

CITATION: *Jensen v Queensland Building Services Authority* [2013] QCAT 121

PARTIES: Jan Boss Jensen
(Applicant)
v
Queensland Building Services Authority
(Respondent)

APPLICATION NUMBER: OCR161-11

MATTER TYPE: General administrative review matters

HEARING DATE: 28 February 2013

HEARD AT: Brisbane

DECISION OF: **Bevan Hughes, Member**

DELIVERED ON: 25 March 2013

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. The decision of the Queensland Building Services Authority dated 16 June 2011 to refuse to categorise Jan Boss Jensen as a permitted individual is set aside; and**
- 2. Jan Boss Jensen is categorised as a permitted individual pursuant to section 56AD of the *Queensland Building Services Authority Act 1991***

CATCHWORDS: GENERAL ADMINISTRATIVE REVIEW – PERMITTED INDIVIDUAL – relevant event – circumstances – insolvency – harassment and proposal to cancel licence – insulation scheme – non-payment by debtors – reasonable steps – previous proposal to cancel licence

Queensland Building Services Authority Act 1991
Queensland Civil and Administrative Tribunal Act 2009
Benz v Queensland Building Services Authority [2010] QCAT 625, applied
FAI Insurances Ltd v Winneke (1981) 151 CLR

342, cited
Papallo v Queensland Building Services Authority [2012] QCAT 59, applied
Vadasz v Queensland Building Services Authority [2013] QCAT 84, applied
Younan v Queensland Building Services Authority [2010] QDC 158, applied
Younan v Queensland Building Services Authority [2011] QCA 1, applied

APPEARANCES and REPRESENTATION (if any):

- APPLICANT:** Jan Jensen represented by Dr Andrew Greinke of Counsel, instructed by Morgan Conley Solicitors
- RESPONDENT:** Queensland Building Services Authority represented by Robinson Locke Litigation Lawyers

REASONS FOR DECISION

What is this Application about?

- [1] On 22 June 2011, Mr Jensen applied to the Tribunal to review the Authority's decision not to categorise him as a permitted individual.
- [2] Mr Jensen is a licensed builder and a director of his own company, JAD Building and Constructions Pty Ltd.
- [3] On 4 May 2010, Mr Jensen appointed a liquidator to his company.
- [4] On 20 May 2010, the Queensland Building Services Authority proposed to cancel his licence. This is because Mr Jensen was a director of the company when the liquidator was appointed. He is therefore an 'excluded individual'.¹ This cancels his licence unless the Authority decides to categorise him as a 'permitted individual'.²
- [5] On 5 May 2011, Mr Jensen applied to the Authority to be categorised as a permitted individual.
- [6] On 16 June 2011, the Authority decided not to categorise Mr Jensen as a permitted individual. This means that Mr Jensen cannot perform work as a licensed builder for five years.

¹ Section 56AC of the *Queensland Building Services Authority Act 1991*.
² Section 56AD of the *Queensland Building Services Authority Act 1991*.

What does the Tribunal do?

- [7] In a review application, the Tribunal's purpose is to produce the correct and preferable decision by way of a fresh hearing on the merits.³
- [8] The Tribunal must therefore decide whether Mr Jensen should be categorised as a permitted individual.

What does the Tribunal consider?

- [9] The Tribunal must consider whether Mr Jensen took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of a relevant event.⁴
- [10] The Authority stated that if the Tribunal is satisfied of this, then it had no issue with the Tribunal exercising its discretion to classify Mr Jensen as a permitted individual.

What is the relevant event?

- [11] The relevant event is the appointment of a liquidator to the company.⁵ This happened on 4 May 2010.⁶

What are the circumstances that resulted in the relevant event?

- [12] The Authority submitted that the circumstances that resulted in the liquidation were the insolvency of the company as at 6 April 2010, "or maybe earlier".⁷
- [13] In the Authority's view, the company had a cash flow crisis. However, the Authority added that the cause of insolvency "is not clear, due to the absence of financial records".⁸
- [14] Mr Jensen disputes this. He summarises the circumstances as:
*"The circumstances that resulted in the external administration of JAD were a number of factors, including the harassment by Mr Hunter, the government's failed insulation scheme and two debtor's (sic) refusing to pay the company, that were outside of my control."*⁹

Insolvency of company

- [15] During the hearing, the Authority expended considerable effort to scrutinise the company's financial position in the period preceding the company's liquidation on 4 May 2010.
- [16] The Authority contends that as at 30 June 2009, the company's financial statements show that it had insufficient assets to pay its current liabilities. The company itself had net assets of \$10.00.¹⁰

³ Section 20 of the *Queensland Civil and Administrative Tribunal Act 2009*.

⁴ Section 56AD(8) of the *Queensland Building Services Authority Act 1991*.

⁵ Section 56AC(2)(b) of the *Queensland Building Services Authority Act 1991*.

⁶ BRI Ferrier Circular to Creditors dated 6 May 2010.

⁷ Authority's Closing Submissions dated 28 February 2013 at paragraph 32.

⁸ Authority's Closing Submissions dated 28 February 2013 at paragraph 32.

⁹ Supplementary Statement of Jan Boss Jensen dated 17 January 2013 at paragraph 222.

¹⁰ JAD Building and Constructions Pty Ltd Balance Sheet as at 30 June 2009.

- [17] However, it is the related Trust that underpins the company's financial position.¹¹ The Trust had nil *net* assets.¹² This is the position *after* deducting current liabilities from assets.
- [18] It means that liabilities were met, at least as at 30 June 2009. Indeed, it represents an improvement from the previous year, when accumulated losses amounted to \$6,390.92.¹³
- [19] Regardless, the net asset position alone does not encapsulate the financial position. As at 30 June 2009, the Trust also earned revenue of \$626,964.23,¹⁴ a gross profit of \$145,888.86,¹⁵ and a net profit of \$18,474.98.¹⁶ This demonstrates sufficient cash flow to operate the business as a going concern.
- [20] The Authority contended that the cause of the liquidation was the insolvency of the company as at 6 April 2010.¹⁷ The ASIC Summary of Affairs completed and signed by Mr Jensen on 4 May 2010 lists creditors at \$296,000.¹⁸
- [21] Mr Jensen answered that the company operated on a cash basis – the company paid its accounts when it was paid.
- [22] Importantly, Mr Jensen is not required to inject his own personal funds. That would be contrary to the principle of limited liability.¹⁹
- [23] He must simply conduct the business in a manner where it has sufficient capital to meet future liabilities:

“Most businesses are reliant upon credit to operate and 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.

Similarly, cash flow anticipates that incoming funds will be sufficient to pay current liabilities.”²⁰

¹¹ JAD Building and Constructions Pty Ltd is trustee of the JJ & JD Family Trust and operated the business.

¹² JJ & JD Family Trust Balance Sheet as at 30 June 2009.

¹³ JJ & JD Family Trust Balance Sheet as at 30 June 2009.

¹⁴ JJ & JD Family Trust Income Statement for year ended 30 June 2009 and Trading Statement for year ended 30 June 2009.

¹⁵ JJ & JD Family Trust Trading Statement for year ended 30 June 2009 and Profit and Loss Statement for year ended 30 June 2009.

¹⁶ JJ & JD Family Trust Income Statement for year ended 30 June 2009 and Profit and Loss Statement for year ended 30 June 2009.

¹⁷ Authority's Closing Submissions dated 28 February 2013 at paragraph 32.

¹⁸ Supplementary Statement of Jan Boss Jensen dated 17 January 2013, page 230.

¹⁹ *Younan v Queensland Building Services Authority* [2011] QCA 1 at paragraphs 25 and 26.

²⁰ *Vadasz v Queensland Building Services Authority* [2013] QCAT 84 at paragraphs 68 and 69.

- [24] Under cross-examination, Mr Jensen claimed that \$200,000 to \$300,000 was coming in over the next two to three months. From 1 October 2009 to 8 March 2010, the company received in excess of \$800,000.²¹ This suggests a reasonable basis for Mr Jensen's claim, rather than mere speculation.
- [25] The Authority also notes that the company did not lodge Business Activity Statements until 9 March 2010. That may be so, but that does not mean the company was insolvent.
- [26] The most recent financial statements show that the company did have assets sufficient to meet its liabilities. Although the company had creditors, they were essentially trade creditors paid from work in progress receipts. The company's account statements show that it had sufficient ongoing income to meet its expenses.
- [27] I therefore reject the contention that the company's putative insolvency was a circumstance that resulted in the company's liquidation. The company was sufficiently capitalised to sustain it through normal trading conditions.

Harassment and Proposal to cancel licence

- [28] Mr Jensen expended considerable effort to demonstrate a history of alleged acrimony with an officer of the Authority, Mr Gregory Hunter since 2008.²² This history culminated in correspondence from the Authority proposing to cancel his licence.²³
- [29] The Authority sent the proposal to cancel the licence only two months before the liquidation. The potential impact is that Mr Jensen could no longer operate the business. Because of this close proximity in time and the potential impact, I am satisfied that the Authority's proposal to cancel Mr Jensen's licence was a circumstance resulting in liquidation.
- [30] This is regardless of whether Mr Jensen was subjected to behaviour that constitutes harassment. If he was harassed, I do not consider that the harassment itself was a circumstance resulting in liquidation.
- [31] It is the proposal to cancel his licence, rather than the alleged harassment, that is a circumstance resulting in the liquidation.
- [32] This is because without the proposal to cancel the licence, there is no evidence to suggest that Mr Jensen would have liquidated the company based on the alleged harassment alone. None of the alleged history between him and Mr Hunter prior to the Authority's letter dated 9 March 2010 led to Mr Jensen liquidating the company.²⁴

²¹ Suncorp Transaction History 1 October 2009 to 8 March 2010.

²² Supplementary Statement of Jan Boss Jensen dated 17 January 2013 at paragraphs 32 to 132 and 156 to 165 provide the most cohesive account.

²³ Letter QBSA to Jan Boss Jensen dated 9 March 2010.

²⁴ Supplementary Statement of Evidence of Jan Boss Jensen dated 17 January 2013 at Paragraphs 32 to 98.

- [33] It was the proposal to cancel the licence in the Authority's letter dated 9 March 2010 that is the "critical step"²⁵ that led directly to Mr Jensen's decision to liquidate the company.
- [34] I therefore find that the Authority's proposal to cancel Mr Jensen's licence on 9 March 2010 was a circumstance that resulted in the company's liquidation.

Failed insulation scheme

- [35] The Authority submitted that no evidence has been provided in relation to the insulation scheme. However, Mr Jensen stated that²⁶:

"In addition to the harassment from Mr Hunter, JAD had also suffered loss and damage as a result of the Federal Government's \$2.8B failed 'pink batts' insulation scheme, which had made cash flow difficult at that time.

JAD was one of the hundreds of companies that had invested thousands of dollars into purchasing insulation stock after relying on the representations from the government that the scheme would run until the (sic) early 2012.

... the Federal Government... scrapped the scheme without warning in February 2010, less than 2 months prior to the company going into external administration.

The value of stock that was held by JAD became practically worthless overnight, as the demand for home insulation dropped to virtually zero after the scheme was scrapped."

- [36] During the hearing, Mr Jensen stated that while the insulation scheme did not cause the liquidation of his company, it did affect its cash flow. This is because 30 to 40 percent of the company's turnover was attributable to the insulation scheme. The Authority did not contest any of this evidence.
- [37] Given the insulation scheme's substantial contribution to turnover, I find that the scheme's failure was also a circumstance resulting in liquidation.

Intransigent Debtors

- [38] Mr Jensen stated that two debtors refusing to pay the company also resulted in the appointment of the liquidator.²⁷
- [39] The evidence is that Mr Jensen's company entered into contracts with these debtors on 24 September 2009 and 2 October 2009, and was still seeking payments in April 2010²⁸.
- [40] Mr Jensen gave sworn evidence during the hearing that these were his company's two main projects at the time. Payments from the alleged debtors would have substantially contributed to the company's cash flow.

²⁵ *Benz v Queensland Building Services Authority* [2010] QCAT 625 at paragraph 10.

²⁶ Supplementary Statement of Evidence of Jan Boss Jensen dated 17 January 2013 at paragraphs 166 to 169.

²⁷ Supplementary Statement of Evidence of Jan Boss Jensen dated 17 January 2013 at paragraphs 171 to 179.

²⁸ Letter Cooke & Hutchinson Lawyers to JAD dated 19 March 2010 and letter Sawford Voll Lawyers to JAD dated 19 April 2010.

[41] I am therefore satisfied that failure to procure payments from the alleged debtors was also a circumstance resulting in liquidation.

Did Mr Jensen take all reasonable steps to avoid the coming into existence of these circumstances?

[42] The Authority must decide whether Mr Jensen took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event. To do this, the Authority must regard action taken by Mr Jensen for prescribed matters²⁹ and can regard other matters.³⁰

Prescribed matters

(a) Keeping proper books of account and financial records

[43] The Authority concedes that Mr Jensen kept proper books of account and financial records, “though it is not clear that these were maintained on a continuous basis”.³¹

[44] Mr Jensen engaged a Chartered Accountant to regularly prepare and maintain his financial records.³² The records were sufficiently kept for a small business of the company’s size.

(b) Seeking appropriate legal or financial advice before entering into financial or business arrangements or conducting business

[45] The Authority contends that “no legal advice was sought in respect of the BSA notices which did not cancel the licence”.³³ However, the Authority did not identify the substance of the advice and how it would have assisted the company:

“It is not helpful simply to say that it was unreasonable not to take advice without identifying the substance of the advice which would have been received had advice been taken and identifying how that would have been of benefit to the company in that situation.”³⁴

[46] In any event, Mr Jensen did not need to seek advice for the notices.

[47] For the notices issued before 9 March 2010, the steps he did take had already succeeded in categorising him as a permitted individual.³⁵

²⁹ Section 56AD(8A) *Queensland Building Services Authority Act 1991*.

³⁰ Section 56AD(8B) *Queensland Building Services Authority Act 1991*.

³¹ Authority’s closing submissions dated 28 February 2013, paragraph 38.

³² Supplementary Statement of Evidence of Jan Boss Jensen dated 17 January 2013 at paragraph 138.

³³ Authority’s closing submissions dated 28 February 2013 at paragraph 38.

³⁴ *Younan v Queensland Building Services Authority* [2010] QDC 158 at paragraph 15.

³⁵ See discussion under heading “What were reasonable steps for Mr Jensen to avoid the proposed cancellation of his licence?”.

[48] For the notice dated 9 March 2010, I have already found it to be a circumstance that resulted in the liquidation. The test is that the builder must take reasonable steps to avoid the coming into existence of the circumstances that resulted in the event – not the circumstances themselves.³⁶ Therefore, Mr Jensen was not obliged to seek legal advice after receiving the proposal to cancel his licence on 9 March 2010.

[49] This is because that would be taking a step to deal with a *circumstance* (proposal to cancel licence) that resulted in the event (liquidation), rather than the *coming into existence* (the reasons for the proposal) of the circumstance (the proposal). The focus of the section is on prevention,³⁷ not cure.

(c) Reporting fraud or theft to police

[50] This matter is not relevant to this review.

(d) Ensuring guarantees provided were covered by sufficient assets

[51] This matter is not relevant to this review.

(e) Appropriate credit management for amounts owing and taking reasonable steps for recovery

[52] It would be incongruous to consider credit management in isolation. This is because the pending suspension or cancellation of Mr Jensen's licence itself meant he could not continue to work. This in itself affected credit control – customers are reticent to pay when work is not being done.

[53] Mr Jensen claims that he had appropriate credit management procedures for the company.³⁸ Specifically, he states that if a debtor failed to pay, he “would first attempt to deal with the matter before seeking legal advice.”³⁹

[54] Mr Jensen also states that during the life of the company, the only times recovery action would have been necessary were the two debtors who refused to pay at the same time, precipitating the liquidation of the company.⁴⁰ Debtor payment history is relevant:

“It is germane that there had been a history of two years of trading that [the debtor] had been able to pay all amounts owing to [the company]...”⁴¹

Both debtors had previously made significant progress payments.⁴² There was no reason for Mr Jensen to have implemented particular credit management procedures for these debtors.

³⁶ *Yunan v Queensland Building Services Authority* [2010] QDC 158 at paragraph 27.

³⁷ *Yunan v Queensland Building Services Authority* [2010] QDC 158 at paragraph 24

³⁸ Supplementary Statement of Evidence of Jan Boss Jensen dated 17 January 2013 at paragraph 144.

³⁹ Supplementary Statement of Evidence of Jan Boss Jensen dated 17 January 2013 at paragraph 146.

⁴⁰ Supplementary Statement of Evidence of Jan Boss Jensen dated 17 January 2013 at paragraph 147.

⁴¹ *Papallo v Queensland Building Services Authority* [2012] QCAT 59 at paragraph 111.

⁴² For example, letter Westpac to JAD Building & Construction Pty Ltd dated 16 March 2010 advising of \$58,000 payment to JAD Building & Construction Pty Ltd.

- [55] The courts have emphasised the distinction between reasonable steps to *avoid the coming into existence of the circumstances* that resulted in the event, with reasonable steps to *address the event*.⁴³ Mr Jensen need only address the former.
- [56] The circumstances are non-payment of \$31,309.39 and \$50,000.00 by two debtors.⁴⁴ The test is not whether Mr Jensen took reasonable steps to avoid those non-payments. Rather, it is whether he took all reasonable steps to avoid the coming into existence of those non-payments.
- [57] To avoid the coming into existence of the non-payment by the first debtor, Mr Jensen took the steps of performing the work and sending letters of demand.⁴⁵ He negotiated. The result was that the first debtor offered to pay \$20,940.00.⁴⁶ Mr Jensen's steps can be considered reasonable, given it resulted in an offer to pay two-thirds of the amount owing.
- [58] Non-payment by the second debtor was not evident until 19 April 2010, at the earliest.⁴⁷ Before 19 April 2010, the steps that Mr Jensen took to avoid the coming into existence of the non-payment were to perform the work and to render the invoice on 1 April 2010.⁴⁸
- [59] It is fewer than three weeks between the rendering of the invoice and non-payment. He is a small business operator who had concomitant issues with his licence, beyond his control.⁴⁹ Because of these factors, I do not consider it reasonable for Mr Jensen to have taken further steps during this period to recover payment.
- [60] There is no evidence that Mr Jensen took any steps to recover payment between 19 April 2010 and the appointment of the liquidator on 4 May 2010. Mr Jensen explained that this is because he did not have sufficient funds to engage a solicitor⁵⁰ and he did not have sufficient time to commence legal action due to the pending cancellation of his licence. This is reasonable given the context and potential impact of the Authority's proposal to cancel his licence.

⁴³ *Yunan v Queensland Building Services Authority* [2010] QDC 158 at paragraph 27.

⁴⁴ Supplementary Statement of Evidence of Jan Boss Jensen dated 17 January 2013, paragraph 171.

⁴⁵ Letter JAD to Craig Moore and Claire Ruggieri dated 1 March 2010 at page 113 of the Authority's Supplementary Bundle of Documents filed 15 February 2012; Email JAD to Craig Moore dated 14 March 2010 at page 153 of the Authority's Supplementary Bundle of Documents filed 15 February 2012.

⁴⁶ Letter Cooke & Hutchinson Lawyers to JAD Building and Constructions Pty Ltd dated 19 March 2010.

⁴⁷ Letter Sawford Voll Lawyers to JAD dated 19 April 2010.

⁴⁸ Invoice JAD Building and Renovations to Desiree Bennetts and Matthew Bricknell dated 1 April 2010.

⁴⁹ See discussion under heading "*What were reasonable steps for Mr Jensen to avoid the proposed cancellation of his licence?*".

⁵⁰ Supplementary Statement of Evidence of Jan Boss Jensen dated 17 January 2013, paragraph 175.

[61] In any event, considering steps taken by Mr Jensen during this period would be an incorrect application of the test:

*“... the focus of this subsection [section 56AD(8A)] is on prevention rather than dealing with problems after they have arisen...”*⁵¹

[62] By 19 April 2010, the Authority had cancelled Mr Jensen’s licence and the non-payment had crystallised. This means that any steps he would have taken would have been to address *the circumstance itself*, being the non-payment.

[63] By then, it was too late for him to do anything to avoid the *coming into existence* of the non-payment. There is nothing more he could have done to avoid the coming into existence of the non-payment.

[64] Importantly, there is no suggestion of other debtors that were not sufficiently monitored and pursued.⁵²

[65] There is therefore nothing more that Mr Jensen could reasonably have done to prevent the coming into existence of the non-payment of the outstanding amounts.

(f) Making appropriate provision for Commonwealth and State taxation debts

[66] The Authority contends that as at 30 June 2009, the company owed \$8,974 in tax. The Trust’s net profit was more than twice this amount. There were therefore sufficient funds to meet the tax obligation as at 30 June 2009.

[67] The Authority also notes that on 23 March 2010 and after lodging the overdue Business Activity Statements, the company entered into a payment arrangement with the Australian Taxation Office. The Authority argued that the repayments exceeded net operating profit and therefore could not be kept.⁵³

[68] Under cross-examination, Mr Jensen conceded that he did not keep money aside to pay tax, as he relied on the continuous rollover of funds. However, this does not mean that he was not “making appropriate provision for Commonwealth and State taxation debts”.⁵⁴

[69] The amount owing in tax as at 27 March 2010 was \$25,519.64.⁵⁵ Repayments were to be \$2,191.75 per month, commencing 12 April 2010.⁵⁶ Because this is before the end of the financial year, it is difficult to discern the company’s net operating profit at that time. The net operating profit as at 30 June 2009 was \$18,474.98. This is less than the amount owing in tax.

⁵¹ *Younan v QBSA* [2010] QDC 158 at paragraph 24.

⁵² *Vadasz v Queensland Building Services Authority* [2013] QCAT 84 at paragraph 57.

⁵³ Authority’s Closing Submissions dated 28 February 2013 at paragraph 26.

⁵⁴ Section 56AD(8A)(f) of the *Queensland Building Services Authority Act 1991*.

⁵⁵ Australian Taxation Office Statement No.008 dated 27 March 2010.

⁵⁶ Australian Taxation Office Payment Arrangement dated 23 March 2010.

- [70] However, the net operating profit as at 30 June 2009 is almost ten months before the first repayment is due. Therefore, the net operating profit as at 30 June 2009 alone cannot be an accurate reflection of the company's ability to meet the repayments as at 12 April 2010.
- [71] A more accurate indicator of the company's ability to meet its taxation repayments is the company's income in the months immediately preceding the commencement of the repayment plan.
- [72] The Authority concedes that the company received substantial payments on 28 January 2010, 26 February 2010 and 16 March 2010.⁵⁷ In fact, the company received substantial payments more than these.⁵⁸
- [73] Despite this, the Authority argues that "those funds were expended promptly leaving no trading capital – in fact at times, the account was overdrawn."⁵⁹
- [74] The evidence is that the account was overdrawn on four days over a period of six months.⁶⁰ On each and every occasion, the account was restored to a healthy credit balance within no more than five days.⁶¹
- [75] Each period of low trading capital was brief. Receipts were consistently spent on suppliers.⁶² This is consistent with a builder operating on a cash receipts basis, rather than insolvency.
- [76] In the four months preceding the first repayment due to the Australian Taxation Office, receipts exceeded the monthly repayments of \$2,191.75. This suggests that there would have been sufficient funds to meet the monthly repayments commencing 12 April 2010.
- [77] Therefore, appropriate provision has been made for the taxation debt by entering into a repayment plan for monthly payments less than the company's monthly receipts.
- [78] It is not necessary that Mr Jensen actually pay the debt to the Australian Taxation Office.⁶³ Mr Jensen made appropriate provision for his debt with the Australian Taxation Office by entering into the payment arrangement.

⁵⁷ Authority's Closing Submissions dated 28 February at paragraph 28.

⁵⁸ Suncorp Transaction History shows deposits into the company account of \$16,520.00 on 17 December 2009, \$75,200.00 on 18 December 2009, \$6,000.00 on 29 December 2009, \$7,867.70 on 11 January 2010, \$17,000.00 on 12 January 2010, \$10,499.00 on 14 January 2010, \$19,100.00 on 25 January 2010, \$7,050.00 on 27 January 2010, \$6,500.00 on 28 January 2010, \$49,200.00 on 29 January 2010, \$28,200.00 on 3 February 2010, \$7,435.90 on 15 February 2010, \$38,374.00 on 16 February 2010, \$7,000.00 on 22 February 2010, \$10,290.50 on 26 February 2010 and \$18,800 on 5 March 2010.

⁵⁹ Authority's Closing Submissions dated 28 February 2013 at paragraph 28.

⁶⁰ Suncorp Transaction History shows a debit balance of \$204.28 on 11 February 2010, \$34.28 on 12 February 2010, \$10,195.25 on 25 February 2010 and \$4,929.36 on 4 March 2010.

⁶¹ Suncorp Transaction History shows a credit balance of \$7,441.62 on 15 February 2010, \$3,025.14 on 2 March 2010 and \$5,070.64 on 4 March 2010.

⁶² Suncorp Transaction History 1 October 2009 to 8 March 2010.

⁶³ *Vadasz v Queensland Building Services Authority* [2013] QCAT 84 at paragraph 65.

What were reasonable steps for Mr Jensen to avoid the proposed cancellation of his licence?

- [79] On 9 March 2010, the Authority proposed to suspend or cancel Mr Jensen’s licence.⁶⁴ To determine whether Mr Jensen took reasonable steps to avoid the proposed suspension or cancellation of his licence, I must first examine the reasons for the proposal.
- [80] The Authority’s letter relevantly provides these particulars:
- “(a) On 14 April 2008 you were issued a Notice of Licence Cancellation as BSA determined that you were not entitled to hold a licence because you were not a fit and proper person.*
- (b) BSA incorrectly issued you a licence on 9 March 2009.*
- (c) BSA is still of the view that you are not a fit and proper person to hold a licence based on its decision of 14 April 2008.”*
- [81] Although these are separately itemised, upon reading them as a whole they appear to provide only one substantive ground to suspend or cancel Mr Jensen’s licence: that the Authority maintained its determination of 14 April 2008 that Mr Jensen was not a “fit and proper person”.
- [82] This is because both (a) and (c) refer to the same decision of 14 April 2008, while (b) refers only to the Authority’s actions rather than any by Mr Jensen. This suggests that (b) is to be read in the context of (a) and (c) – the Authority incorrectly issued the licence on 9 March 2009 *because* it had previously determined on 14 April 2008 that Mr Jensen was not a fit and proper person.
- [83] Procedural fairness dictates that the Authority provides reasons for its proposal to suspend or cancel a licence to the licensee.⁶⁵ The Authority does not provide any particulars or reasons for why it does not consider Mr Jensen to be a fit and proper person - other than to refer to its previous decision of 14 April 2008.
- [84] This and the Authority’s use of the word “still” suggest that the Authority’s proposal on 9 March 2010 did not rely on any acts or omissions by Mr Jensen after those that led to its decision of 14 April 2008. The only substantive ground provided by the Authority for its proposal on 9 March 2010 is its previous cancellation of the licence on 14 April 2008.
- [85] Effectively, the Authority’s proposal to cancel Mr Jensen’s licence on 9 March 2010 was for no ground other than those relied on for the proposal to cancel his licence on 14 April 2008.
- [86] This means that the grounds for the 9 March 2010 proposal all occurred prior to the first proposal on 14 April 2008.
- [87] The Authority had already imposed a penalty for those grounds by reason of its letter of 14 April 2008. The spectre of double jeopardy looms.

⁶⁴ Letter Queensland Building Services Authority to Jan Boss Jensen dated 9 March 2010.

⁶⁵ *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 360, per Mason J (as he then was)

[88] At the very least, it means that there was nothing that Mr Jensen could do after 14 April 2008 to avoid the coming into existence of the Authority's proposal on 9 March 2010.

[89] Therefore, to determine whether Mr Jensen took reasonable steps to prevent the coming into existence of the Authority's proposal to cancel his licence on 9 March 2010, I need to consider the Authority's reasons for its determination on 14 April 2008.

[90] In that determination, the Authority referred to its letter of 1 April 2008.⁶⁶ That letter asserts⁶⁷:

"The Authority considers that you may not be a fit and proper person to hold a contractors (sic) licence (sic) that you obtained your licence on the basis of incorrect information supplied to the Authority, and that the licence was obtained by fraud or other improper means."

The Authority then provides particulars of allegations relating to information provided by Mr Jensen when applying for his licence.⁶⁸

[91] When confronted with this letter, Mr Jensen took these steps:

- On 2 April 2008, he wrote to the Authority and applied to be categorised as a permitted individual and explained the circumstances - that it was an innocent mistake that the form had been completed incorrectly⁶⁹;
- In May 2008, he applied to the then Commercial and Consumer Tribunal to review the Authority's decision to not categorise him as a permitted individual⁷⁰; and
- As part of the disclosure process, he provided the Authority with copies of police, medical and insurance reports relevant to the information that he had provided to the Authority when applying for his licence⁷¹.

[92] The outcome was that the Commercial and Consumer Tribunal made Orders by Consent to categorise Mr Jensen as a permitted individual.⁷² He was then issued with a new licence in March 2009.⁷³

[93] This shows that not only did Mr Jensen take steps to prevent the cancellation of his licence, but the outcome of those steps was to reinstate his licence.

⁶⁶ Letter Queensland Building Services Authority to Jan Boss Jensen dated 14 April 2008 at the first paragraph.

⁶⁷ Letter Queensland Building Services Authority to Jan Boss Jensen dated 1 April 2008 on page 2.

⁶⁸ *Idem*.

⁶⁹ Supplementary Statement of Evidence of Jan Boss Jensen dated 17 January 2013 at paragraphs 49 to 51 and letter Jan Jensen to Carol Leung dated 2 April 2008.

⁷⁰ Supplementary Statement of Evidence of Jan Boss Jensen dated 17 January 2013 at paragraphs 52 and 53.

⁷¹ Supplementary Statement of Evidence of Jan Boss Jensen dated 17 January 2013 at paragraph 54.

⁷² Supplementary Statement of Evidence of Jan Boss Jensen dated 17 January 2013, paragraphs 55 to 57 and Commercial and Consumer Tribunal Consent Notice dated 18 February 2009.

⁷³ Supplementary Statement of Evidence of Jan Boss Jensen dated 17 January 2013 at paragraph 57.

- [94] The Tribunal has recently held that a successful outcome from pursuing legal avenues is evidence that the steps taken in the process were reasonable.⁷⁴
- [95] The steps Mr Jensen took to avoid the coming into existence of the Authority's proposal to cancel his licence on 9 March 2010 were not only the appropriate legal avenues, they had already succeeded. The steps he took can therefore only be reasonable.

What were reasonable steps for Mr Jensen to avoid the failure of the insulation scheme?

- [96] The failure of the insulation scheme was an event beyond Mr Jensen's control. Creating, implementing and ceasing the scheme were all policy decisions made by the Federal Government.
- [97] I therefore do not consider that there were any reasonable steps that Mr Jensen could have taken to avoid the failure of the scheme.

Conclusion

- [98] The relevant event is the appointment of the liquidator to the company on 4 May 2010.
- [99] The circumstances that resulted in the happening of the relevant event are the Authority's proposal to cancel Mr Jensen's licence, the failure of the insulation scheme and the non-payment of two amounts from alleged debtors.
- [100] Mr Jensen took all reasonable steps to avoid the coming into existence of these circumstances by:
- Taking reasonable steps to avoid the coming into existence of the cancellation of his licence;
 - Not being able to take reasonable steps to avoid the coming into existence of the failed insulation scheme; and
 - Taking reasonable steps to avoid the non-payment of the two payments allegedly owing to the company.
- [101] Before becoming a builder, Mr Jensen went through some unfortunate circumstances. He suffered injuries in a motor vehicle accident that was not his fault and he was denied compensation. Rather than give up, he became a builder.
- [102] After he liquidated his company, he paid creditors out of his own funds. He did not have to do this. His trade and reputation clearly mean much to him.
- [103] Mr Jensen impressed me as an earnest participant in the industry who simply wants a chance to continue to ply his trade.
- [104] He should be permitted to do so.
- [105] The discretion is to be exercised so that the correct and preferable decision is that Mr Jensen is categorised as a permitted individual.

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Vadasz v Queensland Building Services Authority [2013] QCAT 84 at paragraph 58.