

CITATION: Dancey v Queensland Building Services Authority [2014] QCAT 173

PARTIES: Adam Lucas Dancey
(Applicant)
v
Queensland Building Services Authority
(Respondent)

APPLICATION NUMBER: OCR091-12

MATTER TYPE: Occupational regulation matters

HEARING DATE: 13 September 2013

HEARD AT: Brisbane

DECISION OF: **Member F FitzPatrick**

DELIVERED ON: 30 April 2014

DELIVERED AT: Brisbane

ORDERS MADE: **The decision of the Queensland Building Services Authority dated 14 February 2012 refusing to categorise Mr Dancey as a permitted individual is confirmed.**

CATCHWORDS: OCCUPATIONAL REGULATION – APPLICATION FOR CATEGORISATION AS PERMITTED INDIVIDUAL– where applicant was bankrupt – whether he took all reasonable steps to avoid the happening of the circumstances that resulted in his bankruptcy – where applicant did not take appropriate legal and financial advice – where applicant gave personal guarantees for company liabilities without adequate assets to cover them – where applicant did not make appropriate provision for his taxation debts

Queensland Building Services Authority Act 1991 s 56AD(8)
Queensland Civil and Administrative Tribunal Act 2009 ss 20, 24

Yunan v QBSA [2010] QDC 158
Smith v Queensland Building Services Authority

[2012] QCAT 58
Spedding v Queensland Building Services Authority [2012] QCAT 516
QBCC v Meredith [2014] QCA 62
McDonald v DG of Social Security (1984) 1FCR 354
Szbel v Minister for Immigration (2006) 228 CLR 152
Queensland Building and Construction Commission v Vadasz [2014] QCATA 001

APPEARANCES and REPRESENTATION (if any):

APPLICANT: Adam Lucas Dancey represented by Ms Susan McNeil of Counsel instructed by Dillon Lawyers

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

REASONS FOR DECISION

- [1] Part 3A of the *Queensland Building Services Authority Act* 1991¹ is designed to exclude individuals from the building industry for a 5-year period if they demonstrate their “*incapacity to manage*”.²
- a) their own finances; or
 - b) the finances of a company of which they are a director, secretary or influential person.
- [2] The authority must not grant a licence to an excluded individual.³ If an individual is twice excluded from holding a licence, they face permanent exclusion⁴, on the basis that they are no longer a fit and proper person to hold a licence.⁵
- [3] Mr Dancey was the sole director and shareholder of First Fire Protection Pty Ltd (FFP) at the time of a receiver and manager being appointed on 11 September 2007. The Queensland Building Services Authority sent a notice to Mr Dancey notifying him that he had become an “excluded individual” under s 56AC of the QBSAA as a result of the company event.
- [4] Mr Dancey became bankrupt on 21 September 2009 (the bankruptcy event). The Queensland Building Services Authority sent a notice to

¹ As it was at the material time.

² Explanatory notes to Bill introducing part 3A.

³ *Queensland Building Services Authority Act* 1991 (QBSAA) s 56AE.

⁴ *Ibid* s 58.

⁵ *Ibid* s 60. Where there are two bankruptcy events or two company events flowing from the one set of circumstances the Act only registers one exclusion event on each count-56AC 5) and 6). However there is no similar discounting provision in relation to successive company and bankruptcy events flowing from the one set of circumstances.

Mr Dancey notifying him that he had become an “excluded individual” under s 56AC of the QBSAA as a result of the bankruptcy event.

- [5] Mr Dancey applied to the Authority to be categorised as a permitted individual for each of the events⁶, on the basis that he had taken *all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant events*⁷.
- [6] The Authority’s decision maker decided not to categorise Mr Dancey as a permitted individual in relation to either event. Mr Dancey filed this application in the Tribunal to review both decisions. However he has since withdrawn his application to review the decision stemming from the company event.
- [7] Mr Dancey says that the decision ‘*restrict my ability to gain employment and to keep my current employment*’. If this review application is unsuccessful, Mr Dancey will be facing permanent exclusion from holding a licence under the QBCC Act, (as it is now). However this consequence flows from the operation of the legislation and is not a relevant consideration for the Tribunal to take into account on this review.

Role of the Tribunal.

- [8] This review Tribunal must conduct a fresh hearing on the merits⁸, into whether Mr Dancey took “all reasonable steps” to avoid the circumstances which resulted in his bankruptcy. It has evidence before it that was not available to the original decision maker. It must stand in the shoes of the decision maker and make the correct and preferable decision under s 56AD in relation to the bankruptcy event.
- [9] The options available to the review Tribunal are to:
- a) confirm or amend the decision; or
 - b) set aside the decision and substitute its own decision; or
 - c) set aside the decision and return the matter for reconsideration to the decision-maker for the decision, with the directions the tribunal considers appropriate.⁹

The relevant event:

- [10] Both parties agree that this decision relates to the bankruptcy event on 21 September 2009.

The circumstances that resulted in the happening of the relevant event:

- [11] The Authority submitted that although the company event occurred approximately 2 years before the bankruptcy event, there was ‘no

⁶ Ibid under s 56AF.

⁷ Ibid s 56AD(8).

⁸ *Queensland Civil and Administrative Tribunal Act 2009* s 20.

⁹ Ibid s 24.

intervening cause of the bankruptcy...the guarantee creditors existed at the time of the administration of FFP'. 'Therefore, the circumstances that caused the bankruptcy arose in 2007'.¹⁰

- [12] Mr Dancey submitted that the circumstances resulting in the bankruptcy event included that he was the managing director of FFP and derived his income from FFP; that a receiver and controller was appointed to FFP on 11 September 2007; and that during the life of the company Mr Dancey provided personal guarantees of FFP's debts. When the company failed, Mr Dancey lost his employment and income, could not meet his repayment obligations for various assets and this affected his liability with respect to guarantees for motor vehicles and other assets¹¹. Furthermore:

The relevant event arose as a consequence of the company going into liquidation, the loss of the income of the Applicant, and the consequential effect that had on the ability of the Applicant to meet its obligations in relation to the personal guarantees.¹²

- [13] I consider that the circumstances giving rise to Mr Dancey's bankruptcy arose in July 2007, prior to the company event, and so for the purposes of this review, the focus of the enquiry should be the steps Mr Dancey took to avoid the circumstance that FFP had significant exposure and few rights under a high risk finance agreement, and where he had personally guaranteed FFP's obligations, in circumstances which exposed his personal finances to the same degree of risk.
- [14] The company event triggered a chain of circumstances leading to the bankruptcy. While I accept there was little Mr Dancey could do to avoid the consequences of his poor management decision, the legislation holds him accountable for failing to avoid the circumstances resulting in the bankruptcy event, and not its consequences.
- [15] I find that the circumstances that resulted in Mr Dancey's bankruptcy included:
- a) FFP seeking a loan in mid 2007;
 - b) FFP entering into an factoring agreement with Benchmark Debtor Finance Pty Ltd in July 2007 which did not protect FFP's interests;
 - c) Mr Dancey personally guaranteeing FFP's obligations in July 2007 where FFP's exposure under the agreement was high, and when he had insufficient assets to meet his liabilities under the guarantee;
 - d) Benchmark terminating the agreement and appointing a receiver on 11 September 2011, as it was entitled to do even if FFP had complied with its obligations under the agreement;

¹⁰ Closing submissions at page 4, [16].

¹¹ Applicant's submissions at [13] – [19].

¹² Ibid at [60].

- e) Benchmark taking out default judgment against Mr Dancey in the Supreme Court of Victoria on 19 August 2008 for \$467,875.03 plus interest and costs;
- f) Mr Dancey having insufficient assets to meet the judgment debt and his decision to file a debtor's petition.

Did Mr Dancey take all reasonable steps to avoid the circumstances which resulted in his bankruptcy?

- [16] A decision maker under s 56AD(8) must consider the “*action taken*” by Mr Dancey in relation to six prescribed financial management responsibilities¹³ and may also have regard to any other relevant matters.¹⁴ On considering the mandatory factors:

It is immediately apparent that these are all concerned with the prudent management of a company as an ongoing business, or even, in the case of (...seeking appropriate financial or legal advice...) something which is to be done before one conducts business or enters into financial or business arrangements. In other words, the focus of this subsection is on prevention rather than dealing with problems after they have arisen.¹⁵

What were reasonable steps depended on what was reasonable for the individual concerned in the circumstances in which he found himself, with such information as he then had. It is not a question of whether he did everything possible to prevent these circumstances from arising, or whether they would not have arisen if he had acted differently. The reasonableness of his behaviour must be assessed by reference to what was known by him at the time, without the benefit of hindsight.¹⁶

- [17] A decision maker cannot grant Mr Dancey permitted individual status unless it is satisfied, on the basis of Mr Dancey's application¹⁷, that the action he took with respect to each of the relevant prescribed financial management responsibilities amounted to taking ‘reasonable steps’ to avoid the circumstances leading to the bankruptcy event¹⁸.

An application to be categorised as a permitted individual must under s 56AD(3) include the reasons why the authority should categorise the individual as a permitted individual for the relevant event. Further, 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

¹³ s 56AD(8A).

¹⁴ s 56AD(8B).

¹⁵ Younan Ibid “except in the case of (fraud) which is obviously concerned with a situation where a problem has arisen outside the control of the individual in question”.

¹⁶ Ibid at [26] (footnotes omitted).

¹⁷ s 59AD(1).

¹⁸ “It does not at all follow that because an individual has not personally participated actively in relation to those that are applicable, then, as a matter of law, that individual cannot satisfy the test in s 56AD(8). Neither section so provides expressly or impliedly. The true position is that, if having regard to any one of those activities QBSA determines that an applicant had not personally participated actively with respect to it but had placed full reliance upon another with respect to it, the issue raised by s 56AD(8) would be whether, in the relevant circumstances, such reliance was reasonable. *QBCC v Meredith* [2014] QCA 62 at [32].

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.¹⁹

Section 56AD(8A)(b) seeking appropriate legal and financial advice before entering into financial or business arrangements or conducting business.

- [18] Mr Dancey gave evidence that he received legal and financial advice before setting up FFP in early 2004. Between 2004 and 2007 he says he reviewed his personal financial position annually with an accountant, Mr Dennis Livingstone.
- [19] Mr Livingstone was also FFP's accountant and Mr Dancey met with him quarterly between 2005 - 2006 to review its position. He says that from 2007 he consulted Mr Livingstone monthly about FFP's performance and about a loan to expand FFP's business. It was put to Mr Dancey in cross examination that the real driver for the loan was that FFP was experiencing cash flow problems, and that Mr Dancey had intimated as much to a meeting of FFP's creditors. I don't think it is necessary to make a finding on the purpose of the loan.
- [20] Even if the Tribunal accepts that Mr Dancey sought appropriate legal and financial advice about whether or not a loan was in FFP's best interests, he acknowledges that he did not seek financial or legal advice about the terms of FFP's factoring agreement with Benchmark or the related personal guarantee before entering into those agreements on 4 July 2007.
- [21] Mr Dancey says that he was referred to Benchmark by a finance broker after the Westpac and ANZ banks had refused FFP's loan application because it could not offer adequate security. Engaging the services of a finance broker does not amount to the sort of financial advice contemplated by s 56AD(8A)(b), and Mr Dancey did not claim that it did.
- [22] I consider that it would have been a reasonable step for a person in Mr Dancey's position to seek legal and financial advice in relation to the specific terms of such a substantial loan agreement. This is particularly so because I am satisfied that Mr Dancey was aware that this factoring agreement entailed more financial risk to FFP, (and consequently his own finances by virtue of the related personal guarantee,) than a bank loan, warranting a higher level of scrutiny by legal and financial advisers.
- [23] Mr Dancey provided the Tribunal with a copy of the legal advice he received on 19 September 2007, after Benchmark had terminated the agreement with FFP. The Authority directed the Tribunal to the following paragraph:

Even if you have not breached your obligations under the agreement, and even if you have not committed an Event of Default...Benchmark can still

¹⁹ Younan ibid at [37].

terminate the agreement ..in its absolute discretion...Clearly these are very harsh provisions but they are still enforceable. If we had seen this agreement before you entered it, we would have recommended against executing it in the strongest terms. As however that is now in the past, we can only advise you on its effect.²⁰

- [24] This advice is not relevant to the question of whether Mr Dancey took “all reasonable steps”. S 56AD does not require a decision maker to be satisfied that the circumstances resulting in Mr Dancey’s bankruptcy would not have arisen had he sought appropriate financial or legal advice. Rather, the question is whether he took all reasonable steps in light of what was known by him at the time, without the benefit of hindsight, and I have concluded that he did not take those reasonable steps before entering into the Benchmark loan.
- [25] The advice is only relevant insofar as it demonstrates that the ‘*harsh terms*’ of the agreement, and in particular, Benchmark’s broad termination rights, left FFP in a vulnerable position, giving rise to the circumstance that Mr Dancey’s own finances were also at risk by virtue of the guarantee. The advice confirms that FFP had no prospect of resisting Benchmark’s termination, even if it had complied with its obligations under the agreement. In other words it is evidence that the terms of the Benchmark agreement itself gave rise to the circumstances that resulted in the bankruptcy event, namely the circumstance that FFP’s interests and consequently Mr Dancey’s own financial interests under the agreement were not adequately protected.
- [26] Mr Dancey claimed that Benchmark had acted unfairly in terminating the agreement, as FFP had observed its repayment obligations. He said that Benchmark’s precipitous action was catastrophic for FFP, and resulted in his bankruptcy. However these arguments merely recite the consequences of Mr Dancey’s earlier failure to take the reasonable step of seeking appropriate advice. The test is not whether Mr Dancey has taken all reasonable steps to deal with the circumstances that resulted in the happening of the relevant event.

What is required by subsection (8) is a consideration of whether the individual took all reasonable steps to **avoid the coming into existence** of those circumstances²¹

- [27] I find that Mr Dancey did not obtain appropriate legal and financial advice before entering into a significant debtor finance agreement with Benchmark on 4 July 2007 and before guaranteeing FFP’s obligations under that agreement. Accordingly, Mr Dancey failed to take one of the reasonable steps he could have taken to avoid the circumstances that resulted in his bankruptcy.

²⁰ Letter Wainright, Ryan, Eid Lawyers to Mr Dancey dated 19 September 2007, p 7.
²¹ Younan op cit at [27].

“All reasonable steps”

[28] As the legislation obliges Mr Dancey to take *all* “reasonable steps”, his application for permitted individual status cannot succeed in light of the finding that he has failed to take one of those steps. Nevertheless, I will briefly canvass the other prescribed factors in s 56AD(8A), as it is mandatory for a decision maker to have regard to each of those factors in deciding whether or not to categorise Mr Dancey as a permitted individual.

Section 56AD(8A)(a) Keeping proper books of account and financial records.

[29] Mr Dancey’s evidence is that he maintained his own financial records and arranged for proper books of account and financial records to be prepared for FFP. He said he was unable to produce FFP’s records as they were taken by the liquidator and he did not have the money to travel to the liquidator’s offices in Melbourne, or to pay the inspection and copy fees. He says that he asked Mr Livingstone for copies of FFP’s records at the start of these proceedings, however Mr Livingstone only kept records for five years and had moved premises, so he didn’t have copies. He did not adduce any corroborating evidence about the record keeping from Mr Livingstone; or from FFP’s finance officer or Mrs Dancey, who both maintained the MYOB records.

[30] There is no evidence before the Tribunal to indicate that Mr Dancey failed to take appropriate action in relation to FFP’s financial record keeping or that this failure gave rise to circumstances that resulted in Mr Dancey’s bankruptcy. Equally, there is insufficient evidence before the Tribunal for it to be satisfied that record keeping was not a factor. While Mr Dancey does not have to meet any predetermined evidentiary standard²², he is required to provide sufficient information to satisfy a decision maker under s 58AD(8) that he took appropriate action on this count.

[31] Mr Dancey may believe that proper records were kept for FFP, but this is a question of fact which is best answered after considering the records themselves. Mr Dancey did not quantify the costs involved in obtaining FFP’s financial records and did not provide details of his efforts to obtain copies, or an adequate explanation for not calling witnesses who may be able to confirm that the record keeping was appropriate. It is not unusual for an insolvent company’s documents to be in the hands of a third party. To excuse the production of these documents on the strength of a general claim that they were unavailable would be to undermine the effect of this subsection, when financial record keeping is a mandatory consideration in reaching a decision under s 58AD(8).

[32] In the absence of FFP’s financial records, or corroborating evidence that the records were “proper”, the Tribunal is not able to determine whether or not poor financial record keeping led to the circumstances resulting in the company event; if this had implications for the bankruptcy event, and if so,

²² *McDonald v DG of Social Security* (1984) 1 FCR 354; *Szbel v Minister for Immigration* (2006) 228 CLR 152.

whether Mr Dancey had taken reasonable steps to avoid the circumstance that the records were deficient in some material way.

- [33] I am not satisfied that Mr Dancey took action to ensure that FFP kept proper books of account and financial records.

Section 56AD(8A)(d) ensuring guarantees provided were covered by sufficient assets to cover the liability under the guarantees

- [34] Mr Dancey was forced into bankruptcy in 2009 because he did not have sufficient assets to satisfy his personal guarantees over FFP's debts. However a decision maker under s 58AD(8) must have regard to the action Mr Dancey took at the time the guarantees were entered into. The legislative requirement is to ensure that sufficient assets are available. A belief that a guarantee can be met from income is not enough.

- [35] While Mr Dancey may have taken appropriate action in relation to smaller guarantees made prior to July, 2007, I am not satisfied that he took appropriate action in relation to the Benchmark guarantee. Mr Dancey was obliged to take his commitment of around \$320,000 under the existing guarantees into account in ensuring that he had access to sufficient assets to cover the Benchmark guarantee.

- [36] On the evidence available, I agree with the Authority's submission that in July 2007 FFP had a shortfall of assets and current assets. Its cash on hand and trade debtors were insufficient to cover trade creditors and tax owed, and in the previous financial year it had made a loss. I agree that Mr Dancey's exposure under the Benchmark guarantee was significant. Mr Dancey agreed to a suggestion from the Authority that even if Mrs Dancey's assets were taken into account, the \$450,000 advanced to FFP by Benchmark exceeded the value of the Dancey's joint assets by something in the vicinity of \$250,000.

- [37] Mr Dancey asked the Tribunal to consider action he took after the liquidation of FFP to meet the guarantees and stave off bankruptcy, for example returning motor vehicles, and entering into repayment arrangements. He also asked the Tribunal to consider that he suffered a considerable drop in income. Other than these steps there was little he could do.

- [38] Again, these are merely symptoms of Mr Dancey's earlier failure to take reasonable steps to avoid circumstances in which FFP had been wound up, the company had insufficient assets to meet its liabilities, Benchmark had sought to enforce its rights under the guarantee, Benchmark had obtained Default Judgment in the Supreme Court of Victoria against Mr Dancey, and where he had insufficient assets to meet that judgment debt.²³

²³

Cf approach of the learned members in *Smith v Queensland Building Services Authority* [2012] QCAT 58, and *Spedding v Queensland Building Services Authority* [2012] QCAT 516 which may turn on their own facts.

- [39] I am not satisfied that Mr Dancey took reasonable steps to ensure that the Benchmark guarantees were *covered by sufficient assets to cover the liability under the guarantees.*

Section 56AD(8A)(e) putting in place appropriate credit management for monies owing and taking reasonable steps for recovery of the amounts

- [40] Mr Dancey says that appropriate credit management strategies were in place, however it would have been more persuasive had Mr Livingstone given evidence in this regard. In the absence of FFP's financial records or better evidence of FFP's credit management practices it is not possible to determine whether or not credit management was a factor in FFP's failure; that it contributed to the bankruptcy event; and if so, that Mr Dancey took reasonable steps to ensure that appropriate credit management strategies were in place. I am not satisfied that Mr Dancey took all reasonable steps on this count.

Section 56AD(8A)(f) making appropriate provisions for Commonwealth and State taxation debts

- [41] Mr Dancey did not provide any evidence that he had made appropriate provision for his taxation debts.
- [42] He says he lodged personal tax returns each financial year. However, he had not made provision for an outstanding Director's Penalty Notice because the amount was in dispute, partly because a payment he made was wrongly applied to reduce FFP's GST liability and not applied to the DPN. He did not identify any other basis for disputing the Notice.
- [43] Mr Dancey's statement of affairs reveals that he was indebted to the ATO under the DPN for \$52,749.66, and that the debt arose in January 2006.

Even though it might be accepted that the taxation debt was not the direct cause of the relevant event for the purposes of section 56AD(8), it was a significant debt and as (Mr Dancey) had no financial means to clear this debt (it) was part of the overall matrix of circumstances that led to his bankruptcy.

His obligation under subsection (f) to show he took reasonable steps to avoid the coming into existence of the circumstances which led to his bankruptcy was to make a proper provision for the payment of outstanding tax. There is simply no evidence that he made any such provision..²⁴

- [44] I am not satisfied that Mr Dancey made adequate provision for tax debts.

Order

- [45] I am not satisfied that Mr Dancey took all reasonable steps to avoid the circumstances which resulted in the bankruptcy event, so I confirm the

²⁴ *Queensland Building and Construction Commission v Vadasz* [2014] QCATA 001 at [36] and [37].

Authority's decision to refuse Mr Dancey's application to be categorised as a permitted individual.