QCAT

Queensland **Civil and Administrative Tribunal**

CITATION:	Beerling v Queensland Building Services Authority [2011] QCAT 25
PARTIES:	Dane Wilson Beerling v Queensland Building Services Authority
APPLICATION NUMBER:	QR236-09 and QR090-09
MATTER TYPE:	Occupational regulation matters
HEARING DATE:	10 May 2010
HEARD AT:	Brisbane
DECISION OF:	Dr Bridget Cullen Mandikos
DELIVERED ON:	21 January 2011
DELIVERED AT:	Brisbane
ORDERS MADE:	The Queensland Building Services Authority's decisions in matters QR236-09 and QR090-09 are confirmed and the applications for review are dismissed.
CATCHWORDS :	OCCUPATIONAL REGULATION - Section 56AD of the *Queensland Building Services Authority Act 1991;* refusal to categorise the applicant as a permitted individual; factors to be considered in determining whether "all reasonable steps" were taken. *Queensland Building Services Authority Act 1991* s 56AC and s 56AD(8) *Younan v Queensland Building Services Authority* [2010] QDC 158

APPEARANCES and REPRESENTATION (if any):

APPLICANT :	Mr Marshall Cooke, of Counsel, instructed by Rostron Carlyle Solicitors
RESPONDENT:	Mr Malcolm Robinson of Forbes Dowling Lawyers

REASONS FOR DECISION

[1] These are applications made pursuant to s87 of the *Queensland Building Services Authority Act 1991* ("the QBSA Act") to review, consistent with s86(1)(j) of the *QBSA Act*, decisions made by the Queensland Building Services Authority ("the QBSA") refusing to categorise Mr Dane W. Beerling ("Mr Beerling") as a permitted individual for relevant events. The decisions under review were made by the QBSA pursuant to section 56 AD of the QBSA Act. As this is a merits review, the Queensland Civil and Administrative Tribunal ("QCAT") (which has subsumed the jurisdiction of the former Commercial and Consumer Tribunal ("CCT")) stands in the shoes of the QBSA when making its determination.

[2] The former CCT ordered that these matters, QR236-09 and QR090-09, be heard together, but not consolidated.[1]

Synopsis of decisions under review

[3] Application QR090-09 - Mr Beerling applied pursuant to s56AD(1) of the QBSA Act to be categorised as a permitted individual with respect to the following 2 "events":

- The appointment of Administrators to ACN 059 006 736 (formerly DWB Constructions Pty Ltd) ("DWBC") on 15 December 2008; and

- The appointment of Administrators to ACN 100 584 683 (formerly Town and Country Sheds Pty Ltd) ("T&C") on 15 December 2008.

[4] The QBSA delivered exclusion notices to Mr Beerling with respect to these events on or about 17 December 2008.

[5] Application QR236-09 – Mr Beerling applied pursuant to s56AD(1) of the QBSA Act to be categorised as a permitted individual with respect to the following 2 "events":

- The appointment of Administrators to ACN 055 213 271 (formerly Australian Garages & Carports Pty Ltd) ("AG&C")on 15 December 2008; and

- The appointment of Administrators to ACN 010 382 304 (formerly Wholesale Garages & Carports Pty Ltd) ("WG&C") on 15 December 2008.

[6] The QBSA delivered exclusion notices to Mr Beerling with respect to these events on or about 10 June 2009.

[7] Mr Beerling thereafter applied to the QBSA to be categorised as a Permitted Individual under section 56AD (8) of the QBSA Act (on 16 January 2009 with respect the DWBC and T&C events, and on 21 July 2009 with respect to the AG&C and WG&C events). The QBSA refused these requests, and it is these decisions that are under review. Stated

[1] Order of the Commercial and Consumer Tribunal, dated 29 October 2009.

simply, I must determine afresh whether Mr Beerling should have been permitted to be a permitted individual.

Interrelation of the companies

[8] Mr Beerling has outlined the steps he took in a statement dated 22 April 2010, arguing that:

> *"The four companies are really one event in that the cause of the collapse was due to the same reasons given that the companies were into [sic] related so closely."*[2]

[9] The Administrator for the companies, Julie Williams ("Ms Williams"), shares Mr Beerling's view that the companies' business operations "are interrelated in nature of being they all performed a function in the group offering products and services under the label "Australian Garages and carports".[3] Ms Williams further expressed a view that the demise of all four companies should be treated as one event of insolvency pursuant to s206F of the *Corporations Act 2001* (Cth) for purposes of the Australian Securities and Investments Commission determining whether Mr Beerling should be disqualified.[4]

[10] It is rather obvious that the companies are interrelated, shifting money to and from one another within the group, and serving mutually beneficial business purposes. I am uncomfortable, particularly in view of the evidence given by Mr Beerling and Ms Williams, accepting that there are 4 relevant events to consider in these 2 review applications, but am confined to doing so for reasons that I will explain further below.

What is a relevant event?

[11] Schedule 2 of the QBSA Act defines "relevant event" as meaning "a relevant bankruptcy event or a relevant company event". Section 56AC(2) of the QBSA Act provides that, as is the case here, an individual becomes an excluded individual for a relevant company event in circumstances where an administrator is appointed and the individual was a director of the company at the time. Following on from this, s56AC(6) of the QBSA Act than states that:

> *An excluded individual for a relevant company event (the first event) does not also become an excluded individual for another relevant company event (the other event) if the first event and the other event are both consequences flowing from what is, in substance, the one set of circumstances applying to the company.*

Excluded individuals vs permitted individuals – What is the nature of the decisions under review?

[12] A situation such as this, where there are 4 relevant events, which form the subject matter of 2 distinct review applications, warrants careful

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[2] Statement of Dane Wilson Beerling, dated 22 April 2010, para [25].
[3] Statement of Julie Williams, dated 30 April 2010, para [8].
[4] Statement of Julie Williams, dated 30 April 2010, para [9].

examination. There are serious occupational consequences leading to permanent exclusion for individuals that have been twice excluded for a relevant event (s58 QBSA Act). However, this is an application seeking review of the decisions rejecting Mr Beerling's applications to become a "permitted individual". Mr Beerling has not reviewed the decisions by the QBSA declaring him to be an "excluded individual".

[13] The distinction between applications seeking to review decisions to exclude individuals and applications seeking to review decisions declining to permit individuals was described by Mr Robinson for the QBSA in these terms:

> *"…you start to distinguish between penguins and they're not all just the same. Excluded individuals – if somebody is excluded they're excluded. If somebody applies for permitted [individual] then you permit them for that event."*

[14] As the excluded individual decision is not before QCAT on review, I am not able to make a decision with respect to whether the exclusion notices should have issued with respect to all 4 relevant events. Had these decisions been reviewed, it would have been open to the Member hearing those applications to determine whether the domino effect of DWBC's demise upon Mr Beerling's other companies was such that s56AC(6) of the QBSA Act could be interpreted to have been enlivened. That would involve a decision by the Member as to whether the term "company" as used in s56AC(6) of the QBSA Act must necessarily involve the same company, or whether it might be interpreted to apply to different companies that fall under the banner of one group, as is the case here.

[15] As there is no application seeking review of the excluded individual decisions, I must necessarily accept that there are 4 relevant events that were the basis for the exclusion notices issued by the QBSA.

Permitted individual – s 56AD(8) and *Younan*

[16] The test to be applied on this review is set out in s 56AD(8) of the QBSA Act, which provides:

> *"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."*

[17] The applicable legislation and considerations for QCAT in a s 56AD(8) matter have been neatly set out by his Honour Judge McGill in *Younan v Queensland Building Services Authority* [2010] QDC 158 ("*Younan*") as follows:

> *This is shown most clearly by the terms of subsection (8A), which provides a number of matters to which attention must be paid when 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."(citations omitted). The authority is required to 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."

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. (citations omitted). 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.

QBSA's reasons for decisions

DWBC & T&C

[18] The QBSA's findings of fact and reasons for its decision in the DWBC and T&C matters can be summarised as follows:

- There were 7 branches of DWBC. There was no evidence that the performance of these branches was monitored, nor evidence of sales analysis or financial planning prior to October of 2008. In response to a 46% drop in new sales contracts, Mr Beerling responded by increasing marketing and receiving "support from suppliers," a term that the QBSA took to mean that payment terms were extended to DWBC. Thus, the response to DWBC's financial crisis was to increase costs.

- There was no indication that drawings had been reduced, and no evidence that loans made by DWBC to T&C, WG&C and DWB Online Trading Pty Ltd, and by T&C to DWB Investments Pty Ltd had been called up.

- An Independent Review Report prepared by Mr Beerling's accountant, Mr Trevor Schmeirer ("Mr Schmierer"), indicated that the balance sheet for DWBC had 2 commercial properties in its non-current assets, the effect of which was to unbalance the current asset and current liabilities ratio, such that DWBC was undercapitalised with respect to its current liabilities. This was caused by the acquisition of a property located at 35 Commercial Road.

[19] The QBSA's findings of fact and reasons for its decision in the AG&C and WG&C matters can be summarised as follows:

AG&C

- On its own financial records, AG&C appeared to have been solvent, and there was no explanation as to why AG&C was placed into Administration.

WG&C

[20] WG&C appeared to have been making losses for many years, without explanation as to the reasons for the ongoing losses, or identification of steps taken to remedy the losses. Specifically, the QBSA found that there was no evidence that any of the following reasonable steps were taken:

- Although WG&C was a large business, there was no evidence of market analysis or financial planning/forecasting.

- There was no reduction in drawings taken, or explanation as to why WG&C endured losses in the consecutive years of 2007, 2008 and 2009.

- There was no indication of sales analysis or financial planning prior to October of 2008 (when WG&C first had difficulty paying its debts).

- There was no evidence of attempts made to decrease costs or increase efficiency.

[21] There was considerable focus at the hearing of this matter on the financial statements, balance sheets, profit and loss statements and accounts of DWBC. Mr Beerling gave evidence, which I accept, that he began having cash flow problems at the end of October 2008, and difficulty with debts at the end of November 2008. Of the four companies, the two that were most effected by cash flow were DWBC and WG&C.

Did Mr Beerling take "all reasonable steps"

[22] Mr Beerling has identified four external factors, which he says led to a downturn in the businesses at issue in both review applications:

1. The global financial crisis;
2. Marital issues;
3. Steel price increases from Bluescope steel; and
4. Competition from larger suppliers.

[23] In support of Mr Beerling's arguments that he took all reasonable steps, his accountant and tax agent, Mr Robin William Ewing ("Mr Ewing"), made a statement outlining his views that Mr Beerling's financial difficulties were primarily due to the global financial crisis. Mr Ewing's affidavit did not address the financial position of the four companies in any detail, such that his evidence is merely a conclusion unsupported by any evidence that Mr Beerling took "all reasonable steps" to avoid the circumstances that led to liquidation of the four companies.

[24] In addition to the global financial crisis, Mr Ewing placed some emphasis for the financial difficulties of the companies on personal financial difficulties Mr Beerling faced, including:

- Being under pressure from the ANZ Bank with respect to a mortgage loan over his Noosa residence. The house was on the market, but did not sell at a price sufficient to extinguish the bank debt in full.

- Mr Beerling loaned in excess of $200,000.00 over a three year period from 2006-2008 to his then wife, Zorana Beerling's, ultimately unsuccessful clothing manufacture and retail business from his family trust. He eventually wrote off the loans.

[25] At the hearing of this matter, Mr Malcolm Robinson for the QBSA conceded that Mr Beerling was "clearly a very sensible businessman who has done a lot of effort". That said, I agree with Mr Robinson's argument that ultimately Mr Beerling's efforts fell short of his having taken "all reasonable steps". Whilst placing blame on the global financial crisis is an argument that seems to appeal to licensees in cases such as this, such arguments must be looked at carefully. The global financial crisis did not happen in the space of a week[5], and therefore, at some stage of its progression, business operators exercising due diligence should have had enough indicators of looming problems to take "all reasonable steps" to avoid a financial catastrophy. It is my view that where Mr Beerling failed to take "reasonable steps" was in respect to the timing of his identification that economic conditions placed his businesses in peril.

[26] For convenience, I have framed my reasons around the s 56AD(8A) QBSA Act factors that the QBSA (and therefore QCAT in this review) must have regard to in making a decision about whether Mr Beerling took all reasonable steps to avoid the demise of DWBC. In broad brush, it is my view that Mr Beerling fell short was in failing to take preventative steps of the nature contemplated in *Younan*, as opposed to responding to the crisis once it was already in swing.

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

[27] Mr Beerling's evidence was that he sought advice from his accountants generally, with respect to tax and BAS matters, but that with respect to business strategy, his accountants "generally weren't telling [him] what to do". He thought that he might discuss financial strategy, including capital and cash flow matters, with his accountants on an annual basis only. Because the companies had enjoyed considerable growth, prior to the events that led to their demise, he did not prioritise obtaining advice on strategic issues.

With respect to the timing of the global financial crisis, Mr Ewing agreed under cross-examination that Queenslanders would have been alert to rumblings of the global financial crisis before October of 2008. The significance of this timeframe is that Mr Beerling, in response to questions posed in his *Application seeking to be categorised as a permitted individual*, indicated that with respect to AG&C, he first had difficulties paying debts in October of 2008. In other words, there is no evidence that Mr Beerling had conducted financial planning or sales analysis prior to October of 2008. In view of Mr Ewing's evidence, Mr Beerling should have been attuned to the financial position of the national economy earlier than he was, and should have taken steps to prevent the events from happening.

[5] Applicant's Documents, pages [163] – [176].

[28] Mr Beerling gave evidence at the hearing that with hindsight, it would have been reasonable for him to have involved an accountant on a monthly basis to provide advice regarding cash flow and capital requirements. In consideration of the size of DWBC in particular, I agree with the QBSA's view that more significant financial advice beyond preparation of financial statements and tax documents, was required.

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

[29] At the hearing of the matter, Mr Ewing gave evidence attributing the downfall of the companies to the businesses' cash flow having dried up in the economic downturn. This was a reflection of a downturn in sales, which had a quick effect on cash flow, as advance deposits were taken for orders. The consequence of the cash flow drying up, according to Mr Ewing, was that the companies' liquidity ratios were not being met.

[30] Mr Schmierer gave evidence that he raised concerns about the liquidity ratio of DWBC, and the need to raise capital to rebalance the ratio, with him in September of 2008. At that juncture, the liquidity ratio of DWBC was 0.49:1, when it was not meant to be less than 1:1.[6] However, by this point, for a combination of personal reasons relating to loans provided to his ex-wife, and his inability to sell a property he owned with his ex-wife at Noosa, Mr Beerling was not in a position to be able to inject the necessary capital back into DWBC. In his words, he was "in a position where I couldn't grab any more capital to put back in the business".

[31] The 16 January 2009 report to creditors, prepared by the Administrator, Ms Williams, identified undercapitalisation as a factor that contributed to the failure of the companies. Once DWBC was in this position, the position of the other 3 related companies was perilous. To illustrate, DWBC, which the QBSA's legal representative referred to as the "main company" in his cross-examination of Mr Beerling, was devoted to the supply and installation of garages, car ports, and sheds. AG&C employed engineers to design sheds for DWBC and other companies. Approximately half of AG&C's business was derived from DWBC, and the remaining half from external companies. WG&C manufactured and distributed the sheds for DWBC and other companies. Mr Beerling estimated that at least three-quarters to 80% of WG&C's business was sourced from DWBC. The fourth company, T&C was a trade services company used to employ subcontractors.

[32] The reason behind the undercapitalisation of DWBC related to the purchase of a commercial property, using cash, located at 35 Commercial Road. The effect of using cash to purchase the property was to remove a current asset and replace it with a fixed asset, which then threw out the liquidity ratios. The purchase of 35 Commercial Road was not entirely for the use of DWBC, but was also to assist with the storage of stock of Mr Beerling's then wife's fashion business. In part, Mr Beerling's personal generosity with respect to his then wife's business was at the expense of

[6] Email from John Schmierer to Mr Beerling, dated 17 September 2008.

the companies that eventually failed. It is difficult to know to what extent he was motivated by personal reasons as opposed to business reasons in purchasing 35 Commercial Road, but in any event, is the simple fact of the purchase with cash assets that caused the difficulty. Being a significant investment, and in line with *Younan*, it is my view that it would have been prudent to seek advice from an accountant about the terms of purchase prior to contract.

[33] The failure to ensure proper liquidity ratios was such a grave error, though I accept that it was inadvertent and lacked any malevolent intent on the part of Mr Beerling, that it cannot be said that all reasonable preventative steps were taken to protect the 4 companies in question in the manner contemplated by *Younan*.

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

[34] There is no evidence that Mr Beerling took steps to recover the funds (in excess of $200,000.00) that he had lent to his then wife, Zorana Beerling, to assist her with establishing a clothing manufacture and retail business in Noosa. Rather, the loans were written off.

[35] Further, there was no evidence in relation to a call by AG&C for recovery of a loan made to Mr Beerling, in the sum of approximately $125,000.00. Nor was there evidence of the calling up of loans from DWBC or T&C. While these factors are, in the context of the interrelated financial circumstances of the 4 companies, less serious than the undercapitalisation of DWBC in my view, they form part of the mix.

Orders

[1] For the reasons that have been canvassed above, the decisions of the QBSA, refusing to categorise Mr Beerling as a permitted individual, in matters QR236-09 and QR090-09 are confirmed and the applications for review are dismissed.