QCAT

Queensland Civil and Administrative Tribunal

CITATION:	*Queensland Building Services Authority v Meredith* [2010] QCATA 50
PARTIES:	Queensland Building Services Authority (Appellant) v Steven Grant Meredith (Respondent)
APPLICATION NUMBER:	APL104-10
MATTER TYPE:	Appeals
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	Justice Alan Wilson, President
DELIVERED ON:	**16 September 2010**
DELIVERED AT:	Brisbane
ORDERS MADE:	**The decision of the learned Tribunal member is set aside and the decision of the QBSA is reinstated.**
CATCHWORDS :	DOMESTIC BUILDING DISPUTE – REVOCATION OF BUILDER'S LICENCE – BANKRUPTCY – REVIEW OF DECISION – APPEAL FROM REVIEW – *Queensland Building Services Authority Act* 1991, s 56AC(1) – MEANING AND EFFECT – where respondent lodged a debtor's petition under Part IV of the *Bankruptcy Act* 1966 (Cth) – where his creditors accepted composition and bankruptcy annulled – where the QBSA sent a notice to the respondent that he was an "excluded individual" and revoked his licence pursuant to 56AC of the QBSA Act – where member of QCAT overturned the decision of the QBSA on review – where member found that annulment of bankruptcy nullified filing of petition – where applicant alleges that member failed to correctly apply s 56AC – whether respondent "took advantage of the laws of bankruptcy" or became "bankrupt" pursuant to s 56AC – whether "becomes

bankrupt" in s 56AC refers to provisions of the Bankruptcy Act or the fact of bankruptcy itself – whether member erred in application of s 56AC – whether error of law

Bankruptcy Act 1966 (Cth), Part IV, ss 73(4), 74(5)
Corporations Act 2001 (Cth), ss 206E, 206F
Queensland Building Services Authority Act 1991, ss 42(1), 56AC, 56AF, 86(1)(k)(i)
Queensland Civil and Administrative Tribunal Act 2009, ss 20, 24,142

Lombardo v Federal C'ssner of Taxation (1979) 40 FLR, applied
Oates v Commissioner of Taxation [1990] FCA 510, applied
Roberts v Wayne Roberts Concrete Constructions Pty Ltd [2004] NSWSC 734. cited
Shi v Migration Agents Registration Authority [2008] HCA 31, cited
Union Club v Battenberg [2006] NSWCA 72, cited

REASONS FOR DECISION

[1] The *Queensland Building Services Authority Act* 1991 (QBSA Act) has the announced objects of regulating the building industry by, among other things, ensuring the maintenance of proper standards and achieving a reasonable balance between the interests of building contractors, and consumers. One of the ways in which the Act seeks to achieve those purposes is to create an authority, the Queensland Building Services Authority (QBSA), and giving it the power to issue licences to builders; and, in providing that only licensed builders may carry out building work[1].

[2] QBSA also has power to take a builder's licence away[2]. It decided to categorise Mr Meredith as an "excluded individual", meaning he could not hold a licence. He applied to QCAT to review that decision and on 27 April 2010 a member of this Tribunal set aside the QBSA decision. QBSA appeals the member's decision to this Appeal Tribunal.

[3] QBSA's decision process required it to give notice to Mr Meredith that it considered him to be an excluded individual, with reasons, and it did so[3]. That decision may be reviewed by QCAT[4]. In exercising its jurisdiction

1 QBSA Act, s 42(1)
2 ibid, Part 3A
3 QBSA Act, s 56AF
4 QBSA Act, s 86(1)(k)(i)

this Tribunal must decide the review in accordance with both the *Queensland Civil and Administrative Tribunal Act* 2009 (QCAT Act) and the enabling Act (here, the QBSA Act); produce, by the review, the correct and preferable decision, and do so by hearing and deciding the matter by way of a fresh hearing on the merits[5]. The Tribunal may confirm or amend the decision, or set it aside and substitute its own decision[6].

[4] QCAT has an internal appeals procedure, with an automatic right of appeal to this Appeal Tribunal if the grounds of appeal involve questions of law alone.[7] That is the case here.

[5] It is appropriate to note, in passing, the odd wording of s 20(1) of the QCAT Act which provides that the purpose of the review is to produce the "correct **and** preferable" decision. The term commonly used in similar legislation touching administrative review and, I think, the better expression is "the correct **or** preferable" decision – for reasons explained by Kiefel J in *Shi v Migration Agents Registration Authority*[8].

[6] The parties provided the member with a statement of agreed facts, which remain uncontentious.

[7] On 30 September 2009 Mr Meredith lodged a debtor's petition under Part IV of the *Bankruptcy Act* 1966 (Cth) (BA). On 12 November 2009 his creditors resolved to accept his proposal for a composition pursuant to s 73(4) of the BA and on the same day his bankruptcy was annulled under s 74(5). On 17 November 2009, however, QBSA issued a written notice under s 56AF of the QBSA Act notifying him that the Authority considered him to be an "excluded individual".

[8] In doing so, QBSA said the event which caused it to come to that decision was that "… *on or about 30 September 2009 you entered into bankruptcy under the Bankruptcy Act 1966 (Cth)"*. QBSA identified the reason for its decision as:

> You became bankrupt or otherwise took advantage of bankruptcy laws by entering into a Part IX agreement or Part X arrangement or agreement under the *Bankruptcy Act* 1966.

[9] The learned Tribunal member determined the matter on the papers after receiving the agreed statement of facts and written submissions from the parties. She concluded that the effect of the annulment of Mr Meredith's bankruptcy was to render it a nullity, with the consequence that he was thereby "…*put back into the position he was prior to the filing of the debtor's position*". By inference, it may be taken that the learned member concluded that he had not, therefore, "become bankrupt" and QBSA was not, therefore, entitled to categorise him as an excluded individual.

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5 QCAT Act, s 20
6 QCAT Act, s 24
7 QCAT Act, s 142
8 [2008] HCA 31 (30 July 2008)

[10] The phrase appears in s 56AC of the QBSA Act, which relevantly provides:

> **56AC Excluded individuals and excluded companies**
> (1) This section applies to an individual if—
> (a) … the individual takes advantage of the laws of bankruptcy or becomes bankrupt (***relevant bankruptcy event***);
> …
> (3) If this section applies to an individual because of subsection (1), the individual is an ***excluded individual*** for the relevant bankruptcy event.

[11] Section 56AF applies if QBSA considers that an individual who is a licensee is an excluded individual for a relevant event. As remarked earlier that is what occurred and the Authority gave Mr Meredith the notice in terms set out above.

[12] QBSA contends that the learned member erred in law in failing to correctly apply s 56AC and that she should have found that Mr Meredith had either "*taken advantage of the laws of bankruptcy*" or had become bankrupt; and, in either event, that she should have found that he was in truth an "excluded individual" within the meaning of that expression in s 56AF.

[13] Although the Authority's submissions to the Tribunal addressed both phrases the decision refers only to "becomes bankrupt" and it does not appear that the learned member expressly considered the question whether he might have "*taken advantage of the laws of bankruptcy*". Although that phrase appears in a number of other pieces of legislation in Queensland, neither parties' submissions (prepared, in each case, by counsel) was able to refer to any judicial consideration of its meaning.

[14] It is clear the relevant phrases are used disjunctively in s 56AC(1)(a). Bankruptcy is, of course, a process which enables an orderly division of a bankrupt's property amongst creditors and, eventually, lets the bankrupt start afresh and free from the burden of debt. The Commonwealth BA creates consequences for the property and status of the bankrupt and, also, the means by which the bankruptcy can be brought to an end. The "advantage" is eventual absolution from debt.

[15] Whatever the proper meaning of the expression "takes advantage of the laws of bankruptcy", it was plainly intended to have a different meaning from "becomes bankrupt".

[16] The phrase "*take advantage of*" is, in its ordinary meaning, synonymous with "*use*". Here, Mr Meredith entered into bankruptcy but then, as is uncontentious, his creditors voted in favour of accepting a composition under s 73 of the BA, leading to annulment. In the context of s 56AC, then, applying the ordinary meaning of the phrase can lead to results that are unreasonable: for example, that a person might find themselves categorised as an excluded individual if they use the laws of bankruptcy to have their bankruptcy annulled.

[17] The *Acts Interpretation Act* 1954 permits consideration of extrinsic material capable of assisting interpretation if the ordinary meaning of words leads to a result that is unreasonable[9]. The Explanatory Memorandum to the *Queensland Building Services Authority Amendment Bill* 1999 explained the intention of Part 3A as:

> Clause 27 inserts a new Part 3A – Excluded and Permitted Individuals …
> A major deficiency with the existing regulatory structure has been the ability of defaulting contractors to restructure their corporate structure to re-emerge as a 'phoenix' company following cancellation of a licence. **This new part is designed to remove individuals who have demonstrated their incapacity to manage finances from the building industry for a 5-year period.** (emphasis added).

[18] In the Second Reading Speech of the Bill[10] the Minister said:

> …the bill contains provisions to prevent bankrupts and persons associated with bankruptcy from holding or being associated with a building contractor's licence for a period of 5 years … the scheme introduced by the bill provides for 'excluded individuals' who may not hold a licence. These are bankrupts or **individuals who take advantage of the laws of bankruptcy such as through entering into a 'part X arrangement' with creditors** or who are associated with a failed company … (emphasis added)

[19] Although QBSA's letter to Mr Meredith particularised his "taking advantage" as "entering into a Part IX Agreement or Part X Arrangement or Agreement under the *Bankruptcy Act*" he did not, in fact, enter into anything other than the composition mentioned earlier. That said, however, it is plain from this extrinsic material that the provision uses the phrase in a general way which has its foundations in the proposition that persons who use the bankruptcy legislation as a means of reducing or extinguishing the burden of their debts are thereby demonstrating an incapacity to manage their finances.

[20] That construction accords with the objects of the legislation and the statutory scheme it creates, which includes an obligation upon licensees to satisfy the relevant financial requirements stated in policies promulgated under the Act[11] and, as Part 3A makes clear, to exclude persons who, or companies which, cannot remain liquid.

[21] It is interesting that the Australian Securities & Investment Commission (ASIC) defines "phoenix" events involving companies (the phrase used in the Explanatory Memorandum) as those which occur when a company fails or is unable to pay its debts, and that sections 206E and 206F of the *Corporations Act* 2001 (Cth) permit either the courts or ASIC to ban a person from managing a corporation if they have engage in phoenix activity. It is notions of that kind which, it appears, the "taking advantage" phrase reflects.

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9 s 14B

10 The Hon Judy Spence MLA, 21 July 1999, p 2772

11 s 31(1)(c)

[22] It was argued, for Mr Meredith, that the phrase is not directed at persons who simply "access" the provisions of the BA but is, rather, intended to prevent the licensing of individuals who engage in the mischief of entering into bankruptcy with the intention of denying creditors full access to their available assets in order to meet and pay debts. That construction invests the phrase with a meaning which is too constrained. As the very events which have touched Mr Meredith show, the "use" of the bankruptcy laws may take a number of forms and it is the manner of use against which the legislation turns its face. So much is clear from the reference to the "laws of bankruptcy" when those words are read in the context of, but also in contrast with, the following phrase "becomes bankrupt".

[23] Even without the assistance of the extrinsic material it is tolerably clear from the provision itself that it is intended to be a broad catch-all for persons who, by whatever means, relieve themselves of the whole or part of their debts by going into bankruptcy; and that, by the phrase, the legislature intended that any use of the laws of bankruptcy to that end would be caught, and lead to the licensee becoming an excluded individual.

[24] Even if that construction is mistaken, Mr Meredith is in any event caught by the phrase "becomes bankrupt". An annulment has the effect of putting the bankrupt back in the position they would have been in if the bankruptcy had never occurred[12] but, as Hill J observed in *Oates v Commissioner of Taxation* [1990] FCA 510, the fact that legislation uses the words "becomes bankrupt" does not mean that the phrase has the same meaning as it does in the BA. The meaning of the phrase must be discovered in the context of the legislation in which it appears, and the purpose of that legislation[13].

[25] The question becomes, then, whether the expression as it is used in s 56AC is properly understood to mean "becomes bankrupt and the bankruptcy has not subsequently been annulled" or whether the words are to be construed as applying whether or not an annulment has occurred.

[26] The phrase falls to be considered in the context of legislation focussing upon the qualities to be exhibited by a person who ought properly be licensed under it. The focus is upon the act itself, not its legal effects; the only question to be asked under the subsection is whether or not the individual has "become" bankrupt.

[27] Again, the focus of the legislation is upon the contractor's suitability to hold a licence, by reference to his or her capacity for financial management and, in particular, demonstrated ability to remain liquid. It is this financial ability upon which the subsection focuses. Once that is appreciated, the phrase "becomes bankrupt" in this discrete legislation

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12 *Roberts v Wayne Roberts Concrete Constructions Pty Ltd* [2004] NSWSC 734; and, *Union Club v Battenberg* [2006] NSWCA 72

13 At para [59]

refers not to the provisions of the BA, or the consequences of annulment under it but, rather, to the fact of bankruptcy.

[28] The learned member fell into error, with respect, in deciding the question whether or not Mr Meredith had taken advantage of the laws of bankruptcy when, for the reasons given here, that was apt to describe what had occurred and sufficient to warrant the QBSA to consider, under s 56AF, that he was an excluded individual by reason of what had occurred (the relevant bankruptcy event). In addition, because the alternative phrase "becomes bankrupt" also applies the Authority was entitled, too, to form the conclusion that he was again an excluded individual.

[29] In an appeal based upon a question of law[14] this appeal tribunal may set aside the primary decision, and substitute its own. That is the appropriate course here. The decision of the learned Tribunal member should be set aside and the decision of the QBSA reinstated.

[14] The meaning of a technical legal term – which is an apt way to describe the phrase being considered here – is a question of law: *Lombardo v Federal C'ssner of Taxation* (1979) 40 FLR 208, at 25