

CITATION: *Crocker v Queensland Building and Construction Commission* [2015] QCAT 39

PARTIES: Dene Ward Crocker
(Applicant)
v
Queensland Building and Construction
Commission
(Respondent)

APPLICATION NUMBER: OCR028-14

MATTER TYPE: Occupational regulation matters

HEARING DATE: 10 September 2014

HEARD AT: Brisbane

DECISION OF: **Member McLean Williams**

DELIVERED ON: 10 February 2015

DELIVERED AT: Brisbane

ORDERS MADE:

1. The Application for Review is allowed.
2. The decision of the Respondent made on 24 December 2013 that the Applicant is an excluded individual pursuant to s 56AC of the *Queensland Building and Construction Commission Act 1991* due to the appointment of administrators to IDH Modular Pty Ltd on 4 October 2013 is now set aside.

CATCHWORDS: APPLICATION FOR REVIEW – OCCUPATIONAL REGULATION – BUILDING – EXCLUDED INDIVIDUAL – was an external consultant, sibling to a director, a person in a position to control or substantially influence the conduct of the company’s affairs – meaning of “influential person”

Queensland Building and Construction Commission Act 1991 (Qld) s 56AC
Queensland Civil and Administrative Tribunal Act 2009 (Qld) ss 20, 61

Queensland Building and Construction

Commission v Arthurs [2014] QCA 307
Walker v Queensland Building and Construction Commission [2014] QCAT 228
McClintock v Queensland Building Services Authority [2011] QCAT 47

APPEARANCES and REPRESENTATION (If any):

APPLICANT: Mr N Marshall Cooke of Counsel, instructed by
 Streten Masons, Lawyers

RESPONDENT: Mr Malcolm Robinson, solicitor of Robinson
 Locke, Litigation Lawyers

REASONS FOR DECISION

- [1] This Application for Review has its origins in the appointment of external administrators to a building company by the name of IDH Modular Pty Ltd (“IDH Modular”). This occurred on 4 October 2013. Subsequently, on 16 October 2013, IDH Modular underwent a court-ordered winding up.
- [2] Although never a director or officeholder of IDH Modular, the Applicant was nonetheless engaged by that company as an external consultant, and also happens to be the brother of one of the former directors of IDH Modular. The Applicant is also a director of ThreeBM Pty Ltd (ACN 139 039 857) (“ThreeBM”), and ThreeBM had a formal subcontract agreement with IDH Modular, which commenced on 27 July 2012. Pursuant to that agreement, ThreeBM provided various contract administration and project management services to IDH Modular. Many (yet not all) of the services invoiced to IDH Modular by ThreeBM were performed by the Applicant, personally. Particularly relevant to these proceedings is the further fact that the Applicant is also a registered builder, and thus the holder of a building licence under Part 3 of the *Queensland Building and Construction Commission Act 1991* (“the Act”).
- [3] On 24 December 2013, the Queensland Building and Construction Commission (“the Respondent”) made a determination pursuant to s 56AF of the Act that the Applicant was now an ‘excluded Individual’, and thus ineligible to continue to be a license holder under the Act, and thus ineligible to operate in the Queensland Building Industry in any licence holding capacity. In the opinion of the Respondent (as was expressed in reasons for decision sent to the Applicant on 24 December 2013), the Applicant was an “influential person” for IDH Modular during the 12 months immediately prior to the appointment of external administrators on 4 October 2013, which is a “relevant company event” for purposes of s 56AC(2) of the Act. In the result, the Applicant becomes ineligible to hold a builder’s license under Part 3 of the Act.
- [4] The decision communicated to the Respondent on 24 December 2013 is a “reviewable decision” for purposes of the *Queensland Civil and Administrative Tribunal Act 2009* (“QCAT Act”), and the Applicant now

seeks a review of this decision before QCAT, pursuant to s 20 of the QCAT Act.

The legislation

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

...

- (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.

...

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

[6] Section 56AF then provides:

- (1) This section applies if the authority 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.

[7] In the Reasons for Decision sent to the Applicant on 24 December 2013 in conformity with the requirement set out in s 56AF(2) (above), the Respondent makes clear that it considered the Applicant to be an "influential person" for purposes of s 56AC(2)(c), because of his role as an external consultant to IDH Modular, notwithstanding that those

consultancy services were provided by the aegis of ThreeBM. Naturally, on this Application for Review it is the Applicant's contention that he was *not* such an influential person. The central issue therefore becomes a determination as to whether the Applicant was in all the circumstances an influential person in the case of IDH Modular in the 12 months preceding the appointment of external administrators to that company.

What is an "Influential Person"?

[8] The dictionary in 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.

[9] At no stage has the Applicant been a director or shareholder of IDH Modular, or a company secretary, or a significant shareholder, financier or a senior employee of IDH Modular. Nevertheless the Respondent contends that the Applicant was still in a position to control or substantially influence the conduct of the affairs of IDH Modular, and thus a person of influence, as defined. As indicated earlier in these reasons, the Applicant is a director of ThreeBM, and ThreeBM had a formal subcontract agreement with IDH Modular for the performance of various contract administration and project management tasks. Over the course of that subcontract agreement ThreeBM issued 34 tax invoices to IDH Modular for works performed by ThreeBM, and ten of those invoices were for services performed directly by the Applicant.

[10] It is the Respondent's submission that the very fact that the definition of an influential person in Schedule 2 of the Act includes reference to senior employees and financiers reveals that the scope of what it is to be an influential person must necessarily extend beyond those with legal voting control (such as substantial shareholders); or those who are the members of the board of a company. The respondent submits that an influential person must extend to include any natural person with actual, implied, or ostensible authority and the ability thereby to affect the company's legal relationships with others, or the ability to control or influence the conduct of the company's affairs. In light of *Queensland Building and Construction Commission v Arthurs*,¹ (a case decided by the Court of Appeal after the hearing of this Application for Review) I agree that the Respondent's submission embodies the correct approach. Yet, the determination of influence ultimately depends on a close appreciation of the actual known circumstances in any given case, and cannot be assumed in preliminary fashion.

¹ [2014] QCA 307, (28 November 2014), at [28].

- [11] Pursuant to s 56AC, determination of this Application necessitates:
- (i) determination as to whether a provisional liquidator, liquidator, administrator or controller has been appointed to IDH Modular, or that IDH Modular was wound up or ordered to be wound up (“relevant company event”);
 - (ii) determination as to whether the relevant company event was for the benefit of a creditor; and
 - (iii) whether within the period of one year immediately before the occurrence of the relevant company event the applicant was an “influential person” for IDH Modular.
- [12] It is uncontentioned that (i) IDH Modular had external administrators appointed and that it was subsequently wound up pursuant to Court orders; and that this was a ‘relevant company event’, as defined; and that (ii), the relevant company event occurred for the benefit of a creditor, in this instance the petitioning creditor Markyta Pty Ltd. Ultimately therefore, the only live issue remains the question as to whether the Applicant was an influential person in the twelve months preceding 4 October 2013.
- [13] In relation to the concept of an “influential person” the Respondent further submits² that use of the words “in a position to” are expansive of the further words used in the definition “control or substantially influence”, such that the definition directs inquiry to what a person *could* do, rather than requiring any particular examination of what the person did in fact do; and that control or influence is to be over the “conduct of the company’s affairs” which is a broad concept, not confined to matters that may occur at a company general meeting;³ and nor does it have to mean control or influence over every aspect of the company’s affairs. Again, I agree with those general propositions yet caution that these observations are trite, and do not absolve the need to look at the actual known circumstances, as revealed by the evidence in order to ascertain whether the Applicant was in a position where he could (or did) either control or substantially influence the conduct of the affairs of the company.

The Evidence

- [14] The Respondent points to various records (principally yet not exclusively e-mails) that variously reveal that the Applicant attended what it has described⁴ as “substantial meetings” as the sole representative on behalf of IDH Modular, and that was involved in e-mail correspondence on behalf of IDH Modular as either an action addressee or CC addressee in which “substantial matters” were negotiated. In each instance these items of documentary evidence relate to business dealings between IDH Modular and a former trading partner, AWX Constructions Pty Ltd. Additionally, on 28 November 2012 the Applicant signed a notice to show cause ‘for and on behalf’ IDH Modular that was addressed to AWX Constructions Pty Ltd

² See Respondent’s final submissions paragraph [5].

³ *ASIC v Lucas* (1992) 32 FCR 165 at 184 per Drummond J.

⁴ Respondent’s closing submissions, paragraph [10].

in which IDH Modular alleged a substantial breach of contract (a failure to pay) by AWX Constructions.

- [15] Amongst other evidence, the Applicant relies upon a statement by his brother Mr Lee Crocker (exhibit 3) wherein Mr Lee Crocker says that the directors of IDH Modular were himself together with a Mr Mark Walsh and a Mr Calem Brooks (both of whom are now thought to reside overseas and neither of whom were able to be contacted to give evidence) and says that he, together with Mr Walsh and Mr Brooks had responsibility for the day-to-day management of IDH Modular. Mr Lee Crocker also said that in all dealings with AWX Constructions Pty Ltd the Applicant made it clear that he was only ever acting as a subcontractor on behalf of IDH Modular, and that the final decision in relation to any agreement would be between AWX and the directors of IDH Modular.
- [16] The Applicant confirms in his own statement of evidence (exhibit 2) that in all his dealings with AWX Constructions Pty Ltd he was at pains to be clear that he was only a subcontractor to IDH Modular and that any final decision in relation to any agreement with AWX Constructions would become a matter for the directors of IDH Modular. In effect, the Applicant's evidence was that he was no more than an intermediary in various business negotiations.
- [17] I take the view that cross-examination by Mr Robinson on behalf the Respondent did not unsettle any of the evidence from the Applicant about the limit of his role. The state of the evidence is such that one is certainly able to discern that the Applicant did act as a mouthpiece for IDH Modular, yet it is not possible from it to conclude whether the Applicant did more than that, in the sense of determining whether he had the further capacity to have an effect on the shape or character of the company's affairs.
- [18] Ultimately the state of the evidence is such that it is not sufficient to enable me to draw the inference that the Applicant was in a position to control or substantially influence the conduct of IDH Modular. The correct and preferable decision (per QCAT Act s 20(1)) is therefore that the Applicant was not an influential person for s 56AC of the Act. Accordingly the Application for Review is allowed. The decision of the Respondent made on 24 December 2013 that the Applicant is an excluded individual is therefore set aside.