

CITATION: *Barber v Queensland Building and Construction Commission* [2016] QCAT 132

PARTIES: Daniel John Barber t/as Patio Doctors
(Applicant)
v
Queensland Building and Construction
Commission
(Respondent)

APPLICATION NUMBER: OCR079-15

MATTER TYPE: Occupational regulation matters

HEARING DATE: 7 April 2016

HEARD AT: Brisbane

DECISION OF: **Member Paratz**

DELIVERED ON: 27 May 2016

DELIVERED AT: Brisbane

ORDERS MADE: **1. The decision of the Queensland Building and Construction Commission, made on 31 March 2015, to refuse to categorise Daniel John Barber as a permitted individual is confirmed.**

CATCHWORDS: BUILDERS LICENCING – PERMITTED INDIVIDUAL – Where the QBCC refused to declare the applicant to be a permitted individual – where the builder had not obtained appropriate financial or legal advice or kept proper records

Queensland Building and Construction Commission Act 1991 (Qld) ss 20, 56AD(8), 56AD(8A), 86, Schedule 1 s 58
Queensland Civil and Administrative Tribunal Act 2009 (Qld) ss 19, 20, 24

APPEARANCES:

APPLICANT: Daniel John Barber in person

RESPONDENT: Cheriden Farthing (QBCC Solicitor)

REASONS FOR DECISION

- [1] Mr Barber built patios. He held a licence in the class of '*Sheds, Carports and Garages*', and operated under the trading name of '*Patio Doctor*'. He was declared bankrupt on 18 September 2014 on his own petition.
- [2] The Queensland Building and Construction Commission ('QBCC') notified him on 5 January 2015 that he was considered to be an excluded individual under s 56AC of the *Queensland Building and Construction Commission Act 1991*(Qld) ('QBCC Act') due to his bankruptcy.
- [3] Mr Barber applied on 13 January 2015 to be declared a permitted individual pursuant to s 56AD of the QBCC Act, as it then applied. The QBCC made a decision on 21 January 2015 refusing that application. Mr Barber sought an internal review of that decision by the QBCC on 23 February 2015. The internal review on 31 March 2015 also refused to categorise him as a permitted individual.
- [4] He applied to the Tribunal on 12 May 2015 to review that decision of the QBCC. The application was heard by an oral hearing. This is the decision in the application.

The applicable provisions

- [5] The sections of the QBCC Act being considered in this Application were amended in late 2014¹ by provisions which came into effect on 1 July 2015. The transitional provisions provide that an application made before the former section 56AD was repealed, are to continue and be decided as if that section had not been repealed.²
- [6] As the original application to be categorised as a permitted individual was made before the amending provision came into effect, the former provisions apply.
- [7] The effect of being declared an excluded individual, and of not being categorised as a permitted individual, is that the licensee is not entitled to hold a licence for a period of five years from the date of the event.
- [8] The Tribunal has jurisdiction to review the decision of the QBCC not to categorise an individual as a permitted individual for a relevant event.³ On review, the Tribunal may confirm or amend the decision, set aside the decision and substitute its own decision; or set aside the decision and return the matter to the decision-maker.⁴

¹ *Queensland Building and Construction Commission and Other Legislation Amendment Act (No 57) 2014* (Qld) s 20.

² QBCC Act Schedule 1 s 58.

³ QBCC Act s 86(1)(j).

⁴ QCAT Act s 24.

- [9] The Tribunal has all the functions of the decision-maker for the reviewable decision.⁵ The purpose of the review is to produce the correct and preferable decision, following a fresh hearing on the merits.⁶ The Tribunal stands in the shoes of the decision-maker and makes the decision afresh.
- [10] The QBCC Act provided that the QBCC may only categorise a person as a permitted individual if it is satisfied, on the basis of the application, that the individual took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event.⁷ In this matter, the relevant event is the bankruptcy of Mr Barber.
- [11] The QBCC Act required that in considering whether it is satisfied that all reasonable steps were taken to avoid the coming into existence of the circumstances that resulted in the liquidation, that the QBCC had to take certain factors into consideration:⁸

(8A) 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

Mr Barber's evidence and submissions

- [12] Mr Barber has been significantly affected personally by the events leading up to his bankruptcy, and by the cancellation of his licence.
- [13] In a letter to the QBCC dated 6 March 2016 he said that he had to relocate to Melbourne for employment in a signage business, and referred to his struggle to get work '*in the industry I love and most qualified to perform, Patios, Pergolas, Carports and Garages*', and said:

..however my true passion is Outdoor Home Improvements, and I miss the satisfaction derived from quoting and building to the customer's requirements. I had over 3,000 happy customers over a 15 year period and I miss my family, friends and customers, and I want to come back to Queensland to renew my career. For almost 18 months, I have had time to

⁵ QCAT Act s 19(c).

⁶ Ibid s 20.

⁷ Ibid s 56AD(8).

⁸ Ibid s 56AD(8A).

think of where I had failed and where I could improve my business skills. I never ripped off a customer and I always paid my workers exactly what was agreed. My biggest problems occurred when I leased two new vehicles instead of making do with the ones I had. Also, I trusted people in business that I should not have.

- [14] Mr Barber did not produce any documentation in relation to the financial details of his bankruptcy at the hearing. He said that he did have financial records from 2013 to late 2014 in his possession, but had not put them in evidence or brought them to the hearing. He was unaware of the amount outstanding to creditors after his administrator in bankruptcy sold his assets, including the cars and his house and contents.
- [15] He said that his business had dropped off in January to February 2014 and never regained momentum in that year. He attributed that partly to his loss of motivation after matters involving the QBCC in relation to two projects, and his unhappy experience with his cars, and said that he was drained financially and emotionally.
- [16] He had also had personal family matters relating to the health of his brother which were concerning him at the time.
- [17] He said that he did not get any legal advice about recovery of a debt in relation to a job at 8 Reserve Road, Burleigh Heads, and agreed that he should have got legal advice about that.
- [18] He was asked what steps he had taken about the QBCC matters and said that he went to the Housing Industry Association, and sought internal reviews of the matters, but had not applied to the Tribunal to review the decisions in those matters. He agreed that he should have sought reviews, but said that he didn't think of that because he 'came from a handshake background'.
- [19] He described the job at 16 Bellbird Place, Wishart as '*the most satisfying and best project I ever worked on, and also the last one*'. He said that the certifier had classed it as a carport, but conceded that it could be called a sunroom, and was to be a play area for children. He was not licenced to build a sunroom.
- [20] He had not obtained Development Approval before he commenced construction, and conceded that it would have been a reasonable step to do so before commencing work. He described that as '*my bad*'.
- [21] He said that he had obtained a 50% deposit from the client because '*given my financial state I was unable to afford the materials for such a large structure*'. He said he was open and honest with the client and gave him a substantial discount. However, by June 2014 he was having some financial difficulty.
- [22] At that time, he tried to refinance his apartment to get some cash-flow, sold a block of land, and tried to sell his business. He sold the land in

August 2014 for \$14,000.00 and used the funds to pay off his creditors and '*stay afloat*'. He incurred a \$70,000.00 credit card bill over that period.

- [23] He had been experiencing problems with the Falcon utility that was leaking gas and he traded it, on a Ford Ranger in May 2012. He said that he didn't take any advice as to whether he could afford the lease repayments on the new vehicle saying that '*I thought I was unbeatable*' and agreed that he should have sought advice.
- [24] He was unable to keep up lease payments on the Ford Ranger, his trade debts accumulated, and he ultimately sought advice from a consulting firm, De Jong Read. He hoped they would develop a strategy and a plan to pay off his creditors, but that did not eventuate. They advised him to declare bankruptcy. He said they did tell him about the financial effect of bankruptcy on his being a builder, but his answers were confused as to whether they advised him that he would not have a building licence in the event of bankruptcy.
- [25] He was asked how he was ensuring that he had sufficient working capital to conduct building works, and said that he was '*living day to day*'. He had first tried to sell the business in July 2013, but decided that no-one would buy it with the leaking Falcon which led him to buying the Ford Ranger.
- [26] He submitted that he was a hard worker, and that everyone is entitled to a second chance, that he didn't want to give up, and that he wanted to keep going on building patios.
- [27] Mr Barber's father gave evidence that his son was a perfectionist and worked with pinpoint accuracy.

QBCC submissions

- [28] The QBCC in its Reasons for Decision dated 31 March 2015 stated that it was not satisfied that Mr Barber provided sufficient evidence that he took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the event as required by s 56AD(8A) of the QBCC Act. It made corresponding submissions on the hearing.
- [29] The QBCC submitted that Mr Barber's business was slowing down from the end of 2013, but that he sought and took no appropriate legal or financial advice as to that. He had also not sought financial or legal advice as to the effects of purchasing the Ford Ranger, or to recoup debts owing to him, or to challenge decisions of the QBCC which he saw as wrong.
- [30] It further submitted that Mr Barber had not shown that he had kept proper financial records.

Discussion

- [31] Mr Barber presented as a well-meaning man who was passionate about his work as a builder of patios. He had some personal and business difficulties, and experienced a downturn in his business.
- [32] The QBCC does not have the discretion to categorise a person as a permitted individual unless it is satisfied that the provisions of the QBCC Act are made out.
- [33] It is clear, based upon the evidence and acknowledged by the comments of Mr Barber in his evidence, that he did not seek proper financial or legal advice in relation to the lease of the Ford Ranger, as to recovery of unpaid debts, or as to his overall financial situation until he approached De Jong Read by which time it appears that his financial situation was untenable.
- [34] Mr Barber did not produce proper records as to his last two years of trading, and no material has been produced as to his financial situation in the bankruptcy itself, so it is not possible to outline his actual financial situation.
- [35] It is therefore not possible to conclude that Mr Barber kept proper books of account and financial records as required under s 56AD(8A) of the QBCC Act.
- [36] The consequence of these omissions is that he cannot be seen to have taken all reasonable steps to avoid the events leading to his bankruptcy as required by s 56AD(8A) of the QBCC Act in order to be considered to be declared a permitted individual.
- [37] The decision of the QBCC is the correct and preferable decision, and I confirm that decision, and order accordingly.