

**CITATION:** *Grofski v Queensland Building Services Authority* [2011] QCAT 611

**PARTIES:** Stephen Francis Grofski  
(Applicant)  
v  
Queensland Building Services Authority  
(Respondent)

**APPLICATION NUMBER:** OCR221-10

**MATTER TYPE:** Building matters

**HEARING DATE:** 25 November 2011

**HEARD AT:** Southport

**DECISION OF:** **Susan Gardiner, Member**

**DELIVERED ON:** 2 December 2011

**DELIVERED AT:** Brisbane

**ORDERS MADE:** **1. The decision of the Authority dated 2 August 2010 refusing to categorise Mr Grofski as a permitted individual is confirmed.**

**CATCHWORDS:** PERMITTED INDIVIDUAL – Where applicant left all accounting and bookkeeping to another director – whether applicant took all reasonable steps to avoid the liquidation of the company

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

*Henley v QBSA* [2010] QCAT 242 followed

**APPEARANCES and REPRESENTATION (if any):**

**APPLICANT:** Mr Stephen Grofski in person

**RESPONDENT:** Mr Malcolm Robinson Solicitor represented the QBSA

## REASONS FOR DECISION

- [1] On 2 August 2010, the Queensland Building Services Authority refused an application by Mr Stephen Grofski to be categorised as a permitted individual under s 56AD(1) of the *Queensland Building Services Authority Act 1991*.
- [2] Mr Grofski is a licensed builder, holding a license in the classes of carpentry, joinery and plastering solid.
- [3] In May 2007 Mr Grofski and Mr Bruce Trollip incorporated Budget Render Pty Ltd. Both men were joint directors and shareholders of Budget Render. Mr Trollip was to be responsible for management and office duties, Mr Grofski had a “hands on” role to deal with supervision of staff and the building job sites.
- [4] Both Mr Grofski and Mr Trollip gave evidence that in about January 2009, Mr Trollip wanted to take Budget Render in a different direction and it was agreed between the men that Mr Grofski would resign his directorship and separate from the company. Mr Trollip was to take full control of Budget Render. A heads of agreement was signed on 14 January 2009 to give effect to that agreement.
- [5] This heads of agreement records:
  1. Mr Grofski and Mr Trollip conducted two businesses together, Budget Render and Pro X Paint Pty Ltd;
  2. Both wanted to separate these businesses – Mr Grofski to take Pro X Paint and Mr Trollip to take Budget Render;
  3. Budget Render owed money to Mr Grofski and upon that money being repaid, Mr Grofski would transfer his shares in Budget Render to Mr Trollip and Mr Trollip will transfer his shares in Pro X Paint to Mr Grofski.
- [6] While the separation did occur, the money was never paid to Mr Grofski and the shares in Budget Render were never transferred.
- [7] Mr Grofski signed a letter dated 5 January 2009 resigning his directorship of Budget Render. This resignation was accepted in a letter from Mr Trollip on 8 January 2009 but not registered by Mr Trollip with ASIC till 20 September 2009.
- [8] At the time of his resignation in January 2009, Budget Render owed Mr Grofski \$80,000 in wages and repayment of his contributions. Mr Grofski says he decided Budget Render could pay this over time when it was in a position to do this. Mr Grofski says he expected this time to be when the next major job was completed.
- [9] The evidence from both Mr Grofski and Mr Trollip was that Mr Grofski stood aside from Budget Render’s business at that time and effectively played no further part in Budget Render. Mr Grofski says at Mr Trollip’s

request, from time to time he “dropped into” Budget Render’s building sites to ensure work was being done correctly but that this was a gesture of good will only and he was not paid for these inspections. Mr Trollip agrees with this evidence.

[10] On 20 August 2009, Mr Trollip changed the name of Budget Render Pty Ltd to Pro X Constructions (QLD) Pty Ltd.

[11] Mr Grofski says that as far as he was aware, as at his resignation as a director in January 2009, Budget Render (Pro X as it became) was trading satisfactorily and was able to pay its debts as they fell due, although the economy and the business had slowed down a bit.

[12] On 1 December 2009 a deed of assignment was entered into between Pro X and Mod Pods (Aust) Pty Ltd (Mr Grofski’s company) assigning debts owing to Pro X to Mod Pods. Mr Grofski says that this was to allow him to enforce the debts and recoup the money owing to him by Pro X.

[13] Mr Trollip agrees with Mr Grofski’s evidence saying that Pro X failed because of the general downturn of the global financial crisis but particularly because of the unlawful termination of a contract by a third party. This contract represented 70-75% of the overall business of Pro X. On Mr Trollip’s evidence, this contract was terminated by the third party in late December 2009 – the same month that the deed of assignment of outstanding debts was entered into between Pro X and Mod Pods but eight months from Mr Grofski’s resignation as a director of the then Budget Render .

[14] Mr Grofski gave evidence that he was unaware of any problems with Budget Render up until or after he resigned his directorship. He says that Mr Trollip was responsible for the business management and he undertook this role with the assistance of an employee.

[15] From what Mr Grofski could see on site, all employee wages (himself included) and sub-contractors were paid and he was never refused credit with any supplier. Mr Grofski thought Mr Trollip was experienced and knowledgeable in this area. Mr Grofski himself did not have even a basic understanding of the company’s accounting practices or true financial position. He is unable to read or understand (without detailed explanations) any accounting documents. Mr Grofski simply trusted Mr Trollip with these matters.

[16] On about 8 April 2010, liquidators were appointed for Pro X. The company had outstanding debts of \$602,201.00, the largest debt being to the Australian Taxation Office of \$286,847.00. Mr Grofski is listed as a debtor for \$31,894.00.

[17] The large debt to the ATO cannot be accounted for totally in the 2010 year. At the hearing, the evidence of Mr Trollip was vague and uncertain but an analysis of the final figures satisfies me that the ATO debt had been

building for some time and over more than one financial year. It appears that Mr Trollip at least, would have been aware that he was paying his creditors by giving priority to wages, subcontractors and supplies – all the things that Mr Grofski could readily see, but not addressing a hidden growing tax debt that Mr Grofski was unaware of, as he did not see or understand the company accounting.

[18] Under the current Queensland licencing system for builders, if a builder is a director or influential person in a company that has become insolvent, the builder is an excluded individual and their building license is cancelled for five years<sup>1</sup>. With the insolvency of Pro X, Mr Grofski became an excluded builder and Mr Grofski was advised of this by notice from the Authority on 29 June 2010.

[19] However an excluded builder can apply to be a permitted individual allowing them to retain their building license if the builder can satisfy the authority that he took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event, here the liquidation of Pro X<sup>2</sup>.

[20] The QBSA Act also sets out the matters the Authority (and therefore this Tribunal) must have regard to when examining any action by the excluded builder to show that he took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event. These are:

- a. keeping proper books of account and financial records;
- b. seeking appropriate financial or legal advice before entering into financial or business arrangements or conducting business;
- c. reporting fraud or theft to the police;
- d. ensuring guarantees provided were covered by sufficient assets to cover the liability under the guarantees;
- e. putting in place appropriate credit management for amounts owing and taking reasonable steps for recovery of the amounts;
- f. making appropriate provision for Commonwealth and State taxation debts.

[21] The Authority is not prevented by this list from having regard to other matters when deciding if a builder took all reasonable steps<sup>3</sup>.

[22] The leading decision of Judge McGill in *Younan v QBSA*<sup>4</sup> identifies a four step process when determining a permitted individual. These steps are:

1. Identify the relevant event;
2. Identify the circumstances the resulted in the happening of the relevant event;

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<sup>1</sup> Queensland Building Services Authority Act 1991, s 56AC.

<sup>2</sup> Queensland Building Services Authority Act 1991, s 56AD.

<sup>3</sup> Queensland Building Services Authority Act 1991, s 56AD(8A).

<sup>4</sup> [2010] QDC 158.

3. determine if the applicant took all reasonable steps to avoid the coming into existence of those circumstances; and
4. if the threshold test is satisfied, should discretion be exercised to classify the applicant as a permitted individual.

[25] His Honour then goes on to say “*what were reasonable steps depended on what was reasonable for the individual concerned in the circumstances in which he found himself, with such information as he then had. It is not a question of whether he did everything possible to prevent these circumstances from arising, or whether they might not have arisen if he had acted differently. The reasonableness of his behaviour must be assessed by reference to what was known by him at the time, without benefit of hindsight*”<sup>5</sup>.

[26] The essential question becomes whether it was reasonable for Mr Grofski to completely rely on Mr Trollip for all accounting and bill paying (accepting as he did Mr Trollip’s assurances that everything was in order) or whether Mr Grofski should have independently satisfied himself about the accounts.

[23] It appears on the evidence that everything was not in order and that a hidden tax debt was mounting. This would have been ascertainable by Mr Grofski by either asking for the accounts to be explained to him or even by independent inquiry with the employee who handled the accounts and the book-keeping.

[24] It is also concerning that when these men parted company in early 2009, Mr Grofski did not think that things may have been amiss when a company that he thought was trading profitably, could not pay him the monies owing to him at the time he resigned as director. Mr Grofski gave evidence that he remained a shareholder of Budget Render as it then was in a misguided attempt to protect the monies he was owed.

[25] These concerns are heightened by the December 2009 deed of assignment which, when viewed independently, could be construed as an attempt to remove the monies owing to Mr Grofski when “the writing was on the wall” so to speak, in relation to Pro X.

[26] The *Corporations Act 2001* places a high personal duty on directors to ensure the company is not trading insolvent. These duties in relation to applications for permitted individuals were discussed in *Henley v QBSA* [2010] QCAT 242 beginning at paragraph 55 and I respectfully adopt the learned member’s comments therein. The learned member particularly commented<sup>6</sup>

*“Individual director [sic] should obtain information about the company’s operations and be active at board meetings. The Australian Securities*

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<sup>5</sup> *Younan v QBSA* [2010] QDC 158 at para 26.

<sup>6</sup> At paragraph 57.

*and Investments Commission Practice Note 22 mentions the following for directors to consider in forming their opinion as to the company's solvency: review of profit and cash flow forecasts; ability to realize current assets, particularly inventories and receivables; ability to meet suppliers credit terms; removal of financial support by major lenders; and effects of contingent liabilities."*

- [27] Mr Grofski took none of these steps. Because he trusted Mr Trollip everything was left to him to manage, with no inquiry from Mr Grofski other than cursory assurances from Mr Trollip that all was well, taken by Mr Grofski at face value.
- [28] Faced with this evidence and, in a sad lesson for Mr Grofski about his responsibilities as a company director, I cannot be satisfied that he took all reasonable steps to avoid the coming into existence of the circumstances which led to the ultimate insolvency of Budget Render, Pro X as it became.
- [29] For these reasons, Mr Grofski's application must fail. The decision of the Authority dated 2 August 2010 refusing to categorise Mr Grofski as a permitted individual is confirmed.