. On the balance of probabilities, I consider that there were a series of individual oral contracts for different components of the work. These involved the applicant agreeing to undertake the work either personally or through Archicad. This was done, however, without any clear obligation for defined amounts to be paid by the Homeowners at any particular point in time, other than that from time to time they agreed that some amounts for outlays be paid directly to sub-contractors. The demolisher fell into this category. It follows that I do not accept that the amounts of \$110,000 and \$60,000 are amounts owed by the Homeowners at the stages the applicant asserted.
70. It is clear that the applicant knowingly used Archicad to perform work that Archicad was not licensed through the BSA to perform. Further, he used Archicad to do the work without a written contract even though he knew of the requirements of the *Domestic Building Contracts Act 1991*.
71. Further, irrespective of any agreement between Archicad and the Homeowners about direct payments by the Homeowners to subcontractors, it is apparent that this understanding about the arrangements did not necessarily extend to the subcontractors concerned. The applicant's evidence acknowledges that the demolisher fell into this category. Following non-payment of an instalment by the Homeowners, the applicant paid the demolisher in order to release his liability to Archicad. Whatever that means, it is clear that it involved paying the \$5000 outstanding to the demolisher. Also, liability was incurred by Archicad to suppliers, including Queensland Sheet Metal Roofing. The applicant states that he continued to make payments to suppliers although Archicad had not been paid, and extinguished the debts other than that owing to Queensland Sheet Metal Roofing. In this regard, it appears that the applicant blurred the distinction between himself personally and Archicad.
72. It has been submitted by the applicant that fraud on the part of the Homeowners has been established. As they have not been heard, I would have been reluctant to make such a finding in any event. However, I do not consider that the evidence supports such a finding. It is apparent that the Homeowners were reluctant to enter into a written contract. The applicant considers that they deliberately misled him and 'dragged' him in to the situation. He asserted that the Homeowners have engaged in similar conduct on several other occasions. In this proceeding, it is the actions of the applicant which are relevant. The applicant decided to take what he referred to as a risk to be on site and facilitate the work in the hope or expectation that Construction Design would soon receive a written contract. The applicant made business decisions to undertake work in circumstances when he did not have a written contract, in the absence of any clear oral terms of agreement, through a company not licensed to undertake the work, even after he had realised that he 'was in trouble' by September 2007

when the Homeowners failed to pay an instalment of \$5000 directly to the demolisher.

73. I accept that the applicant took some legal advice regarding recovery of monies from the Homeowners. On one occasion he threatened to take legal action and at one stage intended to pursue recovery. However, his evidence is that the applicant believed he could not recover the 'substantial amount' which he considered outstanding from the Rendons. The substantial amount seems to be the amount alleged to be outstanding of \$110,000. It is accepted that at some point he intended to pursue legal action to recover monies but ultimately gave priority to expending money on other legal matters, firstly for a matter unrelated to Archicad, namely a previous, successful application to the CCT to be categorised as a permitted individual and secondly, in respect of action taken by the concreter to recover monies owing from the Rendons, the applicant and Archicad relating to the Homeowners' project.

74. Further, it is accepted that the applicant continued to make payments to suppliers although Archicad had not been paid, and extinguished the debts other than that owing to Queensland Sheet Metal Roofing.

75. Further, it is accepted that once liquidation proceedings had commenced, he took some further advice from business consultants and attempted to secure a repayment plan.

## **Applying the Law**

### The identification of the relevant event

76. The relevant event is the liquidation of Archicad on 15 April 2009.

### The identification of the circumstances that resulted in the happening of the relevant event

77. The liquidation of Archicad happened because Archicad failed to pay Queensland Sheet Metal Roofing and it took steps to wind up the company. The debt owed to Queensland Sheet Metal Roofing arose during the work on the foundations at the Rendons' property. Archicad was unable to pay Queensland Sheet Metal Roofing because of the situation it had allowed to develop with the Rendons. Singh, as co-director of Construction Design, would not allow work to commence on the project as there was no written contract. The applicant, while aware of Singh's view and following his advice for Construction Design, made a decision to do the work, either personally in respect of the site works or under the guise of Archicad for other works, without clear terms of agreement obliging the Homeowners to make scheduled progress payments or any payments to Archicad.

78. Although substantial work was undertaken on the Rendons project, irregular and small payments from the Rendons totalling only \$11000 plus some outlays was received over a period of 12 months or so. Unsurprisingly Archicad experienced cashflow problems. The applicant had no proper system of monitoring Archicad's cashflow in any event: although he kept a record of expenses, he did not undertake any bookkeeping. However, even without a proper system, in



circumstances where substantial work was undertaken and liabilities incurred to subcontractors and suppliers without any reasonable expectation of payment, it was inevitable that cashflow would be problematic.

79. Archicad did not have a written contract in place. It was allowed to incur expenses without clear contractual obligations in place to for payment to it from the Homeowners. It took advice about the recovery of monies from the Rendons but did not pursue recovery. These circumstances resulted in cash flow problems which ultimately resulted in the liquidation.

A consideration of whether the applicant took all reasonable steps to avoid those circumstances coming into existence

80. The tribunal must have regard to the matters set out in section 56AD(8A). In relation to these matters.

*Keeping proper books of account and financial records*

81. The applicant kept some undefined records which included a list of expenses, but he personally did not do any bookkeeping. It is accepted that he engaged external accountants to keep and prepare accounting records and financial statements for Archicad. These could only be based on the information the applicant provided to the accountants. In cross-examination, the applicant was unable to explain why the amount owing by the Rendons did not appear in financial statements for the relevant period. The financial statements do not reflect the position of the company consistent with the applicant's evidence. This demonstrates a failure to keep and provide to accountants engaged to prepare financial statements proper accounting records for Archicad.

82. Further, it is apparent that at times the applicant blurred the distinction between himself personally and Archicad. For example, he continued to make payments personally for the other liabilities outstanding in the name of Archicad. Accordingly, the financial position of Archicad is not properly reflected by the applicant's evidence about it.

83. The tribunal finds that proper books of account and financial records were not kept.

*Seeking appropriate financial and legal advice before entering into financial or business arrangements or conducting business*

84. The applicant did seek advice about conducting the project involving the Rendons. Singh, his accountant and co-director in Construction Design, advised him that he would not agree to Construction Design beginning work on the project without a signed contract. This advice was accepted by the applicant for Construction Design, but not applied in respect of Archicad.

85. The advice of Singh was accepted to Stop Work on the site in June 2008 and reports some issues to the BSA. However, by then the circumstances leading to the happening of the liquidation had occurred.

86. Legal advice was taken about recovery action. It seems that the advice was that because of the lack of a written contract, recovery could be difficult. It seems that he decided not to pursue any possible action because of cashflow problems, and because he had other calls on him for funding of two other legal proceedings, one relating to Archicad and the other unrelated.

*Reporting fraud or theft to the police*

87. This issue does not arise.

*Ensuring guarantees provided were covered by sufficient assets to cover the liability under the guarantees*

88. There are no relevant guarantees on the evidence.

*Putting in place appropriate credit management for amounts owing and taking reasonable steps for recovery of the amounts*

89. The applicant first met the Rendons in April 2007. The demolition work commenced shortly afterwards. The proposed contract between Construction Design and the Rendons was not signed or returned at any time by the Rendons.

90. On the applicant's evidence, he continued to allow Archicad to perform work and incur liability for over 12 months, despite having realised by September 2007 that the Rendons had difficulty paying a \$5000 payment for demolition works and that he was in trouble. Despite this, he subsequently continued work on the Rendons' property.

91. He did take some legal advice and on one occasion, he threatened legal action.

92. Other than payment of outlays, throughout this period, Archicad received a total of \$11,000 in payments. These were not paid in accordance with any schedule of progress payments as there was not one. Although he engaged accounts to prepare some accounting records, the applicant was keeping inadequate records to allow cashflow to be managed. He was not managing cashflow.

93. I find that that the applicant did not have in place appropriate credit management arrangements.

*Making appropriate provision for Commonwealth and State Taxation debts.*

94. The evidence does not suggest a failure to make provision for taxation liabilities.

*Other Matters taken into account*

95. The tribunal is entitled to have regard to other factors in considering whether the applicant took all reasonable steps to avoid the circumstances coming in to existence. I am entitled to consider the manner in which the applicant conducted the business in a broad sense.

96. The tribunal considers it relevant that not only was there no written contract between the Rendons and Archicad for work performed, the terms of any oral

contract regarding different components of the work undertaken were vague as regards the obligations of the Homeowners to make payments to Archicad. It was not a 'volunteer' when it came in sideways. Whether or not Archicad was initially intended to be part of the contractual matrix, it was placed in that position by the actions of the applicant when he agreed that Archicad undertake work for the Rendons.

97. Steps taken by Construction Design to present and prepare a written contract are not steps taken by Archicad to avoid the circumstances leading to the liquidation. Construction Design is a separate corporate entity.
98. It is relevant that the applicant used Archicad to perform work that Archicad was not licensed through the BSA to perform, despite his understanding that it was unlicensed and was not entitled to enter into a contract to do the work. Further, he used Archicad to do the work without a written contract even though he knew of the requirements of the *Domestic Building Contracts Act 1991*.
99. Also, it is clear that confusion was allowed to develop with at least one subcontractor, the demolisher, about whether it was contracting with Archicad or with the Rendons.
100. It is acknowledged that the applicant continued to make payments to creditors extinguishing other debts, and endeavoured to negotiate with Queensland Sheet Metal after it applied for a liquidator to be appointed, but these attempts were unsuccessful. Further, he paid all other creditors in full. However, by the time these steps were taken, the circumstances that resulted in the liquidation had already occurred.
101. The \$12000 for which the company was ultimately liquidated was a small amount and the shortfall after collection of monies outstanding by the liquidators was smaller. This is probably because the applicant personally was making payments on Archicad's behalf. Accordingly, it is not a true reflection of the position Archicad was placed in as a result of the manner in which the applicant conducted the business, in particular as regards the circumstances that resulted in the liquidation.
102. In all of the circumstances, I am not satisfied that the applicant took all reasonable steps to avoid the coming into existence of the circumstances which led to the liquidation.

And if satisfied in relation to (3), a decision about whether to exercise the discretion to categorise the individual as a permitted individual

103. Given that I am not satisfied as to the threshold issue, I am not required to consider this issue.

### Decision

The reviewable decision to refuse to categorise the Applicant as a permitted individual is confirmed.