

CITATION: Bradley v Queensland Building Services Authority [2013] QCAT 505

PARTIES: Colin James Bradley
(Applicant)
V
Queensland Building Services Authority
(Respondent)

APPLICATION NUMBER: OCR233-12

MATTER TYPE: Occupational regulation matters

HEARING DATE: 11 July 2013

HEARD AT: Brisbane

DECISION OF: **Sandra G Deane, Member**

DELIVERED ON: 19 September 2013

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. The decision of the Queensland Building Services Authority made on 1 June 2012 to refuse to categorise Mr Colin Bradley as a “permitted individual” is confirmed.**
- 2. The decision of the Queensland Building Services Authority made on 4 June 2012 to refuse to categorise Mr Colin Bradley as a “permitted individual” is confirmed.**

CATCHWORDS: Permitted Individual – review of decision not to allow application to be categorised as permitted individual

Queensland Building Services Authority Act 1991 ss 56AD(1), 56AD(8), 56AD(8A)
Queensland Civil and Administrative Tribunal Act 2009 s 20

Vadasz v Queensland Building Services Authority [2013] QCAT 84

APPEARANCES and REPRESENTATION (if any):

APPLICANT: Colin James Bradley represented by Mr R Glenday of Counsel instructed by Hall & Co, Solicitors

RESPONDENT: Queensland Building Services Authority represented by Mr M Robinson of Robinson Locke Litigation Lawyers

REASONS FOR DECISION

- [1] Mr Bradley was a director of NTM Builders Pty Ltd, a licensed building contractor. He held a nominated supervisor's licence. On 10 January 2005 administrators were appointed to NTM and on 11 March 2005 Mr Bradley became bankrupt. As a consequence of these events the QBSA wrote to Mr Bradley in late 2009 notifying him that the QBSA considered him a permanently excluded individual. The effect of which is that Mr Bradley cannot hold a licence as a contractor or as a nominated supervisor or be a director, secretary or influential person for a licensed company or be in partnership with a licensed contractor. Mr Bradley contends he did not receive notice from the QBSA in relation to this matter until 2010.
- [2] In May 2012 Mr Bradley applied to the QBSA seeking to be categorised as a permitted individual in respect of both events¹.
- [3] In his NTM application he stated that:
- a) NTM first started having difficulty paying debts in June 2004;
 - b) the main cause of the relevant event was 'domestic discord or relationship breakdown' and that he became aware of this in February 2004;
 - c) other significant contributing causes were economic conditions affecting the industry, inability to recover amounts owing and incorrect legal advice and that he became aware of the downturn in the building industry in September 2004;
 - d) at the time of appointment of administrators there was approximately \$200,000 owing to creditors including the Australian Tax Office.
- [4] In his bankruptcy application he set out almost all of the same facts and background.
- [5] By decision dated 1 June 2012 the QBSA decided not to categorise Mr Bradley as a permitted individual in relation to the appointment of administrators to NTM.

¹ *Queensland Building Services Authority Act 1991 (QBSA Act) s 56AD(1).*

- [6] By decision dated 4 June 2012 the QBSA decided not to categorise Mr Bradley as a permitted individual in relation to his bankruptcy.
- [7] Mr Bradley seeks a review of both of these decisions. The Tribunal is required to consider Mr Bradley's applications to be categorised as a permitted individual afresh on the material before it to produce the correct and preferable decision.² If the Tribunal is satisfied on the material before it that the test in section 56AD(8) of the QBSA Act is satisfied it may set aside the QBSA's decision and substitute its own. Even if so satisfied there is discretion to be exercised.³
- [8] The QBSA and the Tribunal in its place in these proceedings may categorise a person as a permitted individual if it is satisfied that the individual took all reasonable steps to avoid the coming into existence of circumstances that resulted in the happening of a relevant event and there are no factors which disentitle the exercise of the discretion.
- [9] Section 56AD(8A) of the QBSA Act sets out mandatory matters to have regard to when determining whether a person took all reasonable steps.
- [10] It is not disputed that the relevant events are the appointment of administrators to NTM and Mr Bradley becoming bankrupt. It is necessary to consider the section 56AD(8A) matters in relation to each event.
- [11] Mr Bradley contends that due to the delay in him becoming aware of the consequences of the appointment of the administrators and of his bankruptcy he has been prejudiced as the passage of time has hindered his efforts to obtain supporting documentation. His evidence of the prejudice claimed and the details of steps that he took to source information between the time of becoming aware in 2010 and making application to the QBSA in May 2012 was quite general in nature. From the applications for notices to produce filed in these proceedings it appears that Mr Bradley did not approach the administrators for access to NTM's books and records until 'in or about May 2012' at which time the administrators advised the records had been destroyed in November 2011. Mr Bradley's delay in approaching the administrators has also contributed to the records not being available.
- [12] Mr Bradley's answers to the questionnaire at the time of entering into administration cited the cause of the insolvency as escalating building costs, delays in constructions jobs and poor estimating and cost control.⁴ Mr Bradley's answers to the questionnaire do not refer to the property settlement with his ex-wife as a cause of the insolvency.

² *Queensland Civil and Administrative Tribunal Act 2009* s 20.

³ *Vadasz v Queensland Building Services Authority* [2013] QCAT 84.

⁴ P61-69 Exhibit 6 at P69.

- [13] The Administrator's report cites inadequate control over contract costing processes and lack of regular financial reporting.⁵ It also states that the financial trouble occurred during the 2003/2004 financial year.⁶
- [14] In this proceeding Mr Bradley raised as a cause of the insolvency that the Bank of Queensland had unexpectedly withdrawn funding.⁷ It appears the withdrawal of funding occurred in or about 2001 or 2002. Mr Bradley's questionnaire does not refer to this matter. Mr Bradley's application to the QBSA and the application as filed in this Tribunal do not refer to such a matter.
- [15] Mr Bradley's evidence on many matters was inconsistent. He stated that he gave his written evidence from his recollection and without regard to what little documentation was available to him. Mr Bradley gave lengthy oral evidence at the hearing. His evidence was inconsistent with the documentary evidence including documents which he completed at the time of the administration, which he now contends were incorrect or incomplete. I find that it is more likely than not that the documentary evidence is more accurate than Mr Bradley's more recent recollections because it was completed soon after the events occurred. I find that it is more likely than not that the Bank of Queensland's withdrawal of funding was not a cause of the insolvency.

NTM Event

Keeping proper books of account and financial records⁸

- [16] There was some evidence of this matter. Mr Bradley gave evidence that:
- a) books of account and financial records were maintained by NTM;
 - b) initially Mr Bradley's then wife assisted with day to day bookkeeping, invoicing and accounts payable;
 - c) after the divorce NTM engaged a bookkeeper to input data into the accounting and estimating package and that data was regularly provided to NTM's accountants who prepared monthly BAS and every 2 months profit and loss statements and regularly prepared forecasts;
 - d) he looked at the project based financial information generated by the accounting and estimating package every week or fortnight;
 - e) he borrowed money from NTM to assist him to make the property settlement to his ex wife;

⁵ P45-58 Exhibit 6 at P57.

⁶ P51 Exhibit 6.

⁷ Affidavit sworn 28 June 2013 – Exhibit 2.

⁸ QBSA Act 1991 s 56AD(8A)(a).

f) such a loan did not appear in the financial statements as at 30 June 2004 despite it not being repaid by 30 June 2004 and that he might have taken the equivalent as wages.

- [17] The Administrator's report dated 28 January 2005⁹ indicates that unsecured creditors were \$338,418 and the debt to the ATO was "to be advised" of which Mr Bradley had given personal guarantees for approximately \$200,000.
- [18] I note that no statement of evidence by the bookkeeper was tendered and no explanation was given as to why it was not possible to obtain.

Seeking appropriate financial or legal advice before entering into financial or business arrangements or conducting business¹⁰

- [19] There is evidence before the Tribunal that Mr Bradley sought legal and accounting advice. There is limited evidence as to the nature of that advice.
- [20] Mr Bradley gave oral evidence that he met with his accountants every month to 6 weeks to discuss the financial reports. Although NTM's financial position was deteriorating Mr Bradley did not increase the frequency of such meetings after the divorce.
- [21] The QBSA in Exhibit 7 has extracted some documents from the files produced in response to a Notice to Produce directed to NTM's and Mr Bradley's former legal advisers. Most of the documents produced relate to claims by trade and other creditors. There is some evidence of deliberate delaying tactics although Mr Bradley denies prior knowledge of such matters.
- [22] Mr Bradley gave evidence that due to the economic down turn a number of jobs did not proceed or were reduced in scope. There was no evidence before the Tribunal of any legal advice received by NTM in relation to these matters.

Reporting fraud or theft to the police¹¹

- [23] There was no evidence to suggest fraud was a relevant matter. Mr Bradley referred to a matter of fraud in his oral evidence but accepted that this was at a much earlier time and that the strain it placed on the business had been overcome prior to the circumstances which lead to the relevant events.

Ensuring guarantees provided were covered by sufficient assets to cover the liability under the guarantees¹²

⁹ P44 – 58 Exhibit 6.

¹⁰ QBSA Act 1991 s 56AD(8A)(b).

¹¹ QBSA Act 1991 s 56AD(8A)(c).

¹² QBSA Act 1991 s 56AD(8A)(d).

- [24] There was no evidence to suggest the giving of guarantees by NTM was a relevant matter to its insolvency.

Putting in place appropriate credit management for amounts owing and taking reasonable steps for recovery of the amounts¹³

- [25] There was no evidence of appropriate credit management though recovering of amounts owing does not appear to have been a significant factor in the liquidity issues. There was evidence that there had been issues with recovering amounts under one contract. Mr Bradley gave evidence that he sought legal assistance to recover amounts claimed. There was no documentary evidence placed before the Tribunal in relation to this matter despite the Notice to Produce being issued to NTM's and Mr Bradley's former lawyer in respect of this dispute.

Making appropriate provision for Commonwealth and State taxation debts¹⁴

- [26] Mr Bradley gave oral evidence that he caused provisions for tax to be made and that it was NTM's practice when it received money to distribute the amount to 3 accounts including a separate account for GST and a separate account for tax.
- [27] The few financial records in evidence do not appear to corroborate this.
- [28] Mr Bradley completed a director's questionnaire at the time of the insolvency. At paragraph 46 he stated that 3 months of BAS were outstanding. As earlier noted Mr Bradley gave evidence that his accountants prepared the BAS on a monthly basis.
- [29] There is insufficient evidence upon which I can be satisfied that appropriate provision was made.

Other matters

- [30] Mr Bradley contends that the settlement with his former wife caused a drain on NTM as he borrowed money from NTM and refinanced to make the necessary payments. As noted earlier in these reasons Mr Bradley did not refer to this as a contributing factor in his initial report to the administrators.
- [31] Mr Bradley gave evidence that during 2003/2004 financial year NTM acquired 3 vehicles and incurred a 5 year liability to Esanda for lease payments. Mr Bradley gave evidence that he was advised to enter into these transactions as NTM had few tax deductions and that this occurred prior to the property settlement with his ex-wife. The evidence was not clear as to precisely when this transaction occurred or the specific legal or financial advice sought in relation to this transaction.

¹³ QBSA Act 1991 s 56AD(8A)(e).

¹⁴ QBSA Act 1991 s 56AD(8A)(f).

- [32] Mr Bradley also contends that there was a downturn in the industry. He gave brief oral evidence of his experiences at the time. There is no corroborating evidence. I cannot now recall such a downturn so I am unable to take “judicial notice” of such a matter. There is insufficient evidence upon which I can be satisfied that such a matter was a cause of the insolvency.
- [33] Mr Bradley gave evidence that:
- a) he hired an external estimator to work up tenders;
 - b) it took about 3 – 4 months from preparing the tenders to winning jobs;
 - c) in the intervening time costs were escalating;
 - d) after winning the job there would be a negotiation on price with the client, which further reduced revenue;
 - e) the estimator ought to have factored in cost increases;
 - f) NTM experienced cashflow issues as a consequence;
 - g) the estimating issues came to his attention in March/April 2004.
- [34] There is no evidence that Mr Bradley put appropriate systems in place to ensure tenders were appropriately priced by the external estimator.
- [35] There is evidence that NTM was experiencing difficulty with obtaining finance in January 2004, which is before the separation from his wife.¹⁵
- [36] There is evidence that Mr Bradley took steps to reduce NTM’s personnel costs by increasing the amount of work he personally undertook, ceasing to engage his supervisor and only employing a labourer, as an apprentice and employing a receptionist at lower rates than the supervisor. However at about the time of taking this action to lower business expenses Mr Bradley caused NTM to take on additional liabilities in relation to 53 Gilliver Street.
- [37] Mr Bradley gave evidence that he was mindful of the QBSA’s requirements in relation to asset backing of NTM. As a consequence, after his separation, NTM bought the house at 53 Gilliver Street with the assistance of Mr and Mrs Hawkins, his step father and mother. Mr Bradley’s evidence was that Mr and Mrs Hawkins lived in part of the house and worked in NTM’s business and NTM used part of the house as an office. Mr Bradley gave evidence that if NTM had not purchased this property NTM would have needed to rent office space. There is no evidence before the Tribunal that prior to this time NTM rented office space. In fact the evidence suggests that NTM conducted its business from Mr Bradley’s home prior to this time. There was no evidence as to

¹⁵ P81 Exhibit 7.

why this was a necessary additional expense. This evidence is inconsistent the Administrator's report dated 28 January 2005 which stated that NTM's registered office and principal place of business prior to their appointment was 52 Gilliver St, Mr Bradley's residence.

- [38] It is also inconsistent with the historical titles search¹⁶ which indicates Mr Bradley and Mr and Mrs Hawkins bought 53 Gilliver St in June 2004 and then NTM bought it from them outright in October 2004.
- [39] I note that there was no corroborating evidence from Mr and Mrs Hawkins and no explanation of why such evidence was not provided.
- [40] At the time of purchase of 53 Gilliver Street NTM was experiencing financial difficulties but Mr Bradley caused NTM to borrow money to assist with the purchase and incurred further liabilities.
- [41] Mr Bradley placed significant emphasis on a proposed subdivision of a block of land at 52 Gilliver Street. This property was originally purchased by Mr Bradley and his then wife. After the divorce the property remained in his name. He gave evidence that he refinanced that property in about August 2004 to obtain some cash and transferred ownership to NTM. The list of assets provided by Mr Bradley at the time of administration does not refer to 52 Gilliver Street being an NTM asset.¹⁷ This evidence is also inconsistent with other documentary evidence that suggests that the loan agreement entered into on 28 October 2004 was in Mr Bradley's name.¹⁸
- [42] Mr Bradley gave evidence that costs of obtaining subdivision approval were unexpectedly higher than originally anticipated and that the process took longer than expected so that it was not possible to realise the expected profit. There was no independent evidence of these costs or the valuation and there was no evidence other than Mr Bradley's oral evidence that Mr Bradley obtained legal advice in relation to this course of action despite the Notice to Produce being issued to NTM's and Mr Bradley's former lawyer.
- [43] I find that Mr Bradley has not demonstrated that he took all reasonable steps to avoid the circumstances that resulted in the appointment of the administrators.
- [44] As I am not satisfied that Mr Bradley took all reasonable steps it is not necessary to consider whether the discretion ought to be exercised to categorise Mr Bradley as a permitted individual.
- [45] The QBSA's decision is confirmed.

Bankruptcy Event

Keeping proper books of account and financial records

¹⁶ P137-138 Exhibit 7.

¹⁷ P61 Exhibit 6.

¹⁸ P133 Exhibit 7.

- [46] There is no evidence in relation to this matter except that Mr Bradley gave oral evidence that he and NTM used the same accountant.
- [47] I am not satisfied that Mr Bradley kept proper personal books of account and financial records.

Seeking appropriate financial or legal advice before entering into financial or business arrangements or conducting business

- [48] Mr Bradley gave evidence that he sought financial and legal advice. There is no detailed evidence of the nature of that advice and whether it was advice to NTM or to himself personally.

Reporting fraud or theft to the police

- [49] There was no evidence to suggest fraud was a relevant cause of the insolvency.

Ensuring guarantees provided were covered by sufficient assets to cover the liability under the guarantees

- [50] Guarantees to NTM's creditors were a significant cause of this relevant event. There is no evidence as to what assessment was undertaken of NTM's financial position at the time they were given and therefore the quantum of shortfall exposure Mr Bradley was adopting. There is no evidence to demonstrate that Mr Bradley had sufficient personal assets to cover any such shortfall.
- [51] Mr Bradley's evidence is to the effect that he transferred personal assets to NTM at a time when NTM's asset position was deteriorating. The risk that the guarantees may be called upon was increasing and his personal asset position was deteriorating.

Putting in place appropriate credit management for amounts owing and taking reasonable steps for recovery of the amounts

- [52] Recovering of amounts owing does not appear to have been a factor in the bankruptcy.

Making appropriate provision for Commonwealth and State taxation debts

- [53] There was limited evidence in relation to this matter. Mr Bradley's evidence in relation to his own tax position was somewhat unclear. He gave evidence that he kept his personal income low to pay little tax and to keep more money in NTM and that NTM's accountants also acted for him.
- [54] There is no evidence of the amount owing to the ATO. There is insufficient evidence for me to be satisfied that appropriate provision was made for taxation debts. There is evidence which suggests that \$20,000

was owing by Mr Bradley in April 2004 in relation to income tax from previous financial years.¹⁹

[55] I find that Mr Bradley has not demonstrated that he took all reasonable steps to avoid the circumstances that resulted in his bankruptcy. It is not necessary to consider whether the discretion ought to be exercised to categorise Mr Bradley as a permitted individual.

[56] The QBSA's decision is confirmed.

¹⁹ Exhibit CB1 to Exhibit 2 at page 6.