

CITATION: *Walker v Queensland Building and Construction Commission* [2014] QCAT 228

PARTIES: Alan Walker
(Applicant)
v
Queensland Building and Construction
Commission
(Respondent)

APPLICATION NUMBER: OCR156-13 / GAR187-13 / GAR188-12

MATTER TYPE: Occupational regulation matters

HEARING DATE: 3 February 2014

HEARD AT: Brisbane

DECISION OF: **Dr Cullen, Member**

DELIVERED ON: 26 May 2014

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. The 8 May 2013 decision of the Respondent that the Applicant is an Excluded Individual as the result of the appointment of liquidators to Grantigard is set aside.**
- 2. The 8 May 2013 decision of the Respondent that the Enviropest (Sunshine Coast) Pty Ltd and Enviropest (Qld) Pty Ltd are excluded companies is set aside.**

CATCHWORDS: APPLICATION FOR REVIEW – OCCUPATIONAL REGULATION – BUILDING - EXCLUDED INDIVIDUAL – was general manager an influential person.

Queensland Building and Construction Commission Act 1991 (Qld), s 56AC, s 56AF, Schedule 2

Laidlaw v Queensland Building Services Authority [2010] QCAT 70; cited
Buckley v Queensland Building Services Authority [2013] QCAT 469

McDonald v Queensland Building and
Construction Commission [2013 QCAT 702]

APPEARANCES and REPRESENTATION (if any):

APPLICANT: Simon Taylor of counsel instructed by Mardee
Campbell solicitor of Crouch & Lyndon Pty Ltd

RESPONDENT: Malcolm Robinson of Robinson Locke Litigation
Lawyers

REASONS FOR DECISION

- [1] The sole issue for determination by the Tribunal in this matter is whether the respondent, the Queensland Building and Construction Commission, correctly determined that the applicant, Mr Alan Walker, is an excluded individual pursuant to s 56AF of the *Queensland Building Service Act* 1991 (Qld) (as it was then). On 8 May 2013, the Commission determined that Mr Walker was an excluded individual following the appointment of liquidators to Granitgard Pty Ltd on the 25 October 2011.
- [2] It is the Commission's position that Mr Walker, who was given the title of 'General Manager' was an influential person, which in turn triggers application of s 56AC.
- [3] Section 56AC of the Act provides:
- (2) This section also applies to an individual if—
 - (a) after the commencement of this section, a company, for the benefit of a creditor—
 - (i) has a provisional liquidator, liquidator, administrator or controller appointed; or
 - (ii) is wound up, or is ordered to be wound up; and
 - (b) 5 years have not elapsed since the event mentioned in paragraph (a)(i) or (ii) (**relevant company event**) happened; and
 - (c) the individual—
 - (i) was, when the relevant company event happened, a director or secretary of, or an influential person for, the company; or
 - (ii) was, at any time after the commencement of this section and within the period of 1 year immediately before the relevant company event happened, a director or secretary of, or an influential person for, the company.
 - (3) If this section applies to an individual because of subsection (1), the individual is an **excluded individual** for the relevant bankruptcy event.

- (4) If this section applies to an individual because of subsection (2), the individual is an **excluded individual** for the relevant company event.

[4] Section 56AF of the Act provides:

- (1) This section applies if the commission considers that an individual who is a licensee is an excluded individual for a relevant event.
- (2) The commission must give the individual a written notice identifying the relevant event and stating the following—
- (a) why the commission considers the individual is an excluded individual for the relevant event;
- (b) the individual may apply to the commission to be categorised as a permitted individual for the relevant event if the individual has not already done so;
- (c) the circumstances, stated in subsection (3), in which the commission must cancel the individual's licence.

[5] There is a dictionary definition contained in Schedule 2 of the Act for '*influential person*':

influential person, for a company, means an individual, other than a director or secretary of the company, who is in a position to control or substantially influence the conduct of the company's affairs, including, for example, a shareholder with a significant shareholding, a financier or a senior employee.

The relevant event

[6] I find that the appointment of liquidators to Granitgard Pty Ltd on 25 October 2011 was for the benefit of a creditor, and is a '*relevant event*' for purposes of the Act. Turning then to the issue of whether Mr Walker was an influential person requires that the Tribunal consider what it is that Mr Walker actually did for Granitgard. Section 56AC of the Act requires a finding by the Tribunal that the Applicant was an influential person during the one-year period immediately before the relevant event transpired. In Mr Walker's circumstances, if the Tribunal finds that he was an influential person in the one-year period prior to the appointment of liquidators to Granitgard on 25 October 2011, the Tribunal must find that the Commission correctly concluded that he should be categorised as an excluded individual.

[7] I think it relevant to indicate that during the hearing of this matter, the Tribunal was called upon to make an evidentiary ruling relating to the timeframes within which evidence relating to Mr Walker's employment duties could be considered relevant. The Tribunal concluded that:

- (1) evidence relating to the nature of the duties performed by Mr Walker *prior* to commencement of the one-year period was relevant as it might have some bearing on the Tribunal's findings in relation to the duties he was performing during the one-year period itself as employment responsibility is generally progressive; and

(2) evidence relating to the nature of Mr Walker's duties *after* expiry of the one-year period was not relevant for purposes of s 56AC. That is for the reason that if Mr Walker was given greater managerial powers following the appointment of liquidators to Granitgard, it would be manifestly unfair to consider what might be termed a '*promotion*' as evidence that he also performed those duties during the one-year legislative timeframe.

[8] There are several factual matters that are not in dispute between the parties:

- Mr Walker is presently employed as a General Manager by Termiguard Pty Ltd;
- Mr Walker is the director of Enviropest (QLD) Pty Ltd and Enviropest (Sunshine Coast) Pty Ltd;
- Mr Walker was the General Manager of Granitgard for the period from June 2010 to the appointment of liquidators on 25 October 2011.

[9] It is Mr Walker's case that although his title was '*General Manager*', he did not have the ability to either control or substantially influence the conduct of Granitgard's affairs. It is Mr Walker's position that the Tribunal must look beyond the mere title, and must also consider what he actually did do as the general manager, and determine whether such tasks demonstrate that he really was in a position to control or substantially influence the conduct of the Granitgard's affairs.

[10] The Commission submits that Mr Walker was, by virtue of his post, in a position to exercise if not express, implied, authority on behalf of Granitgard, and further submits that he did in fact exercise substantial influence on at least one occasion.

What did the title '*general manager*' mean vis-à-vis Mr Walker

[11] During the one-year period of time prior to the appointment of liquidators to Granitgard, the Commission submits that Mr Walker held himself out to be the general manager of Granitgard during the process of its acquiring another business, and also delivered correspondence on Granitgard letter by which he held himself out as general manager.

[12] In contrast, Mr Walker says that he was essentially a point of contact for Queensland based persons to make enquires in relation to Granitgard. This was for the reason that the Granitgard's director, Mr Richard Sapsford, lived in Sydney. In his affidavit, Mr Sapsford explains that as the director of Granitgard, he believed that it would be best to have a Queensland company presence. Mr Sapsford explains that he asked Mr Walker if he would be interested in being the Queensland contact for Granitgard for the reason that Mr Walker was already involved with the Enviropest companies that Mr Sapsford was then a director of.

- [13] It is of some importance that Mr Sapsford says in his affidavit:
5. Any other enquires to the Company that might have been related to accounts (payments or receipts), legal matters, something that required decision making and anything not sales or warranty related, was referred to either myself or another person in the Company.
 6. Although Alan Walker had the titled of General Manager, he was only a general manager by name.
 7. During the time that Alan was acting as the Queensland contact for the Company, I did not seek his input into any decisions about the finances or the general day to day running of the Company.
- [14] In order for the Tribunal to find that the Commission made the correct and preferable decision in determining that Mr Walker was an influential person in relation to Granitgard at the time of its liquidation and therefore an excluded individual, the Tribunal would have to disregard, decline to accept, or accept other evidence as preferable to that provided by Mr Sapsford. There is no logical basis for the Tribunal to do any of these things.
- [15] There was significant cross-examination of both Mr Sapsford and Mr Walker at the hearing. I accept Mr Sapsford's evidence that Mr Walker was not in a position to, nor had authority to, exercise any influence over Granitgard, and find that the arrangements in place between Mr Walker and Mr Sapsford are properly characterised as having been created for mere convenience. I accept the evidence that was before the Tribunal that Mr Walker spent little time on a day-to-day basis dealing with Granitgard matters, estimated to occupy less than five per cent of his overall time.
- [16] During Mr Sapsford's cross-examination, he explained that Granitgard did business both inside and outside of Queensland and though it had a telephone number in Queensland, and a representative, it had no formal office. In response to the question asked by Mr Robinson, the solicitor for the Commission, '*Who was, in fact, the General Manager of Termiguard?*' Mr Sapsford replied that it was himself. Mr Sapsford said that Mr Walker was a collator of information, which in turn was passed along to him, and further that Mr Walker did not deal with sales or warranties.

The 9 June 2010 letter on Granitgard letterhead

- [17] I am not persuaded by the Commission's argument that Mr Walker's having delivered a letter on Granitgard letter, which he signed without specifically limiting the scope of his authority, makes him an influential person. It is the case that on 9 June 2010, Mr Walker delivered a letter on Granitgard letterhead to Pest Busters (a company that had been purchased by Mr Sapsford) outlining information required. I accept the evidence given by Mr Walker that the purchase of Pest Busters by Mr Sapsford actually had no relationship to Granitgard whatsoever. I also accept the evidence of Mr Walker that he was not involved in any of the negotiations relating to the Pest Busters purchase.

- [18] There is nothing of any particular importance contained in the letter dated 9 June 2010, as it relates to the handover of a transaction that has already taken place. In this respect, I consider the letter to be of little significance in support of the Commission's argument that Mr Walker was an influential person. I accept that Mr Walker was asked to take on some additional duties for Granitgard which were essentially to ease communication and administration of potential Queensland customers.

The conversation with Mr Walker's cricketing friend, Adam Hayes

- [19] There was considerable focus at the hearing on a conversation that transpired between Mr Walker and his friend, Adam Hayes, with whom he played cricket. On 29 May 2008, Mr Walker swore an affidavit filed in the Federal Court in proceedings between Granitgard and a company called Termiside Pest Control Pty Ltd. In that affidavit he swore to the following:

2. In or about early May 2008, I spoke to Mr Adam Hayes, a friend whom I met playing cricket approximately 4 years ago. I had been informed by him some time in 2006 that he was building a new home with Metricon Homes and that a Termiglass termite protection system had been installed during construction. The address of their home is 38 Salvado Drive, Pacific Pines, Queensland 4211 (the 'Property').
3. During this conversation I said to Mr Hayes words to the following effect:

"My company is involved in a court action in respect of Termiglass. They have provided us with samples of their product but we do not believe that the samples are representative of the product they are installing in homes. I recall that you told me you had Termiglass installed at your place. Will you give permission for my company Granitgard to remove a section of the brick work at the perimeter of your home in order to expose the Termiglass installed in the cavity and allow us to take a sample?"

He said: "Yeah, no problem."

- [20] The Commission places considerable emphasis on Mr Walker's use of the words '*my company*'. The Tribunal does not consider that anything in particular can be taken from the use of these words in the context in which they arose – the point was to secure Mr Hayes cooperation with product testing. Moreover, Mr Hayes was a cricketing friend of Mr Walker, not a potential customer, nor a business contact.

The Khammash Minor Civil Dispute

- [21] The other matter which the Commission placed some emphasis on in arguing that Mr Walker either had actual or ostensible authority in relation to Granitgard revolved around a QCAT minor civil dispute commenced by a Mr Khammash in which the respondent was named '*Mr Alan Walker t/as Granitgard*'. In his affidavit dated 15 October 2013, Mr Walker explains that the Khammash proceedings in QCAT incorrectly named the respondent, in that the ABN listed was not for the Granitgard company

that he is “General Manager” for; but for Granitgard Marketing, a different company altogether.

- [22] The proceedings commenced by Mr Khammash were ultimately dismissed on 29 October 2012. Mr Khammash was also unsuccessful in his application for leave to appeal. It is the case that parties often incorrectly name respondents in QCAT proceedings, particularly in minor civil disputes where parties are predominantly self-acting. Considering Mr Walker’s explanation that he liaised with Mr Sapsford in relation to the Khammash proceedings, and took all steps at the instruction of Mr Sapsford, I do not consider that anything in particular turns upon the naming of the respondent. Mr Walker was obviously confident that he would be indemnified by Mr Sapsford if any claim by Mr Khammash was successful, and at Mr Sapsford’s instruction simply let the matter in QCAT proceed to a conclusion.

Conclusion – Mr Walker

- [23] The evidential onus confronting an applicant in review proceedings was addressed in *Laidlaw v Queensland Building Services Authority*,¹ where it was stated at [23]:

23. Consideration has been given to the issue of onus in merits review proceedings in the federal arena before the Administrative Appeals Tribunal, where similarly the AAT Act does not deal with the issue of onus of proof. Generally there is no onus. However, practically, a party will want to adduce evidence which supports the party’s case, since the Tribunal can only make its decision on the material before it. In the absence of appropriate evidence the tribunal will not be free to make the decision sought by the party. This has sometimes been described as an evidentiary burden, but there is no formal onus of proof. The question is whether the Tribunal is satisfied that the provision under consideration can be invoked on the information or material before it.

- [24] The parties have helpfully drawn my attention to the QCAT decisions in *Buckley v QBSA*² and *McDonald v QBCC*.³ As the factual matrix in both of these cases were considerably different from those present here, the only guidance I am able to take from them relates to the need by the Tribunal to consider the nature of the role considered influential.
- [25] In Mr Walker’s circumstances, it is difficult to overlook the statements made by Mr Sapsford about Mr Walker’s lack of ability to influence Grantigard, consistent with the representations made by Mr Walker himself. There are no matters of considerable significance capable of supporting a contrary view. The Tribunal has found no basis upon which it could decline to accept Mr Sapsford’s express statement that Mr Walker had no actual authority.

¹ [2010] QCAT 70.

² [2013] QCAT 469.

³ [2013] QCAT 702.

- [26] The Commission's decision of 8 May 2013 that Mr Walker is an Excluded Individual as the result of the appointment of liquidators to Grantigard is set aside.
- [27] Subsequent to the Commission forming the view that Mr Walker was an Excluded Individual, it resulted in 2 companies that Mr Walker is a director and secretary of, Enviropest (Sunshine Coast) Pty Ltd and Enviropest (Qld) Pty Ltd becoming excluded companies pursuant to s 56AC(7) of the Act. It follows that as the Tribunal has found that Mr Walker is not an excluded individual, the decisions that the Enviropest Companies are excluded companies are also set aside.