LIMITS ON BSA LICENCE CANCELLATION FOR MULTIPLE EVENTS

Dinsey v *Queensland Building Services Authority* [2012] Qcata

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Mr Dinsey held a building contractors license – medium rise with the Queensland Building Services Authority. He was also a director of multiple companies to which liquidators were appointed in June and September 2011. Because he was a director of a company to which liquidators were appointed, he was automatically categorised as an excluded individual under s 56AD of the *Queensland Building Services Authority Ac* which meant the Authority had no choice but to cancel his building licence. Because the appointment of liquidators was to multiple companies there was more that one 'company event' and therefore Mr Dinsey was permanently excluded from holding a builders licence. The relevant legislative provision of the QBSA Act is:

> **56AC Excluded individuals and excluded companies**
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> (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
> (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.
> (3) If this section applies to an individual because of subsection (1), the individual is an ***excluded individual*** for the relevant bankruptcy event.

He applied to the Queensland Civil and Administrative Tribunal to review the decision of the Authority to categorise him as an individual for multiple company events because he contended there was only one 'company event'. The function of the Tribunal on a review of an administrative decision is to produce the correct and preferable decision by way of a rehearing on the merits.[1] In other words it is a merits review.

To escape permanent exclusion, Mr Dinsey relied on s 56AD(6) of the QBSA Act to argue there was only one company event. It provides:

> 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.

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1 Queensland Civil and Administrative Tribunal Act s 20

He submitted that the appointment of liquidators and controllers to the companies in the group of companies was a direct result of the failure of Wimmer (NSW) Pty Ltd, a company that operated a soft drink business and of which Mr Dinsey was a director. Although not particularly relevant for this application, the failure of Wimmer, he contended was due to matters beyond his control. This failure then created a domino effect leading to the failure of the entire group of companies which is why, he says, it was only one company event. Even though the group companies of which he was a director were not involved in any type of building work, the Act still applied to Mr Dinsey.

The Tribunal, at first instance, rejected Mr Dinsey's argument in favour of the contention put by the Authority. Specifically, that the reference to 'company' in s 56AC(6) should be interpreted strictly and in the singular. That is, the first event and the other event should be taken to refer to one and the same company. The Tribunal held that Mr Dinsey was excluded for each of the company events and therefore permanently excluded.

Mr Dinsey appealed to the QCAT Appeal Tribunal. His appeal was allowed. The Appeal Tribunal held that where a licensee under the QBSA Act is a director or influential person of companies within a group of companies and a controller, administrator or liquidator is appointed to the group of companies, the appointment is to be regarded as a single company event within the meaning of s 56AC(6) of the QBSA Act. The effect of this decision for Mr Dinsey is that, subject to him being categorised as a permitted individual[2], he would only be excluded from holding a building licence for a period of five years rather than permanently.

Section 56AC of the Act provides that if, for the benefit of a creditor, a provisional liquidator, liquidator, administrator or controller is appointed and the individual, usually a licensee, was a director, secretary or influential person for the company, then, the individual is an excluded individual for the relevant event. Section 56AE says that the Authority must not grant a person a licence if the person is an excluded individual for a relevant company event. Section 58 goes onto provide that an individual is permanently excluded if the individual has twice been excluded for a relevant event. In the Dinsey case there were seven relevant events meaning, on the approach taken by the Authority that Mr Dinsey was permanently excluded.

Before dealing with s 56AC(6), the Tribunal member, the Honourable James Thomas, made some observations about the reasoning behind the various terms used in the Act. Terms such as 'excluded individuals'; 'permitted individuals', 'permanently excluded', 'excluded companies' were all introduced in a raft of amendments in 1999 to identify persons or companies who could not be entrusted with holding a contractor's licence under the Act as a result of accumulation of demerit points or failure to satisfy judgments. In particular, individuals who take advantage of the laws of bankruptcy or who are directors or influential persons in companies that go into liquidation or have administrators appointed, have their commercial competency called into question. The purpose of excluding such individuals is to prevent the re-emergence of 'phoenix' companies following the cancellation of a license[3].

The only way to avoid exclusion for a relevant event is under s 56AD(8) by becoming categorised as a permitted individual which means an individual can retain a contractor's licence; or if permanently excluded by the application of 56AC(6) if there are multiple events to limit the exclusion to five years.

However s 56AC(6) does, in certain circumstances, limit the number of times an individual can be excluded 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

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2 QBSA Act s 56AD(8)

3 Explanatory notes to the 1999 amendments page 18-19 and para 27 of the Reasons.

company. It was this section to which the Appeal Tribunal had regard in considering Mr Dinsey's appeal.

In arriving at this conclusion Mr Thomas disagreed with the interpretation of s 56AC(6) which confined the reference to the 'company' to being in the singular. Despite the reference to 'company' appearing three times and there is no reference to company in the plural (companies) in the subsection, he held that 'company' in the singular also meant company in the plural. He did not accept it was the intention of the legislature that the subsection should be read down to limit its operation to the same company.

By careful analysis of how 'company' is used each time in the subsection, he said one should not immediately assume that because it 'has a singular number on the first occasion, it is likely to bear the singular on the other occasions of its use'. When used on the first occasion it is an adjective qualifying the noun 'event' and its singular character derives from the singular number of the particular event to which it relates'. The reference to 'event' does not necessarily mean it is the same event and therefore 'the real question is whether there might reasonably be events involving different companies'.

Starting with the reasonable premise that it is not unusual to operate a business through a group of companies, he says that the subsection might be referring to events involving different companies. The use of the word 'company' as a noun in the final words of the subsection, and by application of the Acts Interpretation Act which provides that the word should include the plural unless the context suggests otherwise, 'company' can be read as 'companies'. This is particularly so where the use of the definite article 'signifies little when the preceding use of the word to which it is attached might cover different events involving different companies'.

It was contended by the Authority that some guidance and support for the singular interpretation can be taken from s 56AC(5), which refers to exclusion for a bankruptcy event. This was rejected because, logically, bankruptcy involves an individual while corporate conduct 'by directors may involve multiple companies and involves many complex situations and combinations'.

By the application of the Acts Interpretation Acts and with 'ordinary grammatical interpretation' the Appeal Tribunal held that contrary to what might appear at first blush, the reference to a singular company can now be read as the plural companies in s 56AC(6).

The implications of this for an excluded individual are significant. Individual licensee builders conducting business through a group of companies is not unusual. There have been recent collapses of large building enterprises operating through a group of companies, e.g. Raptis Group and Cavalier Homes. Licensees who are directors or influential persons within corporate groups can now rely on the Dinsey decision to at least restrict their exclusion to a maximum of five years.