DINSEY:
NOT A MICKEY MOUSE DECISION
QBCC CONFERENCE

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1. INTRODUCTION

1.1 The Appeal Tribunal decision in *Dinsey* changed the approach to the exclusion provisions in Part 3A of the *Queensland Building and Construction Commission Act*.

1.2 As a result, where multiple companies suffer insolvency events all arising from what is, in substance, the one set of circumstances applying to those companies, there is only to be one trigger Relevant Event.

1.3 There are clearly many good reasons why it is common to divide business and development enterprises amongst a number of companies. These particularly include tax reasons and asset protection reasons. Also, of course, for licensing purposes the turnover of a building company includes gross income from all sources, whether geographical or from non-building work. Hence, if income other than from building work is earned by the one entity, it will affect its capital requirements for the purposes of the *Financial Requirements for Licensing*.

1.4 By way of example, a group of companies might include:

(a) A trading entity;

(b) An asset holding entity – the assets might be land or equipment;

(c) For developers, a sales/marketing entity; and

(d) Where the group also manufactures product, a manufacturing entity.

1.5 The aim of this paper is to discuss the application of Part 3A of the Act to such a group.

2. LAW REGARDING EXCLUDED INDIVIDUALS

2.1 Section 56AC of the QBCC Act provides that a person is an Excluded Individual if, within the last five (5) years, they have been a director, secretary or influential person in a company to which there has been an insolvency event for the benefit of a creditor.

2.2 S.56AC(6) provides as follows:

> *"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."*

2.3 This aims to prevent there being multiple relevant events where there is more than one insolvency event.

3. APPEAL TRIBUNAL DECISION IN DINSEY V QBSA

3.1 The fundamental finding in the appeal decision in *Dinsey* [2013] QCATA 225 was that the reference to "the company" could refer to multiple companies:

> *[40] It may readily be accepted that the "first event" must refer to a particular and therefore single company event. But there is then reference to "another company event (the other event)" (emphasis added). This easily brings into reckoning an event in relation to a second company. "Another relevant company event" is by no means limited to an event affecting the company involved in the first event. There is no good reason why the "first event" may not apply to one company, and "the other event" to a second company. There is equally no good reason in logic or fairness why the final words of the section ("applying to the company") should be confined to a single company, namely the company involved in the first event.*
>
> *[41] Indeed s 32C of the Acts Interpretation Act 1954 suggests otherwise. It states:*
>
> *32C Number*
> *In an Act -*
> *(a) words in the singular include the plural; and*
> *(b) words in the plural include the singular.*
>
> *[42] Such an interpretation of course may be displaced, wholly or partly, "by a contrary intention appearing in any Act" But when one reads s 56AC(6) as a whole, and in context, I do not think that any intention is shown contrary to inclusion of the plural in the final words of the section "applying to the company". If anything, the context suggests that the plural was intended. The section makes perfect sense if the final words "the company" are read as including "companies".*

4. MULTIPLE EVENTS TO THE SAME COMPANY

4.1 A plain reading of s. 56AC(6) shows that if multiple events to the same company arise from the same set of circumstances, they must be considered as one only Relevant Event.

4.2 Almost every company that is placed in administration, at the second meeting of creditors will be placed into liquidation or enter a deed of company arrangement. Clearly, these are events that follow as an obvious consequence flowing from the commencement of the administration.

4.3 It is conceivable however, that multiple events to the one company do not arise from the same set of circumstances. For example:

(a) Appointment of receiver will usually occur due to breach of a finance facility. The reasons for such appointment will be the reasons for breach of the finance facility; and

(b) In the meantime, the company may not have paid tax for a long time and the directors might receive a Director Penalty Notice. As a result, the dominant reason for the administration is the unpaid tax, the reason for which might stem from something different.

4.4 In these circumstances, it might be that, following consideration of the circumstances, the triggers are different.

5. MULTIPLE COMPANIES EACH SUFFERING AN EVENT

5.1 The decision in *Dinsey* provides confirmation that Section 56AC(6) can apply to multiple companies. It does not however mean that if companies are in a group, it must be considered that there is one only event.

5.2 For the section to apply, both events must result from, what is in substance the one set of circumstances applying to both companies.

5.3 It is likely that if a group of companies with the same directors and shareholders are placed into the same type of insolvency event on the same day the events arise from the one set of circumstances. Practically, it would be unusual for this not to be the case. However, coincidence in time is not the test. The test requires the one set of circumstances applying to the companies, and that test must be satisfied even where there is coincidence in the insolvency events.

5.4 The question however becomes more difficult where the companies are placed into different types of insolvency events months apart. In those circumstances, after review they might or might not arise from the one set of circumstances.

5.5 As usual in these types of matters, the facts of each matter need to be considered on their own merits.

5.6 Whether multiple insolvency events arise from the same set of circumstances, they must necessarily be approached by identifying the cause of the Relevant Event to each discrete company within the group.

5.7 The words "*consequences flowing from….the same set of circumstances*" raises consideration of causation of the events.

5.8 Considerations that would likely indicate similar causation in most cases would be:

(a) Whether the companies had finance that was cross collaterised across the group – hence through guarantees. As a result, if one company breaches the facility, then all companies are in breach;

(b) Whether there are loans between the companies (related entity loans) through which different entities within the group were funded;

(c) The group was involved in the same venture.

5.9 Factors that might suggest different causes of the Relevant Events are:

(a) The interests of one company have been ignored to the benefit of another. Whilst a permitted individual case, there was some discussion of this point in *Alafaci v QBCC* [2014] QCAT 499 at [40] to [43]:

> *[40] Mr Alafaci contends that the insolvency of Mars West and of Planet Plumbing (VIC) are both consequences flowing from the one set of*

> *circumstances and that he ought not be regarded as an excluded individual in respect of the Second Event. This was a contention first raised during the hearing. Mr Alafaci did not seek to review the QBSA's decision that he was an excluded individual for the Second Event. This application is to review the QBSA's decision not to categorise him as a "permitted individual" in respect of the Second Event.*
>
> *[41] …*
>
> *[42] Mr Alafaci did not, in substance, make any submissions as to why the Dinsey decision, which related to a review of a QBSA decision that Mr Dinsey was an excluded individual, is relevant to the Tribunal's jurisdiction to determine a review of a decision to refuse to categorise Mr Alafaci as a "permitted individual". I am not satisfied that it is directly relevant and refuse the request to relist the matter for further oral and written evidence.*
>
> *[43] While the insolvency of Mars West factually contributed to the insolvency of Planet Plumbing (VIC) I am not satisfied that the insolvency of Mars West and of Planet Plumbing (VIC) are both consequences flowing from the one set of circumstances. A circumstance that resulted in the insolvency of Planet Plumbing (VIC) was borrowing money from Mars West, a company experiencing cash flow difficulties, where Planet Plumbing (VIC) had no or little prospect of repaying the amount borrowed. Planet Plumbing (VIC) also had other creditors, including the ATO, which it had no or little prospect of paying.*

(b) No cross-collateralisation or inter-company loans – hence the companies' financial fortunes are not inter-related;

(c) A tax issue in one only company.

5.10 The fact that different types of insolvency events occur on different dates is not conclusive that the events have different causes. It does however hint that there might be different factors involved.

6. MULTIPLE BANKRUPTCY EVENTS

6.1 Section 56AC(5) of the QBCC Act provides:

> *(5) An excluded individual for a relevant bankruptcy event (the first event) does not also become an excluded individual for another relevant bankruptcy 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 individual.*

6.2 It does not seem possible for this to apply to bankruptcies of multiple individuals.

6.3 On that basis, this can only apply to different events to the same person – such as signing an authority pursuant to s. 188 of the Bankruptcy Act followed by bankruptcy.

7. WHAT ARE THE PRACTICAL RAMIFICATIONS ARISING FROM DINSEY?

7.1 If insolvency events to more than one company are in truth only one set of circumstances applying to the group, it means that, if the licensee wants to be permitted, there still needs to be a permitted individual application.

7.2 Prior to the Appeal Tribunal decision, each event was treated separately – hence the permitted individual test is considered from the perspective of the relevant company, not globally from the group perspective – see *Ernst v QBSA* [2011] QCATA 155 at [55] to [57], citing *Walker v Wimborne* [1976] HCA 7.

7.3 The above point highlights that it is necessary to determine what constitutes "the Relevant Event" before the permitted individual test can be considered. That is, to consider the "reasonable steps test" as required by s. 56AD(8), it is necessary to identify "the Relevant Event". Only once this is done is it possible to identify "the circumstances that resulted in the happening of the Relevant Event" or consider the steps taken to avoid such event.

7.4 Conversely, if there is not finality as to whether or not 56AC(6) applies, and hence it remains uncertain as to what constitutes the "Relevant event", it does not seem feasible to attempt assessment of what caused "the event" or what steps might have been taken to avoid it.

7.5 If a person is categorised as a Permitted Individual for a company event, and later claims that another event resulted from the same set of circumstances, the assessment of the later matter could in some instances sit awkwardly with earlier assessment of the permitted individual matter. That is:

(a) The earlier Permitted individual application must proceed on a finding as to what constituted the Relevant Event – namely to the insolvency of that company;

(b) In such matter, there must have been consideration of consequential elements of the test, namely identification of the circumstances that caused that Relevant Event, and assessment of reasonable steps based upon those circumstances;

(c) Such application will be premised upon the permitted individual application that was lodged;

(d) To allow a claim at a later time that an insolvency event suffered by a different company flowed from the same set of circumstances must change the identification of the Relevant Event, and therefore the consequential elements in the earlier permitted individual case.

7.6 As a result, at first glance, it would seem:

(a) Inappropriate to proceed with permitted individual review/s when it is not fixed as to whether or not s. 56AC(6) applies; and

(b) If a permitted individual application has been dealt with and decided, it could be inappropriate to re-open the issue as to identification of the circumstances.

8. WHAT AFFECT IS THERE ON MATTERS RESOLVED BEFORE 2013?

8.1 The statute law on this point has not changed since 1999. However, prior to the appeal decision there were cases decided, both by BSA and the Tribunal, applying the old approach to the law.

8.2 Where a decision was made previously by a Tribunal, this would be binding upon the Commission. In those circumstances, it would not be appropriate for the Commission to make a decision departing from the Tribunal's adjudication. Therefore, if a person was aggrieved, they should apply to the Tribunal for extension of time to re-open their case. Whether or not that would, or even could, be successful, is a matter for consideration beyond this paper.

8.3 If a decision has been made by BSA and is not the subject of review in the Tribunal, it would be sensible from the position of the builder to make an informal application to the Commission asking that they change their decision. If not satisfied with the response, then apply to QCAT for an extension of time within which to proceed with the review.

9. THE PROPOSED AMENDMENT TO S.56AC

9.1 The Report into the BSA issued in November 2012 included comment from HIA (per page 65 of the report):

> *"The current determinations of "excluded" and "a permitted" individual under the QBSA Act are ambiguous to say the least. The format of determining excluded and permitted status relies on "event" deeming provisions. …...The biggest concern is that what most people would regard as one event counts as two in the provisions of the Act. Where a building company fails, this often results in the bankruptcy of the directors. Whilst the failure of the business and the bankruptcy had the same cause, the Act requires these to be counted as two events resulting in permanent exclusion from the industry of the director"*

9.2 As a result the Committee commented (also page 65):

> *"The Committee is concerned that the QBSA's approach to the deeming of financial events (such as bankruptcy, insolvency, etc) has an adverse and potentially unfair impact upon licensees.*
> *The QBSA currently deems the failure of a business and the consequential bankruptcy of the individual directors as two events. Whilst one financial event recorded against an individual can result in that individual becoming unlicensed for five years, two financial events recorded against a licensee results in permanent exclusion."*

9.3 Recommendation 35 stated:

> *"The Committee recommends that the Minister for Housing and Public Works seek amendment to the QBSA Act to provide that where an individual's "relevant bankruptcy event" and "a relevant company*

event" stem from the same financial incident, that they be deemed one event for the purposes of penalties.

9.4 In May 2013 the Queensland Government Response to that Report supported amendment to s. 56AC. In this regard a "relevant bankruptcy event" and a "relevant company event" should be treated as one event if they arise out of the same incident.

9.5 The Bill to introduce this legislation does not appear as yet to have been introduced to parliament.

9.6 Assuming the Bill proposes legislation consistent with the Queensland Government Response mentioned above, considerations that might arise in interpreting the new legislation are:

(a) Similar to the analysis in relation to multiple corporate events, the fact that there is a company insolvency event and a bankruptcy event does not mean automatically that they arise from the same set of circumstances;

(b) It is likely that in most, if not all, matters, the company event will occur first in time, followed later by the bankruptcy event. It is however feasible that a bankruptcy event could occur first, and trigger a company insolvency event;

(c) Assuming the company event occurs first, it is likely that the cause of that event will not be relevant to considering whether the bankruptcy event arises from the same set of circumstances.

(d) In considering whether the bankruptcy event arose from the same set of circumstances as the company event, it would seem critical to identify the causes of the bankruptcy event;

(e) If the bankruptcy event arises from liabilities triggered by default of the company and only from those liabilities, then it would follow that the bankruptcy arises from the same set of circumstances. Examples of personal liabilities triggered by default of the company might be:

- Director's guarantees – note that subject to the wording of the amendment, it might be that the reasonableness of giving such guarantee is not a relevant consideration;
- Director Penalty Notice;
- QBCC debt pursuant to s. 111C;
- Breach by company of Cross-collaterised finance triggering default. In reality though, this is another example of a guarantee.

(f) Factors that might suggest that the bankruptcy did not stem from the corporate insolvency event might be where the bankruptcy results from:

- Personal credit card debt from consumer spending;

- Personal income tax debt;
- Gambling.

(g) The point above illustrates that, again subject to the wording of the amendment, the relevant consideration is “causation” of the events, not “reasonable steps”.

9.7 As to whether the amendment has any retrospective effect, it will be necessary to await introduction of the Bill.

10. SUMMARY

10.1 The critical consideration in applying s. 56AC(6) is identification of the causation of the events. As outlined above, each case turns upon its own facts.

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