

CITATION: *Wright v Queensland Building and Construction Commission* [2015] QCAT 16

PARTIES: John Wright
(Applicant)
v
Queensland Building and Construction
Commission
(Respondent)

APPLICATION NUMBER: OCR060-14

MATTER TYPE: Occupational regulation matters

HEARING DATE: 18 August 2014

HEARD AT: Brisbane

DECISION OF: **Dr Cullen, Member**

DELIVERED ON: 20 January 2015

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. The Decision of the Queensland Building and Construction Commission dated 15 May 2013, in which John Wright was excluded in relation to the appointment of administrators to Wright Bros House Removers and Renovators Pty Ltd is set aside.**
- 2. The Tribunal substitutes the 15 May 2013 decision of the Queensland Building and Construction Commission with a decision that John Wright was not in a position to exercise control or substantial influence over the conduct of Wright Bros House Removers and Renovators Pty Ltd during the year preceding the appointment of administrators to it.**
- 3. The Tribunal finds that s 56AC(6) applies to the appointment of administrators to Wright Bros House Removers and Renovators Pty Ltd and Wright Bros New and Used Homes Pty Ltd.**

CATCHWORDS: APPLICATION FOR REVIEW –
OCCUPATIONAL REGULATION – BUILDING –

EXCLUDED INDIVIDUAL – was brother of company director in midst of family turmoil a volunteer assisting with no authority or an influential person

Queensland Building and Construction Commission Act 1991 (Qld), s 56AC, s 56AC(6), Schedule 2

REPRESENTATIVES:

APPLICANT: Mr Benjamin Whitten, of Counsel, instructed by Sciacca's Lawyers

RESPONDENT: Mr Malcolm Robinson, Robinson Locke Litigation Lawyers, instructed by the Queensland Building and Construction Commission

REASONS FOR DECISION

Nature of the Application for Review

- [1] In this Application for Review, the Tribunal must consider what impact, if any, a brotherly relationship has upon the categorisation of Mr John Wright as an *'excluded individual'* within s 56AC of the *Queensland Building and Construction Commission Act 1991 (Qld)* ('QBCC Act').
- [2] On 15 May 2013, the QBCC determined that John Wright was an excluded individual following the appointment of administrators to Wright Bros House Removers and Renovators Pty Ltd ('WB-HRR') on 27 February 2013. It is not in dispute that this is the *'relevant event'* for purposes of the legislation.
- [3] Prior to the QBCC decision in relation to WB-HRR, John Wright had been categorised as a permitted individual in relation to another relevant event, that being the appointment of administrators to Wright Bros New & Used Homes Pty Ltd ('WB-NUH') on 19 October 2012. The basis for the QBCC's decision in relation to WB-NUH was that John Wright was not a director, secretary, or influential person of WB-NUH in the one year prior to it entering administration. John Wright argues that the QBCC should have made the same decision in relation to the WB-HRR event in this Application for Review.
- [4] In addition to arguing that he was not a director, secretary, or influential person in relation to WB-HRR, John Wright also argues that the WB-NUH and WB-HRR events both arose from the one set of circumstances. If the Tribunal accepted this second argument, the effect would be that s 56AC(6) of the QBCC Act applied such that John Wright would not be an excluded individual in relation to the WB-HRR event.

- [5] The parties agree that the timeframe applicable to the WB-HRR event is from 27 February 2012 to 27 February 2013.

Kevin Wright's Role

- [6] Mr John Wright is the younger brother of one Mr Kevin Wright. Whilst John and Kevin were once both involved in WB-NUH and WB-HRR, on 12 October 2011, John resigned as a director of both companies and asked for his shares in the companies to be transferred to his brother, Kevin.
- [7] The Tribunal accepts the evidence of John Wright that he took these steps for the reason that he wanted to separate his business activities from those of his brother Kevin. Unfortunately, in late-2011 Kevin's marriage broke down, leading to depression, and a complete inability to deal with his business responsibilities. John explains that Kevin's marital breakdown adversely affected his ability to engage with both businesses. Kevin was frequently absent during this period of personal tumult.
- [8] As a result, John decided to step formally away from the businesses he had been involved with Kevin, and set up his own business, Absolute House Relocations Pty Ltd. AHR was registered with ASIC on 12 October 2011.
- [9] Whilst John formally stepped away from both WB-NUH and WB-HRR, he did not drop his brother like a hot potato. Rather, he continued to try and support Kevin as one might expect a brother in a normal, functioning sibling relationship to do. To the extent he believed he could, John was there to help try to pick up the pieces on the work front for Kevin. He attempted to assist Kevin in obtaining fresh finance for his companies. John was also concerned to make sure that WB-HRR and WB-NUH remained solvent, as he wanted to protect his own interests in his properties that had been used as collateral in relation to loans made by the National Australia Bank to Kevin's companies.
- [10] Overall, this entire review application can be encapsulated with the phrase – *'He's become a little bit heavy, but he's my brother'*. It is the assistance offered by John to Kevin that has exposed him to QBCC's finding that he was a director, secretary or influential person of WB-HRR at the time of, or within one year of, the relevant event – that being the appointment of administrators to WB-HRR on 27 February 2013.
- [11] It is difficult to imagine that the legislature could have intended for a licensed builder to have to stand at arm's length from a family member in personal strife in order to preserve their own ability to retain a QBCC licence. Yet, that is precisely the net effect of the decision made by the QBCC in relation to John Wright in this matter.

Did John Wright have influence over WB-HRR?

[12] In deciding this matter, the Tribunal must determine whether, within the period of 12 months prior to 27 February 2013, John Wright was in a position (either as a matter of law, or as a matter of fact) to exercise control or substantial influence over the conduct of the affairs of WB-HRR.

[13] Section 56AC of the QBCC Act provides as follows:

Categorisation of an excluded individual

(c) the individual

(i) was, when the relevant company happened, as 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.

[14] The '*Dictionary*' Schedule 2 of the Act provides:

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.

[15] Kevin, in his Statement of Evidence, indicated that upon John's resignation that:

John had no ability or capacity to influence or control the affairs of the companies in the Wright Bros group, other than by way of instruction or authorisation from me [Kevin].¹

[16] Kevin maintained that, at least during the period until June 2012, he:

[W]as the officer responsible for the direction and making the decisions to legally bind the companies, and I authorised John to do so only in those matter which involved a dispute and which was required to resolve those disputes.²

[17] In June 2012, Kevin:

[E]ffectively walked out of the companies and decided not to have any further involvement in the business.

[18] In his absence, Kevin says that:

John was, with my authority voluntarily dealing with outstanding disputes. No new work was being undertaken.³

¹ Kevin Wright-Statement of Evidence dated 14 August 2014, page 2, s 22.

² Ibid s 23.

³ Ibid s 24.

- [19] During the relevant period, it is not in dispute that (1) John was not an employee of WB-HRR; and (2) John did he receive any wages from WB-HRR or WB-NUH.⁴ In his evidence, John explains the limits of his influence on WB-HRR and WB-NUH as follows:
- a) He did not have access to financial accounts of either company without authority granted by Kevin;⁵
 - b) He could not hire or fire any employees;⁶
 - c) He had no influence over any new contracts sought or obtained;⁷ and
 - d) He did not have any influence over whether to accept or reject any finance offerings by NAB.⁸
- [20] John claims, and the Tribunal accepts, that his influence was limited to engaging with Kevin to obtain new financing for WB-HRR and WB-NUH in order to pay down their debts and simultaneously protect his own interests in properties being used as collateral for company loans.
- [21] During Kevin's cross-examination, he said that he had given John '*general authority*'. Despite this apparent inconsistency, Kevin was in general a poor historian, unable to recall much detail about the period in question. This is understandable, as he was obviously focussing on his family difficulties.
- [22] In the context of the other evidence given by Kevin, the Tribunal finds that the plain meaning of his statement was simply that he accepted John's role as a volunteer to assist him.
- [23] Regardless, the Tribunal places more weight on the evidence given by John himself in relation to his own understanding about the scope of his authority. Unlike Kevin, who by his own admission was on an emotional rollercoaster at the time in question, John continued to operate and advance the business he had set up when he parted ways with Kevin. John's ability to provide an accurate account of the arrangements in place between himself and his brother is more reliable for the reason that John's mind was not clouded by any personal drama.
- [24] To the extent that Kevin suggested that John had '*general authority*', the Tribunal prefers John's evidence that he was a volunteer with no authority, who was required to contact Kevin for specific instructions.

The evidence of the Douglas's

- [25] There is evidence before the Tribunal from Mr Craig and Mrs Angela Douglas, a couple who contracted with WB-HRR for purposes of building a house at Red Hill. The contract, entered into in October 2011 nominated

⁴ John Wright- Statement of Evidence, page 3, s 21.

⁵ Ibid s 23.

⁶ Ibid ss 24 – 25.

⁷ Ibid s 26.

⁸ Ibid s 27.

Kevin Wright as the leading project manager. However, in December of 2011, the Douglas's say that John took over the construction and management of the project, and that they never heard from Kevin again.⁹

- [26] Mr and Mrs Douglas also gave evidence that John conducted himself on behalf of the Wright Bros companies as late as July 2012 (and therefore during the relevant period), in a capacity analogous to that of director, or alternatively as an influential person, by signing and revising contracts, and making decisions regarding invoicing and processing of the contract.¹⁰
- [27] Whilst the Tribunal accepts the evidence of Mr and Mrs Douglas generally, in terms of with whom they were dealing with at which points in time, it finds that they are unable to answer the ultimate issue in these proceedings. That issue is whether John Wright was in a position to exercise control or substantial influence over the conduct of the affairs of WB-HRR.
- [28] Moreover, John Wright's evidence is not inconsistent with the facts sworn to by the Douglas's – he acknowledges that he did do various tasks for the company, but as a volunteer who held the firm belief that he must obtain instruction on any matters of importance. There is no evidence before the Tribunal to suggest that this did not happen while the Douglas job was in progress.

The evidence of Warren Tonks

- [29] The QBCC has also drawn the Tribunal's attention to an email from QBCC employee Warren Tonks dated 1 August 2012 wherein Mr Tonks refers to John Wright as being the '*company director*' of WB-HRR. Whilst this may have been Mr Tonks' understanding of John's role, it is factually incorrect in that John had resigned as a director of WB-HRR by this point. To the extent that the QBCC relies upon the email to prove that John was influential, the Tribunal does not accept that Mr Tonks' own perception of matters is persuasive in determining whether John Wright was an influential person. This is for the reason that it considers John Wright's own state of mind to be of greater importance in determining whether he was in a position to exercise control or substantial influence over the conduct of WB-HRR's affairs.

The email to Darrell Gold

- [30] The Tribunal has also been provided with a copy of an email sent by John Wright to Darrell Gold of the QBCC on 3 January 2012, in which he refers to himself as the '*Managing Director*' of WB-HRR. The content of the email itself relates to the Douglas's job, and merely provides information about that job. There are no decisions of any importance, nor discussion of any consequence, contained within the email. Moreover, the email is copied to Kevin Wright. The Tribunal finds that the email is

⁹ Statement of evidence of Craig Douglas, page 1, s 3.

¹⁰ Ibid, page 2, s 7-8.

consistent with the evidence given by John Wright, that he was a volunteer acting for his brother with no actual authority.

- [31] The Tribunal finds that as a bonafide ‘*volunteer*’, it was not possible for John Wright to be in a position to exercise control or substantial influence over the conduct of WB-HRR. In order to do so, he would have to possess a state of mind consistent with that of a person whom had, or intended to have through conduct, the ability to influence the company. By way of analogy, John may have been pedalling the bike for Kevin, but at all times, Kevin was deciding what direction, and how quickly, the bike would be ridden.
- [32] The Tribunal finds that John had no actual influence or substantial control over the activities of WB-HRR.

Issues #2

- [33] Are the events to WB-HRR and WB-NUH both consequences flowing from what was, in substance, the one set of circumstances applying to those companies?

Relevant Law

S 56AC –Categorisation of an excluded individual

- (6) An excluded individual for a relevant company event (the first event) does not also become an excluded individual for another relevant company event (the other event) if the first event and the other event are both consequences flowing from what is, in substance, the one set of circumstances applying to the company.
- [34] Even if the Tribunal found that John Wright was an influential person in relation to WB-HRR, he asserts that the circumstances which led to the collapse of WB-NUH and WB-HRR are substantially the same set of circumstances, such that s 56AC(6) of the Act should apply. This would mean that John Wright was not excluded for the WB-HRR event.
- [35] The Tribunal finds that WB-NUH and WB-HRR did arise out of the same set of circumstances. The report prepared by John Biggs, CA,¹¹ the external accountant for both WB-NUH and WB-HRR addressed in detail the circumstances of both insolvency events, a mere four months apart. The explanation offered by Mr Biggs was that the NAB identified WB-NUH as a drain on WB-HRR.
- [36] Mr Biggs then goes on to explain that the utility of this decision was to try to minimise financial losses, and points out that by this point, Kevin Wright ‘*had suffered a marital breakdown and effective financial collapse*’. This is a factor that is common to both companies. Considering that the marriage collapse pre-dated both ‘*relevant events*’, and the dates of appointments of receivers to both companies are quite proximate, the

¹¹ Report of John Biggs, Chartered Accountant, 14 May 2014, exhibit JW-5 to the affidavit of John Wright.

Tribunal concludes that s 56AC(6) is applicable in these circumstances. Whilst there are differences in the financial positions of both companies, the common feature pre-dating administration is the lack of attention to business operations that was a direct result of Kevin's personal circumstances.

Orders

1. The Decision of the Queensland Building and Construction Commission dated 15 May 2013, in which John Wright was excluded in relation to the appointment of administrators to Wright Bros House Removers and Renovators Pty Ltd is set aside.
2. The Tribunal substitutes the 15 May 2013 decision of the Queensland Building and Construction Commission with a decision that John Wright was not in a position to exercise control or substantial influence over the conduct of Wright Bros House Removers and Renovators Pty Ltd during the year preceding the appointment of administrators to it.
3. The Tribunal finds that s 56AC(6) applies to the appointment of administrators to Wright Bros House Removers and Renovators Pty Ltd and Wright Bros New and Used Homes Pty Ltd.