

CITATION: *Vadasz v Queensland Building Services Authority* [2013] QCAT 84

PARTIES: Michael Christopher Vadasz t/a Australasian Piling Company
(Applicant)
v
Queensland Building Services Authority
(Respondent)

APPLICATION NUMBER: OCR044-12 / OCR087-12

MATTER TYPE: Occupational regulation matters

HEARING DATE: 8 February 2013

HEARD AT: Brisbane

DECISION OF: **David Paratz, Member**

DELIVERED ON: 14 February 2013

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. The decision of the Queensland Building Services Authority made on 22 November 2011 to refuse to categorise Mr Michael Christopher Vadasz as a “permitted individual” pursuant to s 56AD of the *Queensland Building Services Authority Act 1991* is set aside.**
- 2. I order that Mr Michael Christopher Vadasz be categorised as a “permitted individual” pursuant to s 56AD of the *Queensland Building Services Authority Act 1991*.**
- 3. The stay of the decision of the Queensland Building Services Authority to cancel the license of Mr Michael Christopher Vadasz made on 20 January 2012, made by the Tribunal on 7 December is lifted.**
- 4. The decision of the Queensland Building Services Authority to cancel the license of Mr Michael Christopher Vadasz made on 20 January 2012 is set aside.**
- 5. Either party has leave to apply to the Tribunal for further or other orders**

necessary to give effect to my decision in this matter.

CATCHWORDS: PERMITTED INDIVIDUAL – pile driver contractor – personal Bankruptcy – all reasonable steps taken to avoid the circumstances – effect of global financial crisis – financier selling equipment – discretion of Queensland Building Services Authority

Queensland Building Services Authority Act 1991, ss 56AD, 56AD(8), 56AD(8A)
Queensland Civil and Administrative Tribunal Act 2009, s 20

Yunan v Queensland Building Services Authority [2011] QCA 1

APPEARANCES and REPRESENTATION (if any):

APPLICANT: Self represented

RESPONDENT: Queensland Building Services Authority represented by Mr Malcolm Robinson of Robinson Locke Litigation Lawyers Pty Ltd

REASONS FOR DECISION

- [1] This is essentially an application by Mr Vadasz to be declared as a “permitted individual” under s 56AD of the *Queensland Building Services Authority Act 1991* (the Act).
- [2] There are two applications in this matter that were heard together.
- [3] OCR044-12 is the principal application for a review of the decision of the Authority to refuse to declare Mr Vadasz as a permitted individual, which was filed on 6 February 2012. Mr Vadasz was granted an extension of time by the Tribunal to make that application on 8 March 2012.
- [4] An attempt had been previously made in December 2011 by Mr Vadasz to apply to this Tribunal to have the permitted individual decision reviewed, but that application was mislaid somewhere between Australia Post and the Registry, and was never filed. As a result, the Authority proceeded to cancel his licence in the absence of a review application.
- [5] OCR 087-12 relates to the decision of the Authority to cancel the licence of Mr Vadasz under the Act. On 7 December 2012, the Tribunal granted a stay of that decision.

- [6] The two applications follow each another. If the “permitted individual” application succeeds, then entitlement to a licence would follow (subject to fulfilment of usual conditions).
- [7] Mr Vadasz applied to the Authority to be categorized as a permitted individual on 21 November 2011. That application was refused on 22 November 2011.
- [8] The “relevant event” was the personal bankruptcy of Mr Vadasz on 7 December 2010.
- [9] The petitioner in the bankruptcy was Holcim (Australia) Pty Ltd, a concrete supplier. The amount of the outstanding judgment debt was \$42,435.78.
- [10] Mr Vadasz had conducted a business as a pile driving contractor for 41 years before his bankruptcy. He operated as a sole trader and bore personal liability for the business.
- [11] He had exclusive licence for Australia of innovative pile driving machinery known as G-pile which hydraulically pressed precast concrete piles in to the ground. The machinery avoids the noise and vibration associated with conventional equipment.
- [12] In 2006, he had a turnover of over \$6 million and employed about 30 people.
- [13] The machinery was under lease to CBFC. Mr Vadasz says that as a result of the global financial crisis, that the building industry came to a standstill, and three major jobs, worth \$10 million in total, which he had in line were all suspended. This caused him a cash-flow shortfall and he was unable to keep up the lease payments.
- [14] His business was clearly under financial stress throughout 2010. He was forced to sell his house and his business premises, and injected those funds to reduce debt. He also experienced a marriage breakup prior to, or in, this period.
- [15] The CBFC called in the debt, in October 2010, and appointed a receiver over the operating assets of his business, whilst he was arranging refinancing with another lender. According to Mr Vadasz, CBFC sold the \$3 million worth of machinery for \$340,000 to his major competitor. The effect was that he was unable to continue to operate on the same basis, and was unable to resist the bankruptcy application.
- [16] The effect of the bankruptcy was that he was forced to sell his remaining equipment, and he says he was left with nothing.
- [17] Since his bankruptcy he has made regular payments to his trustee in bankruptcy, and is attempting to rebuild his business. He says that friends in the industry have supported him with loans, and assistance, and he has been able to recover use of his original G-pile machinery. He is now 60 years of age. He has been able to have his licence reinstated in South

Australia and New South Wales. He has the prospect of work in Queensland, but needs his licence reinstated in order to undertake it.

- [18] The evidence of Natasha Dennis, Senior Compliance Officer with the Authority, was that when she made her decision on 22 November 2011, on the basis of the application made on 21 November 2011 and the documents submitted with it, that she was not satisfied that Mr Vadasz took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event, and took any or all of the steps referred to in s 56AD(8A) of the Act.
- [19] The application of Mr Vadasz to the Authority was prepared by himself and was handwritten. After that application was refused, Mr Vadasz engaged solicitors in relation to these applications, and they prepared two substantial ring-binders of financial and supporting material on his behalf.
- [20] In considering this application, I stand in the place of the original decision maker, (s 20 *Queensland Civil and Administrative Tribunal Act 2009*) and am to decide the material on the basis of the material before me. I have substantially much more material before me than Ms Dennis had.
- [21] It is fair to describe the original application to the Authority as sparse, and as not doing justice to the case for Mr Vadasz. The Authority generally found that there was not evidence that satisfied the requirements of the Act. I consider that the Authority was justified in refusing the application at that time on the material before it.
- [22] It is now for me to consider the application on the material before me. The solicitor for the Authority submitted that I am to:
2. consider all material and exercise the discretion conferred by 2.51AD(8) of the Act – see *Hyde v QBSA* [2003] QBT 30 at [50].
- [23] A Statement of Evidence of Mr Vadasz dated 24 May 2012 was filed, and Mr Vadasz gave oral evidence. He identifies four major causes which resulted in his bankruptcy:-
- (a) Litigation against Bloomer Constructions Pty Ltd (Bloomer) in relation to a project at Newstead in Brisbane.
 - (b) The deferment of many projects by developers due to the unavailability of finance after the global financial crisis in October 2008.
 - (c) High equipment leasing costs, in conjunction with an inability to dispose of equipment at a price that was more than the residual value.
 - (d) The conduct of CBFC in calling in the equipment lease and selling the equipment at an undervalue.

- [24] He says that he took steps to maintain his cashflow and in the conduct of his business as follows:-
- (a) He followed legal advice and engaged in litigation against Bloomer.
 - (b) Submitted competitive bids for two major projects, each of which would have provided an upfront payment of 40%, and either of which would resolved his cashflow issues.
 - (c) Held sale/merger discussions with the Keller Group and the Integralign Group.
 - (d) Sought to renegotiate the CBFC leases, and reduce the monthly payments to about one third of the existing \$45,000 per month commitment.
 - (e) Sold his apartment for \$720,000 and his work depot for \$920,000 in April 2010, and used the proceeds to reduce indebtedness to the CBA and CBFC.
 - (f) Was negotiating with the Australian Taxation Office through his solicitors.
 - (g) Was being provided with fortnightly cashflow reports by his in-house financial controller, and monthly cashflows by his accountants, Bentleys.

The Bloomer Litigation

- [25] Australian Piling Company (APC) entered into a contract on 21 November 2008 to design, construct and certify a perimeter retention piling system and internal column piling for Bloomer at 26 Commercial Road, Newstead, for a lump sum of \$1,261,872.
- [26] A dispute arose as to performance of the works as to dewatering of the site and provision of a safe stable working platform. The dispute was taken to adjudication. APC claimed an amount of \$1,294,044. The Adjudicator awarded APC \$415,079.50 for the claim on 19 June 2009.
- [27] The Adjudicator found that he did not have jurisdiction to rule as to the claim for damages by APC, and that part of the claim was unresolved.
- [28] Bloomer applied to the Supreme Court of Queensland to have the decision of the Adjudicator quashed. In *Bloomer Constructions (Qld) Pty Ltd v O'Sullivan & Anor* (2009) QSC 220 White J dismissed that application on 7 August 2009.
- [29] Bloomer then sought a stay of the judgment of the adjudication. In *Vadasz v Bloomer Constructions (Qld) Pty Ltd* [2009] QSC 261, Douglas J dismissed that application and ordered that Bloomer pay the costs of Vadasz in both actions on 3 September 2009.

- [30] The parties then participated in a mediation of the damages claim before Mr Wensley QC, and agreed to a settlement.
- [31] APC was represented by McCulloch Robertson, Solicitors, in the litigation, and Mr R Holt SC and Mrs E J Longbottom of Counsel appeared on its behalf.
- [32] Mr Vadasz said that he settled the damages claim of about \$800,000 for an amount of about \$60,000. He described Bloomer as a well funded serial litigant who had about 15 legal cases in progress. He said that he was unable to afford to proceed further in the litigation, and had to “draw a line” and agree to the settlement.

The bankruptcy

- [33] APC was placed in the hands of a receiver prior to the bankruptcy of Mr Valdasz.
- [34] In an affidavit dated 2 December 2010 in the bankruptcy proceedings, Mr Valdasz said that he was in negotiations for several large projects which would result in a deposit of about \$1 million each, and those monies would be used to pay creditors.
- [35] In his evidence, Mr Valdasz said that he had made arrangements with all his other creditors at the time. He said that he owed a “couple of million dollars”. Holcim advised him that they were a large public company and had no choice but to pursue recovery. He was confident that if Holcim had not pushed him into bankruptcy, that he could have continued trading.
- [36] One of the creditors in the bankruptcy was the Australian Taxation Office for an amount of \$270,000. Mr Vadasz said that his accountant and solicitor had been in contact with the ATO for an extended period about the debt, which involved a significant dispute, and that suitable arrangements were in place.

Business conduct

- [37] Mr Vadasz said that he had started a business administration course at university in 1970, but that his father had become ill, and that he had to leave university to take over the family business. He has worked in the business ever since.
- [38] He has always traded in his own name. He was asked why he did not employ a corporate structure, and he said that in the industry personal guarantees were required in any event, so he proceeded on that basis. He had discussed other structures with his accountant and solicitor.
- [39] He said that he traded through business downturns and recessions, but that nothing was like the global financial crisis of 2008 which was devastating for the industry.

- [40] He employed a fulltime financial controller who was with him for about 10 years, who held degrees in commerce and accounting, and who liaised with his regular external accountants, Bentley Partners, who had acted for him for over 20 years.
- [41] He suggested that his financial controller had not been doing the right thing by him. There was also a suggestion that his general manager had been selling his quotes to his opposition.
- [42] Since his bankruptcy, he said a lot had changed. He has no access to credit, so operates on a cash basis. He has cut a lot of his overheads. He is less trusting than before. He no longer has an in-house financial controller and his personal assistant communicates regularly online with his accountants, Bentleys, who advise on cash control.
- [43] He now has 10 to 12 jobs on at a time. His biggest current job is worth \$3 million. His work is all commercial, and his customers are all builders. He operates around Australia.

Specific Matters

- [44] Subsections (a) to (f) of s 56AD(8A) of the Act set out a number of matters which the Authority must have regard to in deciding whether an individual took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event.
- [45] “Keeping proper books of account and financial records” is required by s 56AD(8A)(a).
- [46] There is no issue as to the propriety or sufficiency of the books and records of the business. Mr Vadasz had his accountant prepare regular annual financial statements. His trustee in bankruptcy has raised no apparent issue as to the sufficiency of his accounts.
- [47] He ensured that all the staff entitlements were paid in full.
- [48] “Seeking appropriate legal or financial advice before entering into financial or business arrangements or conducting business” is required by s 56AD(8A)(b).
- [49] Mr Vadasz had recourse to well regarded solicitors and accountants in his dealings with the ATO, and in maintaining the usual records of the business.
- [50] In pursuing the litigation with Bloomer, he engaged well regarded solicitors, and prominent senior counsel.
- [51] A further firm of solicitors, Michael Sing and Associates, and Mr Sweeney SC, were engaged in relation to the mediation with Bloomer.

- [52] Separate solicitors, O'Loughlins, were engaged by Mr Vadasz in relation to matters involving Independent Reinforcing Supplies (Qld) Pty Ltd which were also related to the Newstead project.
- [53] He therefore sought and had regard to appropriate legal advice in relation to those matters.
- [54] "Reporting fraud or theft to the police" is required by s 56AD(8A)(c). There is mention of wrongdoing by his general manager which does not seem to have been elevated to reporting to the police. The suggestion is that the general manager may have misused his position and improperly dealt with confidential information for personal benefit.
- [55] A question may arise as to whether this conduct is apprehended by the subsection, but no clear evidence is available as to whether there was sufficient evidence to ground a complaint. It is not a clear case of stealing from the business directly.
- [56] No question appears as to ensuring guarantees were covered by sufficient assets, s 56AD(8A)(d), as Mr Vadasz had personal liability for the whole of the debts of the business, and until the global financial crisis was able to trade in a usual course.
- [57] In relation to "putting in place appropriate credit management for amounts owing and taking reasonable steps for the recovery of the amounts" s 56AD(8A)(e), the Bloomer litigation is the only substantial matter that arises. There is no suggestion of other debtors that were not sufficiently monitored and pursued.
- [58] The steps taken in the Bloomer litigation were reasonable, as they were taken under the advice of experienced solicitors and counsel, and were vindicated by the award of the adjudicator, and by an award of costs to Mr Vadasz in each Supreme Court ruling.
- [59] "Making appropriate provision for Commonwealth and State taxation debts" s 56AD(8A)(f), was pressed strongly by the Authority.
- [60] The solicitor for the Authority argued that:
46. The financial accounts show that, at all times, there was an overdue tax debt, with penalties accruing. Hence, he did not pay tax as it fell due.
 47. The Applicant has not explained why this occurred, nor provided detail in respect of what provision was made for taxation debts.
- [61] The evidence of Mr Vadasz was that there was an ongoing dispute with the ATO in relations to a substantial amount of "hundreds of thousands of dollars" which was being handled by his solicitors and accountant. He argued that this explained the provision of unpaid tax.

- [62] At the time of his bankruptcy there was a tax debt of \$270,000. The origins of this, and whether it is constituted wholly or partially by the ongoing dispute is unclear.
- [63] It is significant that the ATO did not petition for the bankruptcy. Mr Vadasz said that his Adelaide based solicitors, O’Laughlin’s, kept the ATO fully informed of his financial status, and that at no time did the ATO indicate that it was concerned about his provision for taxation debts.
- [64] In their submission of 19 December 2011, the solicitors for Mr Vadasz, CCS Legal, argued that:
55. With regard to the ATO debt, referred to in paragraph 4 above, we submit that, until the deferral of the three major projects due to the financial uncertainty associated with the GFC, Vadasz had reasonable grounds for anticipating that he would be able to pay that debt and all of his other debts.
- [65] The subsection refers to making “appropriate provision” for tax debts, not to actually making payment. It is arguable that if Mr Vadasz had a realistic anticipation of being able to pay the amount of claimed tax, if required to do so, once the tax dispute was resolved, that he was making “appropriate provision”.

General matters

- [66] The Authority argues strongly that the business failed because it was fundamentally undercapitalised. In his closing submission, the solicitor for the Authority argued that:-
- 35(a)Continual shortfall of Current Assets as compared with Current liabilities: As a result, the business was reliant upon future work and receipts to cover the previous year’s liabilities. Hence – shortage of Current Capitalisation. This is significant because, when exigencies of business occurred, such as GFC and dispute with customer, there were insufficient funds to pay liabilities.
- [67] The Act is concerned as to whether the Applicant took all reasonable steps to avoid the relevant event. It does not say that the event is determinative. A person may take all reasonable steps, but due to external factors beyond their control, such as global financial conditions or natural disaster, still fall into bankruptcy or liquidation.
- [68] Most businesses are reliant upon credit to operate and to expand. The usual definitions of solvency anticipate that an ability to pay debts as they fall due refers to an ability to do so whether by overdraft or other credit facility. It is not necessary that there be an absolute ability to pay from current reserves of cash.
- [69] Similarly, cashflow anticipates that incoming funds will be sufficient to pay current liabilities. Mr Vadasz argues that he had a reasonable expectation of incoming funds from projects he was to be engaged on in the usual

course of business, but that unusually and extraordinarily, the flow of funds inwards was turned off by the effect of the global financial crisis.

- [70] The position of Mr Vadasz was not that he had an unrealistic or simply hopeful expectation of being engaged on the three major projects in Darwin, Southbank and Maroochydore, which had a total value of \$10 million. He says they were all real jobs which were scheduled to proceed with him at the time, but that all were delayed and have since proceeded.
- [71] Another notable aspect is that the current ratio of assets to liabilities, according to the Independent Review Reports was 1.11:1 as at 30 June 2008 and 1.03:1 as at 30 June 2009. Both of these are positive and do not indicate undercapitalisation.
- [72] In about mid-August 2010, he reached an agreement with CBFC to buy out the leases, and was arranging for this to be financed by a Gold Coast based leasing company. The effect of this would have been to reduce his monthly lease payments by two thirds. Before this could be effected however, the CBFC sold the equipment to McMillan Constructions who were one of his competitors.
- [73] APC also held sale or merger discussions in June 2010 with the Keller Group which owned Frankipile, Vibropile and Piling Contractors.
- [74] APC held parallel merger discussions with Integralign. A letter from Integralign dated 8 September 2010 confirmed the discussions, and noted that APC had immediate cash flow shortfalls, but that projections showed that the bank payments and CBFC payments could thereafter be met.

Discretion

- [75] The solicitor for the Authority submitted that, if all the requirements are met, that a discretion exists as to whether to categorise the applicant as a permitted individual.
- [76] The effect of this submission is that if the decision-maker is satisfied that the applicant took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event, then the decision-maker is not compelled to declare that the applicant is an excluded person just because the relevant event occurred, but can decide not to do so in the circumstances.
- [77] Section 56AD(8) of the Act provides that the authority “may” categorise the individual as a permitted individual. This supports the proposition of a discretion.
- [78] In *Younan v Queensland Building Services Authority* [2011] QCA 1, Fraser JA sitting in the Court of Appeal noted at [5] that:
- [5] In effect, Mr Younan and T & T could not continue to hold a building licence unless the Authority was satisfied that Mr Younan had taken all reasonable steps to avoid the coming into existence of the

circumstances that resulted in the order to wind up Cavalier and the appointment of the liquidator of that company. (If the Authority was so satisfied, a question might arise whether it was obliged or merely empowered to categorise Mr Younan as a “permitted individual”, but that question is not in issue here).

- [79] Fraser JA left open the question as to whether a discretion exists, but did not find against that proposition.
- [80] I consider that the exercise of discretion is relevant in this matter.
- [81] I accept the submission that the Authority has a discretion under s 56AD(8) as to whether to categorise the applicant as a permitted individual (subject to the requirements of s 56AD(8A)).

Conclusion

- [82] I am satisfied that Mr Vadasz took all reasonable steps to avoid the circumstances arising which led to his bankruptcy.
- [83] He was a committed and established piling operator. He had operated for 41 years and satisfactorily managed the finances of the business, with appropriate credit management and taxation arrangements.
- [84] He employed a fulltime financial controller, and had external accountants, to monitor and advise him on financial matters. He kept proper books of account.
- [85] The capitalisation of the business was sufficient to sustain it through normal trading conditions.
- [86] When he became involved in legal disputes he sought advice from reputable solicitors and counsel.
- [87] The shadow that was hanging over the business was the weight of the heavy lease commitments for the specialised G-pile machines. The machines cost \$3 million, weighed 2,000 tons and had lease repayments of \$45,000 per month.
- [88] The sudden and dramatic downturn in the industry became an unsurmountable obstacle for the business. Three major jobs that were in line in Darwin, Southbank and Maroochydore, were suspended, and new work was not available. The business experienced unprecedented cashflow problems and it could not keep up the lease payments.
- [89] Mr Vadasz did what he could to reduce his debt and increase liquidity. He sold his apartment and his business premises. He tried to renegotiate the lease arrangements. He made genuine attempts to sell or merge his business.
- [90] The leasing company exercised its rights over the specialist machinery and sold it. The business was left with basic machinery and little work,

and Mr Vadasz eventually succumbed to a relatively small debt to a concrete supplier, and went into bankruptcy.

- [91] The question then becomes whether discretion should be exercised in his favour, and whether Mr Vadasz should be declared as a permitted individual notwithstanding his bankruptcy.
- [92] Mr Vadasz is undoubtedly a skilled piling operator. The G-Pile equipment which he operates is unique, and has significant public benefit in avoiding the noise and vibration caused by conventional machines. The competitor who bought his machines from the receiver did not use them for three years – whether this is because a lack of skills or a commercial decision is not known.
- [93] Since his bankruptcy Mr Vadasz has been supported by his peers in the industry, and he has committed himself to rebuilding his business at the age of 60 years from having nothing. He has operated on a financially sound basis, and with the supervision, and to the apparent satisfaction of, his trustee in bankruptcy.
- [94] I consider that he has demonstrated that he is a genuine participant in the industry, and can conduct proper financial and business management, and that he should be allowed to exercise his determination and skills.
- [95] Accordingly, I consider that discretion should be exercised in his favour and find that he should be declared to be a permitted individual.

Orders

- [96] My intent is that Mr Vadasz will be able to immediately apply to regain the appropriate licence in Queensland. He will still have to provide certain current financial or other material to the Authority as is usual.
- [97] The situation as to the current orders is quite complicated. I sought submissions at the hearing from the Authority as to appropriate orders in the circumstances, and will make orders accordingly. If it transpires that these orders do not achieve my intent, then either party will have leave to apply further to the Tribunal in order to obtain necessary orders to that effect.
- [98] The orders are:-
1. The decision of the Queensland Building Services Authority made on 22 November 2011 to refuse to categorise Mr Michael Christopher Vadasz as a “permitted individual” pursuant to s 56AD of the *Queensland Building Services Authority Act 1991* is set aside.
 2. I order that Mr Michael Christopher Vadasz be categorised as a “permitted individual” pursuant to s 56AD of the *Queensland Building Services Authority Act 1991*.

3. The stay of the decision of the Queensland Building Services Authority to cancel the license of Mr Michael Christopher Vadasz made on 20 January 2012, made by the Tribunal on 7 December is lifted.
4. The decision of the Queensland Building Services Authority to cancel the license of Mr Michael Christopher Vadasz made on 20 January 2012 is set aside.
5. Either party has leave to apply to the Tribunal for further or other orders necessary to give effect to my decision in this matter.