QCAT
Queensland Civil and Administrative Tribunal

CITATION:	*D'Arro v Queensland Building and Construction Commission* [2015] QCAT 100
PARTIES:	Orazio Salvatore D'Arro (Applicant) v Queensland Building and Construction Commission (Respondent)
APPLICATION NUMBER:	OCR173-11; OCR127-13; OCR014-14
MATTER TYPE:	Occupational regulation matters
HEARING DATE:	11 August 2014
HEARD AT:	Brisbane
DECISION OF:	**Member McLean Williams**
DELIVERED ON:	30 March 2015
DELIVERED AT:	Brisbane
ORDERS MADE:	**1. The original decision on 3 July 2009 that the Applicant is an excluded individual by reason of the appointment of a liquidator to Innovare Developments Pty Ltd on 22 May 2009 is confirmed.** **2. The decision made on 2 October 2012 to refuse to categorise the Applicant as a permitted individual is confirmed.**
CATCHWORDS:	APPLICATION FOR REVIEW – OCCUPATIONAL REGULATION – BUILDING – EXCLUDED INDIVIDUAL – PERMITTED INDIVIDUAL *Queensland Building and Construction Commission Act* 1991 (Qld), s 56AC, s 56AD *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 20, s 21 *Acts Interpretation Act* 1954 (Qld), s 32C *Dinsey v Queensland Building Services Authority* [2013] QCATA 225 *Drake v Minister for Education* (1979) FLR 577 *Shi v Migration Agents Registration Authority*

(2008) 235 CLR 286
McDonald v Director-General of Social Security (1984) 1 FCR 354
Szbel v Minister for Immigration and Multicultural and Indigenous Affairs [2006] HCA 63
Younan v Queensland Building Services Authority [2010] QDC 158
Gary Morrison Constructions Pty Ltd v Queensland Building Services Authority [2012] QCATA 077

APPEARANCES:

APPLICANT: Orazio Salvatore D'Arro

RESPONDENT: Queensland Building and Construction Commission represented by Malcolm Robinson of Robinson Locke Litigation Lawyers

REASONS FOR DECISION

[1] The Applicant, Mr Orazio Salvatore D'Arro has filed a number of inter-related review applications before QCAT. These are matters OCR173-11; OCR127-13; OCR013-14; OCR014-14; OCR015-14; and OCR016-14.

[2] Matter OCR173-11 is an application to review a decision by the Respondent not to grant the Applicant '*permitted individual*' status, pursuant to s 56AD of the *Queensland Building Services Authority Act* 1991 (Qld) ('the QBSA Act'). On 25 June 2009, the Applicant had applied to the Respondent seeking to be categorised as a permitted individual, yet the Respondent refused to do that.

[3] Prior to this, the Applicant had been deemed to be an '*excluded individual*' by the operation of s 56AC of the QBSA Act, because of the appointment[1] of a liquidator to Innovare Pty Ltd ('Innovare'), of which the Applicant was then a director. As will become apparent from these reasons, Innovare was but one of a number of companies operated by the Applicant, as a group. All of the companies in that group have now met a similar fate to that of Innovare, essentially by reason of the same sequence of events. As a further consequence, the Applicant also became bankrupt. As will be discussed further below, bankruptcy is a '*relevant bankruptcy event*' for purposes of s 56AC of the QBSA Act.

[4] Originally, matter OCR127-13 had been an application to review four more decisions by the Respondent, similarly to not grant the Applicant permitted individual status under s 56AD of the QBSA Act. These relevant events were:

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1 On 22 May 2011.

a) Liquidators were appointed to **Innovare Developments** Pty Ltd on 22 May 2009. On 2 October 2012 the Respondent declined to make the Applicant a permitted individual in reference to that relevant event;

b) Liquidators were appointed to **Line Design Studio** Pty Ltd on 22 May 2009. On 2 October 2012 the Respondent declined to make the Applicant a permitted individual in reference to that relevant event;

c) Liquidators were appointed to **Innovare Holdings** Pty Ltd on 22 May 2009. On 2 October 2012 the Respondent declined to make the Applicant a permitted individual in reference to that relevant event;

d) On 1 July 2010 the Applicant entered into bankruptcy. On 2 October 2012 the Respondent declined to make the Applicant a permitted individual in reference to that relevant bankruptcy event.

[5] By a consolidation order made by QCAT on 30 July 2013, matter OCR127-13 was subsumed into matter OCR173-11. Meanwhile, matters OCR014-14; OCR015-14; and OCR016-14 have been resolved between the Applicant and the Respondent. The nature of those resolutions have not been revealed to me and nor have I ever seen a copy of the QCAT file in these matters, however I am informed that the resolution of those matters means that it is no longer necessary to consider some aspects of matter OCR127-13, no matter the fact of its consolidation into matter OCR173- 11.

[6] After some further negotiation prior to the hearing, it was ultimately agreed by the Applicant and the Respondent that the Tribunal should only determine those aspects of the Application for Review in OCR127-13 pertaining to the Applicant having been rejected for categorisation as a permitted individual, by reason of his having become a bankrupt on 1 July 2010;[2] as well as what was originally matter OCR013-14; being the Application to Review the decision of the Respondent that the Applicant is an 'excluded individual', as the result of the appointment of a liquidator to Innovare Developments.

The Relevant Law – 'Excluded' and 'Permitted' Individuals

[7] These Applications for Review involve provisions contained within a regulatory regime created by Parts 3A to 3E[3] of the QBSA Act.[4] One of the main purposes of the QBSA Act is to create a licensing scheme for building contractors. The keystone of that scheme is s 42, which provides that a person must not carry out, or undertake to carry out, building work (as defined), unless that person is the holder of a contractor's licence.

[8] Parts 3A to 3E of the QBSA Act were inserted by amendments in 1999 (Part 3A), and 2003 (Parts 3B – 3E, inclusive). These Parts create a

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2 Originally one aspect of matter OCR127-13, as now subsumed into matter OCR173-11.

3 Sections 56AD – s 67AZM.

4 The Act has since been re-named as the *Queensland Building and Construction Commission Act* 1991 (Qld) ('QBCC Act'). In all material respects the provisions of the QBCC Act are the essentially same as those in the former QBSA Act.

regime in primary response to a legislative concern[5] for phoenix activity, where participants in the building industry might seek to avoid their financial obligations by placing their corporate vehicles into liquidation, or other forms of financial administration, and then their later reappearing in the industry, under a different corporate guise. The statutory regime seeks to address that concern by enabling the exclusion of various categories of person and company from holding a contractor's license. Yet, the legislative scheme also permits, in some circumstances, for excluded individuals to obtain a contractor's license by their applying to become what the QBSA Act terms a '*permitted individual*'.

[9] Central to the present applications are s 56AC, and s 56AD in Part 3A of the QBSA Act.[6] Section 56AC identifies who are to be excluded individuals, then s 56AD provides the means by which an excluded individual may apply to become, instead, a permitted individual. The sections provide:

> **56AC Excluded Individuals and Excluded Companies**
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> (1) This section applies to an individual if –
>
> (a) after the commencement of this section, the individual takes advantage of the laws of bankruptcy or becomes bankrupt (***relevant bankruptcy event***); and
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> (b) five years have not elapsed since the relevant bankruptcy event happened.
>
> (2) This section also applies to an individual if –
>
> (a) after the commencement of this section, the company, for the benefit of a creditor –
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> (i) has a provisional liquidator, liquidator, administrator or controller appointed; or
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> (ii) is wound up, or is ordered to be wound up; and
>
> (b) five 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
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> (ii) was, at any time after the commencement of this section and within the period of one year immediately before the relevant company event happened, a director or secretary of, or an influential person for, the company.
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> (3) If this section applies to an individual because of subsection (1), the individual is an ***excluded individual*** for the relevant bankruptcy event.

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5 Explanatory notes, pages 18 – 19.

6 Now the QBCC Act.

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

(5) An excluded individual for a relevant bankruptcy event (the ***first event***) does not also become an excluded individual for another relevant bankruptcy 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 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.

(7) A company is an ***excluded company*** if an individual who is a director or secretary of, or an influential person for, the company is an excluded individual for a relevant event.

56AD Becoming a Permitted Individual

(1) An individual may apply to the authority, in the form approved by the board, to be categorised as a permitted individual for a relevant event if the individual has been advised by the authority, or has otherwise been made aware, that the authority considers the individual to be an excluded individual for the relevant event.

…

(8) The authority may categorise the individual as a permitted individual for the relevant event only if the authority is satisfied, on the basis of the application that the individual took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event.

(8A) In deciding whether an individual took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of a relevant event, the authority must have regard to action taken by the individual in relation to the following –

(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;

(c) reporting fraud or theft to the police;

(d) ensuring guarantees provided were covered by sufficient assets to cover the liability under the guarantees;

(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.

(8B) Nothing in subsection (8A) prevents the authority from having regard to other matters for deciding whether an individual took all reasonable steps to avoid the circumstances that resulted in the happening of a relevant event.

(9) If an individual is categorised as a permitted individual for a relevant event, the individual is taken not to be an excluded individual for the relevant event.

[10] As noted at the outset of these reasons, a liquidator was appointed to Innovare Developments. That is a '*relevant company event*' as defined by s 56AC(2)(a) of the QBSA Act. At the time, the Applicant was a director of Innovare Developments, and thus a person impacted by s 56AC(2)(c) of the QBSA Act. Hence, he was automatically an excluded individual, by reason of the operation of s 56AC(4).

[11] On 1 July 2010, the Applicant became personally bankrupt, in relation to guarantees that he had given to various trade creditors of the Innovare group of companies. Bankruptcy is a '*relevant bankruptcy event*' for purposes of s 56AC(1)(a) of the QBSA Act, thus making the Applicant an automatically excluded individual, under s 56AC(3). On 10 September 2010 the Respondent sent the Applicant an official notice,[7] advising him of that.

[12] In response thereto, the Applicant applied to the Respondent pursuant to s 56AD(1) seeking to be categorised as a permitted individual, notwithstanding the fact of his bankruptcy. On 2 October 2012 the Respondent rejected the application by the Applicant to be categorised as a permitted individual, after having regard to the various matters it was required to consider under s 56AD(8) and s 56AD(8A) and (8B) of the QBSA Act.

The Nature of this QCAT Hearing

[13] The Applicant presently seeks to review two things:

a) the determination that he is an excluded individual as the result of the appointment of a liquidator to Innovare Developments (OCR013-14); and

b) the decision not to categorise him as a permitted individual after he was declared bankrupt (OCR127-13).

[14] The nature of QCAT hearings under s 20 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act') is by way of a fresh hearing, on the merits. As a result, the Tribunal is required now to '*step into the shoes*' of the original decision maker,[8] and the role of the Tribunal becomes one to reconsider the matter, in light of all of the available evidence (including any fresh evidence), and to produce the '*correct and preferable decision*'.[9]

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7 QBSA Act s 56AF.

8 *Drake v Minister for Education* (1979) FLR 577; *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286.

9 QCAT Act s 20.

[15] In strict terms, during an application for review it is not apposite to speak in terms of there being any persuasive onus,[10] yet it is still for the Applicant to show that all reasonable steps were taken to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event.[11] In this sense, at least, there is still an evidential onus.

[16] During the hearing of the application for review s 21(1) of the QCAT Act requires that the decision-maker for the reviewable decision (in this instance the Respondent) must use his or her best endeavours to help the Tribunal. In the discharge of that obligation the Respondent is required to give full effect to the requirements of Practice Direction No 3 of 2013. As part of that, advocates appearing on behalf of decision-makers have a positive obligation to '*nail their colours to the mast*', and must make submissions as regards what the decision-maker considers to be the correct and preferable decision, in light of the legislative framework and the evidence (including any oral evidence) given at the hearing.[12]

Group Corporate Structure

[17] As revealed, the Applicant stood at the helm of what was a group of companies. The original company, **Innovare**, had been incorporated in 1998 and initially conducted all aspects of the Applicant's building construction business. Over time, and as the Applicant's business grew, various other corporate entities were added to the fold. On 13 January 2004 the Applicant incorporated **Innovare Holdings**, to hold the assets of the business. On 1 April 2005 **Innovare Developments** was incorporated, as a means by which to buy and sell smaller development properties. Then, on 15 August 2006, the Applicant incorporated **Line Design Studio** Pty Ltd to provide architectural services to his other corporate entities.

[18] By the time that the total group had been established, the operating method was one by which Innovare held the building licence and it then contracted to Innovare Developments. Innovare Holdings Pty Ltd held the real property assets of the group, as well as frequently used items of equipment such as scaffolding and on-site portable toilets (held as corporate trustee for the O & C D'Arro Family Trust). Meanwhile, Line Design Studio contracted with Innovare to provide architectural design services, with an estimated 98% of the work performed by Line Design Studio over the life of that particular company being design work that it performed for Innovare.

Addison Avenue – The Empire Falls

[19] A sequence of events was to lead to the liquidation of all the member companies of the Innovare group, as well as to the bankruptcy of the

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10 *McDonald v Director-General of Social Security* (1984) 1 FCR 354; *Szbel v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63 at [40].

11 QBCC Act s 56AD(8A); *Younan v QBSA* [2010] QDC 158 at [37]; *Gary Morrison Constructions Pty Ltd v QBSA* [2012] QCATA at [10].

12 Practice Direction 3/2013 at [5(f)].

Applicant. The Applicant contends[13] that the evidence shows that the companies acted as a group, and that the failure of any one company in the group would have implications for the group as a whole. With the possible exception of Line Design Studio, I accept that to be an accurate assessment.

[20] On 1 March 2007 Innovare Developments entered into a series of development agreements with an entity called Bulimba Transactions Pty Ltd ('Bulimba Transactions'). These related to sequential developments at Lots 5 – 8, Addison Avenue, at Bulimba.

[21] The agreement in relation to each of the lots at Addison Avenue was structured as follows:

a) Bulimba Transactions was the owner of each Lot;

b) Innovare Developments would construct a residential dwelling on each Lot;

c) Bulimba Transactions were to be responsible for selling the newly constructed properties (by engaging a real estate agent for that purpose);

d) Bulimba Transactions would, if requested by Innovare Developments, also grant a mortgage over the land in favour of Innovare Development's financier;

e) upon settlement of the sale of each new dwelling, the proceeds would then be paid in the following order:

   i) firstly, to meet the costs of the sale;

   ii) secondly, the builder's fee and land value (both of which had been pre-determined by the parties); and

   iii) finally any residual profit would be split: on the basis of 37% to Innovare Developments, and 63% to Bulimba Transactions.

[22] In furtherance of this agreement (and consistent with the business model within the Innovare group), Innovare Developments contracted with Innovare for the actual construction of the dwellings that Innovare Developments was obligated to deliver under the agreement with Bulimba Transactions.

[23] Before entering into the contract with Bulimba Transactions, Innovare Developments and the Applicant were careful to ensure that Bulimba Transactions had unconditional contracts to on-sell the properties to third parties, and that town planning approval had been granted. The Applicant submits that this affords evidence that reasonable steps were taken to avoid the coming into existence of the circumstances that resulted in the occurrence of the relevant event. Although those steps were undoubtedly prudent, this *de novo* application requires that the reasonableness of the Applicant's conduct be assessed firstly against the criteria in s 56AD(8A).

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13 Agreed bundle of documents, 51, [25].

Although the steps sought to be highlighted by the Applicant might be considered subsequently relevant, under s 56AD(8B), they do not relate in any specific sense to the matters that need to be considered under s 56AD(8A).

[24] The development agreements between Innovare Developments and Bulimba Transactions contained further noteworthy clauses:

a) providing that if a contract of sale for a Lot had not been entered into prior to a sunset date, then a party to the development agreement may offer to bring the development agreement to an end by payment to the other party of the builder's fee or land value (as the case may be); and

b) a term enabling a mortgage over the Lots being granted in favour of Innovare Developments' financier.

[25] The development of Lots 5 and 6 at Addison Avenue were completed, unremarkably. However, difficulties then arose in the case of the subsequent developments, on Lot 7 and Lot 8.

Non-Payment, Lot 7

[26] In early October 2007, Bulimba Transactions had entered into a contract for the sale of Lot 7, for $2,950,000. Once that contract had become unconditional Innovare commenced construction.

[27] In the contract for the sale of Lot 7 by Bulimba Transactions, there were special conditions that provided that the settlement date was to be fourteen days from the date of notification to the buyer that the dwelling had been completed, and that the settlement date shall be no greater than fourteen calendar months from the date when the contract became unconditional. In the event that the settlement was not effected within that fourteen month period ('the construction period'), the buyer was entitled to terminate the contract, and have their deposit refunded, in full.

[28] On 15 January 2009, the solicitors acting for the third party purchaser of Lot 7 purported to terminate the contract, on the basis that settlement had *not* been effected within fourteen months from the date of the contract becoming unconditional. The purchaser had every right to do that, as Bulimba Transactions had miscalculated the construction period.

[29] On the basis of information contained in the agreed bundle of documents,[14] Bulimba Transactions (and in consequence both Innovare Developments and Innovare) had been operating under the mistaken belief that the sunset date for the Lot 7 contract was sometime in *June* 2009 when in fact it had been in January 2009. This misapprehension appears to have been as the result of a combination of negligence on the part of the solicitors advising Bulimba Transactions, as well as administrative errors within Bulimba Transactions. Here, I interpolate that

[14] Agreed bundle of documents, 58, [73].

Innovare Developments and Innovare must have implicitly accepted the advice given to them by Bulimba Transactions regarding the calculation of the construction period, and did not seek to independently check the calculation of the construction period. I find that very surprising. For, had this mistake been detected, Innovare Developments would have been entitled to payment of $1,069,135.76 in early January 2009 when the project for Lot 7 was supposed to have obtained completion. As matters transpired, Innovare Developments received nothing, and as is to be expected, this created severe cash flow implications.

[30] Although some consideration was given to legal action against either Bulimba Transactions or the firm of solicitors who had been advising Bulimba Transactions, it was determined that this action was not commercially worthwhile.[15]

Purchaser's default – Lot 8

[31] On 15 October 2007, Bulimba Transactions entered into an '*off the plan*' contract in relation to Lot 8. Once the contract had become unconditional and town-planning approval had been granted, Innovare commenced construction. Yet, before that dwelling could be completed, and before any monies had been paid to Innovare Developments, the Lot 8 contract was terminated by Bulimba Transactions; this time due to the purchaser's failure to complete the contract. Although the purchaser then forfeited the substantial deposit sum of $294,000, none of these monies were received by Innovare, because Bulimba Transactions also fell into dispute with Innovare Developments about who was entitled to that payment.

[32] The Applicant contends that Innovare could not have foreseen the adverse result in either of the Lot 7 or the Lot 8 projects. Although that may be true, on any permitted individual application the real question is whether the Applicant took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event. As such, it is the case that the statute requires a different focus of inquiry than fixation on what was only a precursor to the relevant event. I note that Innovare Developments could have better preserved the financial position of the Innovare group had it required a mortgage (or perhaps a caveat) over the lots at Addison Avenue. That did not happen despite there being a clause in the contract with Bulimba Transactions enabling it.

Tightening Credit Arrangements

[33] In parallel with the difficulties that had arisen with the Lot 7 and Lot 8 developments, by late 2008 – early 2009, Innovare Pty Ltd's financier, the National Australia Bank (NAB), also called for a re-valuation of all of the property assets held by Innovare Holdings, and its related entities. Here, it is to be remembered the impact of the global financial crisis

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15 Agreed bundle of documents, 61, [8].

(GFC), and in particular the impact of the GFC on the willingness of the banks to extend credit.

[34] When the re-valuations occurred, the aggregate value of Innovare assets had decreased quite significantly. The NAB required an immediate reduction in the Innovare target loan to value ratio (LVR) from 80%, down to 60%, and became explicit in demanding first receipt of the proceeds of the sale of assets of Innovare Holdings and its related entities, even to the extent of retaining payments to Innovare emanating from the earlier developments of Lots 5 and 6. This had the effect of further reducing available cash flow within the group, and impacted the ability of the Innovare group to pay creditors and employees.

[35] The Applicant contends that the Innovare group could not have foreseen that the NAB would revalue its property assets and reduce its LVR in the manner that occurred when the GFC hit. In the twelve months prior to that occurring, Innovare and its related entities had already taken steps to reduce their combined debt to the NAB, by some $13.5 million, and at the same time had also cut back on overheads in an amount of approximately $1.5 million, per year. The Applicant contends that these efforts to reduce debt and reign in costs affords evidence that the Innovare group had taken reasonable steps to avoid the coming into existence of the circumstances that ultimately resulted in the appointment of liquidators. Once again, although these are certainly matters that warrant examination under s 56AD(8B), they are not in my view matters that touch upon the more explicit factors that must be considered under s 56AD(8A).

QBSA Act, s 56AC(6)

[36] The fact that it is accepted by the Tribunal that the various Innovare companies were operating as a group requires that some determination be made as regards the effect of s 56AC(6) on these Applications for Review.

[37] As was observed in *Dinsey v Queensland Building Services Authority*,[16] the scheme in this part of the legislation is to define '*excluded individuals*' and '*excluded companies*', within s 56AC. Persons who have taken advantage of the laws of bankruptcy within the preceding five years, as well as persons who have been directors, secretaries, or influential persons in companies that have gone into specified types of administration or liquidation are to be excluded from the capacity to hold a license. The only '*escape hatches*' then, are those afforded by s 56AD(8), and s 56AC(6) which, in the case of the latter provision, serves to limit the occasions upon which additional exclusions may be counted. *Dinsey* holds[17] that because of s 32C in the *Acts Interpretation Act* 1954 (Qld), s 56AC(6) should be read as applying equally to a person who runs a business through a group of companies where more than one company

16 [2013] QCATA 225, [30].
17 Ibid [40]–[49].

event flows from the one set of circumstances, as it does in the case of successive relevant company events affecting a single company.

[38] In the circumstances of the current Applicant, a number of relevant company events have occurred in different companies that are all part of the Innovare group, and all have arisen out of the one sequence of events. Exclusion is *prima facie* automatic upon the occurrence of any one of these relevant company events. It is the occurrence of the event – quite irrespective of its cause – that brings about exclusion,[18] *unless* the Applicant becomes a permitted individual under s 56AD; or is otherwise relieved of the obligation to obtain permitted individual status in relation to any of the successive relevant company events, because of s 56AC(6).

[39] As the Innovare companies were conducted as a group, the Applicant should properly be entitled to the ameliorative effect of s 56AC(6), and is relieved of acquiring the status of an excluded individual more than once, despite the multiple relevant company events, any one of which could have, had it happened as a singular event, been the cause for his exclusion.

[40] Although the beneficence of s 56AC(6) may have implications for the Applicant when the question of permanent industry exclusion arises for determination (QBSA Act s 58), the provision affords no particular assistance to the Applicant in the case of the present matter (OCR013-14), which is an application to review the Applicant having been automatically categorised as an excluded individual as a consequence of the appointment of a liquidator to Innovare Developments. Here, it is just not open[19] to the Tribunal to now consider whether there was a relevant company event, as that fact is beyond contention. As a matter of logic I cannot find that there was *not* a relevant company event, given the incontrovertible fact that liquidators were appointed to Innovare Developments, on 22 May 2009, and this was the first company in the Innovare group to have that happen.

[41] In consequence, the only conclusion open to me on matter OCR013-14 is to confirm the original decision. Because of the appointment of a liquidator to Innovare Developments on 22 May 2009 the Applicant is an excluded individual.

Application to be a Permitted Individual – OCR127-13

[42] Consideration next turns to whether the Applicant might be categorized as a permitted individual following his entering into a state of bankruptcy on 1 July 2010. This was a '*relevant bankruptcy event*' for purposes of s 56AC(1)(a).

[43] As an aside, and before determining that issue, I record my view that I do not think that the benefit of s 56AC(6) creates a situation where the

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18 Ibid [36].

19 Ibid [36].

Applicant also escapes the need to seek permitted individual status for the relevant bankruptcy event because he has been relieved of the need to obtain permitted individual status for the successive relevant company events. Bankruptcy and relevant company events are qualitatively different, and are treated differently by the statute.[20]

[44] It is uncontroversial that the circumstances that resulted in the happening of that relevant bankruptcy event was the triggering of various personal guarantees that had been given by the Applicant to Innovare creditors that were then called in to operation, due to payment defaults by the Innovare companies. Examination must turn to the question whether the Applicant took '*all reasonable steps*' to avoid the coming into existence of the circumstances that resulted in the relevant event, in view of the requirements laid out in s 56AD(8A) and (8B) of the QBSA Act.

[45] The matters required to be considered by s 56AD(8A) are actions taken by the Applicant in relation to each of the following:

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;

c) reporting fraud or theft to the police;

d) ensuring guarantees provided were covered by sufficient assets to cover the liability under the guarantees;

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

f) making appropriate provision for Commonwealth and State taxation debts.

[46] A number of the matters identified by s 56AD(8A) are not applicable considerations in this case,[21] and other matters are answered satisfactorily. For example, the evidence supports that the Applicant kept proper books of account and financial records,[22] and that the applicant did generally seek appropriate advice[23] before entering into business arrangements.

[47] Of the matters listed in s 56AD(8A), the primary matters for consideration are sub-subsections (d), and (f), regarding the question (d): whether the Applicant ensured that personal guarantees provided by him were backed by sufficient assets to cover the liability so guaranteed; and (f): ensuring that appropriate provision was made by the Applicant to cover his taxation liability. Before turning to any of those specific matters, some further aspects of the financial dealings within the Innovare group of companies do however warrant comment.

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20 QBSA Act s 56AC(5), s 56AC(6); *Dinsey* at [49].

21 QBSA Act ss 56AD(8A)(c) & (e) do not require examination.

22 Ibid s 56AD(8A)(a).

23 Ibid s 56AD(8A)(b).

[48] The Respondent notes that in 2008 a loan from Innovare Developments to Innovare increased by $2,146,257. The balance sheet for Innovare Developments as at 30 June 2007 shows net assets of $34,906 and total current assets of $2,598,318, of which $2,470,777 (95%) was work in progress and land held for sale. Accordingly, it is not clear how Innovare Developments managed to source this money in order to advance it to Innovare. If it is assumed that a substantial portion of that money in the hands of Innovare Developments arose from the sale of land and billings generated from work in progress, then it is not clear how much of these receipts were used to pay Innovare Developments own financial obligations, rather than being used to make advance payments to Innovare.

[49] As Innovare was undertaking the construction work for Innovare Developments on the Addison Avenue project, then presumably some part of the Innovare Developments work in progress as at 30 June 2008 records the value of work performed by Innovare and expected to be invoiced, but as yet not invoiced by Innovare. Meanwhile, the financial records for Innovare do not reflect any significant increase in trade debtors, thus suggesting that Innovare did not invoice Innovare Developments for any significant amount that was unpaid. This suggests that a significant proportion of the work in progress must have related to the Addison Avenue projects, which were four contracts, each for $923,000. None of these had been completed and sold by 30 June 2008. Hence, as at 30 June 2008, only $3,692,000 could have related to work in progress for the 4 Addison Avenue projects. As Lots 5 and 6 had already been completed, sold and paid, only $1,846,000 could have related to work still in progress by Innovare on Lots 7 and 8.

[50] The Respondent contends that in light of this, the increase and then reduction in the Innovare Developments loan account suggests that funds from Innovare Developments were being used to '*prop up*' Innovare. Equally, the inability at that point in time for Innovare Developments to invoice Bulimba Transactions does not appear to have acted as any form of impediment to Innovare Developments providing a much larger loan sum to Innovare than that for which it was entitled as the unbilled work in progress for Lots 7 and 8. In simple terms, Innovare was only then owed a *maximum* of $1,846,000, yet the loan account reveals that it received $2,637,175. It is not clear why Innovare Developments advanced this disproportionate sum to Innovare, nor whether retrieval of this amount – apparently paid in preference – would have rectified Innovare Development obviously dire financial position.

[51] The available evidence – such as for example that just discussed – reveals significant cross-collateralised financial arrangements between Innovare, Innovare Developments, Innovare Holdings, and a running loan account between Innovare and Line Design Services. The respondent submits that these advances to Innovare appears to have had a significant impact on the ability of Innovare Developments to pay its own financial liabilities, such that Innovare Developments' funds appear to have been

used for the purposes *of the group* rather than to deal with its own particular liabilities. I think that conclusion is inescapable. Certainly nothing that was said by the Applicant before the Tribunal serves now to rebut any of it.

[52] The dispute that developed between Bulimba Transactions Pty Ltd and its purchasers ultimately engulfed Innovare Developments Pty Ltd. Although the applicant has gone to lengths to explain the steps that were taken in terms of taking legal and other advice in order to avoid the relevant event of company liquidation, what remains currently unexplained is why Innovare Developments Pty Ltd did not put in place appropriate security (by way of mortgage or caveat) in order to secure its position. As will be recalled from the rehearsal of events earlier in these reasons, the agreement between Innovare Developments Pty Ltd and Bulimba Transactions Pty Ltd enabled Innovare Developments to require that Bulimba Transactions (as the owner of the Lots) to require security over the property in favour of Innovare Developments financier. On the face of things that did not happen. Nor has the applicant provided any evidence in relation to any negotiations, or attempted negotiations, with creditors regarding attempts to obtain more favourable repayment arrangements, as things started to go bad.

[53] Innovare Developments dire financial position would no doubt have been less dire had it not propped up Innovare, apparently in preference to the payment of other creditors, and it is to be assumed that various Innovare group creditors would not have then called upon the personal guarantees given by the Applicant had they been paid, rather than Innovare.

[54] In relation to the guarantees given by the Applicant, no satisfactory evidence has been given in relation to *how many* guarantees were given, to whom, when, or in what amount. In his evidence on this point the Applicant was vague – proclaiming an inability now to be able to access the necessary documents – and merely said that there were sufficient assets held by him to cover the guarantees. Yet, I have considerable difficulty in accepting that, given the extensive liabilities of the Innovare Group and the materials revealing only two properties – one at Camp Hill and one at Hawthorne – actually owned by the Applicant. The Hawthorne property was sold in 2007 (well before any of these events) and the Camp Hill property was sold in May 2010 by a mortgagee in possession for $825,000, and was similarly part of the security pool for the Innovare corporate group, such that it is most unlikely that any equity in it would have been available to also satisfy the creditor debt that was personally guaranteed by the Applicant. The guarantee debts proved during the Applicant's bankruptcy amounted to $836,312, and the Applicant has provided no satisfactory evidence that he in fact held unencumbered assets in excess of that sum.

[55] In the result, I cannot be satisfied that the Applicant took all reasonable steps (s 56AD(8)) to avoid the relevant bankruptcy event, such that the original decision made on 2 October 2012 to refuse to categorise the Applicant as a permitted individual is now confirmed.