

CITATION: *Mair v Queensland Building and Construction Commission* [2014] QCAT 566

PARTIES: Jeffrey Allan Mair
(Applicant)
v
Queensland Building and Construction
Commission
(Respondent)

APPLICATION NUMBER: OCR219-13

MATTER TYPE: Occupational regulation matters

HEARING DATE: 26 August 2014

HEARD AT: Brisbane

DECISION OF: **Member Paratz**

DELIVERED ON: 4 November 2014

DELIVERED AT: Brisbane

ORDERS MADE: **1. The decision of the Queensland Building and Construction Commission to refuse to categorise Jeffrey Allan Mair as a permitted individual pursuant to s 56 of the *Queensland Building and Construction Commission Act* is confirmed.**

CATCHWORDS: BUILDER – PERMITTED INDIVIDUAL – where a builder applied to be categorised as a permitted individual under the QBCC Act – where the builder was the Director of a company which operated a Hardware Store and was placed into liquidation – where amounts were owing to the Australian Taxation Office – where the builder failed to properly oversee the business as a Director

Queensland Building and Construction Commission Act 1991 (Qld) ss 56AC, 56AD
Queensland Civil and Administrative Tribunal Act 2009 (Qld) ss 19(c), 20, 24

Jones v Dunkel [1959] 101 CLR 298

Meredith v Queensland Building Services Authority [2012] QCAT 146
Re Property Force Consultancy Pty Ltd (in liq)
 [1995] QSC 102

APPEARANCES:

APPLICANT: Mr M Drysdale of Counsel instructed by Gadens Lawyers brisbane

RESPONDENT: Mr M Robinson of Robinson Locke Litigation Lawyers

REASONS FOR DECISION

- [1] Mr Mair is a builder. He was the director of a company called Techmech Group Pty Ltd (the company) which operated a hardware store and which went into liquidation within one year of his being a Director. As a result the Queensland Building and Construction Commission (QBCC) considered him to be an “excluded individual” pursuant to s 56AC of the *Queensland Building and Construction Commission Act 1991* (Qld) (the QBCC Act).
- [2] He applied to the QBCC to be declare a “permitted individual” pursuant to s 56AD of the QBCC Act. The QBCC refused his application on 26 July 2013.
- [3] He has now applied to the Tribunal, by an application filed on 28 August 2013, for a Review of the decision of the QBCC. The application was heard by an oral hearing on 26 August 2014.
- [4] The Tribunal has jurisdiction to review the decision of the Commission not to categorise an individual as a permitted individual for a relevant event.¹ On review, the Tribunal may confirm or amend the decision, set aside the decision and substitute its own decision; or set aside the decision and return the matter to the decision-maker.²
- [5] The Tribunal has all the functions of the decision-maker for the reviewable decision.³ The purpose of the review is to produce the correct and preferable decision, following a fresh hearing on the merits.⁴ The Tribunal stands in the shoes of the decision-maker and makes the decision afresh.
- [6] The Commission stated in its Statement of Reasons for the decision that it was not satisfied that Mr Mair took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the event; or that he took any or all of the steps referred to in s 56AD(8A) of the QBCC Act.

¹ QBCC Act s 86(1)(j).

² *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (QCAT Act) s 24.

³ QCAT Act s 19(c).

⁴ QCAT Act s 20.

Statement of Evidence of Mr Mair

- [7] The statement of evidence of Mr Mair states that he has been a registered builder for over 25 years. He is self-employed and operates a business known as “Mair Renovations” which turns over approximately \$5 million per year.
- [8] He was a director of the company from its incorporation on 14 March 2007 up until his resignation on 21 January 2013. His wife, Pamela Mair, was also a director of the company from 14 March 2007 until liquidators were appointed on 5 May 2013.
- [9] The company owned two businesses – Brisbane Valley Tiles which it purchased in 2008, and the Fernvale Thrifty Link Hardware which it purchased in 2010.
- [10] Mr Mair says that he was approached to buy the hardware business which was well known to him. In September 2010 the company purchased the hardware business for \$90,000.00 which was the value of the stock. It re-employed all the current staff, retaining the business manager, Ms Leslie Sandell, who he knew quite well.
- [11] In or about late March 2012 he was contacted by John Danks & Sons, the major supplier of the hardware business, and was informed that the hardware business was behind in its monthly payments. He then contacted Ms Sandell who told him that some customers were slow in paying. He loaned the company \$50,000 in late March/ early April 2012 to cover the short-term problem with cash flow.
- [12] He temporarily relocated to Roma in April 2012 to work on a lucrative project which Mair Renovations was engaged in. As from August 2012 he was engaged on another large project in Mt Isa.
- [13] In January 2013 his relationship with his wife became very hostile. They agreed that he would retain Mair Renovations and that she could take over the company, and the running of the hardware and tile business. He resigned as a director of the company on 21 January 2013, and from that time on he had nothing further to do with the company.

Oral evidence of Mr Mair

- [14] Mr Mair gave oral evidence at the hearing, and was cross-examined by Counsel for the QBCC.
- [15] He was asked about the Profit and Loss statements of the company, and said that he was not sure how to read those statements. He accepted propositions put to him from the statements ‘*if that is what it says*’.
- [16] He was asked how he kept himself informed of the business when he was in Roma, and said that he would contact Ms Sandell to find out the amount of the sales. He conceded that doing this only gave him half the story, as

he did not get other financial details of the business operation such as the cost of purchases or the amount owed by creditors.

- [17] After he received the call from Danks, he got Ms Sandell to do a spreadsheet of the number of customers and takings and send it to him.
- [18] He said that he would visit the hardware business on occasions, and at times worked there one day a week. He thought he visited about 10 times. When he went there, he would not look at the books and records as he said '*I am basically computer illiterate*'.
- [19] He said that he knew what takings the business had to achieve to survive, which was \$20,000 per week, as the accountant Mr McNamara had told him that. He said he just looked at the takings of the store, to see if the customer base was still there. He said that he contacted the business 2 to 4 times a week.
- [20] Mr Mair expressed displeasure with the accountant. He described him as "fudging the answers", and he lost confidence in him in December 2012.
- [21] He said that he was unaware of tax owing, and that had he known about the debts he could have paid both the ATO and Danks, as he had the capacity to do so, but was not given the opportunity.
- [22] Mr Mair said that he thinks the company was put into liquidation on advice that the accountant gave to his wife to hide the accountant's own ineptitude.
- [23] In his oral evidence Mr Mair described stock and equipment that was taken from the hardware business by his wife for use by her in her horse-breeding enterprise, and was not paid for. He assessed the value of that stock as being between \$250,000 and \$300,000.
- [24] He did not exercise any supervision over the ordering of stock, or over stocktakes. He conceded that if he had looked at the accounts of the company that he would have seen that the BAS was not paid, and that there was insufficient working capital. His reason for not looking at those matters, which would have disclosed the problems, was that '*I relied on those people*' being his staff.
- [25] He said that he told the accountant that he didn't want anything more to do with the company after 21 January 2013. He did not get any advice before resigning. He did not have anything to do with the company from then until it went into liquidation.
- [26] He did get some legal advice in January 2013 from a Solicitor, who negotiated a settlement with Danks. He had separated from his wife in March 2011, but got no legal advice at that time, and there has not been a property settlement with his wife.

- [27] He had confronted his wife between May 2012 and August 2012 about taking stock and equipment from the Hardware business, and this came to a head in January 2013.
- [28] He said that when he resigned as a Director that he didn't think the company would go into liquidation, as he couldn't see any reason for that.

Submissions

- [29] Counsel for the QBCC submitted that the failure by Mr Mair to call his wife and the accountant as witnesses gave rise to inferences in accordance with the rule in *Jones v Dunkel*.⁵
- [30] The QBCC submitted that there were questions of monitoring, reliance and reporting as to the business – that there was not a reasonable system for monitoring stock, and that if Mr Mair had looked at the records of the business he would have seen the tax issue, and the cash-flow issues. It submitted that Mr Mair had shown blind reliance on the accountant.
- [31] Counsel for Mr Mair submitted that it was not reasonable to make any inferences from the witnesses not being called, as Mr McNamara would have to admit to professional negligence, and Mrs Mair would have to admit to a breach of Director's duties.
- [32] Mr Mair's counsel submitted that a Director is entitled to rely on relevant advice from company officers, and referred to *Meredith*⁶ and *Property Force*.⁷ He submitted that when looking at the conduct of Mr Mair, two issues arose:
- a) Whether it was reasonable for Mr Mair to conduct himself as he did as to management of the hardware business, and
 - b) Whether any failures of diligence of Mr Mair caused the relevant event.

Discussion

- [33] Provisions in the QBCC Act were inserted to ensure that persons controlling businesses in the building industry display a necessary standard of business knowledge and competence, as builders deal regularly with large sums of money affecting the general public.
- [34] The "excluded individual" provisions are often said to have been directed at "phoenix builders" who have one business fail through dishonesty, recklessness or incompetence, sometimes causing large losses to sub-contractors, suppliers and customers, and then go on to go back into business under a new guise, thereby putting the public at financial risk.

⁵ [1959] 101 CLR 298.

⁶ *Meredith v Queensland Building Services Authority* [2012] QCAT 146.

⁷ *Re Property Force Consultancy Pty Ltd (in liq)* [1995] QSC 102.

- [35] The wording of s 56AC of the QBCC Act is broad, it simply refers to “a company” of which an individual is a director or secretary or an influential person. It does not specifically refer to “a building company”. The effect of this is that even if a builder is a director of a company that is wholly unrelated to his or her building activities, that the provisions will still apply.
- [36] That is the situation in this case. The issues do not arise from the operation of Mr Mair’s building enterprise “Mair Renovations”. Rather, the issues arise from a hardware and tile business that was a “side-business” for him.
- [37] Whilst it might be seen as unfortunate that Mr Mair has fallen into the ambit of the QBCC Act in this way, the principle that a builder should have a competence in business generally can be seen to run through, so that if a builder fails to display proper business attributes in relation to a company (even an unrelated one) there then arises a concern that the builder may fail to display proper business attributes in relation to his or her primary building enterprise.
- [38] The hardware business appears to have failed due to a combination of management and market factors. There was clearly poor management and supervision of the hardware business generally, which was accentuated when Ms Sandell became ill and was unable to function as efficiently as she had previously. The alleged taking of stock by Mrs Mair clearly would have affected the cash-flow and asset base of the business. The business also faced increased competition from a million dollar upgrade to a nearby competing hardware store.
- [39] Mr Mair was clearly focussed on his primary building business which had significant projects underway, and which required him to be in remote areas working. A consequence of this though was that he was not in close physical proximity to, or personally supervising, the hardware business.
- [40] Mr Mair said that he was not aware of the debt owed to Danks until December 2012. He also says that he was not aware of the financial position of the business until it went into liquidation. These declarations raise the question as to whether he should have been aware of these matters, as a director.
- [41] The primary concern that Mr Mair displayed as to the business was as to the weekly takings. This was a crude and incomplete indicator of the operations of the business. As events showed, this is not a reliable indicator of the overall state of health of the business, as it overlooks the outflows, tax and asset position.
- [42] In an application of this type it is usual for the builder to call upon his lawyer and accountant to support that proper advice was sought and given. None of these people were called by Mr Mair.

- [43] Windeyer J in *Jones v Dunkel* 'embraced the notion of 'fear of exposure' on the part of the party who fails to call the witness'⁸ quoting *Wigmore on Evidence*:

The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstances or document or witness, if brought, would have exposed facts unfavourable to the party.

- [44] Mr Mair has not shown that he did obtain proper legal or accounting advice before purchasing the hardware business, or in the course of conducting it. He did use the services of a Solicitor and an Accountant from time to time. The failure to call them does raise an inference that he did not do so because they would confirm that Mr Mair did not seek appropriate advice from them.
- [45] The proposition put forward by Mr Mair, that he could not call the Accountant because the Accountant would have to admit to unprofessional conduct, is a broad statement that lacks particularity in that no specific failure or breach by the accountant is identified. The accountant was convicted of fraud at some time, but that may be wholly unrelated to any of these matters, and has not been shown to have a direct bearing upon them.
- [46] In essence, Mr Mair is saying that the Accountant and the business manager should have alerted him to the precarious state of the finances of the company and the unpaid tax liability. A Director is entitled to rely on advice given to him, if he has no reason not to believe that it is properly given, to assist him in his duties, but a Director cannot wholly abrogate and delegate his duties of monitoring and supervision to employees or advisors.
- [47] Put simply, Mr Mair did not receive answers to many questions as to the state of the business, because he did not ask them. In failing to do so, he did not take reasonable steps in his position as a Director.
- [48] Even if the failure to call the business accountant does not raise a *Jones v Dunkel* inference, it weakens the force of Mr Mair's contentions that he was not given proper advice by the accountant and his employees, as those contentions are unsubstantiated.
- [49] The supervision of the business by Mr Mair was sporadic and shallow. The consequence was that he was not aware of the true situation of the business.
- [50] The business did not fail solely because of events occurring in the 6 months between when Mr Mair resigned as a Director and the date when

⁸ Simon Davis, *The Jones v Dunkel Inference*, College of Law, 6 March 2008.

the company went into liquidation. The seeds of the failure of the company were laid throughout 2012, and were that:

- a) the business was not being rigorously managed by Ms Sandell, who had become ill;
- b) stock and equipment was being taken by Mrs Mair without payment;
- c) Mr Mair was pre-occupied elsewhere, and was not properly monitoring and controlling the business.

[51] Mr Mair could reasonably have taken many other steps to have avoided the coming into existence of these circumstances. Primarily he could have maintained much better control over the hardware business, and made much more detailed inquiries as to its ongoing operation. He was aware that the business manager had health problems, and he was aware at some stage that his wife was taking stock from the business. He did not take reasonable steps to follow those matters up, and the situation deteriorated. He was clearly pre-occupied with his building business, and having difficulty coping with his personal situation in relation to his wife.

[52] Some sympathy must extend to the situation that Mr Mair has found himself in. What was intended to be a side interest in a seemingly sound and functioning business, which would run without much input from him, transpired to be a financial disaster due to a failure of management, the influence of a marriage breakdown, and possibly poor professional advice.

[53] The hardware business was unrelated to his principal much larger business as a builder, but it has transpired to have significantly affected him in conduct of his building business by his being declared an excluded individual upon the liquidation of the company, and not being categorised as a permitted individual. That has had a direct effect on his ability to be granted a licence for a 5 year period⁹. That is an unfortunate consequence, but one that has resulted, under the legislation, in the circumstances.

[54] Mr Mair cannot be said to have taken all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the liquidation as required by s 56AD(8A) of the QBCC Act, having regard to the following matters referred to in that section:-

- a) keeping proper books of account and financial records
- b) seeking appropriate financial or legal advice before entering into financial or business arrangements or conducting business
- e) putting in place appropriate credit management for amounts owing and taking reasonable steps for recovery of the amounts
- f) making appropriate provision for Commonwealth and State taxation debts

⁹ QBCC Act ss 56AC(2), 56AE.

- [55] The consequence is that Mr Mair is unable to establish that he should properly be categorised as a permitted individual.
- [56] The decision of the QBCC that Mr Mair should not be categorised as a permitted individual pursuant to s 56AD of the QBCC Act is therefore confirmed.