

CITATION: *Pritchard v Queensland Building Services Authority* [2011] QCAT 454

PARTIES: Mr Johnathon Pritchard
(Applicant/Appellant)
v
Queensland Building Services Authority
(Respondent)

APPLICATION NUMBER: QR273-09

MATTER TYPE: Occupational regulation matters

HEARING DATE: 23 May 2011

HEARD AT: Brisbane

DECISION OF: **John Bertelsen, Adjudicator**

DELIVERED ON: 23 September 2011

DELIVERED AT: Brisbane

ORDERS MADE: **1. The decision of the respondent made on 24 September 2009 is confirmed.**

CATCHWORDS: Relevant event – circumstances leading to –
reasonable steps taken to avoid relevant
event – permitted individual

*Queensland Building Services Authority Act
1991, s 56AD*

APPEARANCES and REPRESENTATION (if any):

APPLICANT: Mr Johnathon Pritchard

RESPONDENT: Queensland Building Services Authority
was represented by Malcolm Robinson,
Solicitor

REASONS FOR DECISION

- [1] By review application filed 20 October 2009 the applicant, Mr Pritchard sought the review of a refusal by the Queensland Building Services Authority (“the Authority”) to categorise him as a “permitted individual” pursuant to section 56AD of the *Queensland Building Services Authority Act 1991* (“the QBSA Act”).

- [2] Mr Pritchard was sole director and secretary P.R.A.C. Developers Pty Ltd (“the company”), a company originally registered on 3 August 2005 and carrying on the business, from about 16 April 2007, of residential home construction and/or renovation in the Toowoomba district. The company was a member of the Home Design Building Group.
- [3] The train of events leading to Mr Pritchard being categorised as an excluded individual pursuant to part 3A of the QBSA Act are recited in the Authority’s statement of reasons for the decision dated 19 November 2009 and filed in these proceedings on 23 November 2009. Sections 56AC and 56AD are the relevant sections for the purpose of categorising a person as an excluded individual and for that individual to successfully make application to the Authority to then be categorised as a permitted individual.
- [4] Mr Pritchard became an excluded individual when one Ian Alexander Currie was appointed administrator of the company on 4 August 2009. That appointment was, pursuant to section 56AC, a relevant event such as to exclude Mr Pritchard and the company from performing building work pursuant to QBSA issued licences.
- [5] Mr Pritchard exercised his right to apply to be categorised as a permitted individual by filing with the Authority an application for such on 8 September 2009, the effect of which, if successful, would be to allow him to hold a QBSA license or be in control of a QBSA licensed company.
- [6] In order to be categorised as a permitted individual Mr Pritchard was required to establish, pursuant to section 56AD(8) of the QBSA Act, that he took “all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event” i.e. administrators appointment.
- [7] Pursuant to section 56AD(8A), the Authority in so deciding must have had regard to action taken by the individual in relation to, inter alia:
- 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
 - 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.
- Pursuant to section 56AD(8B) the Authority could have regard to other matters in deciding any such application.
- [8] On 24 September 2009 the Authority not being so satisfied refused Mr Pritchard’s application. Mr Pritchard’s application for review was made to the Tribunal on 21 October 2009. The application is supported by his two affidavits sworn 16 March 2010 and 19 July 2010.
- [9] The Tribunal hearing of the review application is a fresh hearing on the merits with the Tribunal being required to confirm or amend the Authority’s

decision, set aside the Authority's decision and substitute its own decision or set aside the Authority's decision and return the matter for reconsideration to the decision maker for the decision with directions. In becoming the decision maker afresh the Tribunal in this instance must be satisfied that the material placed before it at hearing is sufficient, in terms of section 56AD(8A), for the Tribunal to categorise Mr Pritchard as a permitted individual. If not the Authority's decision is confirmed. Thus the Tribunal is entirely its own decision maker charged to arrive at the correct or preferable decision according to the material before it. As such the notion of onus of proof is inapplicable to this review.

- [10] At hearing Mr Pritchard relied on his application, his two affidavits and his own evidence given primarily in the form of responses to questions posed by the respondent's legal representative Mr Robinson.
- [11] Mr Pritchard's answers to an initial litany of questions by Mr Robinson suggested he understood the concepts of working capital, cashflow (future inflow and future outflow), business planning, the need for accurate and up to date financial data, credit control, the necessity to fund anticipated expenses, setting aside money for tax liabilities (particularly GST) and the need to continually assess these matters.
- [12] Mr Pritchard exhibited an unsure understanding of Financial Requirements for Licensing (FRL) and Net Tangible Assets (NTA) in terms of the QBSA Act despite having some time prior completed the mandatory book keeping course.

Administrator's Reports to Creditors

- [13] The administrator's second report to creditors contained at pages 5 and 6 the company's balance sheet as at 10 April 2009 and the profit and loss statement for the period 1 July 2008 to 10 April 2009.

The balance sheet

Trust funds

- [14] Undistributed income (loss) (\$298,250).
- [15] Mr Pritchard was unsure of what this represented.

Assets

- [16] Other debtors \$685,000
- [17] Mr Pritchard was initially unsure of what this represented but subsequently identified this sum as the expected return from Highgrove Villas being two townhouse style dwellings built by the company.
- [18] Input tax credit control account \$370,487.

- [19] Mr Pritchard agreed that this represented GST received and segregated into appropriate account for payment when due. When asked why was it the liability for GST for the same period (under liabilities) was \$514,763 he could only reply that the company had “not allowed enough”.
- [20] Loan – Pritchard Investment Trust \$66,724.
- [21] He did not know when the loan was taken out nor its purpose.
- [22] Intangible asset – home design franchise – \$384,598
- [23] Mr Pritchard thought this represented the cost price of the franchise and asserted it could be sold for that value despite the profit and loss statement recording a loss. That was his personal unsubstantiated opinion.
- [24] Motor vehicles \$189,942
- [25] Mr Pritchard stated this was represented by a bobcat, Hino Truck and 2 utilities all leased.

Liabilities

- [26] ATO integrated client account \$99,227.
- [27] Mr Pritchard confirmed that this represented income tax owing. He acknowledged that no income tax return for the financial year ended 30 June 2008 had been filed citing changes of company accountants.

The profit and loss statement

- [28] The statement records expenses exceeding income by some \$298,248. When it was suggested that such a loss must reduce working capital Mr Pritchard agreed that the situation was concerning. However he also asserted an error in both the balance sheet and the profit and loss statement stating that “wages – directors” recorded in the profit and loss statement would only have amounted to \$26,000 and not \$239,240; that such would have the effect of producing a \$100,000 approximate positive balance sheet with a negative profit and loss statement approximate \$80,000.
- [29] At the time of purchase of the construction business in April 2007 the company accountants were WHLK Walkers. Mr Pritchard became dissatisfied with their performance particularly in relation to omitted GST credits and retained, in July 2008, Liam Betts an accountant who had done work for the previous owners of the construction business and who was familiar with the specific Databuild financial system used by the company. In July 2008 the company was successful in entering into a payment arrangement with the ATO. Mr Pritchard contended that Liam Betts provided the Authority with the balance sheet and profit and loss statement without his knowledge thus drawing the Authority’s attention to the parlous non compliant state of the company’s affairs.

[30] Mr Pritchard continually pointed to discrepancies in the balance sheet and the profit and loss statement despite the fact that he was meeting with the company accountant Mr Betts once a month and sometimes fortnightly and perhaps even more frequently and with the company book keeper every few days particularly as from December 2008 when he first identified financial difficulties. He stated that when he looked at the company's profit and loss situation in mid March 2009 he thought he was heading to a \$40,000 to \$50,000 profit for the period 1 July 2008 to 31 March 2009. Apart from the wages issue Mr Pritchard could not identify let alone substantiate any other discrepancies in the balance sheet or profit and loss statement.

The report as to affairs (RATA)

[31] This report was provided by Mr Pritchard to the administrator and summarises the company's very much diminished financial position as at 4 August 2009 as follows:-

Between April and August 2009 work in progress was reduced from \$371,993 to \$17,938 a diminution of \$354,055. This was due to completion of current work with no new work being undertaken. Inventory was minimal.

Trade debtors reduced from \$178,234 to \$90,498 a diminution of \$87,736. As this was not otherwise written off or accounted for it presumably must have been received by the company.

Other debtors reduced from \$685,000 to nil. That \$685,000 represented the Highgrove Villas eventually sold according to Mr Pritchard by the administrator for \$780,000.

Setting aside the Highgrove Villas the company took in \$354,055 and \$87,736 a total of \$441,791 which according to Mr Pritchard went to pay creditors, wages and outgoings.

Total liabilities as at April 2009 excluding the J&B Pritchard loan of \$441,287 and secured loans of \$675,975 amounted to \$1,096,808. Total liabilities as at August 2009 excluding the J&B Pritchard loan of \$374,563 and secured loans of \$701,630 amounted to \$736,636.

[32] In the same period (once again setting aside the Highgrove Villas) assets diminished from \$1,632,203 to \$168,911 (realisable \$119,718) a deficiency of \$1,463,292. The eventual sale of Highgrove Villas would have reduced that deficit only marginally. Clearly company losses increased dramatically between April and August 2009. This was confirmed by Mr Pritchard in evidence.

[33] Of concern is the reduction of the overall tax liability from net April 2009 of \$271,288 to August 2009 of \$175,004 (later reviewed by ATO to \$129,736). Even so as at 4 August 2009 the company had only managed to reduce tax liability by \$96,284.

[34] Mr Pritchard maintained there were ongoing accounting errors and that he attempted to have those errors rectified. He engaged yet another

accountant Mr Sammut in April 2009. It seems incomprehensible that despite ongoing close attention to tax liability with accountants, employment of a book keeper, two changes of accountants and changes of company accounting systems that the company could not get its tax commitments in on time. In particular there was no explanation as to how these mistakes were made when there was ongoing close consultation with the company accountant at the time. Mr Pritchard admitted signing BAS statements. Apparent anomalies in the BAS statements as asserted by Mr Pritchard had not been adjusted as at August 2009. GST issues were first brought up according to Mr Pritchard as far back as April 2008 when he engaged book keeper Robyn Dunn. Once again it seems incomprehensible that the GST issues and BAS statements could not have been put in order in the period April 2008 through August 2009.

- [35] Of further concern is the reduction in this period of the company's liability for the J&B Pritchard loan reduced from \$441,287 April 2009 to \$374,563 August 2009 a diminution of \$66,724. In the same period the loan to Pritchard Investment Trust of \$66,724 (an April 2009 asset) reduced to nil by August 2009. In answer as to whether the company was repaid \$66,724 or whether the company forgave the loan to the trust Mr Pritchard thought that the company had forgiven the trust the loan of \$66,724. Effectively in the period April-August 2009 an asset of \$66,724 disappears with a company liability being reduced by the identical sum.
- [36] From April 2009 to August 2009 trade creditors escalated from \$447,440 to \$550,109 an increase of \$107,669. In the same period secured creditors escalated from \$675,975 to \$701,630 an increase of \$25,655. Mr Pritchard could not account for the increase in secured and unsecured creditors when in the same period the company had receipted \$441,791 and with Mr Pritchard downsizing operations taking such measures as letting staff go, reducing rents and taking a big cut in his own wage from December 2008. This was despite, in the same period, looking at the books and meeting with the book keeper on a daily basis and the accountant on a fortnightly basis assessing the situation. Mr Pritchard asserted the "financials" were not true and correct.

Circumstances leading to the happening of the relevant event

- [37] Mr Pritchard in his initial application to the Authority cited insufficiency of working capital as the primary cause of the relevant event and stated that the company first experienced difficulty in paying its debts in December 2008. He felt that at that time he had sufficient personal back up to cope but conceded that the capital insufficiency logically must have been referable to events before that time i.e. before December 2008.
- [38] Piper Alderman Lawyers acting for the company and Mr and Mrs Pritchard wrote to the Authority on 8 September 2009 and in that letter set out the primary causes of the relevant event as follows:
- The company was inundated with work and expanded to a point where the director lost control of critical elements of the business due to his expanding role;

- The quoting process for jobs became increasingly competitive and profit margins were compromised as a result of the global financial downturn;
- Prices of materials such as steel and concrete increased significantly over the course of 2008; and
- The company's financial accounting system was not suitable to deal with the company's expansion.

[39] Those primary causes are virtually identical to the "reasons for the company's failure" set out at paragraph 3.2, page 4 of the administrator's report dated 1 September 2009. Mr Pritchard agreed with the primary causes as set out in Piper Alderman's letter of 8 September 2009. He stated that the company was inundated with work from November 2008; that such was partly planned and not planned; that unit construction was anticipated to be ongoing for 5 or 6 years and as such costs were ascertainable and able to be accommodated; unplanned in that 7 new house construction contracts were signed in about November 2008.

[40] In October 2008 the company had only just received payment of some \$100,000 plus owed to it by Marx Constructions Pty Ltd a constructor for which the company had completed substantial building work. Non payment up to that time had left a \$100,000 plus hole in working capital during the course of 2008. Nonetheless Mr Pritchard felt it was reasonable to sign 7 contracts stating that building work can come in lumps. In December 2008 he attempted unsuccessfully to refinance. He also set about reducing overheads by payroll and rent reduction, attempting to sell company assets and/or parts of the business and minimising his own wage. Staggering or scheduling the contracts was a considered option.

Quoting process

[41] The increasing competitiveness was apparent to Mr Pritchard particularly in the period January 2009 to March 2009. He stated he realized what was happening as it occurred; that from April 2009 the company needed to downsize and consolidate. Planned developments were shelved. This was some 5 months after first identifying the December 2008 difficulty in paying company debts.

[42] Mr Pritchard conceded there must have been an insufficiency of working capital as at January 2009 but could not say whether the company complied with the mandatory NTA test at that time despite continuing to trade. Mr Pritchard stated he was advised to effect a cash injection to restore liquidity which he did to the tune of \$60,000-\$70,000 between January 2009 and April 2009. He stated that such injection was inadequate to solve the cash flow problem but the company kept trading anyway. The company simply did not have the working capital to handle the expanded volume of work.

Increase in the price of materials

[43] Mr Pritchard stated that price increases could not be provided for in contracts for the reason lenders would not accept potential variations on fixed housing loan approvals. The price of materials generally increased particularly during the course of 2008 but in particular the price of steel sky

rocketed. By the time the company came to build margins were compromised. The global financial crisis made quoting ferociously competitive further compromising margins.

Company financial accounting system

[44] Mr Pritchard realized the inadequacy of the Databuild financial system as early as April 2008. That system was followed by the MYOB and QuickBooks Accounting Systems. Despite these changes and accountants involvement Mr Pritchard asserted the financials still were not true and correct.

Home design group franchise (the group)

[45] The purchase of the construction business in April 2007 included membership of Home Design Building Group which was in practical terms a franchise agreement. Mr Pritchard obtained legal and accounting advice at the time. That agreement obliged the company to accept building contracts for all customers (people wanting to build their own home) introduced by the group within the agreed geographical district.

[46] That agreement further provided for the company to pay a commission to the group set variously at 4.25% and 1.75% of the building contract price payable as to 50% on payment of contract deposit and 50% at time of frame stage payment.

[47] Such commission structure had the effect of depleting progress payments at an early stage of construction and thus cash flow. Because the company had granted the group the sole and exclusive right to market the services of the company it was effectively obliged, so long as the contract was properly costed, to accept any such contract that the group was able to introduce.

[48] Group commission arrangements applied to all 7 contracts entered into in about November 2008 (as opposed to the usual 1 or 2 contracts the company would enter into at a time). Thus the company had entered into, and was obliged to enter into, 7 fixed price building contracts at a time of rapidly increasing material costs with the attendant obvious depletion of margins. Additionally, commission was payable in the early stages of construction further depleting cash flow at a time (November 08) immediately proceeding the identified inability to pay debts (December 08).

[49] If proper books of account and general records were available at the time it would have been clear that entering into 7 contracts would require additional working capital. Mr Pritchard in response to whether it occurred to him to have sufficient working capital in place prior to committing to 7 contracts he answered no. Rather Mr Pritchard was hopeful of receipt of funds from the sale of the Highgrove Villas and considered he had time on his side. It did not occur to Mr Pritchard to change the company business plan nor to involve his accountant. Mr Pritchard conceded that was a mistake.

Summation of circumstances

[50] As at December 2008 the company's insufficiency of working capital was manifest. That insufficiency was pre existing. In November 2008 the company took on a major expansion of building work for which it was, by any common sense measure, ill-equipped to handle i.e. there simply would not be enough working capital to support the cash flow required for the volume of work being undertaken. Profit margins at this same time were compromised due to materials price increases. Ferocious competition cut margins further. The company was probably utilising unsuitable accounting systems.

Conclusions on evidence

Keeping proper books of account and financial records

[51] No financial records for the year ending 30 June 2008 were available or produced. The only evidence of the financial state of the company at any time during the course of its operative life of some 2 years and 4 months were the April 2009 balance sheet and the profit and loss statement prepared by accountant Betts. This abysmal absence of books of account and financial records is unaccounted for save to say a general statement by Piper Alderman that "the majority of the company documentation is currently in the possession of the administrator".

[52] Mr Pritchard had ample opportunity during the 2 year 4 month period of operation to see to it that proper books of account and financial records were put in place. It is not good enough for Mr Pritchard to point to ongoing inaccuracies in financials blaming accountants of which there were 3 in the 2 year 4 month period of operation, criticize accounting systems that apparently were inadequate or unsuitable for the style of business and then come to the Tribunal declaring that the limited financials were not true and correct. There was no evidence that he ever got round to initiating and maintaining what he would consider to be accurate books of account and financial records. In that context the financial information available to him was inadequate for him to draw any conclusions about the true financial state of the company as at December 2008 when difficulty paying debts was encountered resulting in the steps taken by him being totally inadequate. Even Mr Pritchard's asserted wages error is questionable. He stated that the profit and loss statement 1 July 2008 to 10 April 2009 should have correctly recorded wages – directors at \$26,000 i.e. \$641 per week for that period. Other evidence by Mr Pritchard was that the company would have made a moderate profit for the financial year ended 30 June 2008 and that he first took a wage reduction and reduced payroll in December 2008. Therefore part at least of the \$26,000 was paid in the period December 2008 to April 2009. Although there was no evidence as to what wage was paid to Mr Pritchard during the period July 2008 to December 2008 it is clear that it must have been minor and is consistent with, if anything, of an inadequate cash flow during the latter part of 2008.

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

[53] When embarking on a major departure from its norm of 1 or 2 contracts at a time and taking on 7 contracts at the 1 time in November 2008 the company failed to vary its business plan or indeed seek financial advice as to whether it could realistically take on the immediate upsurge in contract work. Taking on 7 fixed priced contracts at a time of depleted cash flow brought about by shrinking contract profit margins during the course of 2008 was risky particularly given that material prices were continuing to rise. Mr Pritchard's course of action appeared to be to set about making a limited cash injection, some time later, into the company and to stagger the 7 contracts. There was no evidence of cash flow forecasting rather Mr Pritchard's own assessment that he could cope. In the very next month December 2008 ongoing depleted cash flow brought on debt payment failure. Reducing overheads from December 2008 in the face of the 7 contract onslaught and difficulties paying debts and later making cash injections of some \$60,000 to \$70,000 was on Mr Pritchard's own admission never going to solve the cash flow problem. From December 2008 to April 2009 no further measures were taken to arrest the company's deteriorating financial position. Mr Pritchard thought the company would make a profit of \$30,000 to \$40,000 for the financial year through to 31 March 2009. How he came to that conclusion was not apparent and out of focus with reality. No further financials addressing the period April 2009 to August 2009 were referred to or produced other than the RATA produced for the administrator. There was no evidence of measures from April 2009 to immediately address what was by then the company's failing financial position other than the decision not to take on any more work and collect outstanding monies. That was tantamount to a cessation of business. Yet a further 4 months elapsed before the administrator was approached.

[54] Mr Pritchard exhibited a disturbing lack of understanding of the company balance sheet particularly as at 10 April 2009 coming to the Tribunal with assertions of inaccuracies but unable to point to any bar the wages issue referred to above. It was incumbent on Mr Pritchard as the company's sole director to ensure that he had a proper understanding of the company's financial position at any given time. His answers to numerous questions about the company's assets and liabilities as at 10 April 2009 indicated clearly he did not have an acceptable understanding of terms and figures and in some instances how liabilities got to be in a 6 figure bracket. If Mr Pritchard understood the concepts and not their day to day application it was his duty to get the necessary help to enable him to understand.

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

[55] There was no evidence of what credit management measures were in place prior to April 2009. From April 2009 to August 2009 there appears to have been an effort made with trade debtors being reduced from \$178,234 to \$90,498. There was no evidence of what recovery steps were taken prior to April 2009.

Making appropriate provision for Commonwealth and State taxation debts

[56] In the 2 years 4 months of operations the company despite retaining 3 different accountants and utilising at least 2 different accounting systems was not able to properly make provision for its ATO tax debts. Outstanding BAS/GST liability was identified in April 2008 when a book keeper was employed but as at August 2009 some 16 months later the tax debt stood at \$129,736. The company did not ever manage to lodge even its 2008 tax return. Despite a payment arrangement with the ATO made in July 2008 the company was never able to pay its ATO tax debt.

Conclusion

[57] The Tribunal considers there is clear evidence that Mr Pritchard did not take sufficient action required of him pursuant to section 56AD(8A) of the QBSA Act such for the Tribunal to consider that he took all reasonable steps to avoid the company having to be placed under administration on 4 August 2009.

Order

[1] The decision of the respondent made 24 September 2009 is confirmed.