QCAT
Queensland **Civil and Administrative Tribunal**

CITATION:	*Corcoran v Building Services Authority* [2011] QCATA 158
PARTIES:	Ross Anthony Corcoran (Applicant/Appellant) v Building Services Authority (Respondent)
APPLICATION NUMBER:	APL020-11
MATTER TYPE:	Appeals
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	**Richard Oliver, Senior Member** **Michael Howe, Member**
DELIVERED ON:	5 July 2011
DELIVERED AT:	Brisbane
ORDERS MADE:	**The appeal is dismissed.**
CATCHWORDS:	STATUTORY INTERPRETATION – Where applicant deemed to be an “excluded individual” pursuant to section 56AC of the *Queensland Building Services Authority Act* – meaning of “for the benefit of a creditor” in section 56AC(2)(a) – whether the phrase should be restricted to situations only where a provisional liquidator, liquidator, administrator or controller appointed by a creditor – whether phrase should be given its plain meaning – consideration of principles of statutory construction – whether procedural fairness *Queensland Civil and Administrative Tribunal Act* 2009, s 142(1) *Queensland Building Services Authority Act 1991*, ss 56AC(2); 56AD; 56AD(8), Part 3A *Acts Interpretation Act 1954*, s 14B(1) *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] 239 CLR 27

Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation [1981] 147 CLR 297

APPEARANCES and REPRESENTATION (if any):

This matter was heard and determined on the papers pursuant to s 32 of *Queensland Civil and Administrative Tribunal Act 2009* (QCAT Act).

REASONS FOR DECISION

Richard Oliver, Senior Member

[1] In this matter I have had the advantage of reading the reasons of Mr Howe, Member, set out below. I agree with those reasons, his conclusions, and the order he proposes.

Mr Howe, Member

[2] Ross Anthony Corcoran was a former director of Canary Candles Pty Ltd and Corwill Holdings Pty Ltd. Mr Corcoran resigned as Director and Secretary of Canary Candles Pty Ltd on 11 November 2006. On 20 February 2008 the then sole Director of the company, Mr Clark, placed Canary Candles Pty Ltd into voluntary administration. At that time Mr Corcoran was the sole shareholder of Canary Candles Pty Ltd. The Building Services Authority made the decision to categorize Mr Corcoran as an excluded individual in relation to this relevant company event on 18 November 2008.

[3] Corwell Holdings Pty Ltd was placed into voluntary administration on 5 June 2008. At that time Mr Corcoran was a Director of that company. The Building Services Authority made the decision to categorize Mr Corcoran as an excluded individual in relation to this relevant company event on 9 July 2008.

[4] Mr Corcoran applied to the Authority to be categorized as a permitted individual in relation to the two relevant company events, but was refused with respect to both. Mr Corcoran applied to the Commercial and Consumer Tribunal (CCT) for reviews of those decisions. On 16 September the CCT ordered the two applications be consolidated. From 1 December 2009 the CCT was amalgamated into the Queensland Civil and Administrative Tribunal (QCAT) and the current application for review was transferred to QCAT.

[5] The review was initially heard by a Tribunal Member who was unable to finalize the matter to decision and the parties agreed to the review being completed by another Member without further oral argument or evidence. The learned Member who decided the review held the decision of the Authority to categorize Mr Corcoran as an excluded individual in relation to the two relevant company events should be confirmed.

[6] The appeal involves a question of law, and accordingly leave to appeal is not required[1].

[7] The appeal is on the following grounds:

a) That the Tribunal erred in finding that the companies had an administrator appointed 'for the benefit of a creditor' within the meaning of s 56AC(2) of the *Queensland Building Services Authority Act 1991* (the Act).

b) In doing so the Tribunal erred by applying an incorrect construction of s 56AC namely if there was in fact a payment to a creditor as a result of the administration then the appointment was for the benefit of a creditor.

c) Alternatively, the Tribunal erred by applying an incorrect construction of s 56AC, namely that the appointment of an administrator of itself resulted in the appointment being for the benefit of a creditor.

[8] An individual becomes an excluded individual under s 56AC(2) of the Act 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

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

For the Benefit of a Creditor

[9] Mr Corcoran submits the words in s 56AC(2) 'for the benefit of a creditor' should be construed in their own context and in the broader context of the Act and related legislation. A construction should be preferred which will most effectively meet the mischief which the legislation is designed to remedy. Mr Corcoran goes on to say in the context and given the purpose of the Act the phrase 'for the benefit of a creditor' should be read as referring to an appointment or winding up order made by a creditor. Where members of a company or its directors appointment an administrator or

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1 *Queensland Civil and Administrative Act 2009*, s 142(1).

liquidator, this should not constitute a relevant event for the purposes of the Act.

[10] Mr Corcoran cites a number of examples in support of this contention. With respect to winding up, the example of the winding up of a solvent company in order to distribute profits. A second, the winding up of a company because a company does not commence business within one year. Another example, the case of members initiating a members' voluntary winding up by passing a special resolution where the company is solvent.

[11] As to the appointment of an administrator, Mr Corcoran suggests where an appointment is made by directors who conclude the company may become insolvent at some future point, though at the time of the administrator's appointment it is solvent, it is contrary to the purpose of the Act to render each of the directors of the company an excluded person.

[12] In these examples, Mr Corcoran suggests, the winding up or the administration has nothing to do with the solvency of the company, and such events should not result in directors or an influential person associated with the company being excluded under s 56AC(2).

[13] Mr Corcoran's last example introduces difficulties for him perhaps, given any conclusion about potential insolvency ahead of a company must be based, one would think, on past trading circumstances and referrable at least in part to the management decisions preceding the decision to make an appointment.

[14] The initial task when interpreting legislation is to give the words used the meaning the words most plainly have.

[15] The High Court said in *Alcan v Commissioner of Territory Revenue*[2]:

> '*This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy'.*

[16] Gibbs CJ also explained the process of construction in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*[3]:

> *'It is an elementary and fundamental principle that the object of the court, in interpreting a statute, "is to see what is the intention expressed by the words used": River Wear Commissioners v Adamson (1877) 2 App Cas 743, at p 763. It is only by considering the meaning of the words used by the legislature that the court can ascertain its intention. And it is not unduly pedantic to begin with the assumption that words mean what they say: cf. Cody v J. H. Nelson Pty. Ltd. [1947] HCA 17; (1947) 74 CLR 629, at p 648. Of course, no part of a statute can be considered in isolation from its context – the whole must be*

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2 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46

3 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1981] 147 CLR 297 at 304-5.

considered. If, when the section in question is read as part of the whole instrument, its meaning is clear and unambiguous, generally speaking "nothing remains but to give effect to the unqualified, words": Metropolitan Gas Co. v Federated Gas Employees' Industrial Union [1925] HCA 5; (1925) 35 CLR 449, at p 455. There are cases where the result of giving words their ordinary meaning may be so irrational that the court is forced to the conclusion that the draftsman has made a mistake, and the canons of construction are not so rigid as to prevent a realistic solution in such a case: see per Lord Reid in Connaught Fur Trimmings Ltd. v Cramas Properties Ltd. (1965) 1 WLR 892, at p 899; (1965) 2 ALL ER 382, at p 386. … However, if the language of a statutory provision is clear and unambiguous, and is consistent and harmonious with the other provisions of the enactment, and can be intelligibly applied to the subject matter with which it deals, it must be given its ordinary and grammatical meaning, even if it leads to a result that may seem inconvenient or unjust'.

[17] The words in s 56AC(2) 'for the benefit of a creditor' are clear and unambiguous. There is no warrant to give them other than their ordinary and grammatical meaning. Application of that principle does not lead to any result that is inconvenient or unjust. A consideration of the context within which the words are used confirms that conclusion.

[18] Part 3A of the Act deals with excluded and permitted individuals and excluded companies. Section 56AC(2) is found in Div 1 of Pt 3A. Division 1 excluded individuals may apply under Div 2 provisions to be excluded from the effects of categorization as excluded individuals under Div 1 upon a detailed examination of their role in the administration or dissolution event leading up to the determination of their excluded status.

[19] The scheme of the Act is clear. The triggering event is that stated in s 56AC(2). The triggering event is broadly described, namely a company, *for the benefit of a creditor*, has a liquidator, administrator or controller appointed. The net so cast casts wide. To ameliorate the potentially harsh consequences of such broad netting, Div 2 of Pt 3A is available to those individuals pronounced excluded to show that in their particular situation, they conducted themselves with respect to the management of the company with due prudence and their role in the company did not contribute to the relevant event – in simple terms, that the failure of the company was not their fault.

[20] The difficulty with the interpretation urged by Mr Corcoran is that insolvency and imprudent company management does not necessarily commence only when a statutory demand is served by a creditor. Much before that point is reached there are numerous indicators of potential insolvency – poor cash flow; incomplete financial records; increasing debt, creditors unpaid outside normal terms; solicitors demands for payment; the issuing of post-dated cheques; unpaid taxes and superannuation liabilities; board disputes and director resignations. There are many more.

[21] A dishonest or incompetent or imprudent director, member or other influential person may, indeed, seek to initiate insolvency procedures themselves to advantage themselves in that process at the cost of creditors and other contributors. On Mr Corcoran's suggested interpretation of s 56AC(2), a company placed into administration by the directors rather

than a creditor would, through that step, stand outside the scope of s 56AC(2) by virtue simply of having taken that step. That cannot be right.

[22] Mr Corcoran submits there is no guidance available from the Explanatory Notes to the legislation or from parliamentary debates. That is not true. Generally, as explained in *Alcan* mentioned above, extrinsic materials cannot be relied on to displace the clear meaning of the text. Section 14B(1) of the *Acts Interpretation Act 1954* provides however that extrinsic material in interpretation of a provision may be considered to confirm the interpretation conveyed by the ordinary meaning of the provision. Extrinsic material is defined to include an explanatory note or memorandum relating to the Bill that contained the provision and the second reading speech made to the Legislative Assembly on the Bill.

[23] Part 3A was added to the Act in 1999. The explanatory notes to that addition state that a major deficiency with the existing regulatory structure was the ability of defaulting contractors to restructure their corporate structure and to re-emerge as a 'phoenix' company following cancellation of a licence. The explanatory notes state the new Pt 3A was designed to remove individuals who demonstrated their incapacity to manage finances from the building industry for a 5-year period. Section 56AC set up the concept of how individuals and companies become defined as "excluded individuals" and "excluded companies" in terms of relevant events. Section 56AD set out the process whereby an excluded individual might be categorised as a "permitted individual". The latter provision allowed individuals who had undergone a bankruptcy event through absolutely no fault of their own to continue to operate in the building industry. The sole ground for categorisation as a permitted individual was that set out in s 56AD(8), namely that the applicant could demonstrate that all reasonable steps had been taken to avoid the occurrence of the facts giving rise to the relevant event. It was intended to restrict classification as a permitted person to instances where the applicant has been the victim of fraud or defalcation by, for example, a partner or spouse. Section 56AD(9) provided that once an individual was categorised as a permitted individual in respect of a relevant event, the individual was not an excluded person in respect of the relevant event.

[24] Language of a rather more colourful character but contextually informative never the less was used by the Minister in the second reading speech to the introduction of Part 3A[4] – '*The Bill introduces a range of enhancements to the existing licensing system for the benefit of consumers and industry participants. Ultimately, they will improve public confidence in the integrity of the system. First, the Bill contains provisions to prevent bankrupts and persons associated with bankruptcy from holding or being associated with a building contractor's licence for a period of five years. This will prevent the re-emergence of shonks through the device of "phoenix" companies. The scheme introduced by the Bill provides for "excluded individuals", who may not hold a licence. These are bankrupts or individuals who take advantage of the laws of bankruptcy, such as through entering into a "part 10 arrangement" with creditors, or who are associated with a failed company.*

[4] Hon. J C Spence, Hansard 21 July 1999, p2772.

They will be "excluded individuals" for five years from the relevant event. So as to prevent injustice, a person who becomes an excluded individual may apply to the Building Services Authority to have that status expunged. To do so, they will have to prove that they could not have avoided the relevant financial catastrophe. This is intended to mean that the cause of the relevant event was entirely outside the responsibility of the individual concerned. Examples might be that a spouse absconded with an individual's assets, or that a financial calamity was due to a natural disaster, against which it was not possible to insure. Further safeguards against injustice are provided through access to review of the authority's decisions by the Queensland Building Tribunal'.

[25] Consideration of the explanatory notes and the statement of the Minister in the second reading speech confirms that the words ‘for the benefit of a creditor’, construed in its own context and in the broader context of the Act should not be read as referring to an appointment of an administrator or the making of a winding up order initiated only by a creditor as proposed by Mr Corcoran, but interpreted much more broadly in furtherance of the scheme of the Act.

[26] There is no warrant for the plain meaning of the words ‘for the benefit of a creditor’ to be read down as proposed by Mr Corcoran to mean that an appointment of an administrator or liquidator must be initiated by a creditor, nor does any question of the provision being ‘penal’ alter the appropriateness of applying a broad threshold test to ‘benefit of a creditor’.

[27] Accordingly the decision of the Tribunal below that the appointment of an administrator, liquidator or controller need not be initiated by a creditor in order for it to be for the benefit of a creditor was correct.

A Payment to a Creditor

[28] Mr Corcoran also contends the Tribunal erred in concluding that if there was in fact a payment to a creditor as a result of the administration of the companies concerned then the appointment was for the benefit of a creditor.

[29] As explained above, the scheme of the Act is to set an initial low threshold test of wide application. Section 56AD then minnows the wheat from the chaff with the sifting of facts in each matter on a case by case basis to ensure those excluded individuals caught under s 56AC, but who are not responsible for the relevant event, are excused.

[30] Accordingly, the Tribunal did not err in concluding the payments to creditors of the companies, which included payments to Mr Corcoran’s wife and accountants and bookkeepers, were within the meaning of the expression ‘for the benefit of a creditor’. Such recognition accords with the low threshold requirement of the provision as explained above. Additionally, the integrity of the corporate structure is maintained where marital relationships and close relationship advisers who are still creditors of the corporation are not, on the simple basis of marital or other fraternal relationship, thereby excluded from the general category of company creditors. The place to consider any such special relationship is post section 56AC in the examination of any application of a director, secretary or influential person

to be accepted as a permitted individual for the relevant event under s 56AD.

The Appointment of an Administrator in Itself Being For the Benefit of Creditors

[31] Mr Corcoran's final ground of appeal is alternatively that the Tribunal erred by applying an incorrect construction of s 56AC in finding that the appointment of an administrator of itself resulted in a benefit to creditors.

[32] Mr Corcoran submits that the QCAT decision under appeal had regard to the decision of *Gallagher v QBSA*[5], which decision was delivered on 18 August 2010 after the hearing of this matter on 17 March 2010. Mr Corcoran comments that the Tribunal did not invite the parties to make any written submissions in relation to *Gallagher*. As previously stated, the review was heard before a Tribunal Member who was unable to finalise the matter to decision and the parties agreed to the review of the Authority decision being completed by another Member without further oral argument or evidence. Both parties have now made submissions about *Gallagher* in their Appeal submissions and there is nothing unfair to the parties in the circumstances.

[33] The Building Services Authority notes that *Gallagher* is the only decision to address the construction of s 56AC in any relevant sense. This statement is too broad. *Gallagher* was a decision which considered the construction and meaning of the words 'for the benefit of a creditor' appearing in s 56AC(2).

[34] At paragraph 18 of the QCAT Act review decision below the learned Member set out this extract from the decision of *Gallagher*:

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

[35] The learned Member did not in any sense suggest or act on the basis she was bound by the decision in *Gallagher*, but simply accepted the reasoning of that decision as correct.

[36] For the reasons previously stated both the text of the words used and the use of the words in the context of the legislative scheme within which they are found justify an easily satisfied benefit requirement of an appointment of a liquidator, administrator or controller. Such ensures the affairs of a company will be scrutinised and vigilance brought to bear on internal company management as was intended by Pt 3A of the Act.

[37] Section 3 of the Act provides inter alia that the objects of the Act are:

a) *to regulate the building industry—*

b) *to ensure the maintenance of proper standards in the industry; and*

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5 *Gallagher v Queensland Building Services Authority* [2010] QCAT 383.

c) *to achieve a reasonable balance between the interests of building contractors and consumers.*

[38] In this context as well it is appropriate, in the interests of a reasonable balance between the interests of building contractors and consumers, to give the words 'for the benefit of a creditor' a flexibly broad interpretation. That interpretation extends, in the view of the Appeal Tribunal, to accepting that in many company situations the very appointment itself of a liquidator, administrator or controller will be for the benefit of a creditor and captured by the s 56AC(2) provisions.

[39] Accordingly the appeal fails and the decision below is confirmed.