

CITATION: *THE BUILDER v Queensland Building and Construction Commission* [2016] QCAT 85

PARTIES: THE BUILDER
(Applicant)
V
Queensland Building and Construction Commission
(Respondent)

APPLICATION NUMBER: GAR038 -16

MATTER TYPE: General Administrative Review

HEARING DATE: 29 February 2016

HEARD AT: Brisbane

DECISION OF: **Senior Member Stilgoe OAM**

DELIVERED ON: 11 March 2016

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. The application for an interim order is dismissed.**
- 2. The builder pay the Queensland Building and Construction Commission's costs of and incidental to the hearing of 19 February 2016 on the District Court Scale.**
- 3. Queensland Building and Construction Commission shall provide the builder with an itemised list of costs by 1 April 2016.**
- 4. The builder shall provide a list of objections to the itemised list of costs by 15 April 2016.**
- 5. If the parties cannot agree on the amount of the costs, the proceeding will be listed for further directions on two business days' notice in writing by one party to the tribunal and the other party**

CATCHWORDS: GENERAL ADMINISTRATIVE REVIEW – QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION – LICENCE – where licence suspended for failure to meet minimum financial requirements – where

application for a stay – where evidence of company’s financial information incomplete - whether balance of convenience favoured a stay

COSTS – where undertaking to provide material before next hearing – where material not provided – where at the hearing company indicated an intention to enter voluntary liquidation – where no notice to the respondent – where respondent prepared extensive material for hearing – whether applicant caused disadvantage – where order for costs of the hearing

Queensland Civil and Administrative Tribunal Act 2009 (Qld) ss 47, 48

Chief Executive Officer, Department for Child Protection v S (2007) 98 ALD 329
Croney v Nand [1999] 2 Qd R 342
Kostopoulos v G E Commercial Finance Australia Pty Ltd [2005] QCA 311
Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd [2008] 2 Qd R 453

APPEARANCES and REPRESENTATION (if any):

Applicant: E Bird, McInnes Wilson Lawyers
Respondent: M Robinson, Robinson Locke Litigation Lawyers Pty Ltd

REASONS FOR DECISION

- [1] The builder is a licensed builder. It is a condition of its licence that it must meet the minimum financial requirements policy of the Queensland Building and Construction Commission. The policy includes a requirement that licensees pay creditors within normal trading terms.
- [2] The Commission suspected that the builder was not paying its creditors within normal trading terms. By letter of 27 November, 2015, it asked the builder to make its aged creditor and aged debtor listings available for inspection. The builder provided those documents by email of 7 December 2015.
- [3] By letter of 14 December 2015, the Commission gave the builder notice of a proposed condition on its licence:
 - a) That the builder provide an up-to-date listing of creditors with a full explanation of the Accounts outstanding beyond normal trading terms.

- b) That the builder provide a similar list as at 5 pm on the last business day of each month within one week of the start of the following month;
- c) That the builder provide details of all creditors who were subject to repayment arrangements.
- [4] On the same date, the Commission gave the builder notice that it intended to suspend or cancel the builder's licence. The reason for the proposed suspension or cancellation was the builder's failure to meet the minimum financial requirements.
- [5] On 22 December 2015, the Commission did impose the foreshadowed condition. On 11 February 2016, the Commission suspended the builder's licence.
- [6] On 17 February 2016, the builder filed an application to review the suspension of its licence. It also sought a stay of that decision.
- [7] The application for a stay came before me on 19 February 2016. These are not the reasons for my decision on that date, but it necessary to say something about that hearing to put this decision into context.
- [8] The question of whether a stay of the original decision should be granted is usually addressed according to established principles: Is it an appropriate case to grant a stay?¹ Does the applicant have an arguable case?² Would a refusal of a stay render the proceeding nugatory?³ Does the balance of convenience favour granting the stay?⁴
- [9] The parties did not argue against the proposition that the failure to grant a stay would render the proceeding nugatory.
- [10] The builder's argument in the application for review seemed to be that the Commission had no power to require the production of documents and, therefore, its decision to suspend the licence on the basis of the documents the builder provided was an invalid decision. Given the builder didn't challenge the decision of 22 December 2015, that seems an unlikely argument but, for the purposes of the hearing on 19 February 2016, I was prepared to accept that it had some prospect of success.
- [11] The real question before me was the balance of convenience. The builder provided documents to the tribunal that indicated it was likely to complete a transaction the next day which would provide a cash injection to the company of \$3million and that there was a progress payment of \$903,324.97 due shortly. On any view, even with these cash injections, the

¹ *Cronney v Nand* [1999] 2 Qd R 342 at 348.

² *Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd* [2008] 2 Qd R 453 at 455.

³ *Chief Executive Officer, Department for Child Protection v S* (2007) 98 ALD 329 at 331.

⁴ *Kostopoulos v G E Commercial Finance Australia Pty Ltd* [2005] QCA 311.

builder would not be able to clear its aged creditors and maintain sufficient capital to continue trading.

- [12] The builder also provided information about a proposed “white knight” who wanted to buy the company, providing an initial cash injection within 30 days of the completion of due diligence and the balance of the purchase price, a substantial sum, in the future.
- [13] I heard evidence from Thomas Rook, a director of the company, about its current financial position. There were many gaps in his knowledge. Despite cross-examination by Mr Robinson, Mr Rook was not able to present a clear picture of the company’s financial position.
- [14] Eventually, I was left with two choices. If I refused the stay, the builder’s debt position would be crystallised but it was likely the company would be placed in liquidation within a week. Funds from the white knight would not be available for creditors. If I allowed the stay, the builder would continue to accumulate debt but there was some chance the company would find funds which would enable it to trade out of its current difficulties.
- [15] I allowed the stay conditional upon an undertaking that the builder would not enter into any new building contracts and that it would provide the Commission with a suite of documents that would fill in the blanks in Mr Rook’s evidence. I listed the stay application for a further hearing on 29 February 2016.
- [16] On 29 February 2016, Mr Bird, for the builder, informed me that: the builder had not complied with its undertaking to provide documents; liquidators were being appointed to the company on 1 March 2016; and the builder did not persist with the application for a stay. Mr Bird submitted that, because my order expired that day, there was no need for any further action by the tribunal.
- [17] Mr Robinson, for the Commission asked me to give reasons for my decision. Mr Bird submitted that, because there was no decision for me to make, the exercise was purely hypothetical.
- [18] The exercise was not purely hypothetical. My order of 19 February 2016 was in these terms: “*The decision of the QBCC dated 11 February 2016, suspending the Applicant’s licence, is stayed until further order of the Tribunal*”. Obviously, I had to make another order. The obvious order is that the application to stay the decision is dismissed.
- [19] Mr Robinson, unaware of the builder’s intention to appoint a liquidator, filed a large volume of material that indicated the company’s financial position was much worse than had been presented to me at the hearing on 19 February 2016.
- [20] I asked Mr Bird why the builder should not pay the Commission’s costs of the proceeding, given that material filed in haste appeared to be incomplete and inadequate.

- [21] Mr Bird told me that the application to the tribunal was one of many fires the company was fighting at the time. (One of those fires was an application to the Supreme Court on similar, although not identical, grounds.) Mr Bird told me that the poor material might be explained by “the circumstances” rather than a deliberate attempt to deceive either the Commission or the tribunal. He said that the fact of the company’s distress and the order of the company’s distress was not in issue; the application for a stay centred around the white knight. He said that the evidence of the shortfall in the company’s capital was not tested in cross examination, nor did the company have the opportunity to test the evidence contained in Mr Robinson’s latest material. He said that the builder didn’t cause an adjournment; the parties were back before the tribunal because my order was only an interim order.
- [22] Mr Robinson submitted that the builder should not have been seeking relief in both the Supreme Court and the tribunal at the same time. He said that the builder’s initial submissions were “light” on the issue of the balance of convenience. He said that, if the white knight was always the centre of the builder’s application, it was odd that evidence of its existence did not appear until the morning of the hearing.
- [23] Mr Bird conceded that the application to the tribunal was a tactical decision which, in hindsight, might have been done differently.
- [24] Without its licence, the builder had no ability to earn money. Without a stay, the builder could not continue building. Even so, it concerns me that a party would bring a proceeding in the tribunal that was merely tactical. It concerns me that the application did not merit a director’s full attention because he was “fighting other fires” even though this application was vital for the company’s continued operation. It seems to me that the application was a cynical use of a tribunal proceeding to keep the inevitable at bay. If I am right about that, it is an abuse of process within s 47(1)(c) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld).
- [25] However, the evidence does not go that far and I take Mr Bird’s point that it would require a detailed examination of the evidence to establish that the builder’s application was, in fact, an abuse of process.
- [26] What is undeniable, though, is that the Commission was put to significant expense preparing for the second hearing. If it was obvious to the builder that it would not be able to meet its undertaking to me, obvious that the white knight had disappeared, and obvious that the builder was not viable, then professional courtesy demanded that Mr Bird inform Mr Robinson at the earliest opportunity, so that he was spared the additional work required for this hearing. The failure to do so falls within a number of subsections of s 48 – causing disadvantage. Section 48(2)(c) enables me to make an order to compensate another party for reasonable costs incurred unnecessarily. I therefore order that the builder pay the Commission’s costs of and incidental to today’s proceeding.