

**CITATION:** Haggett v Queensland Building Services Authority [2010] QCAT 662

**PARTIES:** Mr Gary John Haggett  
v  
Queensland Building Services Authority

**APPLICATION NUMBER:** **OCR057-10**

**MATTER TYPE:** General administrative review matters

**HEARING DATE:** 11 October 2010

**HEARD AT:** BRISBANE

**DECISION OF:** Mr Adrian Williams

**DELIVERED ON:** 22 December 2010

**DELIVERED AT:** BRISBANE

**ORDERS MADE:** The decision of the Respondent dated 4 February 2010 refusing to categorise the Applicant as a permitted individual is confirmed.

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

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

**APPLICANT :** Mr Gary John Haggett represented by Mr Craig Ray (Solicitor) of Craig Ray & Associates, Solicitors

**RESPONDENT:** Queensland Building Services Authority represented by Malcolm Robinson (Solicitor) of Forbes Dowling Solicitors

## REASONS FOR DECISION

### Introduction

1. This was an application brought by the Mr Gary John Haggett ("the Applicant") to review a decision of the Queensland Building Services Authority ("the Authority") to refuse to categorise him as a "permitted individual" for a relevant event.
2. The application was heard in Brisbane on 11 October 2010.
3. The relevant event was the appointment of a voluntary administrator for the company, Barks and Splinters Pty Ltd ("BNS") on 17 December 2009.
4. Following the placement of BNS into voluntary administration, the Authority gave notice to the Applicant on 22 December 2010 that, pursuant section 56C of the Queensland Building Services Authority Act ("QBSA Act"), he was considered an excluded individual.
5. On or about 28 January 2010 the Applicant applied to become a permitted individual under section 56AD (8) of the QBSA Act. The Authority refused the request and that is the decision being reviewed.

### Evidence before the Tribunal

6. The documentary evidence before the Tribunal comprised the following:
  - (a) The Authority's letter to the Applicant advising that the Applicant is an excluded individual.
  - (b) The Applicant's, (undated), application to be categorised as a permitted individual.
  - (c) The Authority's letter to the Applicant dated 4 February 2010 notifying of its decision to refuse the application.
  - (d) The Authority's Statement of Reasons for its decision dated 20 April 2010
  - (e) The Applicant's Application to review the decision filed 5 March 2010.
  - (f) The Applicant's Statement dated 20 May 2010.
  - (g) The Applicant's Supplementary Statement dated 18 June 2010 in response to a list of questions forwarded to him by the Authority.
  - (h) The Applicant's further supplementary Statement dated 19 August 2010.
  - (i) Statement of Tony Lambert.
  - (j) Statement of Stephen John Murphy dated 19 August 2010.
  - (k) A bundle of financial records of BNS between 2006 and 2009.

- (l) Statement of Natasha Dennis on behalf of the Authority.
- (m) Letter dated 13 July 2010 from Craig Ray & Associates Solicitors to the Authority.

A bundle of other documents was handed up on behalf of the Applicant at the hearing comprising:

- (n) ATO payment arrangement letters dated 16 October 2007, 7 June 2008 and 21 November 2008.
- (o) A number of Invoices from the Applicant's Accountants, Murphyco, and 3AM Solutions and his Bookkeeper, Balanix Solutions Pty Ltd.
- (p) A number of MYOB Reports as follows:
  - Card Transactions [Accrual] 1/1/2007 - 28/9/2010.
  - Profit and Loss [with year to date] June 2008
  - Profit and Loss [with year to date] June 2009
  - Aged Payables [Summary] 19/7/2007
- (q) Closing submissions on relevant law and facts.

The Authority for its part provided at the hearing the following additional documents:

- (r) Closing submissions on relevant law.
- (s) Closing submissions regarding the facts.

In terms of oral testimony this was provided solely by Mr Hackett. With the consent of both parties' legal representatives, Ms Dennis was excused from giving oral evidence on behalf of the Authority and her Statement was accepted as her evidence in chief.

## **Background**

7. It is relevant to set out the background of the establishment and the history of the operation of BNS between 2005 and when it was placed in the hands of a Administrator in December 2009. This will initially take the form of a chronology of the significant business events, set alongside some of the key financial events.

8. The Applicant caused BNS to be formed on 30 May 2005. Prior to that time he had worked as a cabinet maker for some 20 years. He had previously been involved in a partnership between his own company Hagfast Pty Ltd and another company MTCO Pty Ltd. The former company was placed into liquidation after a principal customer and debtor of the partnership went into liquidation owing the partnership significant amounts of money. As a result the Applicant applied to the Authority to be categorised as a permitted person which the Authority approved.

9. The Applicant initially conducted the business himself as a cabinet making/shop fit out firm. In early 2006 the Applicant and his wife, Helen Glover discussed the possibility of her establishing and operating an interior design consultancy business which would expand the scope of the business and create opportunities for the cabinet making side of the business.

10. According to Mr Murphy, the Applicant and Ms Glover met with him to discuss the proposed expansion of the business. He said in his statement that:

*"the aim was to produce an additional source of revenue and to expand the client base of the business so that it would generate additional revenue and cash flow at good margin and provide a wider breadth of income sources. Initially this operation was to be carried on from the company's existing premises and utilising existing resources and therefore the cost of establishing this business or additional business would not be significant at all..."*

11. Mr Murphy went on to make the following observation in his statement concerning his recollection of those discussions with the Applicant and Ms Glover.

*"I do recall that some of our meetings in relation to the expansion of the business revolved around discussions in relation to limiting liability, the importance of profits being generated in Barks and Splinters Pty Ltd and consideration of separating the business into separate entities such as a unit trust to facilitate the introduction of third parties into the business who would introduce additional skills."*

The fact that this advice was not followed and the new interior design business was conducted under the umbrella of BNS would be a significant factor in the company's financial future.

12. The new arm of the business was operated out of the company's existing premises however in October or November 2006 rental space became available at Station Road Samford and the design business relocated there. The Applicant's evidence was that this relocation cost approximately \$10,000.00. The Samford premises were fitted out including the construction of complete kitchens including appliances and model kitchens and display bathrooms. Further expenses included the purchase of samples and display stock for resale.

13. The Applicant in his evidence said that he and Ms Glover realised that it would take several years for a return to be made by the company on its initial expenditure in setting up the design business and this would be achieved once its customer base grew.

14. Subsequent to this in June 2007 the Samford premises were no longer available and new rental premises were leased at Mt Glorious Road Samford. The Applicant gave a range of figures for the cost of this relocation and fitout of these premises being between \$60,000.00 and \$80,000.00. In his statement of 18 June 2010 the Applicant said that he did not, at the time, consider this to be a large impost on the company.

15. In September 2008 the Applicant and Ms Glover agreed to open a further retail outlet at Ascot with a view 'to tapping into a wider market.' The cost of this relocation and fitout was \$60,000.00. In his Statement of 18 June 2010 the Applicant said in response to questions put to him by the Authority through its

lawyers that "by September 2008 the company was clearly under pressure and the Samford premises had to be closed and the idea of also expanding to Ascot opened the possibility for the company to access a different part of the market." By early 2009 the Samford showrooms had been closed and Ms Glover located premises at Fortitude Valley whose overheads were less than those of the Samford premises. This was completed by August 2009 and cost between \$60,000.00 and \$70,000.00

16. From the statements provided by and on behalf of the Applicant it was also clear that his marriage from 2008 onwards was under significant strain. Mr Lambert who was engaged by the company as its Accountant in 2008 notes in his statement that he observed the relationship was strained and that, in his view, Mr Haggett was under immense pressure and emotional turmoil applied by his wife. In Mr Haggett's June statement he said that the situation in the matrimonial home became difficult in early 2009 and he left the matrimonial home in July of that year.

17. By mid 2008 onwards the evidence suggests that the business was unable to meet its debts as they fell due. Mr Haggett in his statement of 18 June 2010 deposed that the company was in arrears by mid 2007 although the company had lodged its BAS Statements on time. In June 2008 BNS entered into a payment arrangement with the Australian Tax Office (ATO). Tendered in evidence at the hearing were two such payment arrangement notices dated 7 June 2008 and 21 November 2008. In the first BNS committed to make monthly payments of \$3,600.00 per month from 13 June 2008 until 13 March 2010. Mr Haggett in his June statement indicated that 4 instalments were paid under that arrangement. In the second notice these instalments had increased to \$8,000.00 per month payable between 20 December 2008 and 20 March 2010. In his oral evidence at hearing Mr Haggett deposed that the debt due to the ATO comprised a combination of overdue GST and PAYG instalments. In his evidence he said that the company had only managed to make the first four instalments specified under the second payment arrangement and was not able thereafter to comply with payment of the subsequent instalments. With regard to superannuation, Mr Haggett, in his June statement, deposed that these fell into arrears in late 2008 although two payments were made of \$3,000.00 each in September and November 2008.

18. The positioned worsened significantly in 2009. Firstly a significant trade debtor owing BNS \$135,000.00 failed to pay the company's invoice within its terms of credit. By March of 2009 the Applicant was aware that this had become a problem account, he sought legal advice with respect to recovering the monies owed as well as directly negotiating with the client. It was eventually paid in full by September or October 2009.

19. The deterioration in Mr Haggett's relationship with Ms Glover also affected the business and his capacity to manage it. The evidence suggests that from September 2009 all business related communication directly between them effectively ceased and was thereafter conducted between their lawyers. Based upon a letter sent by the appointed receivers SV Partners to Ms Glover on 19 January 2010 it appears that the Ascot premises were closed by Ms Glover in November 2009 and the stock and business equipment relocated to the Fortitude Valley premises located at 9 Hynes Street. It would appear at some point Ms Glover caused a new corporate entity HG Online Pty Ltd, of which she was the

sole Director and Shareholder, to be incorporated and was, thereafter, conducting the design arm of BNS through that entity.

20. Apart from the ongoing conflict and lack of communication with his estranged wife the stress this caused Mr Haggett affected his capacity to run the business. He indicated that as a result of this stress he has been diagnosed with depression. In support of this, Mr Haggett submitted a brief medical report from his GP, Dr Raymond Edward Collins dated 26 February 2010. Dr Collins in that report said that Mr Haggett exhibited all the symptoms of mixed anxiety and depression. He has been treated with anti depressant medication and been referred to a clinical psychologist and a Psychiatrist with good results to date.

21. Mr Haggett in his applications to the Authority and to the Tribunal also placed events arising out of the Global Financial Crisis as another key factor in the demise of the business. In his statement of 19 August 2010 he deposed that its principal effect was that the number of forward orders dramatically diminished and that it had been a factor in the client, referred to in paragraph 18 above, failing to pay its account where previously this client had always paid within BNS's credit terms. He indicated that the global financial crisis, the subsequent downturn in future business orders and the non payment of an invoice for a significant amount of money were all events that could not reasonably be foreseen.

22. By late 2009 Mr Haggett, on his own evidence, realised that the company could no longer continue to properly function due to his wife's failure to cooperate in the conduct of the business and the businesses overall financial position. He therefore engaged Mobile Accounting Solutions to review the company's overall financial position and whether, in its view, the company could trade its way out of its difficulties. In that firm's letter to the Authority dated 28 January 2010 it indicated that it advised Mr Haggett that the company should be placed under administration and that, in part, it based its decision on its opinion that Mr Haggett did not have the drive, energy and focus to guide BNS out of its then current financial position.

23. In both his oral and written evidence Mr Haggett deposed that he had consistently used a MYOB accounting package to keep track of the business performance. He employed a bookkeeper whose responsibility it was to do data entry on a fortnightly basis and provide regular reports. He said that he would also do some of the data entry himself. His evidence was that he engaged Mr Roger Donnelly between 2007 and April 2009. Thereafter he engaged Mr Tony Lambert as his Accountant between April 2009 and September 2009 but terminated this engagement as he felt he was not receiving appropriate service and that Mr Lambert may have a conflict of interest as he was acting for his now estranged wife on a separate account. BNS's final Accountant was Mr Tony DAgostino of Mobile Accounting Solutions.

#### The Legislation

24. The Authority made a written submission concerning the relevant law that should be applied in cases such as this application and counsel for the Applicant expressly agreed that it should be followed, which I will do.

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.*

25. The Tribunal has jurisdiction to review the Authority's decision to refuse to categorise the Applicant as a permitted individual under section 86 of the QBSA Act.

26. 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*<sup>27</sup>. 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 any direction the Tribunal considers appropriate*

28. The Authority in its submission on the relevant law refers to the onus of proof” and submits that “it is not appropriate to speak in terms of onus of proof”. I accept that submission and I also accept that in any event the Applicant 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**

29. I accept the Authority’s submission that in line with the Act and previous decisions of the former 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.

30. This approach has, of late, been confirmed by Judge McGill in the District Court decision in *Younan v QBSA [2010] QDC 158* (22 April 2010).

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

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

33. As outlined in the chapter entitled Evidence before the Tribunal, written evidence was provided by the Applicant by way of three statements as well as supporting statements from his previous and current Accountants, Mr Murphy and Mr Lambert. In addition there was additional financial material provided which provided a snapshot of BNS’s financial position during the relevant period. The Authority for its part relies upon the evidence of the decision maker Ms Natasha Dennis, its own statement of reasons and the responses made by the Applicant to its series of questions it put to him in August this year. The Applicant gave oral evidence and was cross-examined at the hearing.



## **(1) The relevant event**

34. It is uncontested that the relevant event was BNS being placed into voluntary administration on 17 December 2009.

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

35. It was the Applicant's submission both in its application to the Authority and to the Tribunal that the circumstances which led to the event occurring were both beyond his capacity to foresee or control. These were the breakdown of his marriage and the knock on effects of what is now commonly referred to as the global financial crisis. It is clear that both of these events were significant precursors to the relevant event itself. In particular the breakdown of Mr Haggett's marriage with his wife and business partner led to a position in which there was effectively no communication between them in relation to vital business decisions at a time in which the business was in financial strife and where it may have been possible to have taken some remedial action which may have averted the relevant event from being a necessary outcome. It is not difficult to feel profound sympathy for the situation Mr Haggett found himself. As to the financial crisis and the effect it had in reducing forward orders and creating problem debtors out of formerly financially sound clients, this too was not readily foreseeable.

36. That said there were clear indications that BNS was having difficulty paying its debts as and when they fell due. It would appear that signs of this were evident by the first few months of 2008. The evidence of this financial instability were:

a. BNS had fallen into arrears with its tax payments with the ITO necessitating it entering into two repayment arrangements with the ATO and both of which BNS was unable to comply with; and

b. BNS at least by 2008 and possibly earlier was in arrears in its obligations to pay superannuation contributions to its staff;

c. In Mr Haggett's own evidence it is clear that despite the original business plan prepared in consultation with their Accountant for the interior design business specifying that there would not need to be significant capital expenditure to make it operational, the exact opposite occurred: Or as Mr Murphy in his statement deposed:

*"Initially this operation was to be carried on from the company's existing premises and utilising existing resources and therefore the cost of establishing this business or additional business would not be significant at all..."*

37. Between 2006 and 2008 as various premises were opened (and then subsequently closed), stock purchased and fitouts made, significant sums were spent as follows.

Station Street Samford      \$10,000.00

Mt Glorious Road Samford Between \$60,000.00 and \$80,000.00

Ascot                              \$60,000.00

38. Whilst it is acknowledged that by 2008 the interior design business was commencing to return a profit it is also clear that in a little over three years over \$190,000.00 was spent on these relocations and at a time when BNS was unable to both make provision for its taxation and superannuation obligations and further then unable to comply with payment arrangements it entered into with the ATO to repay these debts.

39. As I observed earlier the fact that both the original business and the interior design business were conducted by the one corporate entity, despite some initial consideration being given to splitting them into separate trading entities also, it would seem, inextricably linked the financial futures of the two limbs such that when the time came there was not the options available to bring in fresh capital or other financial partners.

40. Based on these observations I find that these were the circumstances that led to the happening of the relevant event. Although the breakdown of Mr Haggett's personal relationship with Ms Glover, in turn resulting in her lack of communication and cooperation with him in the conduct of the business, acted to hasten the need to appoint an Administrator, it was of itself not the circumstance that led to this outcome. Similarly the same could be said for the impact of the financial crisis. The turnover of the business peaked in January 2009 and thereafter significantly declined. It may have been possible, in other circumstances, for the business to be placed on a "recession footing" by reducing expenditures closing certain non-performing parts of the business.

41. Some of these things the Applicant did in fact address, for example by significantly reducing the number of employees and ceasing to take a wage in the final six months of the business's operation. However by this time these left BNS unable to address its debts particularly its tax and superannuation arrears.

**(3) Did the Applicant take all reasonable steps to avoid the coming into existence of those circumstances?**

42. For the purpose of making findings on this requirement I will restrict my observations to items (a), (b), (e) and (f) of Section 56AD 8A of the Act. No evidence is before me with respect to the other subsections dealing with fraud and guarantees. I also take note of the approach laid down in *Younan v Queensland Building Services Authority* as how these indicia as laid down in Section 56AD 8A should be viewed:

*"It is immediately apparent that these are all concerned with the prudent management of a company as an ongoing business, or even, in the case of (b), something which is to be done before one conducts business or enters into financial or business arrangements.[8] In other words, the focus of this subsection is on prevention rather than dealing with problems after they have arisen, except in the case of (c), which is obviously concerned with a situation where a problem has arisen outside the control of the individual in question".*

*Younan v QBSA [2010] QDC 158 at par 24*

43. The Applicant submitted that he had throughout the course of the business kept his financial records and books of account up to date. His Solicitor's closing submission was that the accounts were done on a regular basis (weekly to fortnightly) using MYOB accounting software. This was done by the company's bookkeeper and reviewed by the company's Accountants so that taxation returns could be lodged. Most importantly in their submission all taxation and BAS were lodged with the ATO in a timely manner.

44. The Respondent submitted that there was either no or insufficient evidence that reasonable steps were taken in the financial management of the business and in particular:

- a. Preparation of financial documents was not done in a timely manner on a monthly and quarterly basis;
- b. There was no balance sheet prior to December 2009 (although this was withdrawn on the basis of evidence that it had been done);
- c. There was no evidence of monitoring of the viability of contracts the company was undertaking or of monitoring overheads and staffing levels;
- d. Whilst there is indication of injection of funds into the company, there is no evidence of assessment of how much was required for the operations of the company, nor when the injections were, nor the effect of these injections;
- e. There is no indication of the assessment of the viability of the operations of each of the business units operated by the company; for example were they all profitable? Was there assessment as to cessation of non-viable businesses;
- f. There was no evidence of accountancy advice with respect to cashflow prior to November 2009;
- g. There was no evidence that the books of the company were prepared properly, or at all, from month to month in MYOB or another software program.

45. Much of Mr Haggett's oral testimony in both his evidence in chief and under cross examination dealt with the issue of the systems that he put in place to ensure the company's financial records were kept up to date. From this testimony I accepted that he used his best endeavours to ensure data was entered regularly and that he kept a close eye upon accounts payable and owing.

46. It is also clear that there were a number of Accountants engaged principally to prepare tax and GST returns. That said it was also clear that at a strategic level the company was not managed at a level appropriate to its level of complexity and sources of cashflow. Significant business decisions were made without the benefit of cost benefit analysis being conducted. As I observed earlier significant sums of money were spent in establishing, equipping and fitting out four different retail or showrooms for the interior design business. This at a time when the company was significantly in arrears in its tax obligations and then unable to meet an agreed payment plan with the ATO.

47. In my view at least as early as the first half of 2008 it would have been reasonable to have sought appropriate financial or legal advice before entering into these financial or business arrangements and in particular to keep the initial business plan under review as it unfolded, which in turn required significant and frequent injections of capital into the interior design business.

48. Mr Haggett gave evidence as to his monitoring of debtors. I accept, subject to the following caveat that this was done on a regular basis. Not much was provided by way of evidence as to whether this monitoring was across all of the businesses or just his cabinet making business. It was difficult therefore to determine how diligent he had been and whether he left the responsibility for Ms Glover's business for her to monitor.

49. The principal failing in the conduct of the business was the failure to make provision for taxation liabilities and superannuation instalments as they fell due. The company existed with this state of affairs from early 2008 until the appointment of an Administrator and this was clearly not adequately addressed during this period.

50. The further reasonable steps that could have been taken by the Applicant largely relate to the engagement of outside legal and financial advice to adequately manage and oversee the business as it grew. In the 2008/2009 financial year it was generating nearly 1.5 million dollars in income. Despite this the company had difficulty meeting its basic obligations to pay tax and superannuation. Timely and targeted advice at this point may well have generated strategies to avoid the circumstances which led to the relevant event.

51. In making this observation I am expressly taking into account the approach taken in *Younan v Queensland Building Services Authority [2010] QDC 158 at par 26* when assessing what may amount to a reasonable step:

*"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."*

52. A reasonable Director in the circumstances I have outlined above, and in which Mr Haggett found himself, would have thought it prudent to obtain appropriate advice as to the business's cash flow needs, once it became apparent that it had generated a tax debt and that this need would have been even more apparent when it was evident the company, within a matter of months after committing to repay the arrears, would not be able to comply with the agreed payment plan.

53. On the basis of the evidence placed before the Tribunal I accept that there were other reasonable steps that could have been taken by the Applicant to avoid the relevant circumstances coming into existence.

## **Findings**

54. Therefore taking all of these matters into account I find the Applicant failed to take all reasonable steps to avoid the circumstances that resulted in the company being placed into voluntary administration on 17 December 2009.

55. The Tribunal orders that the Authority's original decision be confirmed.