

CITATION: Ausfire Doors and Penetrations v Queensland Building and Construction Commission [2014] QCAT 164

PARTIES: Shawn Ryan t/as Ausfire Doors and Penetrations
(Applicant/Appellant)
v
Queensland Building and Construction Commission
(Respondent)

APPLICATION NUMBER: OCR088-13

MATTER TYPE: Occupational regulation matters

HEARING DATE: 17 February 2014

HEARD AT: Brisbane

DECISION OF: **Member Howe**

DELIVERED ON: 23 April 2014

DELIVERED AT: Brisbane

ORDERS MADE: **The decisions of the Queensland Building and Construction Commission made on 25 February 2013 to refuse to categorise the applicant as a permitted individual are confirmed.**

CATCHWORDS: Permitted individual – whether individual took all reasonable steps – matrimonial breakdown – financial advice – failure to follow advice – rejection of undercapitalisation as a circumstance

Queensland Building and Construction Commission Act 1991 s 56AD(8) and (8A)
Yunan v QBSA [2010] QDC 158
QBCC v Meredith [2014] QCA 62

APPEARANCES and REPRESENTATION (if any):

APPLICANT: Shawn Ryan represented by Mr Dean Morzone QC instructed by Murray and Lyons, Solicitors

RESPONDENT: Queensland Building and Construction Commission represented by Mr Malcolm Robinson, Solicitor of Robinson Locke, Litigation Lawyers

REASONS FOR DECISION

BACKGROUND

- [1] Mr Ryan was a director of Ausco Firestop (NQ) Pty Ltd, a Cairns company which manufactured fire rated doors. He was also a director of Ryan Group Holdings Pty Ltd. Ausco was the trading entity. RGH held assets. RGH was reliant on Ausco for financial support.
- [2] The parties do not dispute and it is clear that in the case of each company the appointment of receivers and managers on 9 February 2010 was a relevant company event as defined by section 56AC(2) of the *Queensland Building and Construction Commission Act 1991 (QBCC)*.
- [3] By ss 56AC(3) and (4) Mr Ryan thereby became an excluded individual with respect to each relevant company event. He applied in June 2010 to be categorised as a permitted individual for each relevant company event but that was refused. He applied again on 12 February 2013 but again his application was rejected on 25 February 2013 on the basis the Commission was not satisfied Mr Ryan had taken all reasonable steps to avoid the circumstances that resulted in the relevant company events.
- [4] Mr Ryan has applied to the Tribunal for review of those decisions.
- [5] Mr Ryan and his wife purchased Ausco and the fire door business in 1996. They leased premises, expanded then purchased premises.
- [6] Mrs Ryan used her administration and bookkeeping skills in the business. Mr Ryan performed hands-on work and supervised employees. They both worked hard. They were very busy and became very successful.
- [7] In 2004 their accountant advised them to set up RGH to safeguard their growing asset base and for tax planning purposes. Ausco generated the cash flow and RGH held capital assets.
- [8] Around 2007 the construction industry in Cairns experienced significant downturn and a number of large construction companies folded. Some of those companies were major Ausco clients.
- [9] There was a direct effect on Ausco's business and its cash flow declined.
- [10] On 20 November 2008 the Ryans marriage ended and they separated. Mr Ryan took the breakdown badly. During the subsequent matrimonial upheavals Mrs Ryan took away a computer with business records. According to Mr Ryan, without that computer or Mrs Ryan's contribution to

the business the business was paralysed. Mrs Ryan refused to return the business records.

- [11] Given RGH depended on Ausco for income, when Ausco had problems this affected RGH's capacity to pay various loans.
- [12] Mr Ryan sold some real estate assets, but in June, 2009 the National Australia Bank served default notices on him, Mrs Ryan and the companies.
- [13] Despite certain proposals made to National Australia Bank and to another lender, Bendigo and Adelaide Bank on 9 February 2010 receivers and managers were appointed to both companies.

Circumstances Resulting in the Happening of the Relevant Events

- [14] By s 56AD(8) of the QBCC the Commission may categorise an individual as a permitted individual for a relevant event only if the Commission is satisfied 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.
- [15] According to Mr Ryan there were 3 circumstances that caused the happening of the relevant events:
 - (a) the breakdown of the marriage;
 - (b) the financial downturn in the construction industry in Cairns; and
 - (c) the mental and emotional health of Mr Ryan resulting from those circumstances.
- [16] According to the Commission, the circumstances that caused the happening of the relevant events are slightly different for the two companies. In respect of Ausco:
 - (a) undercapitalisation from before 2005;
 - (b) using company assets to purchase motor vehicles not necessary in the operation of that company's business;
 - (c) excessive debt beyond the capacity of the company to service from 2007 following the downturn in the Cairns building industry.
- [17] In respect of RGH, the Commission identifies:
 - (a) loss of support from Ausco;
 - (b) undercapitalisation at least from 2007.

Financial Factors

- [18] The Commission says both companies were undercapitalised. The Commission says the companies had insufficient current assets (eg cash) to cover current liabilities in the short term, that is, within a fiscal year. Non-current assets and liabilities are not factored into the equation.

- [19] If one compares current assets with current liabilities over the years 2005 through 2008 for Ausco¹ and 2006 and 2007 for RGH², the asset/liability ratio is less than 1:1. This ratio, says the Commission, indicates both companies were undercapitalised and that undercapitalisation resulted in the occurrence of the relevant events.
- [20] Mr Schreiber was Mr Ryan's accountant. He gave evidence. I might say from the outset that this gentleman impressed me. He was clear in his evidence, knowledgeable and professional and I found him to take pains to be honest and open.
- [21] Mr Schreiber did not dispute the Commission's ratio calculation. He seemed to think however it was simplistic and gave an unrealistic view of the financial position of the companies. He said Ausco was solvent and always capable of paying its debts.
- [22] Mr Schreiber explained the trading strategy adopted in the business. He said when the Ryans had excess cash, they paid down their debts to the banks very quickly. The banks had no problem with that. They supported that "in the good times". He said a snapshot of any of the 30 June profit and loss statements might show a ratio of .29:1 or whatever ratio less than 1:1, but by the end of the following August or September, the ratio might be the other way at 1.5:1, all depending on what was happening with work.
- [23] In regular meetings he held with Mr and Mrs Ryan, what was discussed was forthcoming work and jobs and what cash was expected to be available and when. If there was excess cash, in accordance with the express business strategy adopted over 5 or 10 years they would talk about paying down debt as fast as possible, which they did³. This business strategy was developed by Mr and Mrs Ryan in conjunction with Mr Schreiber as their adviser⁴.
- [24] Mr Schreiber points to a loan of over \$500,000 from the National Australia Bank in (October) 2008 to Ausco to enable Ausco to purchase more assets. He recalls that at that stage a full analysis was undertaken by the bank of the asset, debt and cash flow position of Ausco and subsequently the National Australia Bank advanced the additional funds. I note his suggestion that it would be highly unlikely that the National Australia Bank would provide such funding to an entity that was insolvent or near insolvent⁵.
- [25] According to Mr Schreiber the financial position of the companies as at October 2008 was not necessarily a concern to him. They had approached the banks and the banks were well aware of the downturn in the economy but fully supported Ausco/RGH. Pursuant to strategy the

1 Ex 9.
2 Ex 8.
3 T1-56 LL13-22 and T1-57 LL2-4.
4 Ex 2 at [25].
5 *ibid* at [23].

Ryans were well advanced in their repayments to the banks and the banks were lending them more money in trying circumstances⁶.

- [26] He said, if they had reduced their debts and sold assets they could have traded on though at a reduced rate, but they had to reduce debt to make it manageable or generate more work⁷. That was the advice he gave them. However, he also agreed that that advice was not followed⁸.
- [27] The precise circumstances of default on loans was not been made clear during hearing, however what is clear is that receivers were appointed as a result of loan repayment default.

Marital Relationship

- [28] Mrs Ryan left her husband on 20 November 2008, taking with her the business computer and records and their children. She refused to return the business records to enable “proper accounting” to be done, using Mr Ryan’s words. In the years preceding, in Mr Schreiber’s opinion, accounting and record-keeping in the business had been of a very high standard. Any information he required was provided in timely fashion, at least until around 2008 when he observed the relationship between husband and wife changing.
- [29] Mr Ryan describes the separation as a pivotal moment.
- [30] The Commission’s view is that the marital problems were not a dominant cause of the relevant event or events. The business already had financial problems, the Cairns building industry had significantly cooled and there had already been recommendations to the Ryans to reduce debt.
- [31] I note Mr Schreiber’s evidence that with a married couple like Mr and Mrs Ryan trading under a business structure like Ausco and RGH, it is not possible to see the business as separate from the relationship⁹.
- [32] He elaborated that both the relationship between husband and wife and the direction they wanted to take the business as directors had been changing for a number of years before the separation, but neither party would directly address the linked issues. From 2006, 2007 he observed Mrs Ryan was keen to sell assets and reduce debt and simplify the business. On the other hand Mr Ryan wanted to see the business grow and the assets increase. There was a significant degree of conflict between them over these issues taking place well before 2008. Obtaining clear decisions and direction from them was difficult because they were so often in conflict.¹⁰.

⁶ T1-60 LL41-46 and T1-61 LL1-2.

⁷ T1-63 LL6-8.

⁸ T1-63 LL10-13.

⁹ Ex 2 at [50].

¹⁰ Ex 2 at [43] – [46].

- [33] There is evidence from Mr Ryan's medical practitioner that over the period 2008 through 2010 Mr Ryan experienced anxiety and stress which the medical practitioner attributes to his relationship breakdown. Mr Ryan says he was under an intolerable emotional strain and his separation left him physically and mentally drained and in a debilitated emotional state which considerably burdened his business activities¹¹.

Cars

- [34] Additionally there is the issue about motor vehicles.
- [35] The Commission says Ausco bought motor vehicles that were not required to operate the Ausco business and that was a circumstance that also caused the happening of the relevant event for Ausco.
- [36] The 2008 profit and loss statement shows Ausco owned seven vehicles, yet apparently few employees were employed in the business. The Commission concludes those vehicles were not used in the business. That conjecture is not ill founded given Mr Ryan was deeply interested in motor vehicles and RGH owned an additional 19 collectable vehicles purchased at a cost of over \$2.2M¹².
- [37] Mr Schreiber supported Mr Ryan's evidence that possession of impressive motor vehicles was part of Ausco's marketing strategy. Mr Schreiber had satisfied himself that the automobiles owned by Ausco were acquired for and used for work purposes in the Ausco business¹³. I accept his evidence on this point.
- [38] In respect of the collectable automobiles owned by RGH, they were capital assets owned by the company held as such as part of the business strategy put in place by Mr Schreiber in conjunction with Mr and Mrs Ryan¹⁴.

Conclusions as to the Circumstances That Resulted in the Happening of the Relevant Events

- [39] I conclude that the principal circumstances that resulted in the happening of the relevant events was the failure to reduce excessive debt, and the breakdown in Mr Ryan's marriage.
- [40] The downturn in Cairns in the building industry was an ongoing feature of the construction sector in that region from approximately 2007. I conclude that that problem was addressed and adequately factored into the business plan adopted by Mr and Mrs Ryan in conjunction with Mr Schreiber.

¹¹ Ex 1 at [20].

¹² Ex 1 annexure A, Ryan Family Trust vehicle finance schedule.

¹³ Ex 2 at [31] and T1-55 LL28-43.

¹⁴ Ex 2 at [32].

- [41] From time to time both Ausco and RGH were undercapitalised in so far as they had insufficient current assets to cover current liabilities. However overall the companies were viable corporate entities conducting business to the satisfaction of their bankers until the latter part of 2009. They traded pursuant to a particular business model approved by Mr Schreiber. The National Australia Bank loaned Ausco over \$500,000 in or about October 2008, and I accept Mr Schreiber's evidence that the bank fully analysed the asset, debt and cash flow position of Ausco at that time before deciding to advance further funds. That lends weight to Mr Schreiber's statement and I accept that the companies were viable business entities at that time.
- [42] RGH was created specifically to hold assets as part of a calculated corporate and business strategy. That corporate and business strategy necessarily made RGH dependent on Ausco but I do not conclude on that basis alone that that corporate structure or business strategy was not prudent business management in the circumstance. Prudent business management is at the heart of the issues addressed by s 56AD(8) and (8A)¹⁵. I conclude it was not so much the loss of support from Ausco to RGH that should be identified as a circumstance that caused the relevant event to RGH but rather the same circumstances that resulted in the relevant event so far as Ausco was concerned also engulfed RGH.

All Reasonable Steps

- [43] Having found that the principal circumstances that resulted in the happening of the relevant events for both companies was the failure to reduce excessive debt and the breakdown in Mr Ryan's marriage, the question then to be asked is did Mr Ryan take all reasonable steps to avoid the coming into existence of those circumstances?
- [44] In deciding this application I am required to take into account as far as relevant the matters listed in s56AD(8A).
- [45] In Mr Schreiber's opinion, accounting and record-keeping in the business had generally been of a very high standard. Any information he required was provided in timely fashion, at least until around 2008 when he observed the relationship between Mr and Mrs Ryan changing. Mr Schreiber explained to my satisfaction the sufficiency of the accounts considered at hearing. After the separation I accept maintaining financial records was made extremely difficult with Mrs Ryan's absence from the business and her withholding important business records from both Mr Ryan and the companies' accountant. There is no indication however that a failure in record-keeping or proper books of account caused problems in the conduct of the business.
- [46] In respect of making appropriate provision for Commonwealth and State taxation debts, I accept that was done. In fact the Ausco balance sheet

¹⁵ *Younan v QBSA* [2010] QDC 158 at [24].

for 2008 showed a tax refund of \$61,000 due because Ausco had overpaid tax.

- [47] The other factors of s 56AD(8A) are not relevant save that of seeking appropriate advice.
- [48] It is not in issue that Mr Ryan sought appropriate advice. What is in issue is whether or not he acted reasonably in respect of the advice given.
- [49] It cannot be the case that an individual must always follow in every respect financial or legal advice given. However failure to follow such advice must be a reasonable course to adopt in the circumstances¹⁶.
- [50] Concerning the breakdown in the marriage, Mr Schreiber's evidence is that well before separation, husband and wife had matrimonial problems. There was a high level of conflict between husband and wife occurring well before 2008¹⁷. Accordingly whilst the separation may have been sudden and shocking to Mr Ryan¹⁸, I do not find it rendered him incapable of sensible decision making. There was corroborative evidence from Dr Brodie in that regard.
- [51] Mr Schreiber ascribes the principal reason for failure of the business as the failure to sell assets quickly enough.

The major issue with the business was that the sale of assets did not occur as quickly as they should. The GFC then hit and the value of the property reduced. The whole thing spiralled downwards and the banks, especially the NAB got very nervous and moved to take control of the entities.¹⁹

- [52] It seems fairly clear that for some significant time the husband and wife directors had different ideas about the direction the business should go. This divergence started at least as far back as May 2005²⁰. Mrs Ryan wanted to realize assets and earn a comfortable income from rental properties and spend time with her children. Both husband and wife had worked very hard in the business. Mr Ryan however always wanted the business to grow.
- [53] I conclude that for a significant period prior to the separation both Mrs Ryan and Mr Schreiber tried to obtain Mr Ryan's agreement to sell assets but he was reluctant to follow that course.
- [54] According to Mr Schreiber, in May or June 2008 they discussed selling motor vehicles²¹. Then again in October that year there were further discussions about the sale of assets. Concerning the discussions in October 2008 he said '*This is one of the pushes that we tried to have with*

¹⁶ *QBCC v Meredith* [2014] QCA 62 at [31] and *Yunan* op cit at [26] and the cases footnoted there.

¹⁷ *Ibid* at [51] and [46].

¹⁸ Ex 1 at [15] and Ex 6 at p40.

¹⁹ Ex 2 at [49].

²⁰ *Ibid* at [47].

²¹ T1-62 LL22-24.

*Shawn to offload some of the properties. Shawn was on a roll, could see more growth and potential, and he had the drive to try and take the business another step.*²²

- [55] But Mr Schreiber said he was not surprised that rather than sell motor vehicles Mr Ryan bought more²³. From 2007 Mr Schreiber had advised the directors they had to sell property to reduce debt. However that advice was not followed²⁴. It would therefore appear Mrs Ryan was prepared to follow the accountant's advice, but not so Mr Ryan.
- [56] Mr Ryan said in evidence that they were always looking to sell, through 2007, 2008 and 2009. They had sold 3 properties (out of a portfolio of some 15 or 16 held as at 2007-8²⁵) and were attempting to sell two others when the receivers were appointed²⁶.
- [57] But Mr Ryan's claim that they were always looking at selling from 2007 is somewhat watered down given Mr Schreiber's comment that sale of property would allow Mr Ryan to move on to yet further investments²⁷. Conversely, over the period August 2007 through to June 2008 RGH acquired some 19 collectable motor vehicles at a cost of over \$2M.
- [58] If anything was to be sold Mr Ryan wanted to sell real estate assets before cars²⁸. Mr Ryan wanted to establish a car museum. That was why he did not want to sell the motor vehicles. Only one motor vehicle was actually sold before the receivers were appointed, and that was sold by Mrs Ryan. Mr Ryan said his wife sold that vehicle vindictively by forging his signature.
- [59] Categorising such a sale as vindictive when it was in fact in accordance with the advice from the accountant seems strange yet informative. Mr Ryan admits he was advised to sell the motor vehicles but didn't do it. He was asked why he did not follow that advice. He could not readily answer other than to say after November 2008 it was all too hard²⁹. As previously stated however, I do not believe the breakdown in the marriage after separation rendered him incapable of sensible decision making.
- [60] Mr Ryan maintained his wife tried to thwart his attempts to sell property at every turn in a vindictive and uncooperative display of behaviour³⁰. I accept she took the business computer, and that caused problems, but there is no evidence that she opposed the sale of property, real or personal. Quite the contrary on the evidence given by Mr Schreiber.

22 T1-62 LL11-13.

23 T1-62 LL31-32.

24 T1-63 LL1-13.

25 Exs 8 and 9.

26 Ex 1 at [44 – 45].

27 T1-62 LL16-17.

28 T1-42 LL16.

29 T1-37 LL15-32.

30 Ex 1 at [47].

- [61] Prior to 15 June 2009 the National Australia Bank served loan default notices on both companies and on both directors demanding payment of monies due in excess of \$5.5M. Mr Schreiber wrote to Mr and Mrs Ryan on 15 June 2009 to advise them to sell property and motor vehicles immediately: –

From your recent asset register you still hold unencumbered assets which may need to be sold or alternatively realising some of the motor vehicles held in the family trust. You need to action the sale of these assets immediately so that you can pay the Banks back.

- [62] A small farm, the Ryans' biggest asset, was listed for sale and three properties were actually sold³¹. None of the cars were sold and there is no evidence Mr Ryan tried to sell them. There is no evidence that any attempt was made to sell any other properties or that those other properties were not readily saleable.
- [63] In end result I am not satisfied that Mr Ryan took all reasonable steps to sell assets as he was advised to do on more than one occasion and over a significant period of time.

- [64] In these matters there is an onus on the applicant:

'...subsection (8) authorises the characterisation of an individual as a permitted individual only if the authority is satisfied of the relevant matter on the basis of the application, that is to say on the basis of the case made by the applicant. It follows that if relevant considerations are not addressed by the applicant, so that the applicant fails to show in a relevant respect that he took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event, then the application will fail.³²

- [65] Mr Ryan has failed to persuade me that he appropriately followed the financial advice given to him to sell assets to reduce the excessive debt burdening the companies. Accordingly Mr Ryan has failed to show that he took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant events.
- [66] It follows that I am not satisfied that Mr Ryan should be categorised as a permitted individual for the relevant events. The decisions of the Commission made on 25 February 2013 are therefore confirmed.

³¹ Ex 1 at [44].

³² *Younan* op cit at [37].