

CITATION: *Carmichael v Queensland Building and Construction Commission* [2016] QCAT 24

PARTIES: Tony Lee Carmichael
(Applicant)
V
Queensland Building and Construction Commission
(Respondent)

APPLICATION NUMBER: OCR105-15

MATTER TYPE: Occupational regulation matters

HEARING DATE: 19 January 2016

HEARD AT: Brisbane

DECISION OF: **Member Gordon**

DELIVERED ON: 25 January 2016

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. The decision of the Queensland Building and Construction Commission dated 12 June 2015 that Tony Lee Carmichael was a director, secretary or influential person for Carmichael Builders Pty Ltd (in administration) is set aside.**
- 2. The decision is substituted that he was not director, secretary or influential person for the company.**

CATCHWORDS: EXCLUDED INDIVIDUAL – whether the applicant was an influential person for a construction company which had an administrator appointed for the benefit of creditors

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 20
Queensland Building and Construction Commission Act 1991 (Qld), s5 6AC

Arthurs v Queensland Building and Construction Commission [2014] QCATA 155

*Queensland Building and Construction
Commission v Macdonald* [2014] QCATA 353

APPEARANCES and REPRESENTATION (if any):

- APPLICANT:** Marshall Cooke (counsel) instructed by Rostron Carlyle Solicitors
- RESPONDENT:** Malcolm Robinson (solicitor) of Robinson Locke Litigation Lawyers

REASONS FOR DECISION

- [1] The question in this matter is whether Tony Carmichael was an “influential person” for Carmichael Builders Pty Ltd when administrators were appointed on 10 June 2015 or at any time in the 12 months before that date.
- [2] The Queensland Building and Construction Commission (‘QBCC’) decided that he was, and issued a decision to that effect on 12 June 2015. Mr Carmichael now applies to the Tribunal for a review of that decision. He denies that he was an influential person for Carmichael Builders, having ceased to be its director and secretary from 7 November 2012. He accepts however, that he continued to be a substantial shareholder in another company which wholly owned Carmichael Builders, and that he was employed by Carmichael Builders after 7 November 2012 as its business development manager.
- [3] If the QBCC is right that Mr Carmichael was an influential person for Carmichael Builders then, by section 56AC(4) of the *Queensland Building and Construction Commission Act 1991* (Qld), he is an excluded individual for the “relevant company event”, being the appointment of the administrators on 10 June 2015. The effect of this is that after certain procedures are followed, Mr Carmichael will have his licence cancelled.¹ Mr Carmichael holds a Builder – Medium Rise licence.
- [4] Directors and secretaries of companies at the time of a relevant company event or at any time within 1 year of a relevant company event are caught by the provisions of section 56AC. A relevant company event can be the appointment (for the benefit of a creditor) of a provisional liquidator, liquidator, administrator or controller or a winding up or an order to wind up.
- [5] But an “influential person” for the company would also be caught by the provisions, and so they are capable of extending to people who are in the position of directors of the company but who are not officially appointed or

¹ If the individual applies to the Tribunal for a review of the decision the process is suspended until the review is dealt with: section 56AH *Queensland Building and Construction Commission Act 1991* (Qld).

recorded as appointed in that position, and to others in a position of influence.

[6] “Influential person” is defined in Schedule 2 as follows:-

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.

[7] It has been held that if someone holds 50% of the shares in a private company, this is not conclusive as to whether they are an influential person for the company.² By analogy, this also means that not every financier of a company will be in such a position, nor will every senior employee. So it is necessary also to consider whether the person was in fact in a position to control or substantially to influence the company.

[8] Before applying these tests in this case, I need to set out the relevant factual background of this matter.

Relevant factual background

[9] Carmichael Builders was established as a company when it was incorporated on 1 June 1987. At that time it was called LK & LA Carmichael Pty Ltd and was run by Mr Carmichael’s father from his existing builder’s business. Soon after, sons Tony Carmichael and then Glen Carmichael joined the business as apprentices. A third son, John Carmichael also joined the business. As time passed, the three sons became more involved in the business and in 2002 the company changed its name to Carmichael Builders Pty Ltd to reflect that.

[10] In December 2005 a family trust was set up and when this was complete, ownership of the company transferred to that trust, with the intention that the three brothers Tony, John and Glen would take the benefit of the company’s operations. In about March 2015 John formally dropped out of this trust arrangement. I need to consider the trust in more detail and whether it meant that Tony was an influential person for the company.

[11] In May 2006 after the family trust was fully established, the father started to reduce his involvement in the business. The business was then effectively run by the three brothers, although the father provided guidance from time to time. Glen was construction manager, and Tony was appointed director and secretary. He continued in that role until 7 November 2012. Over this time the business grew substantially so that for the year ending June 2012 its turnover was \$87m.

[12] In March 2012, Glen and John joined as directors of the company so that funding could be obtained for a particular project. Later in 2012 when that project ceased, there were major changes to the company which resulted

² *Arthurs v Queensland Building and Construction Commission* [2014] QCATA 155 a decision not reversed on appeal to the Court of Appeal, and *Queensland Building and Construction Commission v Macdonald* [2014] QCATA 353.

in Glen taking control. John indicated he wished to resign as director and Tony decided he wished to concentrate on other things. For Tony, there were multiple reasons why he wished to hand over control of the company and he describes these reasons in his written and oral evidence, which I accept.³

- [13] To give effect to these desires, Tony ceased to be director and secretary of Carmichael Builders on 7 November 2012. Glen continued his earlier appointment as director. From that time, Glen controlled the affairs of Carmichael Builders with the assistance of some senior members of staff in particular an Executive General Manager, a Chief Financial Officer who later became Chief Executive Officer, a Human Resources manager and both an in-house and an external accountant.
- [14] For the next two years, Tony's role in the company was to seek new business for it in the Northern Territory, Papua New Guinea and in central Queensland. He became business development manager for Carmichael Builders and was given an employment contract.
- [15] Then near the end of 2013 and into 2014 there were other important changes. Over this time it was agreed between the two brothers that Tony would himself take over all Northern Territory business and would promote business in Papua New Guinea for his own businesses, rather than for Carmichael Builders. Glen agreed to assist with this financially by arranging for Carmichael Builders to pay the expenses of Tony's new ventures. Carmichael Builders would then concentrate on work in Queensland.
- [16] The overall effect of these changes was that whilst Tony had run Carmichael Builders up to the end of 2012, after that his involvement in the company reduced substantially and then continued to diminish.

The arguments about substantial influence

- [17] I now need to consider those areas which were examined at the hearing, and also which appear in the QBCC's statement of reasons, for regarding Tony Carmichael as being in a position substantially to influence the conduct of the company's affairs in the year before the administrators were appointed.
- [18] It was submitted that through the family trust, Tony Carmichael was effectively in the position of a 50% shareholder of Carmichael Builders. It was submitted that, whilst this in itself was not conclusive to show that he was in a position of substantial influence, other indicia tended to show that he was. It was accepted that there had been an oral agreement between Tony and Glen that Tony would extricate himself from the business, but that this process had not been completed. They appeared to operate their businesses jointly, and as a family business, and so decisions were made

³ The written evidence is in paragraphs 9, 17 and 18 of his affidavit of 8 September 2015.

jointly. Therefore, it was submitted, this tends to show that he was in a position to control the affairs of the company.

- [19] One of the things showing this was the Carmichael Builders website, another was the close financial tie between the various family ventures and the financial dealings between them. It was shown by the dividends paid by Carmichael Builders to the trust over the last two years before the appointment of the administrators. It was also shown by Tony Carmichael's continued attendance at the board meetings of Carmichael Builders and the continuation of insurance policies for him paid by the company. The fact that a business operated wholly by Tony Carmichael was in fact owned by the trustee of the family trusts of himself and Glen also demonstrated this.⁴
- [20] In its statement of reasons the QBCC also said that it was unsatisfied with the evidence put forward to show the change in the role of Tony Carmichael with the company bearing in mind he had been in close control of the business for many years previously.
- [21] It was also suggested in QBCC's statement of reasons that Mr Carmichael had entered into contracts for construction projects in the Northern Territory, but this was no longer relied on at the hearing.
- [22] When considering these arguments, and in deciding whether Tony Carmichael was in a position substantially to influence the conduct of the company's affairs, I am mindful that I must reach the correct and preferable decision by way of a fresh hearing on the merits.⁵

The family trust

- [23] When the establishment of the family trust was complete, the shares of Carmichael Builders which were originally held equally by Mr Carmichael's father and mother, were transferred to a newly registered company, Carmichael Investments (Qld) Pty Ltd. That company held the shares as trustee of the Carmichael Investments unit trust. The unit trust had 18 units. These units were held in three sub-trusts holding 6 units each. The units within each sub-trust were held by individual trustees for (respectively) three separate family trusts set up in the name of the three sons Tony, John and Glen.
- [24] Effectively therefore, after the establishment of the family trust, Carmichael Builders became a wholly owned investment held in equal shares by the three family trusts set up in the name of Tony, John and Glen.
- [25] In order to understand whether any control of Carmichael Builders could have been exercised by Tony Carmichael under this arrangement, it is necessary to consider the shareholding and directorship of the trustee company Carmichael Investments (Qld) Pty Ltd and also the terms of the unit trust. There were 60 shares in the trustee company and these were

⁴ This is a reference to Carmichael Builders Northern Territory Pty Ltd.

⁵ Section 20 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld).

held equally by Tony, John and Glen so they held 20 shares each. John was appointed director and secretary of the trustee company.

- [26] Later there were changes made to these arrangements. On 25 January 2013 Glen became director and secretary of the trustee company in place of John. In about March 2015 the division of units changed. John's family trust left the arrangement and from that point on, the units were divided equally between Tony and Glen's family trust. At the same time, the shareholding of the trustee company was changed from 20 each for the three brothers to 30 each for Tony and Glen. Glen continued as director and secretary of the company.
- [27] I was told at the hearing by Mr Cooke, counsel for Tony Carmichael, that although there was a constitution for the trustee company, it did not change *Corporations Act* voting powers. This fact accords also with the voting arrangements for unit holders meetings provided for in the deed of trust⁶ which provides for voting powers based upon the number of units held. I was not provided with a copy of the constitution so I shall assume it has no effect on the question of control of the trustee company.
- [28] The trustee company would have an obligation to the family trusts, and to those who might benefit from them, to invest properly and responsibly, to preserve the assets of the trust and to manage the investment properly in so far as this could be done. This would involve therefore, exercising its right to receive information from Carmichael Builders and if it became necessary, to exercise ultimate control of Carmichael Builders as its sole shareholder through a general meeting or by application to the court.
- [29] Tony Carmichael's ability to require the trustee company to fulfil these obligations was in practical terms, limited. Until the change in the number of units and the shareholding of the trustee company in March 2015, Tony Carmichael only had one-third of the vote as shareholder of the company. He shared his responsibilities as trustee of the units held by the family trust in his name with his father, so his vote as a unit holder was potentially further diluted.
- [30] After the change in the number of units and the shareholding of the trustee company in March 2015, although the paperwork is not before the Tribunal, it would appear that in practical terms Tony Carmichael's influence changed little. This was because Glen Carmichael continued as director and secretary of the trustee company and a majority vote of the shareholders could not have been achieved to remove him.
- [31] Tony Carmichael's influence could only have been exercised by an application to the court, which on my finding was never in contemplation nor realistic given the family connections between the people involved.

Other matters

⁶ Page 276 respondent's bundle.

- [32] When considering the question whether in fact Carmichael Builders was simply part of a group of family businesses over which Tony Carmichael had substantial influence, it is necessary to understand more about these other businesses.
- [33] A number of other businesses were set up by the Carmichael brothers. Some of these acted as sub-contractors for the main building business, supplying materials or doing site work. There was also a property and diverse investment company, and companies which were set up to concentrate on the building industry in the Northern Territory or in Papua New Guinea.
- [34] It is true that the Carmichael Builders website did seek to present a number of these ventures as one family business or a group business. The website also called Tony Carmichael “managing director” but he certainly had not held that title with respect to the main company Carmichael Builders for many years, although he does hold this title for one of his own companies.
- [35] It is also true that there were close financial links between Carmichael Builders and these other ventures. There were a number of transactions and loans between them in different directions. Some of these transactions arose because of the agreement for Carmichael Builders to pay towards the expenses of Tony Carmichael in setting up on his own in the Northern Territory – an example is the cost of premises there, leased and paid for by Carmichael Builders. When the administrators were appointed, all these debts and contra-debts were crystallised and appeared in the report to creditors either as money owed to Carmichael Builders by these companies or the other way round. Both Tony and Glen challenge the figures. Despite this, the evidence shows that there was a high degree of cooperation and financial interaction between these businesses.
- [36] The fact that the business may have been run as a group is also indicated by the fact that Tony Carmichael’s Northern Territory company was on paper owned by the trust which was intended for the benefit of both Tony and Glen. This seems strange bearing in mind he regarded it as his own company. However, I am satisfied on the evidence of both Tony and Glen that there was an oral agreement between the two men that this company was in fact owned by Tony. The single share must have been held by the trust for some other reason.
- [37] It is true that dividends were paid to the trust by Carmichael Builders in the last two years prior to the administration of the company and also the insurance premiums were paid to the benefit of Tony. Tony suggested that it might have been his salary that was paid in this way. Of importance for my purposes, there is nothing to show that any decisions about these payments were made at Tony Carmichael’s request or insistence.
- [38] It is also true that in the last year before the appointment of the administrators (as he had done in earlier years) Tony Carmichael attended monthly meetings of Carmichael Builders. In the written evidence these are called board meetings but I accept Glen’s evidence that they were actually

called management meetings. In the last year Tony attended more than half of these either in person or by telephone. It emerged in the evidence that these meetings were more like project meetings where a number of people attended including the project managers to discuss work in progress, and Tony Carmichael would attend as business development manager for Carmichael Builders, or to explain the progress of his own businesses.

- [39] I accept Tony's and Glen's evidence that the financial state of Carmichael Builders was not presented at these meetings. The reference to the budgets presented to these meetings in the affidavits is a reference to the budget for the individual projects. Instead, the company's monthly financial reports would be considered by Glen together with the Chief Executive Officer and the company's in-house accountant in another meeting without other people present.
- [40] With Tony Carmichael's involvement with the company diminishing it seems strange that he would attend these management meetings but from what both he and Glen told me it does seem that this was a hangover from when their father used to run the company – the father emphasised to them the importance of getting all company participants together. The fact that the meetings were regarded as required to achieve some formality also seems to be demonstrated by the minutes of the estimators meetings, which record lengthy reports being given in a very short space of time.
- [41] Both Tony and Glen gave evidence that Tony requested cash flow reports for the company but that these were never provided. Despite these not being provided, Tony never chased this up. I think the truth behind this is as Tony told me, that instead of receiving written reports, Glen reassured him that the company was operating successfully which Tony accepted at face value on the assumption that if there was any difficulty Glen would tell him about it.
- [42] The fact that Glen did not provide the actual figures in writing to Tony is indicative I think of his expressed view that once he had taken over the company it was his company. I am quite sure having heard him give evidence about this that he regarded the company as under his control, and he did not want Tony to interfere. I think from what he said, that he made a conscious decision not to provide Tony with information about the company.
- [43] This also accords with what both of them say, that it was only a few days before the administrators were appointed, that Glen informed Tony that the company was in financial difficulty.
- [44] This demonstrates that even if Tony had wanted to exercise an influence over Carmichael Builders, it is unlikely that he would have been able to do so despite the close family ties and any moral obligations existing within the family. Certainly from a legal and practical point of view his influence was limited.

- [45] The close links with the other family companies make no difference to this fact. They did not result in Tony Carmichael having any greater influence over Carmichael Builders.

Conclusion

- [46] My finding therefore is that, for the benefit of a creditor, administrators were appointed for Carmichael Builders on 10 June 2015, but that Tony Carmichael was not at that time or in the period of 12 months prior to that time a director, secretary or an influential person for the company.
- [47] Hence it is right to set aside the decision of the QBCC given on 12 June 2015 that he was an influential person and substitute an opposite decision.