

CITATION: *Ernst v Building Services Authority* [2011] QCATA 155

PARTIES: Mr Victor Andrew Ernst
v
Queensland Building Services Authority

APPLICATION NUMBER: APL235-10

MATTER TYPE: Appeals

HEARING DATE: 19 May 2011

HEARD AT: Brisbane

DECISION OF: **Hon James Thomas, Judicial Member**
Ms Kerrie O’Callaghan, Senior Member

DELIVERED ON: 27 June 2011

DELIVERED AT: Brisbane

ORDERS MADE:

- [1] **Leave to appeal granted.**
- [2] **The appeal is allowed.**
- [3] **The decision of the Tribunal made on 8 September 2010 is set aside.**
- [4] **On rehearing of the matter, the decision of the Queensland Building Services Authority is confirmed and Mr Ernst’s application to become a “permitted individual” is refused.**

CATCHWORDS:

APPEAL – where respondent conceded mixed questions of law and fact and that appeal should proceed – alleged denial of natural justice – where member alleged to have attributed admissions to appellant when admissions not made

REHEARING – where Tribunal decision set aside – where decision in same terms substituted

REVIEW – *Queensland Building Services Authority Act 1991* section 56AD – “excluded individual” – group of companies under sole

control of appellant, one of which went into administration – whether applicant took all reasonable steps to avoid coming into existence of the circumstances relating to the relevant event

APPEARANCES and REPRESENTATION (if any):

APPLICANT: Mr Victor Andrew Ernst was represented by Mr Dowd, Solicitor of Dowd and Company Lawyers

RESPONDENT: Queensland Building Services Authority was represented by Mr Andriatidis, counsel instructed by Forbes Dowling Lawyers

REASONS FOR DECISION

- [1] This is an appeal by Mr Ernst against a decision of a QCAT member dated 8 September 2010.
- [2] The right to bring such an appeal is subject to the provision of sections 26 and 142 of the *Queensland Civil and Administrative Tribunal Act 2009* (the QCAT Act).
- [3] It is conceded by the Respondent that questions of law or mixed questions of fact and law arise, and it is appropriate to proceed with the appeal and the arguments that are raised in the submissions.

Background facts

- [4] Mr Ernst was at material times the sole director and controller of the following companies:

Freehold Homes Pty Ltd (“Freehold Homes”);
 Freehold Constructions Pty Ltd;
 V & ME Constructions Pty Ltd (“V & ME Constructions”);
 V & ME Pty Ltd;
 V & ME (Tas) Pty Ltd;
 V & ME Civil Pty Ltd;
 Move Homes Pty Ltd.

They are collectively known as the V & ME group.

- [5] Through the V & ME group Mr Ernst undertook property development, construction with steel house frames and truss manufacturing activities. The main vehicle for performance of construction work at material times was V & ME Constructions, for which Mr Ernst was the nominee builder’s licence holder.

- [6] In April 2009 Freedom Homes became insolvent and entered into a voluntary deed of company arrangement under the administration of Messrs Hambleton and Murphy.
- [7] In May 2009 the Queensland Building Services Authority (“QBSA”) advised Mr Ernst that it considered him to be “excluded individual” under section 56AC of the *Queensland Building Services Authority Act 1991* (“QBSA Act”).
- [8] He thereupon applied to be categorised as a “permitted individual”, which was a pre-condition to re-obtaining a licence.
- [9] On 25 June 2009 the QBSA advised him that his application had been refused.
- [10] Mr Ernst then sought a review of that decision in the Commercial and Consumer Tribunal, under s 86(1)(j) of the QBSA Act.
- [11] Before the commencement of any hearing the Commercial and Consumer Tribunal was abolished and replaced by QCAT (in December 2009). The proceeding therefore became a “pending proceeding” under section 245 of the QCAT Act, and under section 256 became a proceeding before QCAT. The review hearing (which took place on 12 April 2010) was therefore governed by the QCAT Act and in particular by sections 17-24 of that Act relating to the conduct of reviews.
- [12] The member constituting the tribunal (Mr Brands) determined that the application was unsuccessful and confirmed the decision of the QBSA.
- [13] As indicated above the present proceeding is an appeal against the QCAT member’s decision.

Grounds of appeal

- [14] The submissions filed on behalf of Mr Ernst seek orders that the QCAT decision of 12 April 2010 be set aside, and that the matter be returned to a reconstituted Tribunal for reconsideration with the hearing of additional evidence.
- [15] The main grounds of appeal, as it seems to us, may be summarised as:
- a) Mr Ernst was denied natural justice by not being forwarded a right to be heard, and by failure of the learned member to provide an adequate statement of reasons for the decision;
 - b) The learned member erred in attributing certain admissions to Mr Ernst when in fact such admissions had not been made.
 - c) The learned member erred in determining that Mr Ernst did not take all reasonable steps to avoid the coming into existence of the relevant event.
 - d) Mr Ernst was not provided with a fair hearing by reason of the manner in which he was cross-examined.

- [16] When the hearing of this appeal commenced, the appellant's solicitor, Mr Dowd, announced that he had lost contact with his client. He had prepared extensive written submissions which we had already read, and asked that we take them into account although he had not received further instructions and was unable to supplement them. However during the hearing of the appeal he made some submissions expressing his client's point of view on some of the issues that arose. Mr Dowd confirmed that his client knew of the date of the appeal but had not made further contact.
- [17] Insofar as the appeal contemplates the receipt of further evidence, the absence of Mr Ernst is significant in that he was not in a position to give further evidence in the event that we were prepared to receive it.
- [18] The first issue that we need to address is whether the conduct of the proceedings before Member Brand was such as to deny Mr Ernst an effective right to be heard, and whether the cross-examination denied him a fair hearing.
- [19] The Appellant's submissions on this issue place considerable weight upon the fact that the matter had been set down for two days, and that upon the commencement of the hearing the learned member intimated that it would only last for one day, and that Mr Ernst should run his case with this in mind. However it is to be noted that the hearing commenced at 9:28am and concluded at 5:31pm with an abbreviated lunch adjournment. The sitting time was almost 7 hours.
- [20] It is significant that once the hearing started there was very little intervention on the part of the member. He allowed the parties to ask their questions with little interruption and listened to frequent oral submissions from both sides with courtesy and patience. At one stage Mr Ernst stated that he wanted two hours to cross-examine the administrator Mr Hambleton, but upon being told by the member that that was "too long" he responded "that's fine". In the event he cross-examined Mr Hambleton at some length and Mr Ernst appears to have covered every point that he wished to cover. It is also significant that at no stage has Mr Ernst indicated the nature of any additional evidence that he wishes to add or which he claims he was deprived of presenting.
- [21] An exchange concerning the witness Natasha Dennis is indicative (see transcript pages 9-15). It commenced with:
- Presiding member.* Is this the bit which you said might take two hours?
Mr Ernst. No, hopefully this will take about 10 minutes.
Presiding member. Don't feel rushed though.
- [22] Mr Ernst then proceeded to cross examine the witness, quite relevantly, and clarified several points. Following this he proceeded to make extensive explanations and submissions from the bar table. By the time proceedings reach page 17 of the transcript, counsel for the QBSA announced that his case was complete except for Mr Hambleton who would be available at 3pm.

- [23] Mr Ernst then gave a fairly lengthy opening (pages 17-23). At that point he presented himself for cross-examination. Some of his answers were a little verbose, and were followed by polite indications from counsel that he “might cut him off”, to one of which Mr Ernst responded “not a problem”. At page 78 counsel quite fairly interrupted a rather lengthy speech concerning the extensive nature of the works in which his companies were still engaged, and at other times intervened with statements such as “If I can politely cut you there..”. However none of these occasions were unwarranted or beyond the legitimate conduct of counsel, confronted with a litigant in person, trying to keep issues relevant.
- [24] Mr Hambleton was called at 2:57pm. Cross-examination started at page 119 with virtually no interruption from the member. At page 124 Mr Ernst seems to have obtained a particular concession that he was seeking from Mr Hambleton. At page 126 he observed “That’s about all I have thanks.” He was then cross examined at some length by counsel for the QBSA. The matter eventually concluded after reasonably lengthy submissions by both men (Mr Robertson 9 pages and Mr Ernst 5 pages, in single line spacing).
- [25] Having carefully perused the transcript we consider that there is no basis for complaint that Mr Ernst was deprived of an opportunity of being heard, or that he was unfairly cross-examined. The issues were adequately ventilated and there is no reason to think that there is any proper basis for granting a rehearing, ether by receiving further evidence upon the appeal, or by referring the matter for rehearing before another Tribunal.
- [26] We therefore propose to proceed with this appeal as a rehearing on the merits based upon the record of evidence presented upon the original review, including the transcript of those proceedings.
- [27] There is some substance in Mr Ernst’s complaints concerning the reasons published by the learned member. Indeed the Respondent concedes that the member erred in attributing to Mr Ernst some admissions that he had not made, namely that there had been “creative accounting” in the running of Freehold Homes and that there were two different sets of accounts for that company. It is also conceded that the member erred in stating that there had been no suggestion of fraud or theft (on the part of Mr Wurth, Mr Ernst’s erstwhile business associate).
- [28] In these circumstances we think that the correct course will be to set aside the decision of the member and substitute our own decision under section 24(1)(b) of the QCAT Act.

Discussion

- [29] The parties are agreed that the “relevant event” for the purposes of section 56AC of the QBSA Act was the appointment of administrators to Freehold Homes on 30 April 2009. Mr Ernst was a director and controller of that company, and he became an “excluded individual” when the “relevant event” occurred.

[30] The real issue in the matter is whether under section 56AD(8) Mr Ernst took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event.

[31] Section 56AD includes the following relevant subsections:

56AD Becoming a permitted individual

(1) An individual may apply to the authority, in the form approved by the Board, to be categorised as a permitted individual for a relevant event if the individual has been advised by the authority, or has otherwise been made aware, that the authority considers the individual to be an excluded individual for the relevant event.

...

(8) 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.

(8A) In deciding whether an individual took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of a relevant event, the authority must have regard to action taken by the individual in relation to the following –

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

(8B) Nothing in subsection (8A) prevents the authority from having regard to other matters for deciding whether an individual took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of a relevant event.

...

[32] It should be remembered that while the review (and in turn this appeal) involves a fresh determination, the relevant requirement of section 56AD(8) is satisfaction of the authority. This requires an objective determination of whether the authority should, on the relevant material, be so satisfied.

[33] Counsel for the QBSA submitted that there were five circumstances that resulted in the happening of the relevant event. It will be convenient to advert to these. They consist of acts by Mr Ernst as controller of all companies in the group, and include:

- i) Setting up a rival company in direct competition with Freedom Homes;

- ii) Causing expenses to be run through Freehold Homes that were properly attributable to other companies controlled by Mr Ernst;
- iii) Failing to take advice or action against V & ME Constructions in relation to a \$300,000.00 debt;
- iv) Causing Freehold Homes to pay rent in advance in the order of \$60,000.00 to \$70,000.00;
- v) Poor management of Freehold Homes.

- [34] The evidence shows that in February 2009, at which time Freehold Homes was in some financial difficulty, Mr Ernst incorporated Queensland Steel Solutions to conduct the same type of business as that conducted by Freehold Homes. He thus set up a rival company in direct competition with the company that in due course failed. It is clear that at this time the frame manufacturing industry was a very competitive one, that the new company would use the same intellectual property as Freehold Homes, and that both companies would have premises in the same area at Narangba.
- [35] In the event the new company survived and Freehold Homes did not. It was “beginning to reap the benefits of [the relevant] technology” (see transcript page 64), although Mr Ernst considered it still needed to increase its turnover.
- [36] From the point of view of Freehold Homes (not to mention its creditors), at a time of financial stress this decision is inexplicable and unjustified.
- [37] Following the administration of Freehold Homes it was ascertained that there were unsecured trade creditors of a little over \$603,000.00 in addition to “related unsecured creditors”, that is to say other companies in the group and Mr Ernst, of approximately \$2,200,000.00.
- [38] The creation of Queensland Steel Solutions at this critical time can only have aggravated Freehold Homes’ problems, and were not the actions of a director committed to the best interests of Freehold Homes.
- [39] So far as the circumstance mentioned in para [33](i) above is concerned, Freehold Homes’ monthly expenses increased from \$13,000.00 per month in 2008 to \$27,000.00 per month in 2009. The increased expenses were caused by increased employee expenses with respect to employees who were really working for the benefit of other companies in the group, and the decision that Freehold Homes should pay \$10,000.00 per month more than the rent it was obliged to pay. The inference is open that Mr Ernst ran his companies in such a way as to allocate unnecessary expenses to Freehold Homes for the benefit of other companies in the group.
- [40] Mr Ernst’s explanation of the extra wages charged against Freehold Homes was that he put a number of employees onto the payroll of Freehold Homes “for the project at Kingaroy”. This was a V & ME constructions project. When asked why Freehold Homes was burdened with these costs Mr Ernst’s answer was “but the payroll continued. Some of the people worked dual roles” (transcript page 127). This is a very vague and unconvincing excuse, and the overall picture is one of Freehold Homes being used as a vehicle for the benefit of other companies in the group.

- [41] So far as item (iii) above is concerned V & ME Constructions contracted to build a number of houses and completed a substantial part of those works. Part of the construction works included 16 frames manufactured by Freehold Homes, valued at \$300,000.00. The cost to Freehold of manufacturing them was \$120,000.00, and its inter-company contract with V & ME Constructions could have been arranged to produce a substantial profit for Freehold Homes. That however was not done. In the event V & ME Constructions ran into trouble with a third party and the relevant project collapsed. V & ME Constructions did not pay its debt to Freehold Homes, which was left to share the burden along with V & ME Constructions arising from the failed project. It is important to remember that this project was not a Freedom Homes project.
- [42] Under Mr Ernst's direction Freedom Homes did not make any effort to recover this debt. Of course in a group of companies under the sole control of one man, contractual rights tend to be what the controlling person says they are. Mr Ernst could have arranged for Freedom Homes to be repaid by V & ME Constructions but chose not to do so.
- [43] Mr Ernst claimed that there was actually no order from V & ME Constructions for those frames (although elsewhere he said that the frames which Freehold Homes manufactured were "always to order"). If there was no order, one immediately asks "why then did Mr Ernst let Freedom Homes make the frames?"
- [44] The relevant events and Mr Ernst's explanations of them are those of a controller prepared to benefit other companies in the group at the expense of Freehold Homes.
- [45] In relation to (iv) above, this is another, (albeit relatively minor) instance of arranging the affairs of the companies in a way unfavourable for Freehold Homes.
- [46] In relation to (v) above eight particulars of poor management are set out in paragraph 61 of the Respondent's submissions. We do not propose to repeat them here, but indicate that they are sufficient to justify a conclusion of poor management of Freehold Homes, and are substantiated by the evidence of Mr Hambleton.

Did Mr Ernst take all reasonable steps?

- [47] The criteria for addressing this question are referred to in ss 56AD(8) and 56AD(8A) of the QBSA Act, which are set out in paragraph [20] above.
- [48] The Appellant's submissions on this issue are summarised in paragraph 120 of his written submissions. He contends that the following activity on his part represents reasonable attempts to avoid the insolvency of Freehold Homes.
- e) He instituted proceedings against Bridgeport (in respect of the Kingaroy project) in an attempt to recover the funds owed by Bridgeport to V&ME (our emphasis).

- f) He issued statutory demands and other proceedings against Bridgeport, including commencement of winding up proceedings against Bridgeport and lodging a caveat over property owned by that company, and various other fruitless steps of enforcement.
- g) He attempted to make Freehold Homes more viable by ceasing its dealings and operations in the Northern Territory. As to this, it was a managerial decision, and presumably a reasonable one, but it is a mere straw in the wind of the company's problems.
- h) He replaced "non performing staff" of Freehold Homes and undertook management, sales and costing reviews.
- i) He attempted to increase Freehold Homes' viability by moving to smaller business premises.

[49] The question to be addressed is not whether he took *some* reasonable steps to avoid the company going into voluntary administration; it is whether he took *all* reasonable steps. So far as the Bridgeport proceedings are concerned, these were primarily for the benefit of V&ME, rather than Freedom Homes, although they might in a loose sense be thought to be to the benefit of the group of companies that Mr Ernst was controlling.

[50] In our view the combined effect of all of these steps falls far short of adequate steps to avoid the insolvency and eventual administration of Freehold Homes, and are outweighed by the other managerial decisions and inter-company activity organised by him as mentioned above.

[51] We have noted Mr Ernst's submissions on the books and records issue (paras 72-78 of his written submissions), which demonstrate some errors in the member's findings which must be set aside. However we consider Mr Hambleton's evidence on this issue should be accepted, and that it has been shown that Mr Ernst failed to organise Freedom Homes in such a way as to keep proper books of account and financial records.

[52] We have also considered Mr Ernst's submissions on the "fraud and theft issue" (paras 79-91 of his submissions) and upon the "Wurth issues" (paras 110-117), as to which Mr Ernst's submissions and evidence are accepted. However the main effect of this is to demonstrate error on the member's part which requires us to reconsider the case. The extent of financial misfortune arising from these issues was not of sufficient magnitude to have brought about Freedom Homes' insolvency, and is not a major factor in the overall picture.

[53] V & ME was incorporated in September 2003 and had been trading for some years before Freehold Homes was incorporated in March 2007. But by September 2008 Freehold Homes was said to be "unable to recover debts", and quite clearly Mr Ernst did not run the group of companies in such a way as to make Freedom Homes a profitable part of the overall enterprise, or to cause the other companies in the group to deal with it in such a way as to allow it to make reasonable profits. To the contrary, as indicated above, in February 2009 he incorporated Queensland Steel Solutions as a new company in the group to do similar work to that which Freedom Homes had been intended to perform.

- [54] Mr Ernst claimed that a major factor in Freedom Homes' collapse was the fact that another company ("Pacific") filed a defence in an action brought by Freehold Homes for \$894,000.00. There was no written contract in this instance. This claim seems to have been an ambit claim without any solid foundation and not to have been a genuine factor in the decision to seek appointment of an administrator.
- [55] It may be true, as Mr Ernst asserts in his submissions and in his evidence, that from the point of view of himself and the other companies in the group it became commercially undesirable to move the funds that would save Freedom Homes. But having established companies to run the businesses, having obviously favoured other companies in intercompany relationships, and having incurred debts to creditors, he owed specific duties to each company.
- [56] In this group of companies with common shareholdings, the relevant transactions, in Mason J's words in *Walker v Wimborne* [1975-76] 137 CLR 1 at 6, "must be viewed from the standpoint of company A and judged according to the criterion of the interests of that company". Acts and transactions that may be for the benefit of some members of the group may well be misfeasances in relation to the subject company.
- [57] In his evidence Mr Ernst said that Freehold Homes became insolvent because "it was never in a position of making money" (transcript pages 78-79). The proper inference in the circumstances is that it did not make money because Mr Ernst did not organise its affairs so that it would do so. He was in sole control of all the companies and in a position to set prices and regulate inter-company contracts. At the material time the group's business activities were organised so as to advantage other members in the group to the disadvantage of Freehold Homes which was treated as the poor relation.
- [58] The evidence supports findings of inadequacy under the criteria mentioned in subparagraphs (a), (e) and (f) of s 56AD(8A) of the QBSA Act, namely -
- i. keeping proper books of accounts and financial records;
 - ii. putting in place appropriate credit management for amounts owing and taking reasonable steps for recovery of the amounts; and
 - iii. making appropriate provision for Commonwealth and State taxation debts.
- [59] It is arguable that there were also some inadequacies under subparagraphs (b) and (c) of section 56AD(8A), but we do not think that these factors had much to do with the relevant event.
- [60] There were sufficient assets within Mr Ernst's control through the companies to have saved Freehold Homes from administration, had he chosen to run Freedom Homes more advantageously in relation to dealings with the other companies, and ultimately to move money from the more profitable companies, especially to discharge a debt that was or should have been owed to Freedom Homes in respect of the manufacture of trusses. While it is understandable from a business point of view that he would wish to

protect those other companies, and that he might regard the provision of further money to Freehold Homes as commercially undesirable, this is far from a demonstration that he took all reasonable steps to avoid the insolvency of Freehold Homes. His organisation of the Freedom Homes' affairs was not in Freedom Homes' interest. It was the benefit of the corporate empire.

- [61] During the hearing of the appeal Mr Ernst's solicitor, Mr Dowd, referred to this aspect (of Freehold Homes being owed money which Mr Ernst was not willing to move from other companies), asserting that "he drew a line in the sand and said 'no more'". This correctly represents his client's position, but it misses the point. In a situation where one man is the *alter ego* of a group of companies, and he runs them so as to favour some over others, and subjects one in particular to disadvantageous trading, and that company becomes insolvent leaving substantial sums owing to outside creditors while the other companies thrive, and one of them fails to discharge a substantial debt that it owes to the subject company, it may be difficult to come to the conclusion that he has taken all reasonable steps to avoid that result.
- [62] In summary, in the present matter it is amply demonstrated that Mr Ernst did not take all reasonable steps to avoid the coming into existence of the circumstances that resulted in Freehold Homes going into administration.
- [63] Because of the member's errors mentioned above in para [27] above it will be necessary to allow the appeal to the extent of setting aside the member's order and substituting our own decision. (See QCAT Act s 146(b)).
- [64] Having reheard the matter on appeal we will substitute an order confirming the decision of the QBSA that Mr Ernst's application to become a "permitted individual" be refused.