QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Hannan v Queensland Building and Construction commission* [2020] QCAT 248
PARTIES:	**MITCHELL GEORGE HANNAN** (applicant) **v** **QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION** (respondent)
APPLICATION NO/S:	OCR225-19
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	19 March 2020
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	Senior Member Aughterson
ORDERS:	**1. The application to extend or shorten a time limit filed on 27 June 2019 is refused.** **2. The application to review a decision fled on 27 June 2019 is dismissed.**
CATCHWORDS:	ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – where application to review a decision filed out of time- whether extension of time should be granted *Corporations Act,* s 95A(1), s 491(1) *Queensland Building and Construction Commission Act* 1991 (Qld), s 56AC, s 56AD, s 56AE *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 33 *Bank of Australasia v Hall* (1907) 4 CLR 1514 *Bramanti v Queensland Building and Construction Commission* (unreported, Queensland Civil and Administrative Tribunal, 18 July 2019) *Ezra Constructions Pty Ltd & Ors v Queensland Building and Construction Commission & Ors* [2019] QSC 47 *Hussain v CSR Building Products Ltd* (2016) 246 FCR 62

Jensen v Queensland Building and Construction Commission [2017] QCAT 232
Reeve v Hamlyn [2015] QCATA 133
Sandell v Porter (1966) 115 CLR 666
Treloar Constructions Pty Ltd v McMillan [2017] NSWCA 72

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] On 27 June 2019, the applicant filed an application to review a decision of the respondent that the applicant is an excluded individual within the meaning of s 56AC of the *Queensland Building and Construction Commission Act* 1991 (Qld) ('the Act'), on the basis that he was a 'director or secretary of, or an influential person for' the construction company Tricore Trade Services Pty Ltd ('Tricore'). A liquidator was appointed for Tricore on 3 April 2019. The decision of the respondent was made on 20 May 2019 and notified to the applicant on 22 May 2019. By s 33 of the *Queensland Civil and Administrative Tribunal Act*, an application to review a decision must be made within 28 days of notification of the decision.

[2] Following directions made on 10 July 2019, on 2 August 2019 the respondent filed submissions opposing an extension of time, primarily on the ground that the application had no reasonable prospects of success. Given those submissions, directions were made on 9 August 2019 requiring the applicant to file any submissions in response by 30 August 2019. No submissions were filed.

[3] The principles applicable to an application for an extension of time are well settled. They are:[1]

(a) the extent of the delay and whether there is a satisfactory explanation for the delay;
(b) the merits of the application and prospects of success;
(c) the likelihood of prejudice to other parties; and
(d) whether the extension of time is in the interests of justice.

[4] In relation to delay, the applicant refers to serious family health issues and commitments to the company's liquidation process. He also says that he thought the 28 day limitation referred to business days. While it is not clear why he should have imagined that to be the case, the delay in the present case is relatively short.

[5] It is the merits of the application that is the primary issue in the present case; that is, whether there are arguable grounds to review the decision that the applicant is an excluded individual under the Act. The answer to that question depends on the operation of s 56AC of the Act. In part, s 56AC provides:

> (2) This section also applies to an individual if –
> (a) a construction company, for the benefit of a creditor –

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1 *Reeve v Hamlyn* [2015] QCATA 133 at [36] (footnotes omitted).

(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 or, 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] Section 56AE(a) of the Act provides that the Commission 'must not grant a person a licence if the person is … an excluded individual for a relevant event'.

[7] In the application to review, the applicant provided lengthy notes and submissions stating why he thought that the decision of the respondent was wrong. They address what the applicant saw as the reasons for the failure of the company, including the holding of un-recoverable bad debts. He states that he did not believe that he was responsible for the company's failure and that on a continuing basis he provided funds to the company from his own resources.

[8] However, as submitted by the respondent, s 56AC of the Act does not give the Commission a discretion to take such matters into account. As noted in *Ezra Constructions Pty Ltd & Ors v Queensland Building and Constriction Commission & Ors*,[2] the amendments to the Act which took effect on 1 July 2015 removed the earlier right of an identified excluded individual, under then s 56AD of the Act, to apply to the Commission to be categorised as a 'permitted individual'.

[9] Accordingly, whether or not a person can resist being categorised as an excluded individual now rests on the terms of s 56AC of the Act. Each of the matters that must be satisfied under s 56AC is addressed in turn.

[10] First, by s 56AC(2)(a), the relevant company must be a 'construction company'. By s 56AC(7), that means 'a company that directly or indirectly carries out building work or building work services in this or another State' and includes a company that within two years before the relevant company event, as to which see s 56AC(2)(b), carried out such work. It is not in dispute that Tricore was a construction company.[3]

[11] Second, a 'provisional liquidator, liquidator, administrator or controller' must have been appointed: see s 56AC(2)(a)(1) of the Act. It is not in dispute that a liquidator was appointed for the company.[4]

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2 [2019] QSC 47, [29]. See also *Bramanti v Queensland Building and Construction Commission* (unreported, Queensland Civil and Administrative Tribunal, 18 July 2019).
3 Submissions of applicant 2 May 2019, [6]; submissions of respondent, [6].
4 Submissions of applicant 2 May 2019, [9aa]; Submissions of respondent, [23(b)].

[12] Third, by s 56AC(2)(a), the liquidator must be appointed 'for the benefit of a creditor'. In *Ezra Constructions*, it was stated that those words 'are to be given a wide interpretation'.[5] It was added:[6]

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

[13] The applicant submits that the liquidator was not appointed 'for the benefit of a creditor' because that was not the object of the appointment. Rather, it was a voluntary appointment of 'an independent, suitably qualified person to assist and take control of the company's legal and debt recovery affairs due to my immediate personal circumstances and debt recovery events'.[7] It was added that 'the company remained solvent at the time of the event' and there were 'no petitioning creditors that would benefit from the liquidation'.[8]

[14] However, on the approach adopted in *Ezra Constructions*, it is evident from the applicant's own submissions that the appointment of the liquidator was 'for the benefit of a creditor'. After referring to the outstanding debt owed to Tricore, which 'would not be available in the immediate future', it is stated:[9]

> TriCore Trade or myself personally were not in a position to:
>
> (i) Fund the immediate and future legal costs associated with pursuing the claim.
>
> (ii) Fund/pay the current creditors of Tricore Trade as a result of the unpaid $374,999.83.
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> (iii) Communicate with TriCore Trades' Creditors, Suppliers, Staff, Clients and other affected people anything different than the above.
>
> (iv) Maintain or negotiate adjustments to the current payment arrangements to the ATO.

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5 *Ezra Constructions Pty Ltd & Ors v Queensland Building and Constriction Commission & Ors* [2019] QSC 47, [44].
6 Ibid, [44]-[45].
7 Submissions of applicant 9 May 2019, [13] & [15a].
8 Ibid, [16a].
9 Submissions of applicant 2 May 2019, [9z[& [9aa].

> As TriCore Trade had 3-4 projects currently in construction, requiring daily ordering/purchasing of materials, resources etc. I felt obliged to make a fast & immediate decision to limit any further costs or expenses incurred to TriCore Trade. And subsequently ceased trading immediately, placing Tricore Trade Services Pty Ltd into liquidation on 3rd of April 2019.

[15] After further reference to placing the company in liquidation, the applicant also states:[10]

> I am not naïve to the impact this has had on the many other businesses, individuals and families as a result of TTS's liquidation. My understanding of these subsequent impacts was a large contributing factor to my decision to liquidate on such short notice – as continuing to trade or prolonging the debt recovery any further would only worsen the situation to these people. The decision to liquidate Tricore Trade following receipt of the latest information surrounding the debt recovery, was done so that the benefit of the creditors and in accordance with my roles & duties as director.

In separate submissions, it is further stated:[11]

> …following my immediate personal circumstances and debt recovery events, I was not in a positon to accurately coordinate the company structure and payment of current creditors…

[16] On that basis, it is evident that the liquidator was appointed 'for the benefit of a creditor'.

[17] Fourth, with reference to s 56AC(2)(b) of the Act, three years have not elapsed since the 'relevant company event'; that is, the appointment of the liquidator on 3 April 2019.[12]

[18] Fifth, with reference to s 56AC (2)(c) of the Act, it is not in dispute that when the 'relevant company event' happened the applicant was 'a director or secretary of, or an influential person for, the construction company'.[13]

[19] Finally, there is a qualification in s 56AC(4) of the Act. Subsection 56AC(4) provides:

> 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 (emphasis added).

[20] In the material in support of his application, the applicant submitted that at the relevant time Tricore was solvent.[14] While the other submissions of the applicant, noted at [14]-[15] above suggests otherwise, further directions were issued on 31 October 2019, requiring the applicant to file any evidence showing that Tricore was solvent at the time of the appointment of the liquidator, with supporting submissions, by 22 November 2019. The respondent was directed to file any

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10 Submissions of the applicant 2 May 2019, [11a].
11 Submissions of the applicant 9 May 2019, [15di].
12 Submissions of applicant 2 May 2019, [9aa]; Submissions of respondent, [23(b)].
13 Submissions of applicant 2 May 2019, [6] & [9bb]; Submissions of respondent, [23(d)] & [23(e)].
14 Submissions of applicant 2 May 2019, [6] & [9bb];

evidence and submissions in response by 29 November 2019. Submissions and material was filed by both parties.

[21] The term 'solvent' is not defined in the Act. Section 95A(1) of the *Corporations Act* provides: 'A person is solvent if, and only if, if the person is able to pay all the person's debts, as and when they become due and payable'. Under this 'cash flow' test of insolvency,[15] it is not a question of whether the person has an excess of assets over liabilities, but rather one of whether debts can be paid as they become due and payable.[16] As stated by Barwick CJ in *Sandell v Porter*:[17]

> The conclusion of insolvency ought to be clear from a consideration of the debtor's financial position in its entirety and generally speaking ought not to be drawn simply from evidence of a temporary lack of liquidity. It is the debtor's inability, utilizing such cash resources as he has or can command through the use of his assets, to meet his debts as they fall due which indicates insolvency.

[22] Much of the material filed by the applicant in response to the directions of 31 October 2019 was material previously filed and which largely related to the bad debts, the circumstances surrounding the liquidation and personal issues. The applicant noted that all available documentation had been surrendered to the liquidator.

[23] The material filed by the respondent indicates that Tricore was not solvent at the relevant time. ASIC searches indicate that the liquidators were appointed on 3 April 2019 pursuant to a creditors' voluntary winding up under s 491(1) of the *Corporations Act*.[18] The liquidators provided to the respondent its first and second reports to the creditors, dated 15 April 2019 and 3 July 2019 respectively.[19] In summary, those reports indicate that Tricore's tax debt at the date of liquidation was at least $821,327;[20] there was an estimated deficiency as regards assets to liabilities in the sum of $1.8m;[21] Tricore had no realisable assets;[22] it is likely that all secured creditors will suffer shortfalls in their security;[23] priority unsecured creditors were owed $296,768;[24] and in relation to known unsecured creditors there were outstanding debts of approximately $1.735m.[25] It was concluded that Tricore had a significant net asset deficiency since at least 30 June 2018, indicating that Tricore was 'unlikely able to pay its debts as and when they fell due from at least that date".[26] There being no evidence as to a capacity to pay debts as they became due by

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15 Compare the 'balance sheet' test, under which, in essence, insolvency arises where total liabilities outweigh the total value of assets: see, generally, Andrew R Keay, *The insolvency factor in the avoidance of Antecedent Transactions in corporate liquidations*, (1995) 21/2 MULR 305.

16 See *Bank of Australasia v Hall* (1907) 4 CLR 1514, 1528, per Griffith CJ; *Hussain v CSR Building Products Ltd* (2016) 246 FCR 62, [58]. See also *Treloar Constructions Pty Ltd v McMillan* [2017] NSWCA 72, [76]-[83].

17 (1966) 115 CLR 666, 670-671. See also *Hussain v CSR Building Products Ltd* (2016) 246 FCR 62, [62].

18 Submissions of the respondent filed 18 December 2019, annexures CS-1 and CS-2.

19 Ibid, annexures CS-3 and CS-4.

20 Ibid, annexures CS-4, para 2.2(i).

21 Ibid, para 3.

22 Ibid, p 7.

23 Ibid.

24 Ibid, para 3(v).

25 Ibid, para 3(vi).

26 Ibid, p 12.

drawing on other sources,[27] it is evident that at the relevant time Tricore was not solvent.[28]

[24] On the basis of the matters outlined above, it appears that the application is without merit and has little or no prospect of success.

[25] In relation to the issue of prejudice, while the respondent refers to *Jensen v Queensland Building and Construction Commission* in support of the importance of adherence to time limits,[29] no reference is made to any specific prejudice to the respondent should an extension of time be allowed.[30]

[26] The final principle to be considered relevant to an application to extend a time limit is whether an extension of time is in the interests of justice. In my view it is not in the interests of justice to pursue an application that seems doomed to fail, mindful not only of the time and costs to the parties but also of the impact on the resources of the Tribunal. As much as the applicant's circumstances attract sympathy, particularly in circumstances where a course of action is taken because of bad debt, it remains that the prospects for any successful review of the respondent's decision rest on the terms of s 56AC of the Act, as outlined above. It is also noted that the applicant did not take the opportunity afforded to him by the directions made by the Tribunal on 9 August 2019 to respond to the submissions filed by the respondent on 2 August 2019. The respondent there outlined and provided submissions in relation to the factors to be considered in any application for an extension of time.

[27] In the circumstances, the application for an extension of time should be refused and the application to review a decision should be dismissed.

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27 See, for example, *Duncan v Commissioner of Taxation* (2006) FCA 885; *Lewis v Doran* (2004) 50 ACSR 175.

28 The same conclusion is evident should a 'balance sheet' test be applied: see fn. 15, above.

29 [2017] QCAT 232, [94]-[99]

30 Submissions of respondent, [49]-[50].