

CITATION: Ernst v Queensland Building Services Authority
(No 2) [2010] QCAT 441

PARTIES: Mr Victor Andrew Ernst
v
Queensland Building Services Authority

APPLICATION NUMBER: QR168-09

MATTER TYPE: General administrative review matters

HEARING DATE: 12 April 2010

HEARD AT: BRISBANE

DECISION OF: Mr Alexander Brands

DELIVERED ON: 8 September 2010

DELIVERED AT: BRISBANE

ORDERS MADE: The Tribunal confirms the decision under review.
This means that the appeal is unsuccessful.

CATCHWORDS : Refusal of application to be categorised by QBSA
as a Permitted Individual – section 56AD(1) of
the *Queensland Building Services Authority Act
1991*.

APPEARANCES and REPRESENTATION:

APPLICANT : Mr Victor Andrew Ernst – self-represented

RESPONDENT: Mr Malcolm Robinson, Forbes Dowling Lawyers
– for Respondent

Ms Natasha Dennis – original decision-maker,
Queensland Building Services Authority

REASONS FOR DECISION

HISTORY OF THE APPLICATION

1. On 23 June 2009, the Queensland Building Services Authority (the QBSA) made a decision not to categorise Mr Ernst as a “permitted individual” pursuant to s56AD of the *Queensland Building Services Authority Act 1991* (the QBSA Act).
2. On 23 July 2009, the applicant appealed to the Commercial and Consumer Tribunal (the CCT) for a review of the decision.
3. On 1 December 2009 the CCT and a number of other Tribunals were replaced by the Queensland Civil and Administrative Tribunal (QCAT/the Tribunal).
4. On 12 June 2010 the application was heard by QCAT.

THE LEGISLATION

5. On 1 December 2009, QCAT came into existence. The CCT and a number of other Queensland Tribunals were abolished by the *Queensland Civil and Administrative Tribunal Act 2009* (the QCAT Act).
6. Under section 256 of the Act, a pending proceeding (being a proceeding commenced in one of the Tribunals abolished by the 2009 Act but not heard by the abolished Tribunal prior to 1 December 2009) is taken to be a proceeding before QCAT. This enabled QCAT to hear Mr Ernst’s application.
7. However, according to section 271 of the QCAT Act, the Tribunal only has the functions that the CCT would have had in relation to the pending proceeding under the now repealed *Commercial and Consumer Tribunal Act 2003* (the CCT Act).
8. The *Queensland Building Services Authority Act* (the QBSA Act) and the *Domestic Building Contracts Act 2000* (the DBC Act) were the empowering Acts for the former CCT. Both Acts are still in force.
9. Section 20 of the QCAT Act makes it clear that this review hearing is a fresh hearing on the merits and that the Tribunal is to produce the correct and preferable decision.
10. In accordance with section 19 of the QCAT Act, the Tribunal, in exercising its review jurisdiction:
 - (a) *must decide the review in accordance with this Act and the enabling Act under which the reviewable decision being reviewed was made; and*
 - (b) *may perform the functions conferred on the tribunal by*

this Act or the enabling Act under which the reviewable decision being reviewed was made; and

(c) has all the functions of the decision-maker for the reviewable decision being reviewed.

11. Section 56AC of the QBSA Act provides as follows:

56AC Excluded individuals and excluded companies

(2) This section also applies to an individual if—

(a) after the commencement of this section, a company, for the benefit of a creditor—

(i) has a provisional liquidator, liquidator, administrator or controller appointed; or

(ii) is wound up, or is ordered to be wound up; and

*(b) 5 years have not elapsed since the event mentioned in paragraph (a)(i) or (ii) (**relevant company event**) happened; and*

(c) the individual—

(i) was, when the relevant company event happened, a director or secretary of, or an influential person for the company; or

(ii) was, at any time after the commencement of this section and within the period of 1 year immediately before the relevant company event happened, a director or secretary of, or an influential person for, the company.

*(4) If this section applies to an individual because of subsection (2), the individual is an **excluded individual** for the relevant company event.*

12. Section 56AD of the QBSA Act provides that:

(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.

(3) If the individual applies, the application must include the reasons why the authority should categorise the individual as a permitted 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.

(9) If an individual is categorised as a permitted individual for a relevant event, the individual is taken not to be an excluded individual for the relevant event.

THE ISSUES

13. The issues in relation to the application before the Tribunal are as follows:

- (i) What was the relevant event for the purposes of s56AD of the QBSA Act?
- (ii) What were the circumstances that resulted in the occurrence of the relevant event?
- (iii) Did the Applicant take all reasonable steps to avoid the coming into existence of those circumstances that resulted in the occurrence of the relevant event as required by s51AD(8) of the QBSA Act?; and, if he did

- (iv) Should discretion be exercised, as also required under s51AD(8), to categorise the Applicant as a permitted individual?

BACKGROUND

- 14. The applicant, Mr Victor Ernst, was the sole director of the V&ME Group of Companies (the V&ME Group), which included Freehold Homes Pty Ltd, V&ME Constructions (V&ME) and Queensland Steel Solutions Pty Ltd.
- 15. Freehold Homes Pty Ltd (FHPL / “the company”) was incorporated in Queensland on 28 March 2007. The company was involved in the manufacture of steel house frames and trusses used in the construction of dwellings. The majority of the steel frames produced by FHPL were sold directly to the public whilst a smaller percentage was sold to related company entities. The company leased some plant and equipment utilised in its operations from V&ME.
- 16. The relevant event for the purposes of ss56AD of the QBSA Act was the appointment on 30 April 2009 of Mr Robert Murphy and Mr David Hambleton as administrators of FHPL.
- 17. The administrators were appointed by the applicant in his capacity as director of FHPL.

SUBMISSIONS

The circumstances that resulted in the happening of the relevant event.

- 18. The applicant submitted that certain projects that V&ME were involved in were cancelled and this affected FHPL's viability because V&ME was to purchase steel frames for those projects from FHPL. As a result FHPL suffered a loss of income.
- 19. Mr Ernst further stated that FHPL's related entities had been financially supporting the company with loan funds. However, the cash flow of these entities was reduced due to the cancellation of projects. As a consequence, these entities could not continue to support FHPL. This in turn resulted in the company being unable to meet its debts as and when they fell due, and this prompted the applicant to place the company in voluntary administration.
- 20. Mr Ernst submitted that another main cause of the relevant event was the inability of the company to recover amounts owing. This issue was said to have arisen in September 2008, that is, in the second year of the company's existence
- 21. The applicant identified a further cause of the relevant event as being the effect of the “economic downturn” on land sales and building income.

22. The respondent's view of the circumstances that resulted in the relevant event differed from the applicant's. The respondent said that no evidence was proved in relation to the alleged decline in land sales and building income, for example as to when this is supposed to have happened, the amount of money involved, or the effect on FHPL's financial position.
23. The respondent submitted that the evidence showed the main cause for the relevant event was not related to FHPL but rather was litigation in respect of V&ME.
24. The submissions in relation to whether Mr Ernst took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the occurrence of the relevant event were as follows:-

Keeping proper books of account and financial records

25. The administrators' evidence before the Tribunal was that FHPL had not maintained books and records in accordance with section 286 of the *Corporations Act 2001*. FHPL was poorly managed financially. There was incorrect costing of projects and poor management of accounts receivable.
The administrators also noted that there were two different sets of accounts for the company. Inadequate books and records were kept, including incorrect reading of transactions in the company's internal accounts leading to a distortion of the company's financial position. There was an admission by the applicant of "creative accounting" in his role as director of FHPL. He was also unable to explain to the administrators why there were two different sets of accounts for the company. There was no evidence that FHPL ever produced accounts signed off by Mr Ernst as FHPL's director. All of FHPL's debtors are disputing FHPL's claims.
26. Mr Ernst acknowledged that there were irregular transactions, not properly recorded in the books, for large amounts.
27. The respondent submitted that Mr Ernst had provided no evidence in relation to the financial position of FHPL at any point in time, including no financial statements.

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

28. Mr Ernst said that before the relevant event he sought advice about administration and the alternatives from Mr David Dowd, Hemming and Hart solicitors.
29. The respondent submitted that there was no evidence that legal, professional or accountancy advice had been sought, including any accountancy advice in relation to FHPL's financial position or the tax issue. For example, no evidence was provided by Mr Ernst as to what assets or income had been lost as a result of the former director's

actions; what the effect was on FHPL of those actions; and whether any advice had been sought or any action taken in relation to the former director's actions.

Reporting fraud or theft to the police.

30. There is no suggestion of fraud or theft in this case.

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

31. There are no relevant guarantees in this case.

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

32. The applicant submitted that at the time of the relevant event the total amount owing to creditors was \$188,041.12 excluding disputed claims and related party funding.

33. This figure was disputed by the respondent who submitted that in the documentation provided by the applicant, the list of unsecured creditors showed they were owed a total of \$398,006.03. This figure was broken down into \$209,964.91 in disputed debts involving the former director and \$188,041.12 in other debts. Other creditors were disclosed and these were owed a total of \$254,209.00. Related party creditors, according to the liquidator, were owed a total of \$2,030,438.00.

34. Mr Ernst said that a former director and his associates had made numerous disputed claims. The applicant claimed that his attempts to collect \$646,716.52 were stalled by the QBSA. He further asserted that any legal action would not have been cost effective as the former director had no funds, had several companies in receivership and had "multi-million law suits already against him." Although recovery action was commenced there was a counter-claim of \$2.8 million, and it was at this point that the applicant placed the company into voluntary administration.

35. The respondent submitted that all the evidence provided by the applicant in relation to the recovery of amounts owing were for not for FHPL but for a different company, namely V&ME and that the claim was not in the name of FHPL.

36. In relation to creditors the respondent further submitted that there was no evidence as to the period over which debts were incurred or what provision had been made for payment or what steps had been taken to pay them or what if any negotiations had taken place with them. No evidence was provided as to what steps had been taken to meet financial obligations.

Making appropriate provision for Commonwealth and State taxation debts

37. The respondent submitted that at the time of the relevant event \$20,741.50 was owed to the ATO, and that there was no evidence of when and how this occurred, of planning for tax liability, nor of any arrangements discussed with or entered into with the ATO regarding this.
38. Mr Ernst's evidence was that when tax fell due he injected funds from elsewhere in the V&ME Group. He provided no evidence that advance provision was made for tax.

DISCUSSION OF THE EVIDENCE

39. There is no dispute in this case that the relevant event was the appointment of administrators to Freehold Homes Pty Ltd (FHPL) on 30 April 2009.
40. There is also no dispute that the applicant, Mr Victor Ernst, was the sole director of FHPL at the time.
41. The Tribunal agrees with the respondent that any evidence in relation to whether Mr Ernst took reasonable steps to avoid his company, FHPL, going into liquidation, must focus on FHPL, and not on the V&ME Group of companies to which FHPL belonged or on what was best for the V&ME Group. For example, given that each company in a group has its own separate creditors, the director of each company should consider the interests of its own company rather than the interests of the group as a whole: *Walker v Wimborne* (1976) 137 CLR at 7; 3 ACLR 529; CLC 40-251 per Mason J.
42. The main cause of the relevant event alleged by the applicant relates to V&ME. The evidence shows that this is not related to FHPL but was litigation in respect of V&ME.
43. There was no evidence that Mr Ernst sought appropriate financial or legal advice before entering into financial or business arrangements or conducting business. The only advice sought was in relation to placing FHPL into administration.
44. The evidence is clear that proper books of account and financial records were not kept in respect of the company in question, FHPL. Mr Ernst admitted that there were two different sets of accounts for the company and that there was "creative accounting" in respect of FHPL.
45. In relation to proper credit management the applicant's evidence in relation to the recovery of amounts owing were for not for FHPL but for another company in the Group, namely V&ME and that the claim was not in the name of FHPL.
46. In relation to making appropriate provision for Commonwealth and State tax debts, Mr Ernst's evidence was that when tax fell due, the

necessary funds were provided to FHPL by other companies in the V&ME Group. There were no independent or advance provisions made for FHPL. This meant that FHPL was vulnerable to the fortunes of those other companies with regard to its tax liabilities.

CONCLUSION

47. Subsection 8 of s51AD of the QBSA Act requires a consideration of whether the applicant took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event.
48. On the basis of all the evidence before it the Tribunal finds that the applicant has failed to show that he took all such reasonable steps as required and the application therefore fails.
49. The Tribunal affirms the decision under review. This means that the Application for a review of the decision made by the QBSA on 23 June 2009 is unsuccessful.