

CITATION: Coconut & Ors v Queensland Building and Construction Commission [2014] QCAT 203

PARTIES: Maryanne Coconut
Shayne Francis Blackman
Leileen Lola Blackman
Robert June Stanley
Vera Nau
(Applicants)
v
Queensland Building and Construction Commission
(Respondent)

APPLICATION NUMBER: OCR143-13; OCR144-13; OCR145-13;
OCR146-13; OCR147-13

MATTER TYPE: Occupational regulation matters

HEARING DATE: 1 May 2014

HEARD AT: Townsville

DECISION OF: **Member JC Carey**

DELIVERED ON: 15 May 2014

DELIVERED AT: Townsville

ORDERS MADE:

- 1. The decision of the Queensland Building and Construction Commission is set aside.**
- 2. The applicants are to be categorised as permitted individuals within the meaning of s 56AD of the *Queensland Building and Constructions Commission Act 1991 (Qld)*.**

CATCHWORDS: Application to be permitted individuals – review of Queensland Building and Construction Commission decision to reject application – reasonable steps

Queensland Building and Construction Commission Act 1991 (Qld), s 56AD

Younan v QBSA [2010] QDC 158

APPEARANCES and REPRESENTATION (if any):

APPLICANTS: Mr Askin, Roberts Nehmer McKee Lawyers

RESPONDENT: Mr Robinson, Robinson Locke Litigation
Lawyers

REASONS FOR DECISION

- [1] The applicants were all directors of Congress Community Development and Education Unit Ltd ACN 010 941 689 ('CCDEU'). CCDEU operated a wholly owned subsidiary company called Shalom Development Services Pty Ltd ACN 067 131 755 ('SDS'). CCDEU originally started as a college for indigenous students whose objectives included '*to positively change the lives of Aboriginal and Islander people who suffer lower socio-economic outcomes of any Australian citizen*'. SDS was incorporated to deliver infrastructure because CCDEU diversified its services at the request of various Government departments.
- [2] CCDEU obtained all of its funding from State and Commonwealth Government sources for the purposes of running the college, providing aged care and rehabilitation services and associated activities.
- [3] Administrators were appointed to CCDEU on 20 August 2012.
- [4] The issues for decision in this application are:
- a) Identification of the relevant event;
 - b) Identification of the circumstances that resulted in the happening of the relevant event;
 - c) Whether the Applicants took all reasonable steps to avoid the coming into existence of those circumstances; and
 - d) If (c) is satisfied should discretion be exercised to classify the Applicants as permitted individuals.¹

Relevant Event

- [5] There is no dispute that the relevant event is the appointment of administrators to CCDEU on 20 August 2012.

Identification of the circumstances that resulted in the happening of the relevant event

- [6] The circumstances that resulted in the happening of the relevant event are:
- a) CCDEU had administrative difficulties recovering Abstudy funding which would have met the educational, travel and accommodation expenses of the students at Shalom College.

¹ See *Younan v QBSA* [2010] QDC 158.

- b) Funding granted by the Department of Housing and Aging (DoHA) was deposited into CCDEU's consolidated account and used for day-to-day cash-flow purposes on a temporary basis in order to overcome short-term cash-flow difficulties caused by the rejection by Centrelink of various Abstudy grant funding applications. This gave rise to the possibility of a demand being made by DoHA for the return of the grant funding.

Whether the Applicants took all reasonable steps to avoid the coming into existence of those circumstances

- [7] Mr Blackman gave evidence on behalf of all applicants and this was accepted by the other applicants and the respondent to be an appropriate course of action. Mr Blackman's evidence was, amongst other things that:
 - a) The college had operated as one of the country's most successful indigenous education facilities for over 22 years.
 - b) The college had kept records of account in accordance with accounting standards up until end of December 2011.
 - c) In early 2012 three (3) critical members of the financial reporting team employed by the college all resigned.
 - d) In 2010 CCDEU commissioned a report by Bentley's Accountants which identified some strategies that could be taken to overcome short-term cash-flow difficulties.
 - e) It had been a source of concern for some time that CCDEU was always playing "catch up" because students' educational needs required immediate action, in some cases prior to grant funding being made available.
 - f) It had been the case that grant funding had always been forthcoming eventually and the short term problems the subject of the relevant event did not manifest themselves until the first half of 2012.
- [8] Mr Blackman also gave evidence that if the college '*waited around*' for grant funding to be made available then students in desperate need of the educational facilities provided by Shalom College would either be at risk of not getting that appropriate service or of not being able to attend the college at all. The Board considered that this imperative outweighed '*usual*' prudent management of grant funding.
- [9] The counter-point to that position was made in submissions by the respondent. The respondent submitted:
 - a) It was not appropriate that '*ordinary prudent*' financial standards should have been dispensed with in order to overcome short term cash-flow difficulties.
 - b) The grant funding was mis-applied and this was a relevant factor in causing the relevant event.

- c) The Tribunal should rely on the report to creditors from Deloitte in which a number of findings were made in respect to the operations of the CCDEU. Those findings were:
- i) Since 31 December 2011 three (3) senior finance managers and other members of CCDEU's finance team resigned. Consequentially CCDEU had not been able to maintain any continuity in its finance team which led to a lack of appropriate, timely and accurate financial information.
 - ii) CCDEU booked and managed travel separately from Centrelink which resulted in CCDEU funding those obligations without first confirming that the student was eligible for travel assistance.
 - iii) CCDEU required cash by the middle of October 2012 (2 months after the appointment of the Administrators). Whilst CCDEU had cash at the time of the Deloitte's report (22 October 2012) it was unlikely to be able to meet its debts from internal sources.
 - iv) CCDEU had mis-applied grants received from DoHA for the new Cooktown facility and used these funds to meet the expenses of SDS. The liability to DoHA of \$3.2 million was arguably due and payable immediately.

[10] The Tribunal must consider whether the applicants took all reasonable steps to prevent these circumstances from coming into existence.

[11] Having regard to the evidence and the submissions made on behalf of the applicants and the respondent the Tribunal is satisfied the applicants did take all reasonable steps for the following reasons:

- a) When the short-term cash-flow deficiency became obvious, CCDEU appointed Bentley's to advise on a series of steps to overcome this problem. CCDEU had been implementing and was continuing to implement most of the recommendations and advice the Board had received from Bentley's at the date of the relevant event.
- b) One of the causes of the short-term cash-flow problem was Centrelink's unexplained rejection of many Abstudy grants. To overcome this problem CCDEU engaged extra staff to travel to remote communities and assist people who have little understanding of a 40 page form (if it could be read at all) and little to no understanding of reasons for the requirements of Centrelink to complete these forms. Faced with unexplained rejections from a Government department with whom CCDEU had had a lengthy relationship, it was reasonable in the circumstances to take that action.
- c) The use or mis-use of grant funding may be a breach of the grant funding agreement, however, does not automatically amount to a breach of a director's duty. That is not a matter for this Tribunal. The funding was not to be acquitted for some significant time, had been placed in a trust account two (2) years previously and had been moved to CCDEU's general accounts at the direction of the funding

body. The intention to replace that funding once Abstudy funding became available was clear.

- d) The relevant event was primarily caused by DoHA's requirement for aged care services to be separated from other CCDEU services. Mr Blackman's evidence² that the voluntary administration was for a very particular purpose to "reconstitute" CCDEU so as to achieve DoHA's requirement for a complete separation of entities running indigenous aged care and indigenous education. In addition, CCDEU at all times had the full support of its secured creditor.
- e) It is this Tribunal's role to establish what amounts to the reasonable steps the applicants should have taken to prevent the circumstances which led to the relevant event. The Tribunal does this by investigating the nature of the harm, foreseeability and degree of risk of its happening and the measures reasonably available to prevent that risk. The temporary re-direction of grant funding was a reasonable step in the circumstances where a relevant event might have come into existence much earlier if that funding had not been made available and Abstudy grants were rejected without explanation by Centrelink.
- f) The taking of these steps by the applicants was reasonable in the circumstances in which they found themselves, based on the information they had to hand and the advice they took at that time.
- g) It is not a question of whether the applicants did everything possible to prevent the relevant event, or whether the relevant event would not have arisen if the applicants had acted differently.
- h) The reasonable steps taken have been assessed by reference to what was known by the applicants at the time, without the benefit of hindsight.

Queensland Building and Construction Commission Act 1991 (Qld) ('QBCC Act'), s 56AD

[12] The Tribunal must also specifically take into account the matters outlined in s 56AD(8A).

[13] They are:

a) **Keeping proper books of account and financial records**

There is evidence that these records were kept appropriately until December 2011. Deloitte is critical of CCDEU for not preparing proper accounts in the first half of 2012. The Tribunal is satisfied that this is explicable by the evidence given that 3 critical members of the finance team resigned at or around the same time. This placed stress on CCDEU's ability to produce the relevant accounts in the short term. It was reasonable for CCDEU, as it did, to engage an external consultant in order to bring this situation back under control.

² See Application to be Categorised as a Permitted Individual dated 26 March 2013.

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

The engagement of Bentley's was a reasonable step. The evidence of Mr Blackburn was that independent advice, be it financial or legal, was sought before conducting the business of the college. This was supported by Mr Jessup who had personal knowledge of the actions taken by the directors and was present at various meetings of relevant stakeholders for CCDEU.

c) **Reporting fraud or theft to the police**

This is not applicable to this matter.

d) **Ensuring guarantees provided were covered by sufficient assets to cover the liability of the guarantees**

This is not applicable to this matter.

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

Deloitte is critical of CCDEU in this aspect and cites evidence of incurring costs prior to grant funding being made available. The Tribunal is satisfied by the evidence that appropriate management for amounts owing and reasonable steps for recovery of those amounts was implemented by CCDEU by engaging additional staff to correctly fill out the Abstudy forms and taking all reasonable steps it could take in its communications with Centrelink for establishing why the applications had been rejected and when funding would be forthcoming. It is noteworthy that the administrators suffered from the same problems in their communications with Centrelink.

f) **Making appropriate provision for Commonwealth and State taxation events**

This is not applicable to this matter.

- [14] For the reasons outlined above, having regard to the unique circumstances of this peculiar case, the Tribunal is satisfied that all reasonable steps were taken by the applicants. The purposes and objectives of the foundation of the college were at the forefront of the applicants' minds. Disadvantaged members of society at risk of failing to be properly educated unless extraordinary steps were undertaken by the applicants is one of the matters the Tribunal considers and has had regard to in deciding whether the applicants took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event.

Exercise of discretion

- [15] Having been satisfied that the applicants did take all reasonable steps to avoid the circumstances that gave rise to the relevant event coming into existence, the Tribunal is satisfied that the discretion to classify the

applicants as permitted individuals should also be exercised. The factors relevant to the exercise of this discretion are the satisfaction of the test under s 56AD(8). The following facts are also relevant:

- a) No phoenix activity has been carried out.
- b) No previous relevant events have been identified.
- c) There are unrelated employees, subcontractors, trade contractors or suppliers or members of the public who may be adversely affected by the applicants losing their licence. SDS continues to operate for the purposes of building infrastructure to fulfil the objectives of CCDEU.
- d) All CCDEU creditors have been paid 100 cents in the dollar.

Orders

- [16] The decision of the Queensland Building and Construction Commission is set aside.
- [17] The applicants are to be categorised as permitted individuals within the meaning of s 56AD of the *Queensland Building and Construction Commission Act 1991* (Qld).
- [18] The solicitors for the applicant foreshadowed an application for costs. The Tribunal directs that any application for costs be made on the papers, to be decided by the Member who made this decision, as follows:
 - a) applicant to file and serve submission on costs within 14 days after the date of receipt of this decision; and
 - b) respondent to file and serve submissions on costs within 14 days after receipt of the applicant's submissions.