

CITATION: *NGE v Queensland Building and Construction Commission* [2017] QCAT 238

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

APPLICATION NUMBER: OCR100-17

MATTER TYPE: Occupational regulation matters

HEARING DATE: 7 June 2017

HEARD AT: Brisbane

DECISION OF: **A/Senior Member Browne**

DELIVERED ON: 14 July 2017

DELIVERED AT: Brisbane

ORDERS MADE: **IT IS THE DECISION OF THE TRIBUNAL THAT:**

- 1. The decision of the Queensland Building and Construction Commission to suspend NGE's licences is stayed pending the determination of the application to review a decision, or until further order of the Tribunal.**
- 2. The decision is made conditional on the following undertaking NGE:**
 - a. Not to enter into any new contracts for the performance of building work; and**
 - b. To provide weekly reporting of its financial position to the Queensland Building and Construction Commission including:**
 - i. Aged debtors;**
 - ii. Aged creditors;**
 - iii. Print out of bank account (to show the current cash at**

bank);

- iv. ATO Portal;
- v. Any correspondence with the ATO regarding payment arrangements or any alleged default by them; and
- vi. Copies of any proceedings by any creditor, whether by claim or statutory demand or application to wind up;

Until the determination of the application to review a decision.

THE TRIBUNAL DIRECTS THAT:

1. The application is listed for a Compulsory Conference in Brisbane on 15 August 2017 at 1:30pm.
2. The application is listed for a Directions Hearing in Brisbane on 24 August 2017 at 2:30pm.
3. Other than to the parties to the proceeding, publication is prohibited of information which may identify the applicant company and its directors, any subsidiary or related companies of the applicant or any of the applicant's current construction projects, until further order of the Tribunal.
4. The parties have leave to be legally represented in the proceeding.

CATCHWORDS:

PROFESSIONS AND TRADES – BUILDERS – LICENCES AND REGISTRATION – where decision made to suspend licence because of failure to meet minimum financial requirements – where applicant filed an application to review and seeks a stay of the suspension decision – whether it was desirable to grant a stay

Queensland Building and Construction Commission Act 1991 (Qld), s 35
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 22, s 66

Erathnage v Medical Board of Australia [2016] QCAT 418

APPEARANCES:

APPLICANT: Mr M Stunden of Counsel instructed by Mills Oakley

RESPONDENT: Mr M Robinson, Solicitor, Robinson Locke Litigation Lawyers Pty Ltd

REASONS FOR DECISION

- [1] NGE is a licensed company operating in the building industry. On 18 May 2017, the Queensland Building and Construction Commission (the QBCC) made a decision to suspend NGE's licence. The QBCC made the decision because it was not satisfied the company met minimum financial requirements (MFR). The QBCC determined that for the protection of industry participants, it is appropriate to suspend the licence of NGE for failure to meet the MFR.¹
- [2] NGE wants to review the decision made by the QBCC. NGE filed an application to review and an application to stay the QBCC's decision until the determination of the review. Both applications were filed on 29 May 2017 and a decision was made by consent to stay the QBCC's decision on an interim basis until the hearing of the stay application.²
- [3] The application for a stay proceeded to a hearing before me on 7 June 2017. After hearing the evidence and submissions made by both parties, I granted the stay and made orders accordingly. My reasons for the decision are now set out below.

What is the Tribunal's power to grant a stay?

- [4] The Tribunal has the power to grant a stay under s 22(4) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (QCAT Act) if it considers it '*desirable*' after having regard to certain matters. Those matters include the interests of the person who may be affected by the refusal of a stay, any submissions made by the decision-maker, and the public interest.³
- [5] In *Erathnage v Medical Board of Australia*,⁴ the Deputy President of the Tribunal said that s 22(4) involves the exercise of a broad discretion and may include a consideration of whether there is an arguable case. The relevant extract from *Erathnage's* case is as follows:

¹ Decision made on 18 May 2017, see exhibit 1, statement of reasons for decision, attachment 'A'.

² Decision made by consent on 1 June 2017 to stay the QBCC's decision dated 18 May 2017 on an interim basis until the determination of the application to stay a decision or until further order of the Tribunal.

³ QCAT Act, s 22(4).

⁴ [2016] QCAT 418.

The words of the subsection give to the tribunal a broad discretion, taking into account those matters therein referred to. These are the matters to which any application for a stay should address. It may be that in addressing those matters, questions of the utility of any application and whether there is an arguable case must also be considered. They are matters which one would expect to be encompassed by the requirement that the tribunal consider the submissions made by the decision-maker for the reviewable decision and the public interest.⁵

- [6] In determining whether to grant a stay of the QBCC's decision and in having regard to the matters set out in s 22(4) of the QCAT Act, I considered the material filed by NGE, the evidence given by witnesses at the hearing and the material and submissions of the QBCC. It is non-contentious that in addition to the matters set out under s 22(4) and in exercising QCAT's broad statutory discretion, a consideration of whether NGE has an arguable case and where the balance of convenience lies are also applicable in determining whether to grant a stay.

Is it desirable to grant a stay?

- [7] Under s 35(3) of the *Queensland Building and Construction Commission Act 1991* (Qld) (the QBCC Act), a licence may be granted subject to conditions as the authority considers appropriate, including that the licensee's financial circumstances must at all times satisfy the relevant financial requirements stated in the '*board's policies*'.⁶ The MFR policy requires all licensees to maintain a current ratio of not less than 1:1, meaning a licensee's current assets must equal or exceed its current liabilities.
- [8] The QBCC may suspend or cancel a licence if the licensee contravened a condition to which the licence is subject under s 35.⁷ In this matter, the QBCC, following a compliance audit of the company, received financial information for NGE as at 30 November 2016. The QBCC issued a notice of proposed cancellation or suspension to the company and, after receiving and considering further information, determined that NGE failed to demonstrate that it meets the MFR.⁸
- [9] In relation to granting a stay, the QBCC argued that there are two clear issues that NGE must address and that either issue alone would make the current ratio deficient.⁹ The issues identified by the QBCC concern a tax debt owing to the Australian Taxation Office (ATO), and a related entity loan concerning one of the company directors in the amount of \$850,000.
- [10] The QBCC said that the balance sheet for NGE shows an amount of \$1,528,431 owed to the ATO which is listed as a non-current asset.¹⁰ The

⁵ *Erathnage's case*, [23]

⁶ QBCC Act, s 35.

⁷ *Ibid*, s 48, s 49.

⁸ Exhibit 1.

⁹ Written submissions filed 6 June 2017.

¹⁰ *Ibid*.

QBCC contended that unless there is genuine dispute about liability for the tax or a payment arrangement has been entered into, the old tax debt will be a current liability.¹¹ The QBCC said that there is no evidence that a proposal put to the ATO has been accepted.¹² In closing oral submissions, Mr Robinson for the QBCC argued that there is no clarity or certainty that the ATO will accept any payment plan put to it by NGE in respect of repayment of the debt.

- [11] In relation to the related entity loan, the QBCC submitted that the list of assets belonging to one of the company's directors, for whom there is a loan, appears to only include land. The QBCC said that land is normally a non-current asset and none of the land listed is inventory held for re-sale. The QBCC said that the company director does not appear to have the capacity to pay as a current asset and, therefore, the loan owed by the company director does not appear collectible as a current asset.¹³
- [12] The QBCC also argued that there is an issue in relation to the payment of creditors. The QBCC said that the payables reconciliation summary as at 22 May 2017 included creditors outside industry trading terms (meaning outside 30 days of invoice)¹⁴ as defined and therefore, in relation to each, proof needs to be given of extended trading terms, dispute, or a payment arrangement.¹⁵ In closing oral submissions, Mr Robinson for the QBCC argued that the list of aged creditors as at 6 June 2017 identifies some new creditors and some amounts owing by the company are significant.
- [13] At the hearing, NGE relied on statutory declarations prepared by the company directors, affidavits prepared by the director and manager of the company's external accountants, Williams Hall Chadwick, Chartered Accountants, and affidavits prepared by the solicitors representing NGE in the stay application, Mills Oakley.
- [14] Michael Cameron, Director of Williams Hall Chadwick, also gave oral evidence about the company's current projects, the number of employees working for the company, and the impact that the suspension has had and will have (if not stayed) on the company.
- [15] Mr Cameron said that the company performs miscellaneous building work on sites, primarily carpentry work. The company employs approximately 40 to 50 employees, of which approximately 40 are full-time employees.
- [16] Mr Cameron gave oral evidence about the projects that the company is currently performing, also referred to as '*significant projects*'.¹⁶ Mr Cameron said that the nature of the projects are of the larger type and the effect that the suspension of the licence has had on the company's cash flow has been

11 Ibid.

12 Ibid.

13 Ibid.

14 Minimum Financial Requirements Policy, s 9.

15 Written submissions filed 6 June 2017.

16 Exhibit 4, [75]-[76].

'significant'. Mr Cameron said that although the relationship with customers was *'quite good'*, the company was unable to go on site for a couple of weeks. Mr Cameron stated that the company turnover was between \$800,000 to \$1.4 million per month. Mr Cameron said that the impact on the company's income due to non-trading since the suspension was, at a minimum, \$400,000 to \$500,000 and that this creates cash flow deficiencies.

- [17] Mr Cameron stated the impact of a suspension on the company would be significant. Mr Cameron referred to the profit margin on current projects as being around 30% to 40% and said that the company requires revenue to meet payments to staff and other creditors. Mr Cameron gave oral evidence about the likely outcome if the suspension was not stayed. Mr Cameron said that there would be an insolvency event if the suspension were to continue for the next two to three more weeks. Mr Cameron stated that unsecured creditors, of whom there are presently approximately 30 to 40, would be *'adversely impacted'*.
- [18] Mr Cameron also gave evidence generally about the company and said that it was trading *'very well'*, in the last four to five months. Mr Cameron stated that the net profit margin for the month of March 2017 was in excess of \$200,000.
- [19] Mr Cameron gave evidence about the ATO debt. He said that the Company is currently in discussions with the ATO about the repayment plan and was waiting for them to respond. Mr Cameron said that if the suspension was not stayed, and the payment plan not agreed to, then the ATO would become an unsecured creditor. Mr Cameron said that the company's current liability as at 22 May 2017 was approximately \$1.7 million referring to it as varying because of the obligations to the ATO. Mr Cameron said that there has been no enforcement action taken by the ATO.
- [20] In relation to trade creditors, Mr Cameron said that management of the creditors has been very good, referring to verbal arrangements between the directors of the company with creditors and suppliers.
- [21] In relation to the related entity loan concerning one of the company's directors, Mr Cameron said that the loan can be treated as *'current'*, due to the control the current director has over the land assets.
- [22] Mr Cameron was cross-examined about his oral evidence-in-chief, including being questioned about the ATO debt and company creditors. Mr Cameron was questioned about what would happen if the ATO refused the payment arrangement put to the ATO by NGE. Mr Cameron said that there would most likely be liquidation or insolvency event and accepted that this may take a month or so. Mr Cameron maintained his evidence however that the discussions with the ATO were positive and that the company expected a response from the ATO by the end of the week.
- [23] One of the company's directors gave oral evidence about recent payments to creditors and a document tendered at the hearing showing a summary

of 'aged payables'.¹⁷ The director of NGE said that there had been a recent payment to the company from a debtor. He stated that arrangements were in place with key suppliers and said that payments were made by the company for materials. The director of NGE said that he knows approximately 50% of the creditors personally and that none of the creditors has commenced enforcement action against NGE.

- [24] NGE's director was cross-examined about the 'aged payables' document and arrangements with creditors or suppliers. He was also cross-examined about his capacity to pay back a company loan in the amount of \$850,000. I found NGE's director to be honest in giving his evidence. He gave oral evidence when questioned about specific suppliers identified in the 'aged payables' document. NGE's director was able to identify for some specific suppliers whether there was an extended term or verbal arrangement in place. When questioned specifically about other suppliers, NGE's director said that he was not aware of the matter. In relation to the loan to the company, NGE's director accepted that he did not have the money in the bank to pay the loan, but stated that he could refinance or sell the land to meet that liability.
- [25] After considering all of the evidence and the submissions made on behalf of the QBCC, I was satisfied having regard to the matters set out in s 22(4) of the QCAT Act that it was desirable to grant the stay.
- [26] I accepted the evidence of Mr Cameron that NGE was a party to a number of building contracts and to suspend trading prior to completion of the contract would impact on the company's cash flow. I also accepted Mr Cameron's evidence that the company employed approximately 40 full-time employees and the company needs trading revenue to continue to trade.
- [27] I was satisfied having considered the affidavits and oral evidence of Mr Cameron and NGE's company director that NGE, with the assistance of its external accountants, was managing all of the issues identified by the QBCC including payment of aged creditors and the ATO debt.
- [28] I was satisfied, based on the oral evidence of NGE's director, that the company was managing the payment of aged creditors and suppliers where some of the suppliers had a verbal arrangement with NGE. I was also satisfied based on the oral evidence of Mr Cameron that negotiations were continuing with the ATO in relation to the ATO debt and that no enforcement action had been taken.
- [29] I accepted the evidence of the two company directors contained in their affidavits in relation to their respective undertakings to be provided in the event that a stay was granted. The undertakings were that NGE was not to enter into any contracts for the performance of building work; and to provide weekly reporting to the QBCC as to its financial position, including aged debtors and creditors, print out of bank statements, the ATO portal,

¹⁷ Exhibit 11.

correspondence with the ATO, and copies of any proceedings by any creditor whether by claim or statutory demand or application to wind up.¹⁸

[30] I was satisfied that the balance of convenience favoured the granting of a stay and that it was desirable to grant it and I made orders accordingly.

¹⁸ Exhibits 2 and 3.