QCAT

Queensland Civil and Administrative Tribunal

CITATION:	*Marangone v Queensland Building Services Authority* [2011] QCAT 210
PARTIES:	Robert Marangone v Queensland Building Services Authority
APPLICATION NUMBER:	OCR112-10
MATTER TYPE:	General administrative review matters
HEARING DATE:	7 April 2011
HEARD AT:	Brisbane
DECISION OF:	**Peter Walker, Member**
DELIVERED ON:	17 May 2011
DELIVERED AT:	Brisbane
ORDERS MADE:	**1. The decision of the Respondent to categorise the Applicant as an excluded individual is confirmed.**
CATCHWORDS:	Excluded individual – whether winding up was for the benefit of a creditor – members voluntary winding up and creditors voluntary winding up – matters that can be considered in deciding whether there was a 'benefit' – nature of the hearing *Queensland Civil and Administrative Tribunal Act 2009*, s 20 *Queensland Building Services Authority Act 1991*, ss 56 AC, 56 AF *Corporations Act 2001* (Cth) *Briginshaw v Briginshaw* (1938) 60 CLR 333 *Gallagher v Queensland Building Services Authority* [2010] QCAT 383

APPEARANCES and REPRESENTATION (if any):

APPLICANT:	Robert Marangone represented by Willem Kilian of Counsel, instructed by Doyles Construction Lawyers

RESPONDENT: Queensland Building Services Authority represented by Malcolm Robinson, Solictor of Forbes Dowling Lawyers

REASONS FOR DECISION

Background

[1] Mr Marangone was the holder of a license issued pursuant to the *Queensland Building Services Authority Act 1991*.

[2] He was also a director of Marangone Constructions Pty Ltd ACN 104 222 782 from 27 March 2003 to 8 June 2005 and then from 16 January 2007 to 14 May 2008.

[3] On 14 May 2008 Mr Marangone resigned as a director and secretary of Marangone Constructions and Geena Marangone was appointed as the sole director.

[4] On 22 May 2008 Roderick Mackay Sutherland was appointed as liquidator of the company.

[5] The liquidator was appointed as a result of a passing of a resolution of the Company's members[1].

[6] On 3 June 2008 a meeting of creditors was held and the liquidation became, by virtue of the provisions of sections 496 and 497 of the *Corporations Act 2001*, a creditors voluntary winding up.

[7] On or about 1 March 2010 the circumstances surrounding this series of events came to the knowledge of the Authority. On that date it appears to have determined that Mr Marangone was an "excluded individual" pursuant to section 56AC(2)(a)(i) of the Act and, by letter of that date, notified the Applicant of its decision to cancel his license pursuant to section 56AF(3) of the Act and of his right to apply for a review of that decision.

[8] His license was therefore cancelled from 6 April 2010 as he did not, within the intervening period, apply to become a "permitted individual".

[9] The Application to Review the decision was received by this Tribunal on 23 July 2010.

Evidence

[10] The Authority has filed a Statement of Reasons for its decision dated 26 August 2010[2].

---

1 Exhibit 3, annexure SOR - 5.

2 Exhibit 3.

[11] Mr Marangone has filed, in support of his application, an affidavit by himself dated 4 February 2011[3], an affidavit of Raymond Anjoul[4] dated 4 February 2011 and a "statement of reasons as to why he is not an excluded individual and why his license should not be cancelled" dated 24 September 2010[5].

[12] On the date of the hearing I was handed additional supplementary submissions from Mr Kilian of Counsel for the Applicant.

[13] The Authority has provided a "Response to the Applicant's Submissions" dated 2 November 2010[6].

[14] On the hearing date, Mr Robinson, for the Respondent also provided additional written submissions.

[15] The affidavits filed on behalf of Mr Marangone[7] do not appear to contradict the facts as stated in the reasons of the Authority and accordingly I have proceeded on the basis that those basic findings are correct. The parties agree that this course is appropriate and indeed no additional evidence was called at the hearing itself.

Nature of Hearing

[16] Pursuant to section 20 of the *Queensland Civil and Administrative Tribunal Act 2009* this application must proceed by way of a fresh hearing on the merits. In other words I must make a decision that I consider to be appropriate based on the evidence before me, or indeed in any other manner that is relevant and appropriate. This process does not involve looking for errors in the decision of the Authority, but rather in making a completely fresh decision.

[17] Further in making this decision I am obliged to sit in the seat of the decision maker. In this respect, relevantly section 3 of the *Queensland Building Services Authority Act 1991* requires the seeking of a reasonable balance between the interests of building contractors and the public at large.

[18] I have been presented with varying submissions on the way this task must be approached. For the Applicant it is submitted that the standard of proof is the civil one being on the balance of probabilities but as adjusted by the principles set out in *Briginshaw v Briginshaw*[8]. The reason for the adjustment was said, by Mr Killian, to be the extremely harsh outcome that arises from the application of the section, namely

---

3 Exhibit 1.
4 Exhibit 2.
5 Exhibit 4.
6 Exhibit 5.
7 Exhibits 1 and 2.
8 (1938) 60 CLR 333.

the automatic cancellation of a building license for a period of not less than 5 years[9].

[19] For the Respondent it is submitted that it is not appropriate to talk in terms of "onus of proof" as the role of the Tribunal proceedings is inquisitorial rather than adversarial. In particular it is submitted that the role of the Respondent, by virtue of section 21(1) of the QCAT Act is to assist the Tribunal to make its decision rather than necessarily to support its own primary decision.

[20] So far as the *Briginshaw* test is concerned Mr Robinson did note that there is provision for an application to become a "permitted Individual"[10] which, to some degree alleviates the potential seriousness of the provision.

[21] I am of the view that, for the purposes of this decision it really does not matter which approach is taken, though certainly I accept that the proceedings are intended to be conducted in an inquisitorial, rather than in an adversarial manner. It should be noted, however, that it is not the reasons of the Authority that are important, but, because of section 20 of the QCAT Act, the information, evidence and matters available to the Tribunal.

[22] In considering my overall approach to the tasks I believe the words of Rich J in the *Briginshaw* decision[11] are apposite where he said:

> *In a serious matter like a charge of adultery the satisfaction of a just and prudent mind cannot be produced by slender and exiguous proofs or circumstances pointing with a wavering finger to an affirmative conclusion. The nature of the allegation requires as a matter of common sense and worldly wisdom the careful weighing of testimony, the close examination of facts proved as a basis of inference and a comfortable satisfaction that the tribunal has reached both a correct and just conclusion.*

"Excluded Individual"

[23] The primary decision that needs to be made in these proceedings is whether Mr Marangone is an "Excluded Individual". Once that decision is made, in the absence of an application for him to become a "Permitted Individual" the consequences follow regardless of individual circumstances. Pursuant to section 56AF(3) it is mandatory that the Authority must cancel the license.

[24] For that to occur the provisions of section 56AC of the Act must apply to him. The relevant provisions of this section are as follows:

> *56AC Excluded individuals and excluded companies*

---

9 Section 56AF(3) of QBSA Act.
10 QBSA Act, s 56 AC.
11 Op cit at 350.

(1) This section applies to an individual if--

(a) after the commencement of this section, the individual takes advantage of the laws of bankruptcy or becomes bankrupt (relevant bankruptcy event); and

(b) 5 years have not elapsed since the relevant bankruptcy event happened.

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

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

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

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

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

(c) the individual--

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

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

(3) If this section applies to an individual because of subsection (1), the individual is an excluded individual for the relevant bankruptcy event.

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

[25] I believe that it is uncontroversial that Marangone Constructions was wound up and further that Mr Marangone was a director within the previous 12 months from when that occurred.

"For the Benefit of a Creditor"

[26] The primary issue that I must therefore direct my mind to is whether or not the appointment of the liquidator or the winding up was "for the benefit of a creditor".

[27] I have been referred to numerous authorities on the issue of statutory interpretation. I accept that the ordinary rules of statutory interpretation require that this phrase must be given meaning. Further I am required where possible, to give the phrase its ordinary meaning and only look to

outside matters, such as the intention of Parliament, in circumstances where the meaning is not clear.

[28] For the Applicant Mr Kilian has referred me to the original Authority decision and has, correctly in my view, noted that there does not appear to have been any great thought given to that phrase as it applies to Mr Marangone's application.

[29] Nevertheless that is clearly not determinative of the issue as it is the facts before me that I must base my decision on. Mr Killian has said the original written submissions of the Respondent[12] are clearly wrong as they suggest that I should look at either the purpose of the winding up or its likely effect. He suggests that it cannot be the effect that needs to be considered as the words of the section require the relevant determination to be made at the time the liquidator is appointed and that the alternate submission made, namely that I should look at the purpose, is correct.

[30] He says that the sole evidence before me, having regard to the *Briginshaw* test is the evidence contained in the affidavit of Mr Marangone, that Mr Marangone was having difficulties in handling the management of Marangone Constructions due to his ill health.

[31] In response Mr Robinson has said that the position of the Authority, in respect of the meaning of the section, has evolved over time. His view has now evolved to the point where he no longer considers the original submissions made with respect to the meaning of the section are not correct. He submits that I should not look to the purpose of the liquidation or its likely effect but solely the words themselves.

[32] I am of the view that to add any additional words into the interpretation of the phrase should be avoided without good cause. I therefore do not consider that it is appropriate to look at the purpose of the winding up, particularly in the manner suggested by Mr Kilian. It seems to me that if one were to seek the actual intention of the person seeking the winding up it would be rare that the test would apply as there could be many purposes behind any winding up and it would be most difficult to determine on a subjective basis what this really was.

[33] The issue of whether a winding up is for the benefit of a creditor was considered by this Tribunal in *Gallagher v Queensland Building Services Authority*[13]. In that decision at paragraph 61 Senior Member Oliver stated:

> *Creditors can benefit in many ways as a consequence of the appointment of liquidators. It is obviously a benefit to creditors just to have liquidators investigate the company's accounts to ascertain if there are any assets available to creditors,*

---

12 Exhibit 5 at paragraph 27.

13 [2010] QCAT 383.

> *preference payments or debtors. In my view the very appointment of a liquidator can be said to be a benefit to creditors.*

[34] That passage has been said by Mr Kilian to be clearly wrong as it makes the insertion of the words "for the benefit of a creditor", redundant. In my view, however, those comments were directed to the factual situation that was being considered rather than intended to be a general statement of the law. That case concerned a situation where a creditor or creditors would not be paid at all or at least not in full. To that extent I consider the statement to be equally pertinent to the facts in this case, and particularly to the case of a creditors winding up.

[35] I consider it quite appropriate to consider general benefits and not simply pecuniary benefits. Furthermore I do not accept that there has to be direct evidence of those benefits before they can be considered. If it was intended that only direct pecuniary benefits are intended to be considered it would be easy for the legislation to state that unequivocally. But in the context of the relevant section it would seem strange if it a person could only become an Excluded Individual in circumstances where creditors obtain a direct pecuniary benefit from the winding up and not where there is no dividend payable.

Corporations Act 2001, Part 5.5.

[36] There was some discussion before me on the type of winding up that occurred in this case. Specifically Mr Kilian has pointed out that it was a Members Winding Up pursuant to Division 2 of Part 5.5 of the *Corporations Act 2001* that became a Creditors Voluntary Winding Up by virtue of the subsequent acts of the liquidator, necessitated by the financial circumstances of the company. Had the Company been solvent it would have simply remained a Members Voluntary Winding Up.

[37] It therefore seems appropriate to consider the difference between the two types of winding up.

[38] If the company is wound up at a meeting of its members, it is called a voluntary winding up. If the company is solvent when it is wound up, it is a called members' voluntary winding up. If it is insolvent it is a creditors voluntary winding up.

[39] A member's voluntary winding up of a solvent company is generally done when the members no longer wish to retain the company structure. This usually occurs when the company has reached the end of its useful life.

[40] The duties of a liquidator where a company turns out to be insolvent are dealt with in section 496 of the Act and have some significant distinctions from the situation where the company is solvent. In particular the creditors have the right to appoint a different liquidator

should they so decide. Further the liquidator, whether the original one or a substitute one, will be obliged to carry out additional investigations such as whether there has been insolvent trading that are not necessary in the case of a members voluntary winding up. These duties are explained by Worrells, Solvency Accountants, in the following terms[14]:

> *Where possible, the liquidator must establish the following:*
>
> *1. Why the company is insolvent and when it became insolvent;*
>
> *2. Whether there is a potential insolvent trading claim against the directors;*
>
> *3. Whether there are any preferential payments to creditors that may be recovered;*
>
> *4. Whether there are any offenses that may have been committed by the officers of the company;*
>
> *5. Whether any void transactions can be overturned; and*
>
> *6. Whether any other recoveries may be made.*

[41] In other words the focus of the liquidators duties change from the winding up a solvent company to ensuring the interests of creditors are properly protected, giving them the right to have some control of the process by appointing their own liquidator and ensuring that further additional investigations are carried out to ensure that all available money is available to them.

[42] I am satisfied that this process is for the benefit of the company's creditors. I am therefore satisfied that a winding up of an insolvent company, when viewed objectively, is "... for the benefit of a creditor".

[43] It is apparent that there are situations where a winding up is clearly not for the benefit of a creditor, a Creditors Voluntary Liquidation where all creditors will be paid in full regardless being one clear example of that. In such a case such creditors as exist have no control over the winding up process and the actions of the company directors do not require scrutiny. This is again explained by Worrells, when dealing with Members voluntary windings up, in the following terms:

> *There is no need for many of the investigations that would normally be carried out in other types of liquidation. As the company is solvent and creditors should be paid in full, there is no need for any recovery actions. Issues like preferential payments and insolvent trading do not apply as most of these recovery actions require the company to have been insolvent at the time of the transaction or that creditors suffer a loss*[15].

---

14 www.worrells.net.au/factsheets.

15 Ibid.

[44] In essence it is submitted by the Applicant that it is for the Respondent to show that it was, in fact, for the benefit of a creditor for a liquidator to be appointed, and that this cannot be assumed on some hypothetical or general basis. In particular it is asserted that the Authority has not discharged its onus of proof.

[45] I do not accept this submission. Section 28(3)(c) of the QCAT Act permits the Tribunal to inform itself in any way it considers appropriate. In my view this enables the Tribunal to apply general concepts and knowledge to the factual situation with which it is faced and not to just strictly consider the evidence that is before it.

[46] In this respect it is appropriate to consider the facts as they were known at the date of the appointment of the liquidator. Certainly it was known by the Applicant that Marangone Constructions had very significant creditors and little in the way of assets. That is clear from the terms of his affidavit[16] and that of Mr Anjoul[17]. It is further clear that, by virtue of the fact that no declaration of solvency pursuant to section 494 of the *Corporations Act 2001* was possible, the liquidator would inevitably form the view that the company was insolvent and it would become a voluntary winding up by creditors.

[47] As a result it was certain that the winding up would have the advantages to creditors that accrue by virtue of it being that type of winding up.

[48] It appears to me that there were also benefits to creditors in this case apart from those directly accruing by virtue of the application of the *Corporations Act 2001* and the manner in which a liquidator approaches a creditor's winding up. In this respect I note that from the Statement of Affairs it is clear that no pecuniary benefit would accrue to creditors, however, apart from anything else, they do have the benefit of being able to crystallise their losses and that is not insignificant.

[49] I am therefore satisfied that the circumstances required by section 56AC have been met. In particular I find that the winding up, being inevitably a Creditors' Voluntary Winding Up, was for the benefit of a creditor. Therefore, by virtue of section 56AF(3) Mr Marangone's license must be cancelled.

[50] I therefore confirm the decision of the Authority to categorise the Applicant as an excluded individual. The Application is dismissed.

---

16 Exhibit 1, paragraphs 15, 16 and 17.

17 Exhibit 2, paragraphs 14 to 20.