

SUPREME COURT OF QUEENSLAND

CITATION: *Ezra Constructions Pty Ltd & Ors v Queensland Building and Construction Commission & Ors* [2019] QSC 47

PARTIES: **EZRA CONSTRUCTIONS PTY LTD**
(first applicant)
GARNET CONSTRUCTIONS PTY LTD
(second applicant)
JAMES RAPTIS
(third applicant)
v
QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION
(first respondent)
BRETT BASSETT AS THE COMMISSIONER OF THE QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION
(second respondent)
MARK E WILSON
(third respondent)

FILE NO/S: BS 5323 of 2018

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 12 March 2019

DELIVERED AT: Brisbane

HEARING DATE: 7 February 2019

JUDGE: Boddice J

ORDER: **I shall hear the parties as to the appropriate form of relief and as to costs.**

CATCHWORDS: STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – INTERPRETATIONS ACTS AND PROVISIONS – PARTICULAR LEGISLATION – where the proper interpretation of the Queensland Building and Construction Commission Act 1991 (Qld) was at issue – where the respondents purportedly issued notices to the applicants under the Act – where the Act was subsequently amended – whether decisions made by the respondents were effective and validly made

COUNSEL: L Harrison QC, with D C Coulsen, for the applicants
S E Seefeld, for the respondents

SOLICITORS: Holt Lawyers for the applicants
Queensland Building and Construction Commission Legal
Services for the respondents

- [1] By an amended application for review, filed 24 July 2018, the applicants seek relief in respect of notices issued by the respondents on 5 April 2018 and 18 June 2018.
- [2] At issue is the proper interpretation of the *Queensland Building and Construction Commission Act 1991* (Qld) (*the Act*) as amended in 2014 and whether decisions made by the respondents were effective and validly made in accordance with that Act. A further ground, that the decision makers had no valid delegation to make the decisions in question, was not pursued at the hearing.

Background

- [3] The first applicant is a company engaged in construction for property developments in and around the Gold Coast. It holds an open building licence issued by the first respondent.
- [4] The second applicant is part of a corporate group which previously carried out construction for property developments in and around the same area. It also is the holder of an open building licence issued by the first respondent.
- [5] The third applicant is a director of the second applicant and, it is conceded by the applicants, an influential person of the first applicant for the purposes of section 4AA of the Act. The third applicant also holds a building licence issued by the first respondent.
- [6] The third applicant was a director of RT No 2 Pty Ltd (*RT No 2*) from 7 August 2013 on 29 September 2014. The third applicant resigned as a director that day. On the following day, 30 September 2014, RT No 2 was placed into administration, owing some \$3.5 million to creditors. RT No 2 did not perform building work and was not the holder of any licence issued by the first respondent.
- [7] Between 7 August 2014 and 1 January 2015, the third applicant was a director of RT No 3 Pty Ltd (*RT No 3*). It was placed into administration on 25 October 2015, owing almost \$7.5 million to creditors. It was subsequently placed into liquidation. RT No 3 never performed building work and never held any licence issued by the first respondent.
- [8] The first respondent is the entity responsible for oversight of the construction industry. The second respondent is the first respondent's Commissioner. The third respondent is an employee of the first respondent. In his position as a "licence entitlement officer", he was a relevant decision maker in the issue of the notices dated 5 April 2018. A

further employee, Jonathan Pacey, in his position as “senior internal review officer” was the decision maker in the issue of the notices dated 15 June 2018.

The notices

- [9] By notice dated 5 April 2018, signed by the third respondent, the first respondent purportedly gave notice under s 56AF of the Act that it considered the third applicant to be an excluded individual. The relevant event relied upon for that assertion was the appointment of administrators to RT No 2 and that the third applicant was an influential person of RT No 2 at the time of that event. The notice gave the third applicant 28 days to make submissions and warned the first respondent may cancel his licence under the Act.
- [10] By notice of the same date, signed by the third respondent, the first respondent purportedly gave notice to the third applicant that the first respondent had become aware of a second relevant event for which he was an excluded individual. That relevant event was the appointment of liquidators to RT No 3. That notice gave the third applicant 28 days within which to make submissions and warned his licence may be cancelled.
- [11] By separate notices dated 5 April 2018, signed by the third respondent, the first respondent purportedly gave notice under s 56AG of the Act that it considered the first and second applicants to each be an excluded company. Those notices relied upon the same relevant events. They gave each of the first and second applicants 28 days to make submissions and warned that its licence may be cancelled.
- [12] By letter dated 3 May 2018, the applicants served submissions on the first respondent for internal review of the notices dated 5 April 2018 issued against each applicant.
- [13] On 18 June 2018, the first respondent issued decision notices to each applicant in respect of those applications for internal review. Each notice, signed by Pacey, advised of the first respondent’s decision that each relevant applicant was an excluded company or individual by reason of a relevant event, namely the appointment of an administrator to RT No 2. The notices advised they were not excluded companies or individuals by reason of the second relevant event, namely, the appointment of administrators or liquidators to RT No 3.

Legislative provisions

- [14] Central to the issues in dispute is a consideration of the applicable legislation in force at the time of the relevant event in respect of RT No 2, and at the time the notices were given by the respondents.
- [15] Relevantly, the applicable legislation at the time of the events surrounding RT No 2, contained the following provisions:

“56AC Excluded individuals and excluded companies

- (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
 - (b) 5 years have no elapsed since the relevant bankruptcy event happened.
- (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
 - (ii) is wound up, or is ordered to be wound up; and
 - (b) 5 years have not elapses since the event mentioned in paragraph (aa)(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.
- (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 event does not also become an excluded individual for another relevant event if the commission is satisfied that both events are consequences flowing from what is, in substance, the one set of circumstances.
- (6) 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.

Division 2 Categorisation as permitted individual

56AD Becoming a permitted individual

- (1) An individual may apply to the commission, 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 commission, or has otherwise been made aware, that the commission considers the individual to be an excluded individual for the relevant event.
- (2) However, if as a result of the application the individual is not categorised as a permitted individual for the relevant event, the individual may not, while the individual is an excluded individual for the relevant event, again apply to be categorised as a permitted individual for the relevant event.
- (3) If the individual applies, the application must include the reasons why the commission should categorise the individual as a permitted individual for the relevant event.
- (4) If the individual is a director or secretary of, or influential person for, a company that is a licensee, the company is taken to be a party to the application, and may make submissions to the commission about the application.
- (5) The commission must give its decision on the categorisation within 28 days, or a longer period agreed between the individual and the commission.
- (6) If the commission does not give its decision within the time required under subsection (5), the commission is taken, for section 86(1)(j) to have decided not to categorise the individual as a permitted individual for the relevant event.
- (7) Nothing in subsection (6) stops the commission, after the time required under subsection (5) has elapsed, from confirming the commission's refusal to categorise the individual as a permitted individual for the relevant event.
- (8) The commission may categorise the individual as a permitted individual for the relevant event only if the commission is satisfied, on the basis of the application, that –
 - (a) section 56AC(5) applies to the individual for the relevant event; or
 - (b) 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) For subsection (8)(b), 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 commission 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 commission from having regard to other matters for 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.
- (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.

Division 3 Licence exclusion and cancellation

56AF Procedure if licensee is excluded individual

- (1) This section applies if the commission considers that an individual who is a licensee is an excluded individual for a relevant event.
- (2) The commission must give the company a written notice identifying the relevant event and stating the following:
 - (a) why the commission considers the individual is an excluded individual for the relevant event;
 - (b) the individual may apply to the commission to be categorised as a permitted individual for the relevant event if the individual has not already done so;
 - (c) the circumstances, stated in subsection (3), in which the commission must cancel the individual's licence.
- (3) The commission must cancel the individual's licence by written notice given to the individual if –
 - (a) the individual has not already applied to be categorised as a permitted individual for the relevant event, and the individual does not apply for the categorisation within 28 days after the commission gives the individual the written notice under subsection (2); or

- (b) the individual has already applied to be categorised as a permitted individual for the relevant event, or the individual applies for the categorisation within the 28 days mentioned in paragraph (a), but –
 - (i) the commission refuses the application; and
 - (ii) either of the following applies –
 - A. the period for applying for a review of the decision to refuse has ended and no application for review has been made;
 - B. an application for review has been made and the commission's decision is confirmed, or the application is not proceeded with.
- (4) Section 49 does not apply to a cancellation under subsection (3).

56AG Procedure if licensee is excluded company

- (1) This section applies if the commission considers that a company that is a licensee is an excluded company.
- (2) The commission must give the company a written notice stating the following:
 - (a) particulars identifying the individual (the *relevant individual*) who is a director or secretary of, or an influential person for, a company and who is an excluded individual for a relevant event;
 - (b) particulars identifying the relevant event;
 - (c) within 28 days after the commission gives the company the written notice, the relevant individual must –
 - (i) stop being a director, secretary or influential person; or
 - (ii) if the individual is eligible to do so but has not already done so, apply to the commission to be categorised as a permitted individual for the relevant event;
 - (d) the circumstances, stated in subsections (3), (4) and (5), in which the commission must cancel the company's licence.
- (3) The commission must cancel the company's licence by written notice given to the company if, within 28 days mentioned in subsection (2)(c), the relevant individual –
 - (a) does not stop being a director or secretary of, or an influential person for, the company; and

- (b) if the relevant individual is eligible to do so but has not already done so, does not apply to be categorised as a permitted individual for the relevant event.
- (4) The commission must also cancel the company’s licence by written notice given to the company if all of the following apply–
- (a) the relevant individual has already applied to be categorised as a permitted individual for the relevant event, or the relevant individual applies for the categorisation within the 28 days mentioned in subsection (2)(c);
 - (b) the commission refuses the application and the relevant individual does not stop being a director, secretary or influential person;
 - (c) either –
 - (i) the period for applying for a review of the decision to refuse has ended and no application for review has been made; or
 - (ii) an application for review has been made and the commission’s decision is confirmed, or the application is not proceeded with.
- (5) The commission must also cancel the company’s licence by written notice given to the company if the relevant individual is not eligible to apply to the commission to be categorised as a permitted individual for the relevant event and the relevant individual does not, within the 28 days mentioned in subsection (2)(c), stop being a director, secretary or influential person.
- (6) Section 49 does not apply to a cancellation under subsection (3).”

[16] The *Queensland Building and Construction Commission and Other Legislation Amendment Act 2014* (Qld) (**Amendment Act**) was assented to on 27 October 2014. Whilst a number of its sections commenced operation on 15 December 2014, the provisions relevant to the amendments to ss 56AC to 56AG commenced operation on 1 July 2015. Those amendments repealed completely the former s 56AD.

[17] In their amended form, those relevant provisions read as follows:

“56AC Excluded individuals and excluded companies

- (1) This section applies to an individual if –
 - (a) the individual takes advantage of the laws of bankruptcy or becomes bankrupt (**relevant bankruptcy event**); and
 - (b) 3 years have not elapsed since the relevant bankruptcy event happened.

- (2) This section also applies to an individual if –
- (a) A construction company, for the benefit of a creditor –
 - (i) has a provisional liquidator, liquidator, administrator or controller appointed; or
 - (ii) is wound up, or is ordered to be wound up; and
 - (b) 3 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 construction company; or
 - (ii) was, within the period of 2 years immediately before the relevant company event happened, a director or secretary of, or an influential person for, the construction company.
- (3) If this section applies to an individual because of subsection (1), the individual is an *excluded individual* for the relevant bankruptcy event.
- (4) If this section applies to an individual because of subsection (2), the individual is an *excluded individual* for the relevant company event unless the individual can satisfy the commissioner that at the time the individual ceased to be an influential person, director or secretary for the construction company the company was solvent.
- (5) An excluded individual for a relevant event does not also become an excluded individual for another event if the commission is satisfied that both events are consequences flowing from what is, in substance, the one set of circumstances.
- (6) A company is an *excluded company* if an individual who is a director or secretary of, or an influential person for, the construction company is an excluded individual for a relevant event.
- (7) In this section –
- construction company* –
- (a) means a company that directly or indirectly carries out building work or building work services in this or another State; and
 - (b) includes a company that, within 2 years immediately before a relevant company event for the company, directly or indirectly carries out building work or building work services in this or another State.

Division 3 Licence exclusion and cancellation

56AF Procedure if licensee is excluded individual

- (1) This section applies if the commission considers that an individual who is a licensee is an excluded individual for a relevant event.
- (2) The commission must give the individual a written notice identifying the relevant event and stating the following –
 - (a) why the commission considers the individual is an excluded individual for the relevant event;
 - (b) that the individual may make a submission to the commission about the relevant event within the reply period;
 - (c) the circumstances, stated in subsection (3), in which the commission must cancel the individual's licence.
- (3) The commission must cancel the individual's licence, by written notice given to the individual, if –
 - (a) after considering any submission about the notice made by the individual within the reply period, the commission still considers the individual is an excluded individual for a relevant event; or
 - (b) the individual does not make a submission about the notice within the reply period.
- (4) Section 49 does not apply to a cancellation under subsection (3).
- (5) In this section –

Reply period, for a written notice given under subsection (2), means 28 days after the commission gives an individual the written notice.

56AG Procedure if licensee is excluded company

- (1) This section applies if the commission considers that a company that is a licensee is an excluded company.
- (2) The commission must give the company a written notice stating the following –
 - (a) particulars identifying the individual (the *relevant individual*) who is a director or secretary of, or an influential person for, the company and who is an excluded individual for a relevant event;
 - (b) particulars identifying the relevant event;

- (c) with 28 days after the commission gives the company the written notice, the relevant individual must stop being a director, secretary or influential person;
 - (d) the circumstances, stated in subsections (3), (4), and (5), in which the commission must cancel the company's licence.
- (3) The commission must cancel the company's licence by written notice given to the company if, within the 28 days mentioned in subsection (2)(c), the relevant individual does not stop being a director or secretary of, or an influential person for, the company.
- (4) Section 49 does not apply to a cancellation under subsection (3)."

[18] The Amendment Act also contained transitional provisions in Part 11 of Schedule 1. Relevantly they provided:-

“53 Definitions for pt 11

In this Part

Amendment Act means the *Queensland Building and Construction Commission and Other Legislation Amendment Act 2014*.

Commencement means the commencement of the provision in which the term is used.

Former, in relation to a provision, means the provision as in force immediately before the amendment of the provision under the Amendment Act.

...

57 Categorisation as excluded individual or permanently excluded individual continues

- (1) An individual who, immediately before the commencement, was an excluded individual for a relevant bankruptcy or company event under former section 56AC continues to be an excluded individual for the relevant bankruptcy or company event under former section 56AC as if that section had not been amended by the Amendment Act.

Note –

The individual would continue under former section 56AC to be an excluded individual until 5 years had elapsed from the day the relevant bankruptcy or company event happened.

- (2) An individual who, immediately before the commencement, was a permanently excluded individual under former section 58 continues to be a permanently excluded individual despite any amendment of parts 3A or 3B under the Amendment Act.

- (3) However, section 61 continues to apply to the person.

58 Becoming a permitted individual after the commencement

- (1) Subsection (2) applies if –
- (a) the commission gave an individual a written notice under former section 56AF(2) before the commencement; and
 - (b) at the commencement, 28 days have not elapsed from the day the commission gave the person the notice mentioned in paragraph (a).
- (2) The person may apply to the commission, and the commission may consider and decide the application, under former section 56AD, as if that section had not been repealed under the amendment Act.
- (3) Subsection (4) applies if, before the commencement, an individual applied to the commission under former section 56AD and the commission had not finally dealt with the application.
- (4) The commission may continue to consider and decide the application, under former section 56AD, as if that section had not been repealed under the Amendment Act.
- (5) To remove any doubt it is declared that the commission may categorise the person as a permitted individual despite the repeal of former section 56AD by the Amendment Act.

59 Categorisation as permitted individual continues

- (1) A permitted individual for a relevant event continues to be taken not to be an excluded individual for the relevant event.
- (2) The relevant event must not be counted in deciding, under section 61, whether the individual is or continues to be a permanently excluded individual.
- (3) In this section –
- Permitted individual*** means –
- (a) an individual categorised as a permitted individual for a relevant event under former section 56AD if -
 - (i) the person continued to be categorised as a permitted individual immediately before the commencement; or
 - (ii) the person is categorised as a permitted individual after the commencement because of schedule 1, section 58; or

- (b) an individual categorised as a permitted individual for a relevant event as result of the tribunal reversing the commission’s decision not to categorise the individual as a permitted individual for the relevant event after a review of the decision by the tribunal.”

Applicant’s submissions

- [19] The applicant submits the respondents erred in law in applying s 57 of Part 11 of Schedule 1 of the Amendment Act. The respondents ought to have applied s 58(5) of that schedule, had regard to the presumption against retrospectivity of legislation and misapplied the provisions of s 20 of the *Acts Interpretation Act 1954* (Qld).
- [20] The applicants submit the respondents also erred in law in treating the Amendment Act as removing the third applicant’s right to be given written notice that he may apply to be characterised as a permitted individual and in failing to give effect to the requirements introduced in the Amendment Act that RT No 2, be a construction company. The requirements of s 56AC(2)(a) were not met in any event as the administrator appointed to RT No 2 was not appointed “for the benefit of a creditor”.
- [21] Finally, the applicants submit the respondents have not yet made a decision, as required by s 56AF(3)(a), that it still considers the third applicant is an excluded individual. The respondents purported to undertake a review that was not available in the absence of such a decision. Its purported determinations are of no effect. Licences cannot be cancelled until those obligations have been met by the first respondent.

Respondents’ submissions

- [22] The respondents submit there has been no error at law in the application of the transitional provisions. Those provisions continue to apply to an individual who, within the previous five years has had a relevant bankruptcy event or the specified relationship with the company to which a relevant company event has occurred. There is no requirement for the respondents to have actually made such a determination about the individual. As the relevant company event, the appointment of an administrator to RT No 2 on 30 September 2014, occurred before the commencement of the Amendment Act provisions, the transitional provisions had application. The relevant question was whether RT No 2 was a company as at that date, not a construction company.
- [23] The respondents further submit that the transitional provisions, insofar as they refer to a permitted individual, apply only to those individuals whose rights had already accrued under the unamended Act. Such a right only arose when the respondents considered an individual to be an excluded individual and that person had been so notified or otherwise made aware. No such right had accrued to the third applicant at the time of the repeal of the permitted individual regime on 1 July 2015. Accordingly, there was no issue as to whether any retrospective operation of the statute had been applied impermissibly.

- [24] The respondents submit the appointment of administrators to RT No 2 on 30 September 2014 was “for the benefit of a creditor”. Those words are to be given their ordinary grammatical meaning. They are not to be interpreted narrowly. The test is whether, objectively, the appointment was for the benefit of a creditor. That test is satisfied if an outcome of the appointment is that it would be for the benefit of a creditor. There is no requirement that the appointment result in an actual pecuniary benefit to the creditor.
- [25] Finally, the respondents submit there was no error of law in the undertaking of an internal review. The relevant notices were issued in respect of a decision which was a reviewable decision under s 86(k)(i) of the Act. Accordingly, the internal review decisions of 15 June 2018 were validly made.

Discussion

- [26] The Amendment Act introduced fundamental changes to the regime applicable to excluded individuals and a consequentially excluded company. Prior to the Amendment Act provisions becoming operational, an individual became an excluded individual if, relevantly, after the commencement of s 56AC, a company, for the benefit of a creditor, had an administrator appointed and five years had not elapsed since that event and the individual was, at the time of the relevant company event, an influential person for that company. The company became an excluded company if that influential person was an excluded individual for a relevant event.
- [27] That regime contained a mechanism for an individual who had been advised, or who had otherwise become aware that the first respondent considered the individual to be an excluded individual for the relevant event, to apply to be categorised as a permitted individual. Such a persons and the consequentially excluded company, had entitlements to make submissions about the application to be categorised as a permitted individual. The first respondent was required to give its decision on that application within a specified period or was taken to have decided not to categorise the individual as an permitted individual for the relevant event.
- [28] The regime under the amended Act specifically excluded provision for categorisation as a permitted individual. However, it did so in circumstances where the regime for excluded individuals and excluded companies was itself amended to pertain to a three year, not five year time period since the relevant event. Further, the amended regime concerned not merely a company, but a construction company, defined as a company, “that directly or indirectly carries out building work or building work services in this or another State”.
- [29] Those significant changes to a regime which materially affected the rights of individuals and companies did not involve matters of mere procedure. The amended regime took away a substantive right, namely, an entitlement to make application to be categorised as a permitted individual and thereby avoid the consequences of a finding that the

person was an excluded individual. That right was also material to the consequentially excluded company.

- [30] As the amendments affected substantive rights and were not merely procedural, the presumption that a statute will be assumed not to have retrospective operation in the absence of some clear statement to the contrary, is applicable. As Dixon CJ observed in *Maxwell v Murphy*:

“A statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way to confer or impose or otherwise effect rights or liabilities which the law had defined by reference to the past events.”¹

- [31] In the present case, the respondents invoked the pre-amendment regime almost three years after the commencement of the relevant amendment provisions. Whilst entitled to do so, it does not follow that the applicants, in response to the respondents’ notices, cannot avail themselves of rights that existed in their favour under that previous regime. Whether they can do so depends on whether it appears, with reasonable certainty, that the amendment provisions were intended to deprive them of those rights.
- [32] A consideration of the relevant amendment provisions, including the transitional provisions, does not support a conclusion that there was a clear legislative intention for the amending provisions to operate to the exclusion of the applicants’ rights under the previous regime. There is nothing in the amending provisions which evidence an intention to allow the first respondent to avail itself of the notice provisions in the previous regime whilst freeing it of its obligation to comply fully with the requirements of that regime.
- [33] A specific requirement in the then existing provisions was the entitlement for the individual, who had been advised by the first respondent that it considered the individual to be an excluded individual for the relevant event, to apply to be categorised as a permitted individual for that relevant event. The then existing s 56AF also required the first respondent to give the company a written notice which included a statement that the excluded individual may apply to be categorised as a permitted individual for the relevant event.
- [34] The transitional provisions also do not evidence that clear intention. The reference to an excluded individual in the transitional provisions is properly to be understood as referring to an individual who fell within the relevant descriptions in the non-amended s 56AC of the Act. The expression is a shorthand description, “of an individual who, within the preceding five years, took advantage of the bankruptcy laws or became bankrupt in accordance with section 56AC(1) or has a specified relationship with a company to which a liquidator was appointed or was effected by other specified actions in accordance with section 56AC(2)”.²

¹ (1957) 96 CLR 261 at 267.

² *D’Arro v Queensland Building and Construction Commission* [2017] QCA 90 at [30].

- [35] The transitional provisions in respect of permitted individuals specifically deal with events which had commenced in accordance with the previous regime but had not been determined prior to commencement of the amended provisions. Such standard transitional provisions do not, of themselves, evidence an intention that an individual or company visited with the consequences of the previous regime many years after the commencement of the amended regime are to be denied rights previously available to them under that existing regime. Section 58(5) of the transitional provisions is consistent with an intention on the part of the legislature for the first respondent to have the ability to categorise a person as a permitted individual, despite the repeal of s 56AD of the Act.
- [36] As the requirements of the non-amended s 56AC were met in respect of the third applicant, subsequent reliance on that regime by the first respondent directly affects the right the third applicant had under that regime to apply to be categorised as a permitted individual. As Fraser JA (with whom Philippides JA and Mullins J agreed) in *D'Arro*,³ the disadvantage arising from the statutory description of an applicant as an excluded individual could not be regarded as an accrued liability or a completed transaction *until* an event such as cancellation of a licence or refusal of an application for a licence. Here an event has occurred which triggered that disadvantage. The first respondent issued notices pursuant to the pre-amendment s 56AC, advising the third applicant that it considered him to be an excluded individual.
- [37] Even if I be wrong in that conclusion, s 20(2) of the *Acts Interpretation Act 1954* (Qld) affords the applicants an entitlement to rely upon the rights acquired under the permitted individual regime. By s 20(2), the repeal or amendment of an Act does not affect a right, privilege or liability acquired, accrued or incurred under the Act. Section 20 operates even where that right has not been taken advantage of by the time of the repeal, provided there has been an event that has happened that would enable advantage being taken of that right.⁴ The reference to “right” is used in a sense informed by the common law doctrine referred to in *Maxwell v Murphy*.⁵
- [38] Accordingly, the first respondent having availed itself of the provisions in force prior to the commencement of the relevant amendment provisions, there was an obligation on the first respondent to ensure the relevant notice was in compliance with its then obligations. Those obligations included a statutory requirement that the third applicant be notified of his right to apply to be categorised as a permitted individual and that the first and second applicant’s also be notified of that right.
- [39] The above conclusion means the first notice dated 5 April 2018 to the third applicant was not a valid notice under the Act in force at the time of the relevant event. A similar conclusion follows in respect of the notices forwarded to the first and second applicants. That being so, there is no reason why this Court ought not to exercise its jurisdiction to set aside those notices.

³ [2017] QCA 90 at [33].

⁴ *Resort Management Services Ltd v Noosa Shire Council* [1997] 2 Qd R 291 at 303-304.

⁵ (1957) 96 CLR 261; see also *State of Queensland v Baker Superannuation Fund Pty Ltd* [2018] QCA 168 at [246] per Morrison JA (with whom Jackson J agreed on this issue).

- [40] This conclusion renders consideration of the ground in relation to whether RT No 2 was not a construction company unnecessary as it was conceded by the applicants that it would not apply in the event the Court found in their favour in respect of the ground concerning the continuing operation of the permitted individual categorisation. It also renders unnecessary consideration of the ground pertaining to the interim review decisions.
- [41] As to the remaining ground of review, namely, that the appointment of the administrator to RT No 2 was not for the benefit of a creditor and that, accordingly s 56AC has no application, the words “for the benefit of a creditor” are not defined in the Act. They also have not been given consideration in that context. To the extent they have been considered in the context of wills and estates, they are of limited assistance.
- [42] The High Court stated the task of a Court in carrying out statutory construction in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*:
- “This Court has stated on many occasions the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of the legislation is the surest guide to legislative intent. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.” (citations omitted)⁶
- [43] Words in a statute are to be given their ordinary meaning in the context of the section in which they appear and having regard to the purpose and scope of the particular legislation. If the language is clear and consistent with other provisions and can be intelligibly applied to the subject matter, it is to be given its ordinary and grammatical meaning even if it leads to a result that may seem inconvenient or unjust.⁷
- [44] Such considerations support a conclusion that the words, “for the benefit of a creditor” are to be given a wide interpretation. There is no basis to conclude that “benefit” requires the establishment of an actual pecuniary benefit or that it be established that was the sole purpose of the appointment of an administrator. That conclusion is consistent with the words themselves and the scope and purpose of the legislation. The excluded individual and excluded company provisions provide important mechanisms for the protection of the public generally and, more importantly, the protection of persons engaged in the provision of building work.
- [45] The appointment of an administrator by a company may have as its purpose the protection of the company’s directors from an allegation that the company had traded whilst insolvent. However, there is still a benefit to creditors in that appointment. It protects the dissipation of that company’s assets whilst ensuring the appointment of an independent person whose primary responsibility is to conduct the affairs of the company thereafter in accordance with the relevant corporate legislation. One of the

⁶ (2009) 239 CLR 27 at [47] per Hayne, Heydon, Crennan and Kiefel JJ.

⁷ *Cooper Brooks (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 305 per Gibbs CJ.

obligations of that independent person is to prepare a report to creditors. That is a process for the benefit of creditors.

[46] The appointment of the administrator to RT No 2 was for the benefit of a creditor.

Conclusions

[47] I shall hear the parties as to the appropriate form of relief and as to costs.