

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *All Remedial & Building Services Pty Ltd v Queensland Building and Construction Commission; Moss v Queensland Building and Construction Commission*
[2019] QCAT 214

PARTIES: **IN OCR306-18:**
ALL REMEDIAL & BUILDING SERVICES PTY LTD
(applicant)
v
QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION
(respondent)
IN OCR079-19:
LANCE MOSS
(applicant)
v
QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION
(respondent)

APPLICATION NO/S: OCR306-18; OCR079-19

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 2 August 2019

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Howe

ORDERS:

- 1. The decision of the Queensland Building and Construction Commission dated 29 October 2018 determining that Lance Moss is an excluded individual under s 56AC of the *Queensland Building and Construction Commission Act 1991 (Qld)* is set aside.**
- 2. The decision of the Queensland Building and Construction Commission dated 29 October 2018 determining that All Remedial & Building Services Pty Ltd is an excluded company under s 56AC of the *Queensland Building and Construction Commission Act 1991 (Qld)* is set aside.**

CATCHWORDS: PROFESSIONS AND TRADES – BUILDERS – LICENCES AND REGISTRATION – OTHER MATTERS – where the individual was a director and shareholder of a company at formation – where shortly after the individual left the company – where individual had no further involvement in the company until administrators of the company were appointed some four years later – where the evidence supported a claim by the individual that he was not involved in the affairs of the company during the duration of its trading – where the Commission did not contest or challenge the assertions by the individual that it was not involved in the affairs of the company – where the individual remained a shareholder of the company but in ignorance of the fact – whether the individual was an influential person in respect of the company

Queensland Building and Construction Commission Act 1991 (Qld), s 4AA, s 56AC

Nobelta v Medical Board of Australia [2013] QCAT 730

REPRESENTATION:

Applicant: Mackie Legal

Respondent: Robinson Locke

APPEARANCES: This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009 (Qld)*

REASONS FOR DECISION

- [1] The parties initially sought to have consent orders made in these associated matters.
- [2] Given the orders sought require an exercise of the Tribunal’s review jurisdiction conducted through a process of a fresh hearing on the merits whereby the correct and preferable decision may be made, they cannot be the subject of consent orders between the parties.¹
- [3] The parties have filed a statement of agreed facts and made joint submissions. Statements of evidence have been filed by the applicants. I shall consider the application for consent orders as a joint request for the exercise of Tribunal jurisdiction based on the material filed to date.
- [4] Mr Moss was appointed a director of All Remedial and Building Services Pty Ltd (‘Remedial’) on 28 June 2010. He was appointed a director of All Pro Australia Engineering and Construction Pty Ltd (‘All Pro’) on 7 May 2014. He ceased to be a director of the latter company on 19 April 2016.

¹ *Nobelta v Medical Board of Australia* [2013] QCAT 730, [22].

- [5] Administrators were appointed to All Pro on 5 September 2018.
- [6] On 29 October 2018 the Commission determined that the appointment of administrators to All Pro was a relevant company event under s 56AC of the *Queensland Building and Construction Commission Act 1991* (Qld) ('QBCC Act'); that Mr Moss was a 50% shareholder of All Pro from 7 May 2014 until 17 April 2018; by s 56AC(2) and (4) of the QBCC Act a person is an excluded individual for a relevant company event if the individual was a director, secretary or influential person of a construction company within two years immediately before the relevant company event; and by s 56AC(6) Remedial became in turn an excluded company because Mr Moss (a director of Remedial) was an excluded individual.
- [7] Mr Moss has worked as a builder since 2006 until his licence was cancelled by the Commission in October 2018.
- [8] In May 2014 Mr Moss, together with a school friend, Mr Low, incorporated All Pro on 7 May 2014 as a building company. Both became directors. Both held shares. Almost immediately after commencement however, they discussed bank accounts for the company but could not agree. Mr Moss proposed a joint account that both could access. Mr Low refused that proposal. That impasse continued until June 2014 when Mr Moss "pulled out" of the company and thereafter ceased to have any involvement in All Pro. At no time did he ever do any building work for the company. From June 2014 Mr Moss had no further dealings with All Pro. He resumed doing building work through his company Remedial.
- [9] In 2016 Mr Low asked Mr Moss to resign as a director. Mr Moss did, effective from 19 April 2016.
- [10] Mr Moss believed that upon signing the relevant forms resigning as director the shares held by him in All Pro would also be transferred out of his name. They were not however. He first knew that when he was advised by the Commission in September 2018 that he was determined to be an excluded individual because All Pro had had administrators appointed.
- [11] An affidavit² sworn by Steven Calamatta the general manager for All Pro from 9 June 2014 until 28 May 2018 confirms that Mr Moss and Mr Low fell out over their inability to agree on a joint banking account and that Mr Moss removed himself from the company at a very early stage without carrying out any work for All Pro.
- [12] Mr Calamatta states in his affidavit that Mr Moss held no position of influence in respect of any aspect of the business affairs of All Pro at any time during his time as general manager of the company.
- [13] Mr Calamatta states in his affidavit that to the best of his knowledge All Pro was solvent and able to meet its financial liabilities and obligations when Mr Moss resigned as a director of All Pro in April 2016.
- [14] Mr Moss also filed an affidavit on 15 March 2019. In that affidavit he confirms that from June 2014 he had no involvement with All Pro. He confirms the matters set out by Mr Calamatta in his affidavit. He states that when he signed forms resigning as director he also thought that would mean he would no longer be a shareholder in the

² Filed 14 March 2019.

company either. He only realised he was still a shareholder in 2018 when he received the Commission's notification that he was deemed an excluded individual from September 2018.

[15] The Commission does not contest the evidence of Mr Moss or Mr Calamatta.

[16] The QBCC Act provides:

56AC Excluded individuals and excluded companies

...

- (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; ... 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—

...

- (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.

...

- (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.

...

- (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;

[17] By s 4AA of the QBCC Act:

Who is an *influential person* for a company

- (1) An *influential person*, for a company, is an individual, other than a director or secretary of the company, who is in a position to control or substantially influence the company's conduct.

...

- (3) Without limiting subsection (1), a person may be an influential person for a company if the person—

...

- (c) directly or indirectly owns, holds or controls 50% or more of the shares in the company, or 50% or more of a class of shares in the company; or
- (d) gives instructions to an officer of the company and the officer generally acts on those instructions; or
- (e) makes, or participates in making, decisions that affect the whole or a substantial part of the company's business or financial standing; or
- (f) engages in conduct or makes representations that would cause someone else to reasonably believe the person controls, or substantially influences, the company's business.

[18] Mr Moss remained a 50% shareholder of All Pro during the two-year period preceding the appointment of administrators. I find Mr Moss was unaware of his shareholding in All Pro however during that period. Nothing suggests he controlled or had any influence at all over the conduct of the affairs of All Pro from very shortly after the company commenced in 2014 through to when administrators were appointed in 2018. That contention is not challenged by the Commission. I find that to be the case. As such I conclude that, despite his 50% shareholding, Mr Moss was not an influential person in respect of All Pro at any relevant time for the purpose of the application of s 56AC.

[19] Given that finding, I find Remedial in turn is not an excluded company pursuant to s 56AC(6) based on Mr Moss' status as an excluded individual.

[20] No party seeks costs and it is appropriate that no order as to costs be made.