QCAT

Queensland **Civil and Administrative Tribunal**

CITATION:	McClintock v Queensland Building Services Authority [2011] QCAT 47
PARTIES:	Mr Peter Cyril McClintock (Applicant) v Queensland Building Services Authority (Respondent)
APPLICATION NUMBER:	GAR006-10 and QR127-09
MATTER TYPE:	Occupational regulation matters
HEARING DATE:	12 November 2010
HEARD AT:	Brisbane
DECISION OF:	Mr J Allen
DELIVERED ON:	21 February 2011
DELIVERED AT:	Brisbane
ORDERS MADE:	The decision of the respondent to categorise the respondent as an excluded individual is affirmed.
CATCHWORDS :	Excluded Individual *Queensland Building Services Authority Act* 1991 section 56AC, influential person, substantial shareholder

APPEARANCES and REPRESENTATION (if any):

APPLICANT :	Mr Peter Cyril McClintock represented by Mr Damien Atkinson of counsel instructed by Hallett Legal
RESPONDENT:	Queensland Building Services Authority represented by Mr Malcolm Robinson, solicitor of Forbes Dowling Lawyers

REASONS FOR DECISION

INTRODUCTION

1. Mr Peter McClintock was a substantial shareholder in and had until 15 April 2007 been the sole director of Crescent Couriers Pty Ltd (the Company), which had traded in the building industry until ceasing to trade in June 2006. On 1 July 2008 an administrator was appointed to the Company on the application of the Company's director, Mr Damon Hughes, pursuant to section 436A(1) of the *Corporations Act* 2001 (Cth). The Queensland Building Services Authority (QBSA) advised Mr McClintock in writing on 16 July 2008 that it considered him to be an excluded individual pursuant to section 56AC of the *Queensland Building Services Authority Act* 1991 (the Act) and invited him to make application to be categorised as a permitted individual under section 56AD of the Act. Mr McClintock made an application to the QBSA to be categorised as a permitted individual. The QBSA advised Mr McClintock by letter dated 27 April 2009 that his application to be categorised as a permitted individual had been refused. Mr McClintock filed an application to review that decision in the former Commercial and Consumer Tribunal on 17 May 2009. That application had not been determined before the Tribunal took over the jurisdiction of the former Tribunal and it is has now come to be heard by the Tribunal. Mr McClintock filed a further application in the Tribunal on 4 January 2010 to review the QBSA decision that it considered him to be an excluded individual. The two applications were consolidated by order of the Tribunal on 8 April 2010. Due to the delay in filing the application to review the excluded individual decisions there was also a requirement that an extension of time be granted in respect of that application. The application for an extension of time was initially heard on the papers by a Tribunal member and refused. Subsequently it was allowed on appeal to the Appeal Tribunal. It was ordered by the Appeal Tribunal that both matters then be heard together. This decision is in respect of the first part of that hearing which dealt with the review of the decision that Mr McClintock was an excluded individual.

THE LAW

2. The provisions of the Act being considered here have recently been the subject of a Court of Appeal decision in *Younan v Queensland Building Services Authority* [2011] QCA 1. Fraser J in his judgment set out the following summary of the provisions:

> *The* Queensland Building Services Authority Act *1991 (Qld) attached serious consequences to those events for Mr Younan and T & T. Each of the winding up order and the appointment of the liquidator was a "relevant company event" under s 56AC(2) of the* Queensland Building Services Authority Act*. The effect of ss 56AC(4) and (7) was that Mr Younan became an "excluded individual" for each "relevant company event" and T & T became an "excluded company" for each "relevant event" (a term which defined in the Act as including a "relevant company event"). Section 56AE precluded the respondent Authority from granting a person a licence if the person was an excluded individual or an excluded company for a relevant event. Under s 56AF*

the Authority was obliged to give an excluded individual for a relevant event a written notice stating why the authority considered the individual was an excluded individual for the relevant event and that the individual may apply to the Authority to be categorised as a permitted individual for the relevant event. Section 56AF(3) obliged the Authority to cancel the individual's licence if the individual did not apply to be categorised as a permitted individual within 28 days after the Authority gave the appropriate notice, or the Authority refused such an application and the individual did not successfully apply for a review of the Authority's decision.

The critical provision for present purposes is s 56AD(8). It provided:

> *"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."*

3. The initial question in respect of these applications is whether Mr McClintock should have been considered an excluded individual under s 56AC of the Act. By s 56AC(2) of the Act the section 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)**;*
>
> *(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.*

Then by s 56AC(3) of the Act *if this section applies to an individual because of subsection (2), the individual is an excluded individual for the relevant company event*.

4. If at the relevant time Mr McClintock was not a director or secretary of the company and the influential person provision becomes applicable to him. Schedule 2 of the Act defines an influential person as follows:

> *For a company, means an individual, other than a director or secretary of the company, who is in a position to control or substantially influence the conduct of the company's affairs, including, for example a*

shareholder with a significant shareholding, a financier or senior employee.

5. The exercise of the tribunal's review jurisdiction in these matters has been the subject of a decision of Wilson J in *Queensland Building Services Authority v Meredith* [2010] QCATA 50. Wilson J stated that

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

MR MCCLINTOCK'S EVIDENCE

6. From Mr McClintock's evidence at the hearing it is clear that the Company had traded successfully from 1988 in the manufacture of lattice and fencing and residential construction and that in 2006 an opportunity had arisen for him to change direction in terms of his building activity. At the time advice was sought from his accountant, Mr Ian Ahrens as to how to proceed and the advice was that a new structure should be created for trading as a commercial builder and that the Company should be wound up. Mr McClintock through his office staff then attended to the collection of debtors and payment of creditors on behalf of the Company. When the QBSA had asked if the Company wished to renew its licence they had said that did not wish to renew. In early 2007 Mr McClintock had separated from his wife and as a result a property settlement was undertaken part of which involved the calculation of Mr McClintock's unpaid entitlements from the Company for wages and long service leave which were substantial. There had also been an Employee Entitlement Fund set up from which there may have been money due. During the family law matter it had been suggested to him by his accountant, Mr Ahrens that he resign as a director of the Company. At the time he resigned as director on 15 April 2007 he had thought the Company was finished as he had paid everybody and was paid. He had not had any conversations with the new director, Mr Hughes and had given him no direction about how the company was to be managed since 15 April 2007. He did not know where things should go from when the Company was wound up and he had had suggestions from Ian (Mr Ahrens) about accounting ways to deal with it and Ian had looked after it. In regard to the administrator being appointed he had been told by Ian that a fellow from McLeod's had been organised and that Ian had said *"I can keep you in the loop and this is how it works from here"*. He stated *"I thought the company was finished and I don't know about liquidators and I had nothing to do with it"*. He was very clear that from April 2007 to 1 July 2008 he had no influence at all over the Company.

7. Mr McClintock when questioned about his payment of the administrator's costs said, that if he was given an invoice by Mr Ahrens he would pay it. When asked about Arubah Pty Ltd, the company who the administrator stated had paid funds in for the administration; he said it wasn't his company. He stated that *"Ian said I would look after it from here"* and that he understood the company was finished and that when everyone was paid he had closed the bank account. He said he may have had a meeting

with Mr Ahrens in May 2007 without Mr Hughes being present. This conversation was later clarified and Mr McClintock said it was not about how the company was being run. He stated that the administration had been planned by Mr Ahrens and he was not aware of the amount of creditors at the time of the administration.

8. Mr McClintock explained his understanding of the Employment Entitlement Fund (the Fund) as being set up to provide benefits to employees. That the financial benefits had never happened and that it was to cover sickness more than long service leave. He said it had been suggested by Mr Ahrens that we enter into it for the purpose of having funds there for years to come. He said that it never happened and it cost him a lot of money. There had been money put into it and never got anything out. He did not know what had happened to the fund but he thought someone had gone to jail or court. When shown the Company profit and loss statement for 2005 Mr McClintock agreed that an amount of $650,000 had been claimed as a deduction for the Fund but did not know whether that amount had been paid. He stated I am a builder I don't know about this. He stated that he did not understand the income tax affairs of the Company in regard to the Fund, that Mr Ahrens was in control of the Fund and that he had entered it on Mr Ahrens advice. Mr McClintock agreed that a further $50,000 had been claimed as a deduction in respect of the Fund in 2006. He said that once the Company was not trading the Fund was no longer required but he did not know what had happened to it. Mr McClintock was asked about his knowledge of an Australian Taxation Office (ATO) investigation of the Company. He stated that something had come from the ATO but it wasn't part of anything he had done. When it was brought to his attention that the Company had not traded since he resigned as a director he said that *"I know a tax thing came through later it was tied up with the Fund"*. Mr McClintock was asked how much the Company had paid out to him when it ceased trading. He stated that it would have been zero it would have been wages only. He was asked to explain how in the Company balance the loan balance owed by the Company to him had been $791,731 in 2005 and 0 in 2006. He said he had not received that money and he could not explain the figure in the balance sheet.

9. Mr McClintock provided a statement dated 22 September 2009 to the Tribunal which he confirmed at the hearing. In his statement Mr McClintock says that the formal property settlement process flowing from the breakdown of his marriage meant that it became necessary for the company to bring to account the amount that CCPL (the Company) owed to me personally for accrued wages and entitlements and CCPL did not have sufficient funds to meet its total accrued obligation to me. This meant that CCPL would be unable to pay the full amount of my entitlements. In order to comply with Corporations Law and in accordance with Corporations Law administrators were voluntarily appointed on 1 July 2008 by the new Director of CCPL. When I resigned as a Director/Secretary on 15 April 2007, the company's financial material indicated that the company was owed monies by the ATO and therefore I was aware of no liability to the ATO. In May 2008, more than 12 months after I had resigned as director, a disputed income tax assessment arose at a time when I had no influence or control over CCPL. The new Director/Secretary and the Administrator dealt with the ATO and CCPL continues to exist. I funded

the administrator's costs. In a further statement dated 20 April 2010 Mr McClintock stated that he was a substantial shareholder, and the BSA material plainly stated that being a substantial shareholder made me an influential person and therefore an excluded person. They failed to explain that to be an influential person I actually had to have exerted influence. I did not exert influence after resigning as director and secretary.

MR AHRENS' EVIDENCE

10. Mr Ahrens in his oral evidence at the hearing confirmed that he had been the company's accountant from the late 1990s and that it had traded profitably without litigation or other problems. That Mr McClintock was involved in lattice fencing and residential construction through the Company and that he had decided on a change of course wishing to move to commercial building in particular retirement villages. Mr Ahrens stated that because of the new direction he had advised that a new structure was required with the old company to be closed down and that this advice had been given in 2005 and 2006. He said that the Company had ceased trading in September 2006 with no more invoices to be issued, collection of debts and payment of creditors and that this work was done by Mr McClintock's office and he had checked progress through the Company accounts. That there had come a time when the Company did not trade or have the ability to trade and that the only liability was money owing to Mr McClintock and related entities and this stage had been reached in March 2007. The amount owing to Mr McClintock was for unpaid entitlements. That the QBSA licence had been cancelled when it came up for renewal. As there was an unpaid liability owing to Mr McClintock the company could not be de-registered without the debt being forgiven by him. This liability had been calculated by Mr Ahrens based on Mr McClintock's unpaid wages, holiday and long service leave during the 20 years that he had been involved with the company. The amount that had been worked out was $2,000,000 and that the purpose of calculating it was that Mrs McClintock had been involved in the company and that the company needed to be brought to account in the family law matter. Mr Ahrens confirmed that the ATO had not been made aware of the changes to the financial statements of the Company in regard to Mr McClintock's entitlement.

11. Mr Ahren's stated that Mr McClintock had separated form his wife in early January 2007 and this had been proceeded by rumblings in his married life. Mr McClintock had resigned as director and been replaced by Mr Hughes at Mr Ahrens' direction on the basis that if there were issues which were looming in the marital situation it was best to have an independent director, in that way Mrs McClintock could communicate with the independent director and would not have to do so with Mr McClintock. That Mr Hughes had worked in Mr Ahrens office as a finance broker. At the time the company had no assets or liabilities and was not trading. That Mr Ahrens preferred that Mr McClintock have no involvement in the Company and that he would tidy up its affairs as best we could and he would attend to the de-registration of the company. Though Mr McClintock had been a director of other companies these were trustee companies and Mr McClintock had not had an interest in them and so it was not thought necessary for him to resign as a director of those Companies. From

15 April 2007 Mr McClintock did not have any involvement in the company. That Mr Hughes worked in Mr Ahrens office and he discussed the management of the company with Mr Hughes. Mr Hughes' role according to Mr Ahrens was to oversee the administration of the company involving review of the annual returns for the ASIC each year.

12. In regard to the claim made by the ATO Mr Ahrens stated that there was nothing at around the time Mr McClintock resigned as director in April 2007. That the issue with the ATO had come along in 2008 and that the promoters had said they were dealing with the ATO and there was no need to worry clients. But that advice from the ATO had been received in March 2008 setting out its attitude to the arrangement. He said that from the attitude of the ATO letter he knew that they were going to do something. That the ATO had asked for a disclosure and they did not go through an audit process. There was a disclosure statement sent with the ATO correspondence requesting amounts contributed and interest. That amended assessments had issued in May 2008 but Mr Ahrens had not seen them until September 2008. Mr Ahrens was concerned that Mr Hughes was involved in a company with debts, both the unpaid entitlements and the taxation liability, that was not trading and if nothing was done there could come a time when Mr Hughes was exposed to the debts. That he had made the decision to put the Company into administration after discussion with an insolvency group. The purpose was to protect Mr Hughes who was filling the role of director. Mr Ahrens stated that he could not recall specific discussions with Mr McClintock and that he had no instructions from him from April 2007 to July 2008 and did not look for them. Mr Ahrens stated that Mr Hughes was not happy with the issue of the ATO investigating the affairs of the company and that was when Mr Ahrens was required to look at the options to sort it out. Mr Ahrens confirmed that there were unpaid wages owing to Mr Hughes in the amount of $150,000 which had been minuted in the 2008 profit and loss account for the Company and that there had been no discussions with Mr McClintock about this. Mr Ahrens confirmed that the ATO debt was dealt with under the voluntary administration process and had never been paid.

13. When queried about the funding of the administrator Mr Ahrens confirmed that Arubah Pty Ltd was his practice company and that it had paid the administrator. He did not know if Mr McClintock had supplied the funds but he believed that he may have had a discussion with Mr McClintock to sort out the problem to assist Mr Hughes. As to whether the major issue was the uncalled entitlement or the taxation debt, Mr Ahrens agreed that the uncalled entitlement of Mr McClintock was not such an issue after the family court property settlement in May 2008 and the main issue was the tax debt. In regard to the Fund Mr Ahrens advised that the name of the fund was the Atlas Trustees Limited Fund, Mr McClintock had been unable to recall the name of the fund, and that contributions had been made in 2005 and maybe in 2006,. He said that marketing officers from the promoting organisation gave accountants guidance and advice and he had been present at a meeting between Mr McClintock and the marketing people. That the fund was entered for the purpose of making provision for employee entitlements in the future. If there was sufficient equity in the Fund money could be drawn down to pay any entitlements that arose for unfair dismissal, holiday pay anything accrued in relation to employee

benefits. Mr Ahrens was asked how the contribution to the fund was calculated and he stated that it was in accordance with a computer program used by the promoting organisation based on the number of employees and their entitlements and that they had been told that this is what the ATO used to assess which payments were covered. Mr Ahrens stated that the $650,000 contribution to the fund in 2005 was funded from the Company in the amount of $70,000 and with a loan taken by Mr McClintock in the amount of $580,000 from the ABN Union Bank in New Zealand, a bank associated with the promoting organisation, which he had on-lent to the company. The loan was to be paid from the maturity value of an insurance bond purchased by the Fund with interest payable quarterly. That there was a need to start with a substantial figure to get the plan growing. Mr Ahrens stated that he knew that a private tax ruling could be sought in regard to this type of matter but that he had discussed it with the accounting group and there had been reliance on generic material and advices. While the Company was trading it had paid the interest on the loan but once it had stopped trading this fell to Mr McClintock who received demands from the New Zealand bank and eventually lawyers. Mr McClintock had brought these demands to the attention of Mr Ahrens. Mr Ahrens said that he had left these matters in the hands of the promoting people. At the time the Company stopped trading the Fund was not an asset of the company because it had been expensed in 2005 and 2006 but if interest and fees in respect of it had been paid the benefit of the fund could have been transferred to another entity. Mr Ahrens stated though that the promoters collapsed the Fund in 2008. The entitlement had not been transferred and no action had been taken to obtain legal advice to get money back from the fund. Mr Ahrens stated that he could not recall any specific discussion with Mr Hughes about the matter of legal or recovery action in respect of the Fund. Mr Ahrens agreed that Mr McClintock's loan account with the Company was partially represented by the amount of funds he had loaned the company for the contribution to the Fund and that this amount had been paid out in cash in the 2006 year. Mr Ahrens stated that Mr McClintock could not have paid the ATO debt from his personal resources.

14. Mr Ahrens provided a written statement to the Tribunal dated 22 September 2009. Mr Ahrens alleged that the appointment of the administrator to the Company was for the benefit of the current director as otherwise the current director could have become personally liable pursuant to Corporations Law. That the appointment had arisen from the circumstances surrounding the family law settlement of Mr McClintock's marriage breakdown. Mr McClintock had to account for his assets including his investment in CCPL, which included related party loans and director's entitlements. At the time that Mr McClintock resigned as director the Company was owed monies from the ATO. At a much later date (more than 12 months after Mr McClintock's resignation as a director) the ATO did contest provisions made for the director's entitlements on the basis that the ATO determined that the provision of employee entitlements was a matter of capital rather an expense on revenue account. It is my understanding that CCPL would have objected to the ATO's actions however as CCPL was already in the process of appointing an Administrator, this matter had to be dealt with by the Administrator. In any

event it was Mr McClintock who lost his entitlements and this issue of the ATO contention became a moot point.

MR HUGH'S EVIDENCE

15. Mr Damon Hughes in his oral evidence at the hearing confirmed that he had been appointed as director of the Company on 15 April 2007 and that Mr McClintock had not influenced him in any way. That the choice to put the Company into administration had come from Mr Ahrens advice. This was based on Mr McClintock's uncalled entitlements, which Mr Hughes was unsure whether that meant they had not been called. He said that advice was that things with the company which needed to be sorted out, I don't know what they were, and hence after that it was put into administration. Mr Hughes said that he was no help in regard to the financial aspects of the Company and would refer them back to Mr Ahrens; he was the accountant and business advisor. Mr Hughes confirmed that the Company had not traded while insolvent as it had ceased trading in 2006. Mr Hughes stated that he was not aware of an Employee Entitlement Fund and would refer that back to Mr Ahrens. He also could not answer questions about ATO investigation of the Company. He also could not answer why he had not been advised about the Company's taxation affairs. He stated he had gone into the Company as an independent director, due to Mr McClintock's marriage things, and basically the financial side and any business dealings you would need to go back to Mr Ahrens. Mr Hughes had no recollection of any company minute that he was to be paid $150,000. Mr Hughes stated that he undertook the normal general duties of running a company. When asked if he did anything unless directed by Mr Ahrens, Mr Hughes stated that he acted on Mr Ahrens' advice in regard to financial matters but he could not recall he had done anything without advice.

16. Mr Hughes also provided a short statement to the Tribunal. In his statement Mr Hughes confirmed his appointment as a director of the Company on 15 April 2007 and that at the time of his appointment the company had ceased to trade, had no assets and had no liabilities other than uncalled entitlements and borrowings from related parties to the retiring director and shareholder. That advice had been sought and provided by Mr Ian Ahrens when the matter of entitlements arose. Mr Ahrens had cautioned him that he could potentially become personally liable should the matter remain unresolved. Following this advice, the administrator was appointed to deal with matters arising from the entitlements in order that I did not become liable. And that the previous director did not influence me in any way.

MS NATASHA DENNIS'S EVIDENCE

17. Ms Natasha Dennis, the respondent's decision-maker in respect of the applications, provided statements to the Tribunal. In her initial statement she had incorrectly stated that Mr McClintock was a director of the Company within 12 months of the appointment of Jonathan Paul McLeod as administrator of the Company on 1 July 2008, which was the relevant event. In her later statement Ms Dennis stated that Mr McClintock was a substantial shareholder of the Company and accordingly was in a position to exercise control over it and by the funding of the administration process he did in fact exercise control of the Company.

MATERIAL FROM THE ADMINISTRATOR

18. Mr McCLintock's application to be a permitted individual included a statement that the amount owing to creditors in respect of the relevant event was $795,535.11 and stated that the main cause of the relevant event was money owed to related entities and the company was no longer required. The application disclosed a profit and loss account for the year ended 30 June 2008 which showed no income and expenses of $157,099 including wages of $150,000. There was also a balance sheet for the same period which disclosed total assets of $1,778.40 and liabilities of $2,439,234.63. The liabilities included a loan from Mr McClintock of $2,057,373.60, GST payable of $7,634.47 and a provision for income tax of ($7.00).

19. The administrator's reports to creditors were also attached to the application. The Tribunal notes that the administrator Mr McLeod in his correspondence stated that he had been appointed under section 436A of the *Corporations Act* 2001 which requires a resolution of the board that the company is insolvent. The second administrator's report dated 28 July 2008 notes that the balance sheet for 2005 showed cash at bank of $160,623.83 and trade creditors of $825,612.80 while in the 2006 year cash at bank was $13,625.80 and trade creditors was nil. The current liabilities in 2005 included a loan from Mr McClintock of $2,860,263.31 and a provision for tax of ($11,290). In the 2006 year the loan from Mr McClintock was $1,725,717.35 and there was a provision for income tax of ($7.00). While the administrator identifies related party creditors in the amount of $2,488,160.56, he states that the proof of debt from Mr McClintock is only in respect of his unpaid employee entitlement in the amount of $55,625 and that if the deed proposal was entered then the other related party debts would be forgiven. In regard to unsecured creditors these include the ATO in the amount of $419,997.00, Arubah Pty Ltd $6,700, Peter McClintock $55,625, Peter McClintock Hybrid Trust $365,690.14 and Vinda Developments $5,971.82. The last two creditors being related entities of the Company. The net position of the company in 2005 was ($3,021,031.62) and in 2006 was ($2,207,611.87). Based on his initial investigation the administrator attributed the company's financial difficulties to loss of income and inability to repay. He also stated that the company may have traded while insolvent based on the working capital ratios as at 30 June 2005 and 30 June 2006. In terms of the net position for the administration the director estimated that the deficiency in assets was $2,912,033.71 and administrators estimate the total liabilities were $2,914,857.94.

20. The Tribunal was provided with a set of financial reports for TLF Constructions Pty Ltd (the Company's former name) for the year ended 2006 which were confirmed by Mr McClintock and Mr Ahrens. These reports differed from those mentioned by the administrator amongst other things in regard to the loan accounts. According to the financial reports Mr McClintock's loan in the 2005 year was $791,731.13 with a nil balance in 2006. There were also variations in non-current assets and receivables. According to the financial report the net assets in 2005 were $78,968.38 and in 2006 $92,388.13.

21. At the conclusion of the hearing of the excluded individual application the Tribunal made directions that notices to produce be given to Ahrens Accountant and Jonathan McLeod in respect of correspondence between the firm of Ahrens Accountant and the Australian Taxation Office in regard to the income tax affairs of the company in respect to the 2004-2005 and 2005-2006 income tax and any amended assessments. The material provided by the administrator, Jonathan McLeod did not relate to that sought but included a copy of a proposed deed of company arrangement for the Company executed by Damon Hughes and Mr McClintock, as deed funder on 28 July 2008. The deed indicated that a third party would contribute $12,000 and that Mr McClintock, the Peter McClintock Hybrid Trust and Vinda Developments Pty Ltd would extinguish all their priority and ordinary unsecured claims against the Company.

MATERIAL FROM AHRENS ACCOUNTANTS

22. The material received by the Tribunal from Ahrens Accountants included a final notice in respect of the Company's 2006 income tax return dated 5 August 2007 and a copy of the 2006 income tax return which is undated but was for signing by Mr Peter McClintock as public officer of the Company. A notice of refund in respect of the 2006 income tax year issued by the ATO on 18 October 2007. Correspondence from the ATO to TLF Constructions Pty Ltd dated 14 March 2008 in regard to the Employment Entitlement Fund noting that ATO records indicate that the company had participated in the arrangement and that the ATO had issued a taxpayer alert on 3 May 2007 outlining its concerns with the EEF arrangement and that the ATO had determined that the contributions to the EEF were not deductible. Attached was a voluntary disclosure form which would remove the deduction and entitle the Company to an 80% remission of penalties. The ATO view was that the payment to set up the EEF was either of a capital nature, it did not relate to the carrying on of a business or it was not actually paid. This correspondence was sent to an address which ASIC records show as being a former principal place of business of the Company. A similar letter and enclosures was sent to Ahrens Accountants by the ATO on 2 April 2008 also with a position paper from the ATO in regard to the arrangement. Ahrens Accountants sent a letter to the ATO dated 18 April 2008 enclosing voluntary disclosure and amendment details in respect of Tweed Lattice and Fencing Pty Ltd (a former name of the Company) in respect of a claim for contribution to the Fund of $500,000 and $62,500 for promoter's fees in the 2004 income tax year. A further voluntary disclosure and amendment details was enclosed in respect of TLF Constructions Pty Ltd for a contribution to the Fund of $500,000, promoter's fees of $62,500 and loan expenses of $25,000 in the 2005 income tax year. The disclosures were signed by Peter McClintock as public officer of the Company. These disclosures resulted in amended income tax assessments as follows:

    2004 amount payable $168,750.00;

    2005 amount payable $119,960.40 and interest charge $26,893.04;

    2006 amount payable $10,934.70 and interest charge $1,292.24;

    General interest charge $54,094.39;

    Total amount payable as at 30 May 2008 $411,889.15.

The amended assessments issued on 23 May 2008.

APPLICANTS SUBMISSIONS

23. Mr Atkinson made submissions at the close of the hearing that there was an onus of proof which lays with the respondent in accordance with the decision in *Thomson v Queensland Building Services Authority* [2008] QCCTB 260. That for the purpose of section 56AC of the Act Mr McClintock was not a director or secretary within one year of the happening of the relevant event on 1 July 2008 and that he would need to be characterised as an "influential person" and that term should be given its plain meaning. That it was a question of whether he had influence or control over the company. In that period what one knows from Mr Hughes and Mr Ahrens who on any view did have control over the company was that that there was no evidence that they made recommendations to Mr McClintock or that they received recommendations from him. That they discussed issues with him or that they deferred to him. What you heard clearly from Mr Hughes is that since 15 April 2007 he has not even spoken to my client. There was never any serious challenge that there had been any serious discussion with my client. Only suggestion is that when Mr Ahrens told Mr McClintock about company being put into administration. The fact that Mr McClintock was a significant shareholder did not make him an influential person. From 15 April 2007 as far as he is concerned business is a shell and he hands it over to his accountant to put it to bed. He did not need to be involved and expected accountant could manage it. In regard to the administration Mr McClintock was told about the administration he was not consulted and any agreement to fund the administration was made after the date of the appointment of the administrator.

24. Mr Atkinson submitted that if a significant shareholder then an influential person is wrong. This is based on section 198A of the *Corporations Act* 2001 which charges the directors with the day to day management of the company, citing Ryan J in *Qld Press Ltd v Academy Instruments 1987 ACLR* and *Howard Smith v Ampol* and *Foss v Harbottle*. He also referred to the decision of Ms Schafer (President of the former Commercial and Consumer Tribunal in) in *Nation v Queensland Building Services Authority* [2006] QCCTB 114 at para 61, where she stated that

> *The BSA's decision relied on the applicant being a substantial shareholder; the fact that the definition of influential person includes by way of example a person who has a substantial shareholding is not determinative of the issue. It does not mean in every case that a substantial shareholder is an influential person. The Macquarie Concise Dictionary defines* "influential" *as* "having or exerting great influence"*.* "Influence" *is defined as* "invisible or insensible action exerted by one person on another, the power of producing effects by invisible or insensible means, modify affect sway move or impel to or to do something*.*"

25. It was not enough to be a significant shareholder only if the person is involved in management of company affairs then can be influential, you have to be a person involved in the management of the company's affairs, you have to show that he is in a position to control company. Mr Ahrens could have come back to Mr McClintock to see if something should be

done, could say right of veto, could have liaised, could have written. None of those things happened. Mr McClintock resigned on 15 April 2007. The reason was not a sham. He was done with the company he didn't need it, there was nothing to fear. He did not know about tax office or problem with entitlement. Mr McClintock would not understand complicated tax scheme.

26. Mr Atkinson also provided written submissions to the Tribunal following production of the documents by Ahrens Accountants and Mr Jonathan McLeod. In his submissions Mr Atkinson identifies the key issue as was Mr McClintock an influential person in relation to the company between 1 July 2007 and 1 July 2008. That this depends on a consideration of the definition of influential person and that the onus of proof lies on the Authority in satisfying the Tribunal on the discrete issue, citing the decision of Mr Lohrisch in *Thomson v QBSA* [2008] QCCCTB 260. Mr Atkinson outlines the evidence presented at the Tribunal and submits that in circumstances where:

    (a) Mr McClintock gave uncontested evidence that he did not exercise any control or influence over the Company;

    (b) that evidence is corroborated by Mr Ahrens and Mr Hughes;

    (c) the QBSA did not put forward any serious evidence of Mr McClintock having a role in the company's affairs

    the application should succeed.

27. Mr Atkinson notes that the hearing had been adjourned to enable documents to be produced from third parties. Which he states to have been for one issue that is whether McClintock might have resigned on 15 April 2007 because he was aware that the ATO was taking an interest in the EEF Scheme. He submits that there are no documents that suggest that the ATO had shown any interest in the EEF scheme prior to 15 April 2007, let alone that Mr McClintock had become aware of any such interest. The QBSA does not make a submission to the contrary. The matter is put beyond doubt by a document dated 3 May 2007 from the ATO as "Taxpayer Alert, 2007/2; Employee Entitlement Fund". And that on reading this document, the EEF was not an issue for the Company or the ATO until after Mr McClintock had resigned and this should be the end of the matter. Nevertheless, the QBSA has sought to gain some other advantage from the documents and by further general submissions. It is submitted, it seeks impermissibly to go beyond the scope of the basis of the adjournment. In the first place the further documents show that the Applicant has been the "public officer" of the Company. Section 252 of the *Income Tax Assessment Act* 1936 (Cth) stipulates that a company must nominate a person to be the "public officer" and that the ATO can serve the Company with a document by serving that person. It suggests that the officers may have other obligations, but not that they have other powers or rights, of (sic) that public officers are otherwise people of influence. That the Applicant appears to have continued to be listed as the public officer after his resignation as director does not suggest that the Applicant had any role in the management of the Company. Mr Atkinson also notes that the Authority has raised the issue of Mr McClintock funding the deed of arrangement and submits, we are meant to infer that, because of that role,

Mr McClintock must have controlled or substantially influenced the Company during the period from 1 July 2007 to 1 July 2008. Mr Atkinson then deals with the proposition that having an overwhelming shareholding and accordingly based on the clear meaning of the words, he is an influential person.

28. Mr Atkinson in his conclusion submits a person is not influential merely because he is a significant shareholder, it must be shown that he or she has continued to be involved in the management of the company's affairs so that they have the real capacity to exercise control. That might be done, for instance if there is evidence that the person is regularly consulted about the company's affairs, or has a power of veto, or that their instructions are sought. This contrasts dramatically with the role of Mr McClintock. As a physical reality, he took no role in the management of the company. As a legal reality, his position as a shareholder gave him no power to control the Company. The evidence showed that during the relevant period, Mr McClintock:

    a) Did not make any recommendations in relation to the Company;

    b) Did not give any advice to the Company;

    c) Was not the subject of any consultation with the Company;

    d) Did not have any right of veto in relation to the Company;

    e) At its very highest was simply informed of the voluntary administration immediately before it occurred.

29. There is no evidence to the contrary and, in those circumstances, the Tribunal must find that Mr McClintock is not an excluded individual.

RESPONDENT'S SUBMISSIONS

30. Mr Robinson made submissions at the hearing that there was no onus of proof on the Authority to show that Mr McClintock was an influential person and that the words of the statute should be given their plain meaning. That the question was one of fact in accordance with the appeal decision in regard to the granting of an extension of time in this matter. In his written submissions Mr Robinson dealt further with the onus of proof issue citing authority in respect of the exercise of the review jurisdiction by the Administrative Appeals Tribunal, *McDonald v Director General of Social Security* (1984) 1 FCR 54, *Szbel v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 28 CLR 152 and *Bushell v Repatriation Commission* (1992) 175 CLR 408. In regard to the question of whether the appointment of the administrator was for the benefit of a creditor Mr Robinson cites *Gallagher v QBSA* [2010] QCAT 383 and section 435A of the *Corporations Act* 2001. As to whether Mr McClintock was an "influential person" Mr Robinson submits:

    a) He was a substantial shareholder of the Company in that he had since 2002 held 29,996 of the 30,000 shares issued by the Company;

    b) The applicant funded the Administrator's costs;

    c) He sought professional advice which he followed. That advice includes resigning, ceasing to be a director and installing a new director, the Applicant making demand upon the company and such new director placing the company into administration; and

d) Further, in the Application seeking to be categorised as a permitted individual, the Applicant stated that he obtained advice about administration from Ian Ahrens and the administration process of the company was planned.

31. Mr Robinson submitted that the definition of "influential person" clearly refers to a person who is in a position to exercise control and is not governed by proof that a person actually did exercise control. It is clear from the example given in the section that this includes a substantial shareholder. This accords with common sense, as part 3A of the QBSA Act is aimed at making persons who are influential in a company being accountable to show they took all reasonable steps to avoid the coming into existence of a relevant event. That by funding the administration, the Applicant is exerting influence over the affairs of the Company. He was an influential person by virtue of his position to control the Company through his substantial shareholding. Further he did in fact exercise control as the administration of the Company was planned and funded by him in accordance with advice he received.

32. Mr Robinson also made further submissions following receipt of the documents from Ahrens Accountants and Mr Jonathan McLeod. He repeated his submission that the Authority does not have an onus of proof and what constitutes an "influential person". He made submissions in reply to Mr Atkinson's submission in respect of *Nation v QBSA* [2006] QCCTB 114 and *Thomson v QBSA* [2008] QCCTB 260 that they were in regard to permitted individual applications and did not apply here. He also sought to distinguish the rule in *Foss v Harbottle* on the basis that consistent with para 26 in Wilson J's decision in *QBSA v Meredith* [2010] QCATA 50, the phrase in s 56AC should be interpreted in the context of legislation focusing on the qualities to be exhibited by a person who ought properly be licenced under it. The focus is on the circumstances themselves, not the legal nuances of technical control of day to day matters in accordance with the *Corporations Act* 2001. The whole purpose of the concept of "influential person" is that the person is capable of exercising influence, not that they have the legal right to direct the day to day management of the Company. There is also a practical aspect in that if the Authority can rely on the fact that someone is a substantial shareholder to show that they are an influential person, by an appropriate ASIC search, it would be possible to make a correct decision immediately. Otherwise a more restrictive interpretation would effectively negate the ability of the Authority to make a decision that a person was influential within a reasonable time. Mr Robinson submits that Mr McClintock has an overwhelming shareholding. Accordingly, based on the application of the clear meaning of the words, he is an influential person. He notes that the change of details of office holder was not lodged with the ASIC until 29 May 2008. The affairs of the Company were ordered in such a way as to be conducted in the interests of the applicant. Mr Ahrens was the Applicant's agent, in the sense that he was acting as accountant for Mr McClintock in the interests of Mr McClintock. The substitute director clearly had no real knowledge of the affairs of the Company and allowed decisions to be made by Mr Ahrens. That there was no suggestion that Mr Ahrens was operating the affairs of the Company for his own benefit. Rather, during the entire period, Mr Ahrens was the accountant for Mr

McClintock and acting in his interests. The Company was under the effective control of Mr McClintock through his agent. The administration was financed by Mr McClintock.

33. In regard to the documents received from Ahrens Accounting, Mr Robinson submits that the 2006 tax return, which records Mr McClintock as public officer, was not lodged until well after his cessation as director is recorded to have taken effect. The applicant and Mr Ahrens were on notice from, at the latest, 14 March 2008 that the ATO was very concerned about the validity of claims for deductions regarding the EEF though probably Mr Ahrens was aware from 3 May 2007. The voluntary disclosure document signed by Mr McClintock on 18 April 2008 in his capacity as an officer of the Company was after the Applicant is recorded as having ceased as a director. This document is clearly an important document in the affairs of the Company. All of the above events occurred prior to lodgement at ASIC on 29 May 2008 of "Change of Company Details" appointment or cessation of a company officeholder. As a result there is clear evidence of Mr McClintock signing documents as a public officer of the Company up to 18 April 2008. And within 12 months of the relevant event, there is clear evidence that he was in fact exercising influence.

DISCUSSION

34. Mr McClintock is a licensed builder who has operated his trade through a company which became known as Crescent Couriers Pty Ltd. As a builder Mr McClintock is subject to the requirements of the *Queensland Building Services Authority Act* 1991. One of those requirements in section 56AC of the Act is that there are consequences if a licensed builder or an entity associated with a licence builder becomes insolvent. These provisions are triggered where a company, for the benefit of a creditor has an administrator appointed as was the case in respect of the Company on 1 July 2008. The provisions apply to individuals who are directors, secretary or influential persons at the time or within a period of one year before the happening of the relevant company event. Once the QBSA became aware of the appointment of the Administrator to the Company they advised Mr McClintock by letter dated 16 July 2008 that he was considered an excluded individual in accordance with section 56AF of the Act. This decision was reviewable and Mr McClintock has sought a review of it by the Tribunal. The Tribunal in accordance with the QCAT Act conducts such a review by way of fresh hearing and has done so in reliance on the written evidence submitted prior to the hearing, the oral evidence at the hearing, subsequent production of documents and submissions from the party's legal representatives. Mr Atkinson raised a matter of an onus of proof in regard to this matter being on the QBSA which was denied by Mr Robinson for the QBSA. Having regard to the fact that this is a review by way of fresh hearing with the Tribunal to exercise the powers of the Authority, the Authority's role is to assist the Tribunal to make the correct and preferable decision and the Tribunal is not bound by the rules of evidence though bound by the rules of procedural fairness the better approach is that this is an inquisitorial process with the Tribunal to satisfy itself based on the material provided and if it requires further material then it has the power to make appropriate orders as was done

here to seek that material. Where the onus lay is that the Tribunal must be satisfied of certain things before it can consider that Mr McClintock is an excluded individual and that is how the decision in *Thomson v QBSA* [2008] QCCTB 260 should be read.

35. Section 56AC requires that the administrator be appointed for the benefit of a creditor and while this matter had been raised in the written material prior to the hearing it was not raised at the hearing or in submissions following the hearing by the Applicants counsel, Mr Atkinson. Mr Robinson for the Respondent rightly submitted that where there are creditors an administration is for the benefit of those creditors in accordance with section 435A of the *Corporations Act* 2001. Here apart from the related party creditors the ATO was a third party creditor in the amount of $419,997.00. The Tribunal is satisfied that the administrator was appointed for the benefit of a creditor in this case the ATO.

36. In accordance with the ASIC report submitted to the Tribunal by the respondent Mr McClintock was not a director or secretary of the Company as at 1 July 2008 and had in fact ceased to be a director on 15 April 2008 and that role had been taken on by Mr Damon Hughes. Mr McClintock therefore must be characterised as an influential person for the Company for section 56AC to apply to him. The dictionary of the Act defines influential person as set out above and an example is given of a substantial shareholder in a company. Mr Robinson submitted that that fact alone should be sufficient to characterise someone as an influential person. While Mr Atkinson submitted that this is not sufficient that there must have been actual influence or control exercised by the person before they could be characterised as an influential person. The written and oral evidence presented at the hearing was that following the decision to wind down the company Mr McClintock, once all debts had been collected and the creditors paid, had taken little interest in it and he had not had any contact with the new director since his appointment nor had Mr Ahrens sought his instructions in matters in regard to the company's affairs. The reason for the appointment of the administrator was cited as being in relation to the potential liability of Mr Hughes as director as a result of the large loan balance which had been created in favour of Mr McClintock as a result of unpaid entitlements needing to be taken into account in his marriage break-up.

37. There was very little evidence in regard to the origin of the debt owing to the ATO in regard to how and when it arose but what was clear was that Mr Hughes the director of the Company had no knowledge of it but that it was the evidence of Mr McClintock and Mr Ahrens that it had only become an issue after Mr McClintock had resigned as a director on 15 April 2007. The evidence at the hearing was that certain deductions had been claimed in respect of an Employee Entitlement Fund in the 2005 and 2006 years and that the ATO had only in 2008 decided to investigate the matter. Due to the inconsistency in the evidence, that is that Mr Hughes had no knowledge of the ATO matter and neither did Mr McClintock directions orders were made for the production of documents. The purpose of these directions was to ascertain who had been involved in dealing with the ATO and while it may have been of interest if Mr McClintock had resigned at a time that the ATO had already shown an interest this would not go to

whether or not he was an influential person at the relevant time. The direction was broad and related to all correspondence with the ATO not just around the time of Mr McClintock resignation as director and so its purpose was as submitted by Mr Atkinson. Following the production of documents it became clear that correspondence had been sent to the company in March 2008 and Mr Ahrens firm in April 2008. As a result Mr McClintock as public officer of the Company had made voluntary disclosure to the ATO of the deductions to an Employee Entitlement Fund in the 2004 and 2005 year. This voluntary disclosure resulted in amended assessments being issued by the ATO which created the ATO debt of $419,997.00. This was at a time that the Company had no funds as they had already been paid out prior to the appointment of Mr Hughes as director.

38. The decision for the Company to make voluntary disclosure to the ATO was only one option that it had. It could have waited for the ATO to investigate the deductibility of the expenses and then objected to the assessments by the ATO. The advantage gained by making voluntary disclosure was a substantial reduction in penalties of 80%. This decision created a liability in a company which was not trading and had no assets to pay the inevitable amended assessments. By section 252 of the *Income Tax Assessment Act* 1936 (Cth) the public officer shall be answerable for the doing of all such things as are required to be done by the Company under the Act and everything done by the public officer which he is required to do in his representative capacity shall be deemed to be done by the company. By the signing of the voluntary disclosure, Mr McClintock bound the Company to the issuing of amended assessments by the ATO at a time when he was not a director and when there was no evidence before the Tribunal that the director had any knowledge of the decision to make such disclosure. The Tribunal does not accept the evidence put to it by the Applicant and his counsel's submissions, that he has not exercised control over the Company; he has done so by executing the voluntary disclosure to the ATO. It is also clear that at least in respect of the voluntary disclosure there must have been some communication between Mr McClintock and Mr Ahrens. Mr Ahrens is stated to be the signatory on the letter dated 18 April 2008 forwarding the voluntary disclosure signed by Mr McClintock to the ATO. There is no need to determine whether the mere fact of being a substantial shareholder is sufficient to characterise an individual as an influential person. In this case Mr McClintock has exercised control over the Company by his dealing with the ATO and the Tribunal is satisfied he was within one year of the relevant company event happening an influential person for the Company.

39. The decision of the QBSA is affirmed.