

**CITATION:** Mudri v Queensland Building and Construction Commission [2014] QCAT 222

**PARTIES:** Miroslav Mudri  
(Applicant)  
v  
Queensland Building and Construction Commission  
(Respondent)

**APPLICATION NUMBER:** OCR229-13

**MATTER TYPE:** Occupational regulation matters

**HEARING DATE:** 12 May 2014

**HEARD AT:** Brisbane

**DECISION OF:** **Senior Member Oliver**

**DELIVERED ON:** 21 May 2014

**DELIVERED AT:** Brisbane

**ORDERS MADE:**

- 1. The decision of the respondent dated 15 August 2013 is set aside.**
- 2. The applicant be categorised as a permitted individual.**

**CATCHWORDS:** PERMITTED INDIVIDUAL – where the applicant was a director of a company – where the company was liable to make a payment to a third party under the *Building and Construction Industry Payments Act 2004* (Qld) – liability to pay as a matter of law – where applicant commenced proceedings against the third party – whether not paying the adjudicated amount constitutes a reasonable step for the purposes of s 56AD(8) amounts to reasonable step

**APPEARANCES and REPRESENTATION (if any):**

**APPLICANT:** Mr Watson of counsel instructed by Cranston McEachern Lawyers

**RESPONDENT:** Mr Robinson, solicitor of Robinson Locke Litigation Lawyers.

## REASONS FOR DECISION

- [1] Mr Mudri is a registered builder. He was a director of a company through which he operated a building business, Bridgeport Constructions Pty Ltd ('Bridgeport'). He resigned as a director of Bridgeport in April 2013. On 30 May 2013, a company with which Bridgeport had a business relationship with in 2008, V & ME Constructions Pty Ltd ('V & ME'), filed an application to wind up Bridgeport on the grounds of insolvency. Bridgeport failed to satisfy an enforcement warrant taken out as a result of an adjudication made in favour of V & ME for \$613,025 on 16 December 2008 under the *Building and Construction Industry Payments Act 2004* (Qld).
- [2] The application for winding up proceeded and liquidators were appointed to Bridgeport on 21 June 2013. There was no contest that Mr Mudri was an influential person in respect of the affairs of Bridgeport. Because of the appointment of liquidators, Mr Mudri immediately was categorised as an excluded individual under s 56AC of the *Queensland Building and Construction Commission Act 1991* (Qld) ('QBCC Act'). To avoid losing his building licence, even though categorised as an excluded individual, he applied to be categorised as a permitted individual. The Commission rejected his application on 15 August 2013. He then applied to the Tribunal for a review of that decision on the 12 September 2013.
- [3] The Tribunal's power to review a decision of an administrative body is contained in s 20 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act') which requires the Tribunal, on the review application, to produce the correct and preferable decision by way of a rehearing on the merits. That means, that the Tribunal stands in the shoes of the decision-maker and has regard to all of the evidence that was before the decision-maker and any further evidence that is filed in the proceeding.
- [4] The test to be applied in deciding whether an individual should be categorised as a permitted individual is set out in s 56AD(8) of the QBCC Act. It provides:

The commission may categorise the individual as a permitted individual for the relevant event only if the commission is satisfied, on the basis of the application, that the individual took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event.

- [5] The application of this section was considered in *Younan v Queensland Building Services Authority*,<sup>1</sup> which is now accepted in this Tribunal:

requires first 'the identification of the relevant event; second, the identification of the circumstances that resulted in the happening of the

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<sup>1</sup> [2010] QDC 158.

relevant event; third, a consideration of whether the relevant individual took all reasonable steps to avoid those circumstances coming into existence; and, if satisfied that, fourth, a decision whether to categorise the individual as a permitted individual.<sup>2</sup>

- [6] The issue for consideration here, as narrowed in the Commission's submissions, is whether failing to pay the adjudicated amount because of the obligations imposed as a matter of law under s 29 of the *Building and Construction Industry Payments Act 2004* (Qld), was a failure to take a reasonable step which could have avoided the appointment of the liquidators to Bridgeport. If the answer to that question is yes, then on the Commission's submission, Mr Mudri has failed to satisfy the requirements of s 56AD(8) however, before that can be considered, some further factual background is necessary.
- [7] Bridgeport and V & ME had a business relationship in 2008 whereby V & ME agreed to construct a number of houses for Bridgeport in the town of Kingaroy. They fell into dispute. As a result, V & ME made a payment claim under the *Building and Construction Industry Payments Act 2004*. When agreement could not be reached, V & ME referred the matter for adjudication with both parties making submissions to the adjudicator. It is worth noting that Bridgeport's position was that no monies whatsoever were payable to V & ME. It is not necessary to descend to the particulars of that disputation, save to say, that on 16 December 2008 an adjudication decision was made in favour of V & ME whereby Bridgeport was required to pay to it \$613,025 inclusive of GST. Bridgeport received the adjudication on 18 December 2008.
- [8] One of the purposes of the *Building and Construction Industry Payments Act* is to ensure that sub contractors and suppliers are paid the adjudicated amount promptly even though there might be ongoing contractual disputes between the parties. This is provided for in s 29 which says:

**29 Respondent required to pay adjudicated amount**

- (1) If an adjudicator decides that the respondent is required to pay an adjudicated amount, the respondent must pay the amount to the claimant on or before the relevant date.
- [9] There may be ongoing disputes between the relevant parties and the fact of the adjudication does not affect that dispute. This is provided for in s 5 of the Act which provides that a claimants entitlements and remedies under the Act do not limit another entitlement a claimant may have under a construction contract or any remedy a claimant may have for recovering the other entitlement. In short, this means that irrespective of what other causes of action that might be available to either party in the dispute, once an adjudicated amount has been decided upon, the statute requires that it be paid as a matter of law. This is, in a nutshell, the position of the Commission.

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<sup>2</sup> Ibid at [26].

- [10] Upon receiving the adjudication Mr Mudri, as a director of Bridgeport, consulted lawyers and took advice as to what steps he could take to avoid paying the adjudicated amount because he believed that the adjudication was wrong and he had no liability to pay. The result of that advice was the institution of proceedings in the Supreme Court claiming against V & ME damages in the order of \$1.5 million.<sup>3</sup>
- [11] To enforce the adjudication, V & ME applied to the Supreme Court on 5 January 2009 for judgement by filing the adjudication certificate.<sup>4</sup> V & ME then sought to enforce the Adjudication Judgment by issuing a statutory demand to Bridgeport under s 459 of the *Corporations Act 2001* (Cth).
- [12] To avoid the appointment of liquidators, Bridgeport applied to set aside the statutory demand and was successful with a consent order setting aside the statutory demand in March 2009. The Supreme Court proceedings were defended but no active steps were taken by either party to prosecute those proceedings.
- [13] Another attempt was made to windup Bridgeport for failing to pay the Adjudication Judgment on 6 October 2009.<sup>5</sup> On the first return date of the application for winding up, the parties were represented, orders were made about the filing of affidavit material, and the application was listed for a hearing. However, once again, V & ME did not prosecute the winding up application.
- [14] Nothing further happened with that proceeding but in the meantime, in March 2010 the applicant received advice from his then solicitors that as V & ME had not taken any further steps in either the civil proceedings in the Supreme Court or the application for winding up, it would be in Bridgeport's best interest to leave matters in abeyance. Bridgeport was also advised that if V & ME did not prosecute the winding up application by *'early April 2010 then that matter, by virtue of the Corporations Law, will be dismissed'*.
- [15] Mr Mudri, adhered to that advice and took no steps with respect to prosecuting his Supreme Court civil proceeding or taking any further action in the winding up application. During 2010, Mr Mudri's lawyers also undertook various investigations into V & ME and ascertained that even if the prosecution of the Supreme Court proceedings were agitated and successful, V & ME had no assets to satisfy any judgment in favour of Bridgeport. Even assuming that there was a judgment in favour of Bridgeport, this would not automatically relieve Bridgeport of the obligation to pay the adjudicated amount, although in theory, it could be offset against any judgment in its favour.

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<sup>3</sup> Supreme Court of Queensland (BS 973/09).

<sup>4</sup> Supreme Court of Queensland (BS 64/09).

<sup>5</sup> Supreme Court proceeding 11102/09.

- [16] Also during this period, Bridgeport divested itself of assets, having ensured that all creditors of the company were paid, with Mr Mudri ultimately resigning as a director of the company on 1 April 2012. During this period, V & ME took no further action with respect to the Adjudication Judgment.
- [17] Quite unexpectedly, on 30 May 2013 V & ME again applied to the Supreme Court for the appointment of liquidators. One can reasonably presume that the papers were served at the registered office of the company but Mr Mudri swears that they did not come to his attention. I should also point out that although lying dormant, the Supreme Court civil proceedings were still on foot but would necessarily have required an application to the Court for that proceeding to proceed further.
- [18] As Mr Mudri was not made aware of the application for the winding up of Bridgeport, it proceeded and an order was made on 21 June 2013. It is somewhat surprising that the notice of the application did not come to Mr Mudri's attention because the registered office of Bridgeport remained at his residence in Maleny but Mr Mudri did give evidence that he spends most of his time working in country towns such as Chinchilla building houses. Although this is unusual, I have no alternative, really, but to accept Mr Mudri's evidence on this point. Once again, given the history of this matter it would be unlike him to sit by and let the winding up application proceed without some intervention.
- [19] Because of the appointment of liquidators, as I have said above, Mr Mudri's licence was cancelled because he was categorised as an excluded individual under s 56AC of the QBCC Act. Conversely, because he applied to be categorised as a permitted individual within a 30 day period, within the required time, his licence was preserved. Also, because he applied to review the decision not to categorise him as a permitted individual within the required time, he could continue to hold his licence.
- [20] The relevant event, is of course, the winding up of Bridgeport in June 2013. The circumstances that gave rise to the winding up, was the failure to pay the adjudicated amount. Therefore, I have to consider whether Bridgeport, or Mr Mudri, took all reasonable steps to avoid the coming into existence of that circumstance.
- [21] Mr Watson for the applicant submits simply that Bridgeport did take all reasonable steps to avoid the coming into existence of the adjudicated judgment by participating in the adjudication. Mr Mudri had no control over the outcome of the adjudication and the advice he received, which is not challenged, is that it would be unlikely that he could either set aside the adjudication or have it stayed. The Commission on the other hand says, that the only reasonable step that could have been taken by Mr Mudri, as director of Bridgeport, was to ensure that the payment was made not only because of the objects of the *Building and Construction Industry Payments Act*, but also because of the statutory requirement under s 29 that the '*respondent must pay the amount to the claimant*'. The difficulty with this submission, is that it excludes from consideration,

the circumstances of the dispute between Bridgeport and V & ME and also steps taken by Bridgeport, to not pay an amount which it contended was not owed, in fact, V & ME was liable to it for a much greater sum.

- [22] This is not a case where Bridgeport simply stood by and refused to pay the adjudicated amount but rather, actively instigated proceedings in the Supreme Court to recover money owed to it to offset the adjudicated amount, resisted two applications for winding up, and made an assessment as to risk of proceeding with the litigation on the advice of its lawyers.
- [23] Even though there is a liability to pay under the *Building and Construction Industry Payments Act*, like any judgment of any court, it is for the judgment creditor to enforce the judgment. It was always clear to V & ME that Bridgeport was not going to pay the outstanding balance despite land being sold under the warrant to reduce the adjudication judgment to \$440,000. This is because there was a genuine dispute about Bridgeport's liability to pay. Although I am not aware of the substance of the application to set aside the statutory demand which was filed in the Supreme Court, it obviously raised a genuine offsetting claim because it seems, by consent, the application was disposed of on 19 March 2009 with the statutory demand being set aside. V & ME must have accepted there was a genuine dispute.
- [24] Similarly, with respect to the winding up application filed 6 October 2009, V & ME did not continue with its prosecution after material was filed by Bridgeport opposing the application. Therefore, from Bridgeport's perspective, and certainly that of Mr Mudri, given the known facts about the assets of V & ME Constructions to meet any judgment, the strategy he adopted, on the advice of his solicitors, seemed to be the sensible one.
- [25] When all of the circumstances are considered, the steps taken by Bridgeport and Mr Mudri as its director in not paying the balance of the adjudication judgment, were reasonable and therefore were reasonable steps to avoid the circumstances that gave rise to the appointment of the liquidator. It is of course a simple thing to say payment of the adjudication judgment would have avoided the winding up and that is true. However, once paid, similar to the proceeds from the sale of the land owned by Bridgeport, there was no prospect of recovery other than through court proceedings which, here would ultimately result in a hollow judgment. Therefore, resistance in payment was the only viable course to protect Bridgeport.
- [26] Although there was a legal liability to pay under the statute, I fail to see the distinction between this liability to pay from a judgment of the court, both of which are susceptible to the same enforcement procedures for recovery. It was always within the capability of V & ME Constructions to enforce the adjudication well before the 2013 but chose not to do. Bridgeport was in a very difficult position, if it paid to avoid the winding up, the money was lost forever because the information it had about V & ME meant that further

litigation against it would be fruitless. If it chose not to pay then, it seems, liquidation inevitable.

- [27] I have therefore come to the conclusion that failure to pay the adjudicated amount contrary to the obligation created in s 29 was not, in the circumstances of this case, a failure to take a reasonable set to avoid the circumstances that resulted in the appointment of liquidators to Bridgeport. I am therefore satisfied that reasonable steps were taken and therefore the decision of the Commission will be set aside.