QCAT

Queensland Civil and Administrative Tribunal

CITATION:	*Cameron v Queensland Building Services Authority* [2012] QCAT 209
PARTIES:	Clifford Gary Cameron v Queensland Building Services Authority
APPLICATION NUMBER:	OCR278-10
MATTER TYPE:	Occupational regulation matters
HEARING DATE:	16 December 2011
HEARD AT:	Brisbane
DECISION OF:	**Mr Andrew McLean Williams, Member**
DELIVERED ON:	22 May 2012
DELIVERED AT:	Brisbane
ORDERS MADE:	**1. The decision of the QBSA made on 23 September 2010 to refuse to categorise the applicant as a permitted individual for the relevant event is confirmed.**
CATCHWORDS:	Becoming a "permitted individual" after a relevant company event – Requirement for satisfaction that the applicant took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event *Queensland Building Services Authority Act 1991*, ss 56AC, 56AD

APPEARANCES and REPRESENTATION (if any):

APPLICANT:	In person
RESPONDENT:	Mr Malcolm Robinson, solicitor (Robinson Locke Solicitors)

REASONS FOR DECISION

[1] QCAT matters OCR277-10 and OCR278-10 are, in all material respects, identical. Each matter comprises an Application for Review,[1] brought

[1] Each application to review was filed in the QCAT Registry on 22 October 2010.

before QCAT pursuant to s 86 of the *Queensland Building Services Authority Act 1991* ('QBSA Act').

[2] By their application, each Applicant seeks to review separate (yet identical) decisions of the Queensland Building Services Authority ('QBSA'), made on 23 September 2010,[2] refusing to categorise each of them as "permitted individuals"[3] for the "relevant event"[4] which, in each case, was the appointment on 28 April 2010 of liquidators to Cliff Cameron Constructions Pty Ltd ("the company"), by way of a creditors voluntary winding up. At all relevant times, each Applicant was a director of the company.

The Law

[3] The relevant provisions are to be found in Part 3A of the QBSA Act. Section 56AC(2) provides that a director, or secretary of, or an influential person for, a company that has a provisional liquidator, liquidator, administrator or controller appointed; or that is wound up, or ordered to be wound up (each of which event is termed in the section to be a "relevant company event"), thereby becomes – by reason of the operation of s 56AC(4) – an "excluded individual" for a period of five years after the occurrence of the relevant company event. The day-to-day effect of that is that the excluded individual thereby becomes ineligible to hold a QBSA licence,[5] and is unable to participate in the Queensland building industry in any licence holding capacity.

[4] The very next section in Part 3A of the QBSA Act is s 56AD. It provides a mechanism by which an excluded individual may still apply to the QBSA to become a "permitted individual", notwithstanding the fact of the occurrence of a relevant event. In circumstances where such an application is made, the QBSA must then determine the application in accordance with the requirements of the QBSA Act. The assessment is one that is governed by ss 56AD(8), 56AD(8A) and 56AD(8B), which provide:

> "(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."
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> "(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 –
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> (a) keeping proper books of account and financial records;

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2 Reasons for the Decision dated 23 September 2010 were provided by the QBSA decision-maker on 24 November 2010.

3 QBSA Act, s 56AD.

4 QBSA Act, ss 56AC(2), 56AC(4).

5 QBSA Act, s 56AE.

(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."

[5] Having made decisions on 23 September 2010 that neither Applicant could be categorised as a permitted individual, a right of review to this Tribunal was enlivened, because of ss 86 and 87 of the QBSA Act. Each Applicant has now exercised that right, having filed Applications for Review on 22 October 2010. The matter came on for hearing before QCAT on 16 December 2011.

[6] The nature of an Application for Review is by way of a hearing *de novo*, in other words a "fresh hearing on the merits" (QCAT Act, s 20), and it is now the role of QCAT to consider all of the material (including any new materials filed by the Applicants), and to exercise the discretion originally conferred on the QBSA by ss 56AD(8), (8A) and (9) of the QBSA Act,[6] in light of all the evidence.

[7] Although it is usually inapposite to speak of either a persuasive or an evidential onus in the context of administrative review proceedings before a Tribunal such as this one,[7] analysis of s 56AD(8) reveals that sufficient evidence must nonetheless be put before the Tribunal in order for it to be satisfied that the requirements of s 56AD(8) have been met by an Applicant. In particular, use of the expression "on the basis of the application" within s 56AD(8) has the result that some evidential onus, at least, is still imposed on Applicants. That observation is consistent with previous decisions of QCAT,[8] as well as the observations of Woodward J in *McDonald v Director-General of Social Security* (at 354), where his Honour observed:

> "It is possible to imagine a case where the Act which the administrator is applying places a requirement or onus on one or other of the parties to an

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6 Consider: *Hyde v QBSA* [2003] QBT 30 at [50]; *Younan v QBSA* [2010] QDC 158.

7 *McDonald v Director-General of Social Security* (1984) 1 FCR 354 at 356 per Woodward J; *Szbel v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [40] per Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ; *Bushell v Repatriation Commission* (1992) 175 CLR 408 at 424-425, per Brennan J.

8 *Fogg v QBSA* [2010] QCAT 203 at [32]; *Vuu v QBSA* [2010] QCAT 335 at [15]

> issue to establish a particular state of facts on which the administrator's decision would be based. If that were so, the same requirement or onus would apply before the [Tribunal]".

[8] On the hearing of these Applications for Review the issues that require my determination[9] are:

(a) identification of the "relevant event";

(b) identification of the circumstances that resulted in the occurrence of the relevant event;

(c) ascertainment as to whether each applicant took all reasonable steps to avoid the coming into existence of those circumstances; and

(d) ultimately, whether the discretion to classify as a permitted individual should be exercised in favour of each applicant.

Identification of the Relevant Event

[9] It is uncontentious that the "relevant event" in the case of each Applicant was the appointment on 28 April 2010 of liquidators to the company by way of a creditor's voluntary winding up. At all relevant times each of the Applicants were directors of the company, such that they are each automatically individuals whom are affected by ss 56AC(2) and 56AC(4) of the QBSA Act.

The circumstances that resulted in the occurrence of the relevant event

[10] In their materials filed before QCAT each of the Applicants has identified four factors as having resulted in the Company having liabilities exceeding assets, thus resulting in the appointment of the Liquidator and a creditor's voluntary winding up. The Respondent takes no issue with those factors, and the evidence that I have seen certainly supports these four factors as having been directly causative of the winding up of the company. The four factors were identified as:

(i) the unprofitable fixed price Q-Build contract;

(ii) difficulties keeping proper books of account and financial records;

(iii) adverse legal action; and

(iv) (unforeseen and thus unbudgeted) taxation liabilities.

(i) The Unprofitable Q-Build Contract

[11] In late 2007 the company had only 4 employees and performed mainly asbestos remediation. However, in February 2008 the company submitted

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[9] *Younan v QBSA* [2010] QDC 158 at [256], per McGill DCJ.

a tender to Q-Build to perform 'responsive' housing maintenance, and was successful in winning that tender. The work for Q-Build started shortly afterwards.

[12] Initially, the rate of work from Q-Build proved to be quite prodigious, and the company was called upon to perform approximately 160 jobs, per week. The greater majority of these were minor domestic repair tasks, such as fixing broken locks and windows, or replacing vandalised letterboxes. On the evidence before me work on the Q-Build contract quickly became almost the exclusive focus of the company.

[13] Because of the amount of work being sent to the company by Q-Build, and over the space of little more than 12 months, the company quickly expanded to 23 employees, as well as making extensive use of sub-contractors, particularly in other trades, outside of carpentry. As part of this the company also took on a five year lease over new premises, and incurred considerable unbudgeted expense in setting up those premises, as well as taking on new vehicle leases, and other overheads. Unfortunately, Q-Build were slow to pay invoices and this created significant cash flow problems in circumstances in which the Applicants had assumed, on the basis of experience with Q-Build in past years, that their invoices would be paid very promptly. Many difficulties in this regard were however caused by reason of an inability by the company to submit invoices to Q-Build for payment in a manner that was acceptable to Q-Build.

[14] Over time, the work for Q-Build proved to be unprofitable, as the fixed price that had been negotiated proved insufficient to meet actual overheads. On the evidence before me, matters got to the point where revenues barely covered wages and other fixed employee overheads.

[15] The Applicants contend that these problems were compounded by reason that the company workforce was fully occupied performing work under the Q-Build tender and there was no residual capacity to perform other, better remunerated work (outside the Q-Build contract), to improve cash flow. The Applicants also say that the company was hamstrung by reason that the Q-Build contract precluded them from refusing to perform Q-Build work that had been assigned to them.

[16] Later, in about April 2009 the work from Q-Build started to dry up, yet, rather than using this as an opportunity to downsize (and thus reduce overhead), the directors of the company (the Applicants) decided to retain existing staffing levels on the assumption that job orders from Q-Build would pick up again, in the new financial year.

(ii) Difficulties keeping proper books of account and financial records

[17] As well as having difficulties submitting invoices for payment that were acceptable to Q-Build, the Applicants state that there were on-going difficulties with financial record keeping within the company running in parallel with that. In an effort to improve things business advisors had been retained by the Applicants in February 2008 at about the same time as the company had first been advised that it had been successful in winning the

Q-Build contract, and a full-time employed bookkeeper, and then also a full-time bookkeeper's assistant, were employed in March 2008, and then June 2008. Despite this, there does not appear to have been any appreciable improvement in the calibre of the company's bookkeeping, and there is no evidence before me in relation to what it was that either the business advisor or the bookkeeper did for the company, in terms of improving financial systems. For example, I would have expected to see some evidence of the Applicants instructing that regular (perhaps weekly) cash flow analysis be brought to them to better inform them in their roles as directors of the company, but there is no evidence of that supporting the application.

[18] The Applicants also state that both the business advisor and the bookkeeper's time was more or less consumed responding to an ATO audit which took place in August 2008, with the result that, although a bookkeeper had been brought on-board in February 2008, within six months that employee fell behind again, in managing the day-to-day books of account. Despite that, there is no evidence of the company having put in place other interim arrangements to meet the day-to-day management information requirements of the company directors whilst the bookkeeper and business advisor dealt with the ATO audit requirements.

[19] In July 2009, the company's external accountant informed the Applicants that no reliance could be placed in the accuracy of the company's books, such that he was not in any position to be able to "sign off" on the external financial review. This had the result that the company could not, at least after January 2009, renew its BSA licence. This, of course, precluded the company from accepting any new building work in 2009, and marked the effective death knell for cash flow.

(iii) Adverse legal action

[20] On 7 November 2007, a company employee fell from height and was seriously injured. This incident resulted in a Workplace Health and Safety investigation, and the company was subsequently prosecuted for a breach of s 28 of the *Workplace Health and Safety Act 1995*. The company pleaded guilty and was convicted and then fined $42,000. As well, the company incurred approximately $35,000 in legal costs associated with that investigation and prosecution. The Applicants contend that no steps could have been taken by the company to avoid this accident, and the additional financial impost had serious consequences for cash flow.

(iv) Taxation liabilities

[21] As alluded to by me already in these reasons, in August 2008 the company was the subject of an audit by the Australian Taxation Office (ATO). The ATO determined that 10 subcontractors who had been engaged over the preceding 18 months were, in fact, employees, such that the company was liable to pay PAYG tax, superannuation and fringe benefits tax, assessed in the amount of $467,105.82. No provision had been made for these amounts. Both of the Applicants say that this was completely unforeseen

by them as they honestly and reasonably believed that the employees were, in fact, sub-contractors.

Did each Applicant take all reasonable steps to avoid the coming into existence of the circumstances that caused the relevant event?

[22] On the hearing of this Application for Review this Tribunal may categorise the Applicants as permitted individuals only if first satisfied that the Applicants took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the appointment on 28 April 2010 of liquidators to Cliff Cameron Constructions Pty Ltd. Those circumstances are the four factors that have already been identified, above. In deciding whether the Applicants took all reasonable steps to avoid those circumstances, QCAT must have particular regard to actions taken by the Applicants in relation to each of the matters specified in s 56AD(8A).

[23] Unfortunately, the materials that have been initially provided in support of the Applications by the Applicants give rise to more questions than they do answers. Although these describe, in descriptive terms, the events that culminated in the occurrence of the relevant event, these do not descend into particularity as regards showing that the applicants took all reasonable steps to avoid the four causal factors that culminated in the appointment of a liquidator to the company. This much was identified by the Respondent's lawyers in correspondence dated 31 March 2011, who then invited further information from the Applicants in relation to a number of relevant matters. The Applicants' answers to those further enquiries were filed before the Tribunal, and have been considered as part of this Application for Review. Unfortunately these answers, as well afford no sufficient evidence that the Applicants took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event. No additional information directed at the matters that must be addressed by ss 56AD(8) and 56AD(8A) were raised by the Applicants in oral evidence, either.

[24] It is unnecessary in these reasons to deal with all matters, on the basis that but a few examples suffice to demonstrate that the Applicants could not be said to have taken "all reasonable" steps, in the manner required by the QBSA Act. Firstly, the Applicant's contend that they were compelled to persist in performing unprofitable work to the exclusion of other, better remunerated work, by reason that they were compelled by the terms of the contract that the company had with Q-Build. Yet, clause 2.1(b) in the relevant contract provides that Q-Build "may" place work orders at any time during the term of the contract after which the company must then accept that work order. Nothing in the contract would have precluded the Applicants from approaching Q-Build, and having an open commercial dialogue and advising that the company's finite capacity to fulfil further Q-Build work orders had been reached in the interim, such that this should become a matter that was taken into account by Q-Build before it "may" place further work orders with the company, at least in the interim. In the circumstances that were confronting the company one would think this to be a reasonable step, yet there is now no evidence before me of any such an approach having been made to Q-Build on behalf of the company.

[25] By way of further example, although it is said that a business advisor and a bookkeeper were engaged to improve accounting and bookkeeping, there is no clear evidence as to what additional management information these persons afforded to the Applicants. There is, for example, no evidence of proper cash flow analysis or assessments of working capital having been performed and of regular reports having been given to the Applicants. The warning signals of impending insolvency in the manner described in *Henley v QBSA*[10] were clearly there for the taking, yet on the evidence before me there is nothing to suggest that the Applicants took all reasonable steps to interpret these, or responds to them. On the evidence before me it would seem that the Applicants "crossed their fingers and hoped" for an improvement in their cash flow, yet that does not qualify as a reasonable step for purposes of s 56AD.

[26] Next, the Applicants report that from April 2009 onwards the rate of work being sent to the company by Q-Build began to decline markedly. The Applicants inform the Tribunal that they elected to retain all staff (and the attendant high overhead) in the hope that work orders from Q-Build would pick up again in the new financial year. Yet there is no evidence before the Tribunal of there being any discussions with Q-Build in relation to this issue. Given the centrality of Q-Build work to the cash flow of the company at this stage one would think that (at the very least) the directors of the company seeking some formal assurances from Q-Build about work volumes in the new financial year would have been reasonable, in all the circumstances. There is no evidence like that before me.

[27] The Applicants also would have it that the *Workplace Health and Safety Act 1995* prosecution of the company in November 2007 – with its attendant heavy fine and legal expenses – was an unforeseen adverse financial event and nothing could have been done to prevent it. I cannot accept that reasoning, on the basis that the company pleaded guilty to an offence under s 28 of the *Workplace Health and Safety Act 1995*, thereby admitting that it (by its controlling minds the Applicants) had failed to ensure the workplace health and safety of its workers, thereby admitting that job safety analysis (JSA) and other reasonable control measures that would have avoided the accident (and thus the prosecution) could have been taken, yet were not taken.

[28] As a final example, the Applicants contend that they honestly and reasonably believed that their employees – as determined by the ATO – were sub-contractors, such that they did not foresee an accrued tax liability exceeding $467,000. No basis for the alleged honest and reasonable belief has been provided. In circumstances in which these personnel were provided with company uniforms and materials by the company as well as being subject to direction by the company regarding the manner of performance of their work these persons would easily qualify as employees under the test enunciated in *Stevens v Brodribb Sawmilling Company Pty Ltd*.[11] One can only infer therefore that reasonable efforts to ascertain their

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10 [2010] QCAT 242 at [55].

11 (1986) 160 CLR 16.

employment status were likely not made at the time that these putative sub-contractors were engaged by the company.

Should the discretion to classify as a permitted individual be exercised in favour of the Applicants?

[29] On the hearing of the Application for Review and on the basis of all the materials put before QCAT I cannot be satisfied that either Applicant took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the relevant company event,[12] being the appointment of a liquidator to the company. In particular, I cannot be satisfied in relation to those specific matters enunciated in each of s 56(8A)(a), (b), (e) or (f).

Order

[30] Upon hearing the application for review the decision of the Tribunal is that the decision of the QBSA made on 23 September 2010 to refuse to categorise the applicant as a permitted individual for the relevant event is confirmed.

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12 QBSA Act, s 56AC(4).