

CITATION: *Queensland Building Services Authority v Plotkin* [2013] QCATA 219

PARTIES: Queensland Building Services Authority
(Applicant/Appellant)
v
Kym Anthony Plotkin
(Respondent)

APPLICATION NUMBER: APL318-12

MATTER TYPE: Appeals

HEARING DATE: 27 May 2013

HEARD AT: Brisbane

DECISION OF: **Justice Alan Wilson, President**
Peta Stilgoe OAM, Senior Member

DELIVERED ON: 26 July 2013

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. Leave to appeal granted.**
- 2. Appeal allowed.**
- 3. Application to review a decision filed 11 April 2012 is dismissed.**

CATCHWORDS: APPEAL – LEAVE TO APPEAL – INTERIM ORDER – OCCUPATIONAL REGULATION MATTER – where respondent categorised as ‘excluded individual’ by QBSA – where respondent sought to have that decision reviewed by the Tribunal – where QBSA applied to strike out application to review – where QBSA contended categorisation of respondent as ‘excluded individual’ is not a reviewable decision under s 86 of the *Queensland Building Services Authority Act* 1991 – where Tribunal held that the categorisation was reviewable and dismissed strike out application – where QBSA seeks leave to appeal that decision – whether categorisation is reviewable decision

Acts Interpretation Act 1954 (Qld), s 14A(1)
Queensland Building Services Authority Act 1991 (Qld), s 3(a), s 17(1), s 56AC(2)(c), s

56AD(1), s 56AE, s 56AF, s 56AG, s 86(1)(k), s 86(1)(j), s 87, Schedule 2
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 17(1)

APPEARANCES and REPRESENTATION (if any):

APPLICANT: Mr G Thomson of Counsel instructed by
 Robinson Locke Litigation Lawyers

RESPONDENT: Ms M H Hindman of Counsel instructed by
 Adamson Bernays Kyle & Jones Lawyers

REASONS FOR DECISION

- [1] The tangled provisions of the *Queensland Building Services Authority Act 1991 (Qld)* ('QBSA Act') are difficult enough for an experienced practitioner to navigate. It is therefore understandable that when Mr Plotkin was faced with (as will be seen) his unusual problem, his solution was to cut a new path through the undergrowth. For the reasons that follow, though, Mr Plotkin's innovative and (it must be conceded) seemingly practical approach must fail.
- [2] That is what happened to Mr Plotkin: on 14 March 2012 administrators were appointed to four building companies which held licences under the QBSA Act.¹ All the shares in the four companies were held by Global Technology Services Pty Ltd. Mr Plotkin had been appointed the sole director of that company only 12 days before the four companies went into administration.
- [3] The Queensland Building Services Authority ('QBSA') sent him four letters (one for each of the four administered companies) which said:

TAKE NOTICE pursuant to Section 56AC of the *Queensland Building Services Authority Act 1991* ... BSA considers you to be an excluded individual for the following reason:

- You were a director, secretary or influential person for the Company at the time of, or within one year of, the event.

Each letter went on to say:

If you do not accept that you are an excluded individual, it is important you obtain advice on your right to review now as any attempt to challenge this decision at a later date will likely be strongly opposed by BSA.

- [4] Mr Plotkin was not a director or secretary of any of the four administered companies at the time of the '*event*' (i.e. each company going into administration). His status as an '*excluded individual*' could only have

¹ StyleBuilt Homes Pty Ltd; Universal Steel Framing Systems Pty Ltd; Cavalier Homes Brisbane Pty Ltd; and Steelbuilt Kit Homes Australia-Wide Pty Ltd.

come from him having been categorised as an '*influential person for*' those companies.

- [5] Letters of the same date² notified the two corporate applicants in the proceedings below that they were also '*excluded companies*' because Mr Plotkin, an '*excluded individual*', was a director of them.
- [6] Mr Plotkin and those two companies brought proceedings in QCAT to review the QBSA's decisions. Mr Plotkin wanted to set aside the decision that he was an '*excluded individual*'. The two companies wanted to set aside the decisions that they were '*excluded companies*'.
- [7] QBSA believed that Mr Plotkin had no right under the QBSA Act to have its decision about him reviewed so it applied to have his application (but not that of the two companies) struck out. The matter was heard and determined by a QCAT Member.³
- [8] The learned Member concluded that because the circumstances in which a right of review of a QBSA decision, set out in s 86, were not '*clear*'⁴ he should not strike out Mr Plotkin's application for review. He also said that if there was no right of review under s 86(1)(k), that provision would be rendered '*nugatory*'.⁵
- [9] The QBSA says the learned Member was wrong, and has sought leave to appeal. Because that decision was not the Tribunal's final decision in the matter, leave is necessary.⁶ The matter involves the construction of a statute and, generally, a matter of some public interest and importance. We are readily persuaded that leave should be granted.
- [10] QCAT only has power to review decisions if jurisdiction has been conferred upon the Tribunal by an enabling Act.⁷ Here the enabling Act is the QBSA Act. It gives QCAT the power to review '*reviewable decisions*' of the QBSA.⁸ The QBSA argues that the '*decision*' it notified to Mr Plotkin was not a reviewable decision.
- [11] Section 86(1) defines *reviewable decision*. None of the provisions in s 86, on their face, directly address the circumstances confronting Mr Plotkin – that is, someone who is not a licensee, nor a director or secretary of a company which has gone into administration but, rather, an '*influential person*' for a company within the meaning of s 56AC(2)(c).
- [12] Section 86(1)(k) says, however:

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² 16 March 2012.

³ *Plotkin & Ors v Queensland Building Services Authority* [2012] QCAT 432.

⁴ *Ibid* [23].

⁵ *Ibid*.

⁶ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 142(3)(a)(ii) ('QCAT Act')

⁷ QCAT Act s 17(1).

⁸ QBSA Act s 87.

(1) The tribunal may review the following decisions of the authority –

...

(k) a decision under section 56AF or 56AG that –

- (i) a person is an excluded individual or excluded company; or
- (ii) an individual is still a director or secretary of, or an influential person for, a company.

- [13] It is said, for Mr Plotkin, that s 86(1)(k) is inherently ambiguous, and that the ambiguity should be resolved in his favour. The QBSA says that the Act provides no right of review to a person who is unlicensed but has been categorised as an excluded individual under s 56AF.
- [14] The dispute requires a close reading of the QBSA Act. The objects of the Act are to regulate the building industry, to ensure the maintenance of proper standards in that industry, and to achieve a reasonable balance between the interests of building contractors and consumers.⁹
- [15] The QBSA has power to issue licences relevant to the building industry.¹⁰ A person is not entitled a licence if that person is an '*excluded individual*'.¹¹
- [16] Under s 56AC, a person becomes an '*excluded individual*' if they go into bankruptcy or, if that individual is a director or secretary or '*influential person for*' a company, and the company goes into liquidation.
- [17] The Act defines '*influential person*'¹² as an individual other than a director or secretary of a company who '*... is in a position to control or substantially influence the conduct of the company's affairs...*'.
- [18] The effect of s 56AC is that, if Mr Plotkin was an '*influential person*' in respect of the companies which went into administration, he attracts the status of '*excluded individual*'. The section does not, however, contain any express provision for the QBSA to make a decision about that matter. Rather, on its face, the section simply confers that status if a company has a provisional liquidator, liquidator, administrator or controller appointed, or is ordered to be wound up.
- [19] Under s 56AF, if the QBSA considers that an individual who is a licensee is an excluded individual, it must give that person a written notice. Under s 56AG it must, similarly, give a notice to a company which is a licensee if it considers that the company is an excluded company.

⁹ Ibid s 3(a).

¹⁰ Ibid ss 33-34.

¹¹ Ibid ss 31–32A. Importantly, it is unlawful for a person to carry out building work in Queensland without the necessary licence(s): s 42 (with some minor exceptions, for owner-builders).

¹² Ibid Schedule 2.

- [20] Accepting the somewhat surprising notion that a person could be categorised in this way but have no right of review under the Act, QBSA points out that under s 56AD(1) a person who has been advised by QBSA that it considers him or her to be an excluded individual may apply to be categorised as a permitted individual.
- [21] It is argued for Mr Plotkin that s 86(1)(k) is ambiguous because it only refers to decisions under ss 56AF or 56AG. Because Mr Plotkin is not a licensee, s 56AF has no application.
- [22] It is further argued that QBSA's letters to the companies, in advising that they are excluded companies, means the QBSA made two decisions. The first decision is that Mr Plotkin is an excluded individual for a relevant event or events. The second decision is that he is an influential person for those building companies. The submission is, therefore, that it is implicit in the letters to the building companies that the QBSA has made a decision under s 56AG that Mr Plotkin is an excluded individual.
- [23] The argument hinges, to a degree, on the rather unusual and unexpected wording of s 56AE which says that the QBSA must not grant a person a licence if the person is:
- (a) an excluded individual for a relevant event; or
 - (b) an excluded company.
- [24] Inferentially, a '*person*' can be *either an 'excluded individual' or 'excluded company'*. If we accept that proposition then, it is argued, s 86(1)(k)(i) can be read as meaning one of: a decision under s 56AF that a person is an excluded individual; a decision under s 56AG that a person is an excluded company; a decision under s 56AF that a person is an excluded individual or excluded company; or a decision under s 56AG that a person is an excluded individual or an excluded company.
- [25] In short, it is said that the words (in s 86(1)(k)) '*... a decision under section 56AF or 56AG that – (1) a person is an excluded individual or excluded company ...*' should be read so as to allow Mr Plotkin a right to seek review, even though he is not personally the holder of a licence.
- [26] Two additional arguments are advanced in support of that construction. The first is that it accords with the '*policy*' of the QBSA Act not to leave a non-licensee without any right of review following a decision that the person is, or is automatically categorised as, an excluded individual. The second argument is that it avoids what is described as the '*nonsensical outcome*' where the building companies could succeed in their applications for review if the Tribunal decided that Mr Plotkin was not in fact an excluded individual – (an issue which is squarely raised in the companies' review application) but Mr Plotkin has no right to obtain the same outcome on his own behalf and is, instead, forced to apply to become a permitted individual under s 56AD.

- [27] It is, on any view, a surprising thing that a person might be categorised as an ‘*excluded individual*’ but have no right to seek review of that event. Interestingly, QBSA’s own letters to Mr Plotkin appear to contain a tacit acceptance of that proposition. Each says:

If you do not accept that you are an excluded individual, it is important you obtain advice on your right to review now as any attempt to challenge this decision at a later date will likely be strongly opposed by BSA.

- [28] In Queensland, legislation is to be interpreted in a way that will best achieve the purpose of the Act being considered.¹³ The arguments made on Mr Plotkin’s behalf are attractive: that he slips between the cracks in legislation which, on its face, allows quite wide range of opportunities for parties affected by decisions of this kind to seek review in the Tribunal.
- [29] The difficulty with Mr Plotkin’s argument is that the QBSA Act does, in fact, provide a mechanism apparently intended to address the precise circumstances which confront him. Section 56AG is headed ‘*Procedure if licensee is excluded company*’. Under s 56AG(2) the QBSA must give the company a written notice identifying the person who is an ‘*influential person for*’ the company and, also, an ‘*excluded individual*’. Within 28 days after the company is given that notice the individual must either stop being a director, secretary or influential person or, under s 56AG(2)(c)(ii) ‘... *apply to the authority to be categorised as a permitted individual for the relevant event*’.
- [30] The result is that, while the QBSA Act appears to deprive someone in Mr Plotkin’s position of a right of review, it does not leave him without a remedy. If Mr Plotkin wants to dispute his categorisation as an excluded individual, s 56AG(2) gives him power to apply. The method of application is set out in s 56AD. It fits Mr Plotkin’s circumstances exactly. The QBSA has advised that it considers him to be an excluded individual and he may, apply in the approved form to be categorised as a permitted individual ‘*for the relevant event*’.
- [31] While we accept, for these reasons, that there is some ambiguity in s 86(1)(k), that ambiguity does not reveal a complete absence of a remedy for a person in Mr Plotkin’s position so that we could say that the legislature overlooked, and simply failed to properly address, his circumstance. The legislature has provided a mechanism whereby Mr Plotkin can seek to change the effects and outcome of the notice each of the companies received. Once that is appreciated, it can be seen why the relief provided under s 86(1)(k) is limited to persons or companies holding licenses (under ss 56AF or 56AG).
- [32] The learned Member concluded that to interpret the legislation in a way which held Mr Plotkin out of any remedy would render s 86(1)(k) ‘*nugatory*’. For the reasons just discussed, we have the misfortune to disagree.

¹³ *Acts Interpretation Act 1954* (Qld) s 14A(1).

- [33] We also note, for completeness, that it was submitted on Mr Plotkin's behalf that s 87 might provide him with a remedy, over and above the specific rights to apply set out in s 86. Section 87 give the power to apply to a person '*... affected by a reviewable decision of the authority*'. Again, for the reasons just set out, we are not persuaded that s 86, or the QBSA Act generally, has the effect that Mr Plotkin is the subject of a '*reviewable*' decision.
- [34] Finally, it is noted that if the outcome of the procedure available to him under s 86AG(2)(c)(ii) is adverse, s 86(1)(j) would provide him with a right of review. The decision '*... not to categorise an individual as a permitted individual for a relevant event*' is a reviewable decision.
- [35] For these reasons the appeal should be allowed and Mr Plotkin's application should be struck out.