

CITATION: *Meredith v Queensland Building Services Authority* [2012] QCAT 146

PARTIES: Mr Steven Grant Meredith
(Applicant)
v
Queensland Building Services Authority
(Respondent)

APPLICATION NUMBER: OCR076-11 / OCR077-11 / OCR078-11

MATTER TYPE: Occupational regulation matters

HEARING DATE: 4 October 2011

HEARD AT: Brisbane

DECISION OF: **Dr Bridget Cullen, Member**

DELIVERED ON: 10 April 2012

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. I set aside three decisions of the Queensland Building Services Authority, dated 10 March 2011.**
- 2. I substitute the decision of this Tribunal that Steven Grant Meredith be categorised as a permitted individual for all three relevant events.**

CATCHWORDS: OCCUPATIONAL REGULATION – Application to review decision by the Queensland Building Services Authority not to categorise the applicant as a permitted individual – duties of director – conduct of co-director – decisions set aside by Tribunal

Queensland Building Services Authority Act 1991, s 56AD

Adler v Australian Securities and Investments Commission; Williams v Australian Securities and Investments Commission [2003] NSWCA 131
Daniels v Anderson (1995) 37 NSWLR 438
Gold Ribbon (Accountants) Pty Ltd (in liq) v Sheers & Ors [2006] QCA 335
Younan v Queensland Building Services Authority [2010] QDC 158
Delonga v QBSA [2004] QCCTB 26

Nation v BSA [2006] QCCTB 114
Darvill v QBSA [2008] QCCTB 35
Laidlaw v Queensland Building Services Authority [2010] QCAT 70

APPEARANCES and REPRESENTATION (if any):

APPLICANT: Mr Steven Grant Meredith

RESPONDENT: Queensland Building Services Authority
represented by Robinson Locke

REASONS FOR DECISION

Background

[1] The Applicant, a young builder named Steven Grant Meredith, seeks the Tribunal's review of three decisions made by the Respondent, the Queensland Building Services Authority ("QBSA"). The QBSA has declined to categorise Mr Meredith as a Permitted Individual in relation to three Relevant Events:

Application No.	Relevant Event
OCR076-11	Bankruptcy
OCR077-11	M&M Constructions Pty Ltd
OCR078-11	Miller Homes No. 1 Pty Ltd

[2] The submissions¹ of the QBSA are quite helpful in succinctly setting out the criteria that the Tribunal is to apply. For the Applicant to succeed, in accordance with s 56AD(8) of the *Queensland Building Services Authority Act 1991*, he must demonstrate that he took "*all reasonable steps to prevent the coming into existence of the circumstances which resulted in the happening of the relevant event.*"

[3] The "relevant events" are not in contention. Therefore, in order to decide whether Mr Meredith took all reasonable steps to avoid the relevant events (as he now asserts is the case), the Tribunal must:

- Identify the circumstances that resulted in the happening of the relevant event;
- Consider whether Mr Meredith took all reasonable steps to prevent those circumstances coming into existence; and
- Consider the exercise of discretion.

Agreed Facts

[4] Prior to my hearing this matter, the parties worked together in order to produce an Agreed Statement of Facts.² Helpfully, this narrows the issues

¹ Closing submissions of the QBSA, filed in QCAT on 10-10-11.

² Agreed Statement of Facts, Hearing Exhibit 1.

still in dispute significantly, thus leaving the only issue in contention before the Tribunal:

“whether it was reasonable for Mr Meredith to not be personally involved in the financial management of the company.”

[5] The following matters have been agreed:

1. *The relevant event is the appointment of administrators to M&M Constructions Pty Ltd and Miller Homes No 1 Pty Ltd and Mr Meredith’s bankruptcy.*
2. *The reasons for the failure of the companies were:*
 - 2.1 *The lack of up-to-date reliable information which would enable the companies to identify the warning signs of insolvency and take remedial action.*
 - 2.2 *Lack of working capital.*
 - 2.3 *Stripping of funds to related entities by [Steven Neil] Miller.*
3. *It is agreed that the bankruptcy was a consequence of the companies’ failure.*
4. *The issue in contention is whether it was reasonable for Mr Meredith to not be personally involved in the financial management of the company.*
5. *Steps that may have been taken include:*
 - 5.1 *Obtaining legal and financial advice from independent sources.*
 - 5.2 *Acting upon claims, letters of demand and other notifications received by the company to the effect that the creditor’s terms were not being complied with.*
 - 5.3 *Personally reviewing the financial records of the company.*
 - 5.4 *Insisting on financial reports and then reviewing these reports.*
 - 5.5 *Ensuring any loan agreements were formalised in writing.*
 - 5.6 *Taking steps to reasonably inform himself of his obligations as a director and to understand his role and duties as a director.*

[6] What is striking about this matter is the confidence that Mr Meredith reposed in his co-director, Mr Miller, to act truthfully and honestly in their mutual business dealings. Sadly, Mr Meredith’s confidence was misplaced, as it was ultimately Mr Miller’s withholding of financial information from Mr Meredith that has caused him to be in the position he now finds himself in.

[7] Mr Meredith readily acknowledged – in his evidence-in-chief and cross-examination at the hearing of this matter – that he did not take any of the steps mentioned in paragraph 5 of the Agreed Statement of Facts. Sadly, Mr Meredith is left to gaze at the events that have transpired, and with the benefit of hindsight, to tragically see that there are steps he could have taken that may have prevented matters from evolving as they did. I found Mr Meredith to be a sincere and credible witness – there was no guff to his manner, and he explained in plain terms the structure of his business affairs.

What steps would have been reasonable?

- [8] In its submissions the QBSA cites several decisions³, wherein the Tribunal has previously applied a “reasonable builder” test. That is, in considering what steps would have been reasonable to prevent the circumstances that resulted in the happening of the relevant event, the Tribunal is to consider what a reasonable builder in the same shoes as the applicant would have done.
- [9] Member Howard, in her decision in *Laidlaw v Queensland Building Services Authority* (citations omitted)⁴, quite helpfully outlined the way in which the reasonable builder test ought to be applied:

In Hyde v QBSA it was considered that a two-stage process is involved in reaching the decision. The first stage of the enquiry is whether the applicant has taken all reasonable steps to avoid the coming in to existence of the circumstances resulting in the happening of the relevant event. Secondly, if so, should the discretion be exercised to classify the person as a permitted individual. ‘All reasonable steps’ does not mean all possible steps. Relevant steps are those taken to avoid the coming in to existence of the circumstances that resulted in the relevant event, but not the relevant event itself. The test of reasonableness has been considered an objective one to be applied having regard to the actual circumstances of the applicant. A wide enquiry is appropriate which includes the manner in which the applicant conducted the business.

- [10] I consider Member Howard’s comment above that “‘All reasonable steps’ does not mean all possible steps” to be of some significance. Here, Mr Meredith, by virtue of the peculiar circumstances of his situation, effectively took no steps. In other words, Mr Meredith’s acknowledgement that those steps as set out in paragraph 5 of the Agreed Statement of Facts could have been taken is irrelevant. Applying the logic employed by Member Howard in *Laidlaw*, all Mr Meredith and the QBSA have done is to identify “possible steps” that Mr Meredith could have taken. This is quite distinct and separate from the identification of what would be “reasonable steps” in the circumstances.

Findings of Fact re: Mr Meredith’s circumstances

- [11] Helpfully, the parties have agreed on most of the pertinent issues, namely identification of the relevant events and agreement about the circumstances that resulted in the relevant events occurring. My role is thus confined to a consideration of the evidence as it relates to the reasonableness or otherwise of Mr Meredith’s having not been personally involved in the financial management of the company. Ultimately, the determination of that issue requires an exercise of discretion by the Tribunal, and the forensic task set for the Tribunal in this instance entails an assessment and weighing of the evidence that can either support or detract from an exercise of discretion by the Tribunal, in Mr Meredith’s favour.

³ *Delonga v QBSA* [2004] QCCTB 26; *Nation v BSA* [2006] QCCTB 114; *Darvill v QBSA* [2008] QCCTB 35.

⁴ *Laidlaw v Queensland Building Services Authority* [2010] QCAT 70, paragraph 11.

[12] I have found the following facts to be established on the parties' evidence, and to be either directly or indirectly relevant to the issue for determination:

- Mr Meredith is a carpenter, born in 1978. He has worked in the construction industry since completing his trade qualifications.
- Mr Meredith met Mr Miller through the Mooloolaba Surf Club when he was competing in surf lifesaving as a "nipper," in 1988. Mr Meredith was 9 or 10 at the time. Mr Miller, at various points, was the President of the Surf Club, and in a position of seniority relative to Mr Miller.
- Mr Meredith was a highly skilled athlete, and was sponsored by the Club to attend numerous sporting events. Mr Meredith won numerous awards and was lauded in the local press for his achievements within the Surf Club. On at least 3 occasions, Mr Meredith was sponsored by Mr Miller to attend Surf Club events, wearing the "Miller Homes" logo. Further, Mr Miller provided Mr Meredith with flexible working hours to facilitate his training and attendance at events.
- Mr Meredith completed his apprenticeship with Mr Miller, during which time he purchased land and built 2 homes with Miller Homes, using the standard Housing Industry Australia contract. This process went smoothly and further engendered his trust and faith in Mr Miller, whom by now was regarded by Mr Meredith as a father figure.
- Mr Meredith completed his apprenticeship, and went on to subcontract for Miller Homes, during which time he was always paid promptly, a factor that only served to strengthen his bonds with (and trust in) Mr Miller. After 18 months to 2 years of subcontracting, Mr Miller became the supervisor nominee for Miller Homes Pty Ltd.
- In June of 2006, Mr Meredith was offered the role of co-director with a 20% shareholding in newly established building and construction companies Miller No. 1 Pty Ltd and M&M Constructions Pty Ltd.
- Mr Miller was in a position of seniority to exercise Svengali-like control over Mr Meredith.
- Mr Meredith was not in a position where, because of the considerable secrecy and deception which Mr Miller applied with respect to the operation of the company accounts, any conventional examination of the accounts would have proved sufficient to reveal information that would thus equip Mr Meredith with sufficient understanding of *the* actual circumstances so as to be able to take steps to avoid the coming into existence of the circumstances that resulted in the relevant event.

Mr Meredith's duties as a director

[13] Much attention has been given by the QBSA to the duties of a director pursuant to the *Corporations Act 2001* (Cth), in support of its argument that

Mr Meredith has fallen well short of his obligations. The QBSA has, in particular, made reference to the comments of Justice Santow in *Adler v Australian Securities and Investments Commission*.⁵

- (a) a director should become familiar with the fundamentals of the business in which the corporation is engaged;
- (b) a director is under a continuing obligation to keep informed about the activities of the corporation;
- (c) directorial management requires a general monitoring of corporate affairs and policies, by way of regular attendance at board meetings; and
- (d) a director should maintain familiarity with the financial status of the corporation by a regular review of financial statements. Indeed, he or she will be unable to avoid liability for insolvent trading by claiming that they had never learned to read financial statements (citation omitted).

[14] The *Adler* case, known to most Australians as the HIH Insurance debacle, was widely reported, as a consequence of its financial magnitude. *Adler* has, as noted by the QBSA, important implications for the “Business Judgment Rule,” the purpose of which is to provide corporate directors with safe harbour from personal decisions made in good faith and with due care. The directors prosecuted in *Adler* sought to argue that they were protected by the “Business Judgment Rule”. In my view, for reasons that I explain below, the QBSA has placed too much emphasis upon *Adler*, and has not adequately considered the impact of *Adler* alongside the most important aspect of Mr Meredith’s circumstances: the admission by his former co-director Mr Miller that he “withheld financial information” from Mr Meredith.

[15] Ultimately, Mr Adler was found to have contravened sections 180-183 of the *Corporations Act 2001* relating to director's duties, those being:

- the duty to act with care and diligence;
- the duty to act in good faith and for a proper purpose;
- the duty to not use the position of director improperly; and
- the duty not to improperly use information.

[16] The other directors in *Adler*, Mr Williams and Mr Fodera, were found to have breached their duties to a lesser extent. Justice Santow found that in order for the Business Judgment Rule to be relied upon, (1) a director must first have made a business judgment, and then (2) be found to have made the business judgment in good faith for a proper purpose.

[17] As Mr Adler had a material personal interest in mind, he had not made a business judgment in good faith and for a proper purpose, and therefore the Business Judgment Rule afforded him no protection. With respect to Mr Williams, Justice Santow found that he either failed to make a business judgment, or if it did, it was not in good faith and for a proper purpose.

⁵ *Adler v Australian Securities and Investments Commission; Williams v Australian Securities and Investments Commission* [2003] NSWCA 131 at 372.

- [18] The circumstances surrounding Mr Fodera are most closely analogous to those of Mr Meredith. Justice Santow found that Mr Fodera failed to make any business judgment at all, as his error was in failing to bring the transaction that ultimately led to HIH's demise to the attention of the other directors, instead acting blindly on instructions. That transaction involved a transfer of \$10,000,000.00, an amount which Justice Santow obviously concluded should have warranted Mr Fodera at least asking, "Why am I transferring this money?"
- [19] In *Adler*, the size of the transfer was sufficient to trigger a need to make a business judgment; that is, Mr Fodera had information and elected not only to ask nothing, but to then blindly proceed with the transfer, as if a transaction of that magnitude was just something that routinely happens in the course of business. That is not the case with Mr Meredith – there was no action, or anything akin to Mr Fodera's "ten million dollar moment" that passed without notice by Mr Meredith. Here, the QBSA submits that Mr Meredith should have actually read the financial statements, and not relied upon his co-director Mr Miller's (ultimately false) assurances that the finances were travelling well.
- [20] The evidence before the Tribunal is that Mr Meredith did ask questions about the finances, but then did not go on to ascertain whether the information he was given was truthful through an examination of the records. Mr Miller, in his affidavit, states that Mr Meredith "regularly made specific enquiry of me relating to the financial affairs of M&M and Miller 1." He goes on to say that, "At all times I gave [Mr Meredith] either assurances that all matters were under control or provided answers in non specific and/or general terms." Mr Miller, along with the Office Manager Rachel Humphrey⁶, agree that financial reports were not provided to Mr Meredith for his perusal.
- [21] One difficulty I have with the QBSA's arguments is that even if Mr Meredith had asked to review the actual financial statements, the result in this matter would be no different. In *Daniels v Anderson* (1995) 37 NSWLR 438 at 495 (the "AWA case") it was noted that with a "non-executive" director (which Mr Meredith was), that in the absence of grounds for suspicion, a director is justified in delegating tasks to an officer (Mr Miller) and in then relying on the judgment information and advice of that officer. In that context, a director is not required to examine entries in the company's books, rather the director is required to ensure a general monitoring of corporate affairs and policies. Why should Mr Meredith have been suspicious of a man who was like a father to him, a man who had sponsored his sporting career since he was a young nipper? I cannot think of a good answer to this vexing question.
- [22] Adopting the language used by the court in *Daniels*, I find that Mr Meredith was not a "sentinel asleep at his post." The evidence before the Tribunal is capable of establishing that Mr Meredith had a rudimentary understanding of the financial affairs of the companies (albeit one in which he was misled),

⁶ Affidavit of Rachel Humphrey, sworn to 16 September 2012, page 3.

as both Mr Miller and the Office Manager Ms Humphrey have sworn that he did make enquiries.

- [23] Mr Meredith's conduct is also distinguishable from Mr Dunn's conduct in *Gold Ribbon (Accountants) Pty Ltd (in liq) v Sheers & Ors* [2006] QCA 335. In *Gold Ribbon v Sheers*, Mr Dunn was found to have washed his hands of responsibility for ensuring that a lending scheme of "last resort" was set up utilising accepted lending practices in order to minimise the risk of defaults, despite his being the only director experienced in commercial lending. There was no suggestion in *Gold Ribbon v Sheers* that Mr Dunn was misled along the way, as is the case with Mr Meredith here.
- [24] Several courts have confirmed the policy considerations behind the Business Judgment Rule; in *Daniels v Anderson*, Justices Clarke and Sheller said:

The purpose of this section is to excuse company officers from liability in situations where it would be unjust and oppressive not to do so, recognising that such officers are business men and women who act in an environment involving risk and commercial decision making.

- [25] Surely, taking away the livelihood of a young man who was deliberately misled by a co-director who had positioned himself in a relationship of familial trust, and despite his seeking assurances about the finances and having been lied to, is unjust and oppressive. It is the particular relationship between Mr Meredith and Mr Miller that travels well beyond the inter-director relationships that existed in the case authorities relied upon by the QBSA, which distinguishes Mr Meredith's conduct here. In these particular circumstances, I am satisfied that Mr Meredith did not derogate from his duties as a director.
- [26] By way of analogy, when a home is burglarised, the police may discuss with the victim whether they took "reasonable steps" to avoid the crime: (1) did they lock the doors; (2) are there bars on the windows; (3) were valuables left in the open on display; etc. That said, when a victim fails to take these seemingly reasonable preventative steps, the police do not step in and hold the victim responsible for failing to foresee the burglary. In effect, this is what the QBSA would have Mr Meredith do – foresee that Mr Miller was going to fleece the companies, and then take reasonable steps to prevent the conduct in circumstances where Mr Miller admits deliberately and knowingly withholding:

"pertinent financial information from him because: 1) I honestly believed the trading difficulties would be overcome; and 2) I did not want him to become concerned about these issues; and 3) As a fatherly figure I was somewhat embarrassed by the predicament I was placing him in."

- [27] The QBSA is critical of Mr Meredith for having failed to undertake a review and consideration of the books and records of the failed corporate entities. Such an examination, says the QBSA, would have revealed the

inaccuracies in the accounts uncovered by the liquidator and would also have revealed the existence of the related entity loans.

- [28] I think that the QBSA's submissions on this point lack strength for the reason that Mr Miller has openly admitted having intentionally deceived Mr Meredith. Mr Miller's conduct was part of a course of action designed to keep hidden from Mr Meredith the existence of the loans, and the true state of accounts. With such contumelious conduct on the part of Mr Miller vis-à-vis his co-director, it is patently unreasonable to assume that a young, ordinary builder like Mr Meredith would have uncovered anything. The matters raised herein are the sorts of discoveries that forensic accountants are capable of identifying, not tradesmen. Rather, I think it entirely probable that had Mr Meredith begun to ask more detailed questions, and required more of Mr Miller than general assurances about the companies financial positions (which he did call for), that Mr Miller would have either lied, or falsified the accounts in order to avoid his own conduct being revealed.
- [29] This must be viewed in conjunction with Mr Meredith's assertions that he did not sign a July 2008 Covenantor's Statement of Financial Position, and that his signature on it was fraudulent. This Covenantor's Statement is significant because it was appended to Mr Miller's licensing renewal for Miller No. 1 Pty Ltd, with the result that the company traded longer (and presumably increased the debt level) than it otherwise should have.
- [30] The QBSA asserts that Mr Meredith has not demonstrated when this fraud came to his knowledge and is critical of his having not taken steps to advise them of his concerns. Mr Meredith points out, in his Statement⁸, that he required the original documents from the auditor prior to determining the source or extent of the fraud. I consider this course of action to be entirely reasonable. Indeed, there exists a plethora of professional conduct rules that prevent solicitors and barristers from pointing to fraud without strong evidence of same. Why should a builder be any different? It seems to me that waiting until there is more concrete evidence as regards a claim of fraud against a man whom Mr Meredith regarded as a father figure is a sensible course of action. To do otherwise would be to go off at half-cock.

Exercise of discretion in Mr Meredith's favour

- [31] Mr Meredith is a young man who has found himself not only bankrupt as a result of the fraudulent conduct of Mr Miller, but potentially unable to engage in the only trade he has worked in since finishing school. The injustice of these circumstances is profound. The QBSA's interpretation of s 56AD(8) of the *Queensland Building Services Authority Act 1991* in these circumstances is, in my view, draconian. I note that Mr Meredith has found himself indebted to his father-in-law for more than \$40,000.00⁹, which surely has created more than a few uncomfortable family gatherings.
- [32] It is my strong belief that Mr Meredith is deserved of the Tribunal's exercise of discretion in his favour. In this set of circumstances, where he has

⁸ Steven Grant Meredith, Statement dated 14 September 2011, paragraph 12(3).

⁹ Steven Grant Meredith, Statement dated 14 September 2011, paragraph 3.

unwittingly been the victim of his co-director's fraud, I do not think there were any steps he could practically have taken to avoid these events.

- [33] His Honour Judge McGill, in *Younan v Queensland Building Services Authority*¹⁰, in considering what amounts to "reasonable," explained:

"The reasonableness of his behaviour must be assessed by reference to what was known by him at the time, without the benefit of hindsight."

- [34] At the hearing of this matter, it was apparent that Mr Meredith is now laden with hindsight, and knows that he could have asked more explicit questions, and could have taken an active role in the financial affairs of the companies. That, however, is not the question.

- [35] Here, Mr Meredith was entitled to rely upon the judgement and advice of Mr Miller without verification that Mr Miller's advice was correct. In *Adler*, discussed above, the court found that reliance of this sort would be unreasonable where a director knew, or "by the exercise of ordinary care should have known" any facts that would deny reliance on others. There is nothing before me that I consider capable of establishing that Mr Meredith should have known that he could not entrust his father-figure of over 20 years to provide truthful information in response to his general questions about how the companies were travelling financially.

- [36] In *Delonga v QBSA* (unreported, 29 October 2004, Q028-02), the Tribunal exercised its discretion in favour of the Applicant, allowing his application to become a permitted individual, as it found:

"that there was an appropriate case for the exercise and discretion in favour of the Applicant. The Applicant was not culpable in the sense of being financially irresponsible nor did he perpetrate any evil of the type envisaged by the legislation such as would disentitle him to the favourable exercise of discretion."

- [37] Mr Meredith, in addition to the creditors who have remained unpaid as the result of Mr Miller's folly, is a victim. He has not, as discussed in *Delonga*, perpetrated any fraud himself, and there are no reasons for this Tribunal's refusal to exercise its discretion in his favour.

Orders

- [1] In accordance with section 24(1) of the *Queensland Civil and Administrative Tribunal Act 2009*, I set aside three decisions of the Queensland Building Services Authority, dated 10 March 2011, wherein the QBSA declined to categorize Mr Meredith as a Permitted Individual in relation to a Relevant Event:

Application No.	Relevant Event
OCR076-11	Bankruptcy
OCR077-11	M&M Constructions Pty Ltd

¹⁰ *Younan v Queensland Building Services Authority* [2010] QDC 158.

OCR078-11

Miller Homes No. 1 Pty Ltd

- [2] In place of these decisions, I substitute the decision of this Tribunal that Steven Grant Meredith be categorised as a permitted individual for all three relevant events.