

QCAT

Queensland Civil and Administrative Tribunal

CITATION:

Buckley v Queensland Building Services Authority [2013] QCAT 469

PARTIES:

Gregory Raymond Buckley
(Applicant)
v
Queensland Building Services Authority
(Respondent)

APPLICATION NUMBER: OCR281-12

MATTER TYPE: Building matter

HEARING DATE: 12 August 2013

HEARD AT: Brisbane

DECISION OF: **Susan Gardiner, Member**

DELIVERED ON: 3 September 2013

DELIVERED AT: Brisbane

ORDERS MADE: **1. The decision of the Authority dated 1 June 2012 to categorise Mr Buckley as an excluded individual in relation to the event, the liquidation of T & M Buckley Pty Ltd, is set aside.**

CATCHWORDS: EXCLUDED INDIVIDUAL - Where the applicant neither a director or shareholder of the company – Where the applicant was styled as General Manager/Construction Manager – Where illness prevented attention to duties – Where facts did not support applicant as Greg was exercising control or substantial influence exercising control or substantial influence

Queensland Building Services Authority Act
1991 ss 56AC

APPEARANCES and REPRESENTATION (if any):

APPLICANT: Ms Karen Schwede Solicitor represented Mr Buckley

RESPONDENT: Mr Malcolm Robinson Solicitor represented the QBSA

REASONS FOR DECISION

- [1] On 31 May 2012, receivers were appointed for T & M Buckley Pty Ltd trading as Shailer Constructions. Terence Buckley was the managing and sole director of T & M Buckley at that time.
- [2] Gregory Buckley (Greg) is Terence Buckley's oldest son. He has worked in his father's company since starting his apprenticeship, working his way up through the various part of the company. As a succession plan, it was Terry Buckley's intention at some time in the future for Greg to take over the reins of the company.
- [3] At the time T & M Buckley had receivers appointed, Greg Buckley had the self-styled title of "General Manager/Construction Manager" for the company. Greg was neither a director nor shareholder of T & M Buckley.
- [4] The Building Services Authority considered Greg an influential person in T & M Buckley at the time the receivers were appointed and as he had a building licence himself. It determined on 1 June 2012 that Greg was an excluded individual under section 56AC of the *Queensland Building Services Authority Act 1991*.
- [5] Greg Buckley has applied to QCAT for a review of this decision. The purpose of a review is for the Tribunal to produce the correct and preferable decision. To achieve this, the Tribunal must conduct a fresh hearing on the merits¹. In considering the matter a fresh, it is the Tribunal's function to review the decision and not the process by which it was arrived at nor the reasons for it. The Tribunal is not required to identify any error in either the process or reasoning that lead to the decision being made. There is no presumption the original decision is correct².
- [6] At the hearing, the parties agreed that the issue for determination by the Tribunal is as follows:
- a) Whether or not Greg Buckley was influential in the affairs of T & M Buckley at any time in the 12 month period between 1 June 2011 and 31 May 2012.
- [7] The parties agree that this issue raises two questions for the Tribunal:
- a) Was Greg in a position to control or substantially influence the conduct of T & M Buckley's affairs during that period?
 - b) Did Greg in fact exercise control or substantial influence in the conduct of T & M Buckley's affairs during that period?
- [9] The term "influential person" is defined in the dictionary to the QBSA Act as meaning "*an individual, other than a director or secretary of the company who is in a position to control or substantially influence the conduct of the company's affairs, including, for example, a shareholder with significant shareholding, a financier or a senior employee*"

¹ QCAT Act s 20(1) & (2) .

² *Kehl v Board of Professional Engineers of Queensland* (2010) QCATA 58 at [9].

Was Greg in a position to control or substantially influence the conduct of T & M Buckley's affairs during that period?

- [10] Terry Buckley was the company's managing director and the nominee for its BSA licence. Both Terry and Greg Buckley gave evidence concerning the running of the company. Both men impressed as honest witnesses. Each presented differently giving their evidence, in line with their personalities.
- [11] Terry Buckley's manner during his evidence could best be described as a "fish out of water". He was clearly emotionally upset by the proceedings (both men were) concerning his son now and the actions of the Authority in relation to his company in the past. He is grieving the loss of his life's work built up in his company and the circumstances in which he now found himself. He was however very clear that the company was his, he made the decisions alone and the blame (such as it was for what had happened) was his.
- [12] Greg Buckley, in his evidence, described his father's diffidence when faced with circumstances where he felt uncomfortable, such as the meetings with the Authority referred to in these proceedings. This was evident in Terry Buckley's evidence before this Tribunal.
- [13] Greg Buckley described a very different man when his father was in his own world – where he felt he understood the business. In this world, Greg Buckley described Terry as a man in control of his work, his company and his life.
- [14] This control is reflected in Terry's statement filed in this proceeding. At its height, T & M Buckley was a large complex concern with many projects on the go. It would have been impossible for Terry to himself control the minute detail of all projects and as with any company, these matters were delegated to others.
- [15] Greg Buckley, while impressing as an honest witness, is a man who appears to have grown to maturity in the shadow of his father. Although his was the line of succession, I am not satisfied that Terry had, for the requisite 12 month period, allowed his son any more responsibility that he had also delegated to other senior construction managers within the T & M Buckley organisation or indeed to senior office and sales staff.
- [16] For the relevant period, Greg Buckley had major health issues. The uncontested medical evidence from Greg's treating doctors is that from early May 2011, these health issues meant that Greg was unfit to work. He was on Workcover during this period.
- [17] Greg gave evidence that on the advice of his doctors, he did attempt a return to work but he says his work was ineffective and he was only

undertaking duties as his father directed. Greg's memory of this period is limited by his illness at the time.

- [18] Both Terry and Greg Buckley gave evidence that it never occurred to either of them to change Greg's title during his period of illness.
- [19] Greg's evidence was that although he worked with the company's subcontractors on projects which necessarily involved ensuring those projects stayed on budget, he had no influence in the overall finances of the company of the directions these finances took.
- [20] David Jackson, the director of the accountancy firm that acted for Shailer Constructions says that from his view, Greg Buckley was not part of the senior management team and the main contacts for T & M Buckley were Terry Buckley and his senior accountant.
- [21] I am not satisfied on the evidence before me that Greg was in a position to control or substantially influence the conduct of T & M Buckley's affairs during that period.

Did Greg in fact exercise control or substantial influence in the conduct of T & M Buckley's affairs during that period?

- [22] The Authority submits that emphasis should be place on the words "*at any time*" set out in section 56AC(2(c)(ii) which says that the section applies if an individual was, at any time after the commencement of that 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.
- [23] The Authority submits that this means it takes only one occasion of Greg *in fact exercise control or substantial influence in the conduct of T & M Buckley's affairs* to make him an influential person and consequently, to be excluded.
- [24] The Authority points to the meetings attended by Terry and Greg at the BSA as examples of this "*one occasion*". In support of this submission the Authority provides statements from other BSA attendees at the meetings in question, Shane Wilson, Olivia McMahon. The tenor of their evidence is that there were two meeting between the Authority and T & M Buckley on 20 March and 5 April 2012. At these meetings (attended by both Terry and Greg Buckley), both employees say Greg Buckley did the majority of the talking and that following the first meeting, email correspondence passed between the BSA and Greg Buckley concerning subcontractors and payments outstanding. The BSA evidence speaks of "heated exchanges" between BSA representatives and Greg Buckley.
- [25] Having had the advantage of seeing Terry and Greg Buckley giving evidence to this Tribunal and hearing from both men the explanations of why Greg in particular was attending the meetings with the BSA (because

of Terry's diffidence in these surroundings and because Greg had a better knowledge of the subcontracting on the jobs he was delegated to supervise), I am not satisfied that the exchanges at these meetings (heated or otherwise) satisfy me that Greg was in fact exercising control or substantial influence in the conduct of T & M Buckley's affairs.

- [26] Certainly at these meetings Greg was speaking on behalf of the company. He says he spoke at the direction and request of Terry in areas where he had knowledge. Terry Buckley agrees with this. Having had the advantage of seeing these two men, I accept this evidence. Being the mouthpiece for his father and the company at the BSA meetings (even loudly as it clearly was) does not necessarily mean he was exercising control or influence. Another explanation is that he was simply the megaphone.
- [27] These decisions of fact are made in the context of the whole evidence. On the medical evidence provided, Greg was seriously ill at the time. This would have contributed to his demeanour but his illness would not necessarily have been apparent to other attendees at the two meetings in question (for personal reasons). On Terry's evidence, Greg attended the meetings at his father's request to assist him with details of the jobs not known to Terry in his wider role and as support for Terry himself.
- [28] I accept the latter explanation as being the reasons for Greg's attendance at the BSA meetings and that speaking at these meetings does not equate with exercising control or substantial influence in the conduct of T & M Buckley's affairs in these circumstances.
- [29] The Authority also points to the evidence of Bruce and Phillip Hohl of Hohl Plumbing Pty Ltd as examples that Greg was exercising control or substantial influence in negotiations concerning a debt owing to Hohl Plumbing by T & M Buckley. Bruce and Phillip Hohl both say they received documents with his signature on them, that Greg attended site inspections, and that Greg attended a meeting in April 2012 where agreement was reached for the payment of the debt by instalments.
- [30] Greg Buckley believed he has never met, conversed with or corresponded with either Bruce or Phillip Hohl. Greg says he did meet with Bruce Hohl on 19 April 2012 but that Phillip Hohl was not present. Greg says he met Bruce Hohl on his father's instructions to deliver terms at that meeting.
- [31] Neither Bruce nor Phillip Hohl was available for cross-examination. Greg Buckley was also not cross-examined on these events. The conflicting evidence of these men remains untested and as such I am unable to form a view as to which is closer to the truth. In these circumstances, I place no weight on either version. It is appropriate that in closing submissions, the Authority also places no reliance on this evidence.
- [32] Although it is unnecessary for me to decide (as I am not comfortably satisfied that Greg was exercising control or substantial influence), I am

not persuaded by the Authority's argument that simply one occasion (relying on the words "at any time") is sufficient to exclude a person. I am minded to think that to be an influential person in the affairs of a company potentially involves ongoing management or representation, not isolated events. This is however a question for a future determination.

- [33] The decision of the Authority dated 1 June 2012 categorising Greg Buckley as an excluded individual is set aside.