QCAT

Queensland Civil and Administrative Tribunal

CITATION:	Queensland Building and Construction Commission v Vadasz [2014] QCATA 001
PARTIES:	Queensland Building and Construction Commission (Applicant/Appellant) v Michael Christopher Vadasz (Respondent)
APPLICATION NUMBER:	APL127-13
MATTER TYPE:	Appeals
HEARING DATE:	4 November 2013
HEARD AT:	Brisbane
DECISION OF:	**Senior Member Oliver** **Dr Cullen, Member**
DELIVERED ON:	10 January 2014
DELIVERED AT:	Brisbane
ORDERS MADE:	**1. The decision of the Tribunal dated 20 February is set aside.** **2. The applicant's decision refusing to categorise the respondent as a permitted individual is confirmed.**
CATCHWORDS:	Occupational Regulation – where the applicant refused to categorise the respondent as a permitted individual so he could retain his builders license – where Tribunal must consider the matters referred to in section 56AD(8) and section 56AD(8A) of the *Queensland Building and Construction Act* – whether the evidence established that the respondent made any provision or appropriate provision for Commonwealth or State taxation debts – where a consideration of the meaning or "provision" – where error of mixed fact and law – where evidence of "provision" inadequate in the circumstances. *Queensland Civil and Administrative Tribunal Act* 2009 s 142

Queensland Building Services Authority Act 1991 ss 56AD(8) and 56AD(8)(A)

Flegg v Crime and Misconduct Commission and Anor [2013] QCA 376
Dearman v Dearman (1908) 7 CLR 549
Fox v Percy (2003) 214 CLR 118
Chambers v Jobling (1986) 7 NSWLR 1
Hyndman v Queensland Building Services Authority [2009] QCCTB 240

APPEARANCES and REPRESENTATION (if any):

APPLICANT: represented by Ms Heyworth-Smith of counsel instructed by Robinson Locke, Lawyers

RESPONDENT: represented by Mr Wilson of CCS Legal, Lawyers

REASONS FOR DECISION

[1] On 20 February 2013 the Tribunal made orders setting aside a decision of the former Queensland Building Services Authority, now the Queensland Building and Construction Commission, refusing to categorise Mr Vadasz as a permitted individual pursuant to section 56AD of the then *Queensland Building Services Authority Act* and ordered that he be categorised as a permitted individual. The effect of this decision meant that Mr Vadasz could keep his licence as a registered builder.

[2] On 22 March 2013 the Commission filed an application for leave to appeal or appeal the Tribunal's decision. Broadly, the basis of the appeal is that the learned member failed to have proper regard to the requirements of sections 56AD(8) and (8A) of the *Queensland Building Services Commission Act* in deciding 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 that he made proper provision for Commonwealth and State taxation debts. The relevant event was the making of a sequestration order against Mr Vadasz on 7 December 2010.

Background

[3] Mr Vadasz owned and operated a specialist pile driving business as a sole trader, known as Australian Piling Company, for many years. The business was very profitable and generated significant gross income for Mr Vadasz. A summary of the financial position of the business in the years preceding Mr Vadasz's bankruptcy is as follows:

2005 financial year: there was a gross income was $3.2m; after operating expenses there was a net profit of $650,979 with the respondent taking $233,293 in drawings.

2006 financial year: there was a gross income of $6.2m; after operating expenses a net profit of $1,097,781 with the respondent taking $264,834 in drawings.

2007 financial year: there was a gross income of $3.8m; after operating expenses there was a net profit of $71,772 with the respondent taking $300,441 in drawings.

2008 financial year: there was a gross income of $6m; after operating expenses there was a net loss $1,019,358 with the respondent taking $277,661 in drawings.

2009 financial year: there was a gross income of $6.5m; after operating expenses there was a net profit of $853,864 with the respondent taking $500,001 in drawings.

[4] One of the major expenses of the business was the finance costs of equipment which included large tracked machines which Mr Vadasz says are worth some millions of dollars. The finance costs were about $45,000/mth. The other major outlay was to “drawings” and more will be said about this outlay later in these reasons.

[5] The financial difficulties arose when a debtor, Bloomer Constructions Pty Ltd refused to pay a claimed amount of $1.250m for a project at Newstead in Brisbane in the 2009 financial year. The claim went through the *Building and Construction Industry Payments Act* adjudication process, with the outcome that Mr Vadasz was awarded only about $415,000.00 of the claimed amount. He then pursued the balance of the claim through the courts. This claim was then the subject of mediation between the parties, following which Mr Vadasz agreed to accept $60,000.00 in full satisfaction of the balance of the claim. He says he compromised the claim because of the substantial legal costs he had incurred and was likely to incur if the claim proceeded. There is nothing unusual in adopting this course of action.

[6] In addition to this loss, Mr Vadasz was confronted with the global financial crises which occurred in October 2008 and carried on into the 2009 financial year. The effect of this was the loss of contracts for piling work which put a further strain on cash flow creating difficulties in meeting the substantial lease payments on his piling equipment. As a result, CBFC, (the financier) appointed receivers to take possession of the equipment, which was then sold, according to Mr Vadasz, at an undervalue.

[7] In an attempt to meet his liabilities, Mr Vadasz sold his apartment in Eastwood in Sydney in April 2010. He also sold the plant depot located at 3 Thompson Street, Dry Creek in May 2010. Despite the sale of these properties for about $1,570,000, he was still unable to pay his creditors including Holcim Pty Ltd (a concrete supplier) and the Australian Tax Office, and was forced into bankruptcy.

[8] The Holcim debt was for $42,435. It issued a bankruptcy notice and subsequently filed a creditor’s petition In the Federal Magistrates Court applying for a sequestration order against Mr Vadasz estate. Mr Vadasz

told the Tribunal[1] that there was no point trying to resolve the debt with Holcim because as he saw it, it would be regarded as a preference payment and at the time of the bankruptcy hearing there were three other creditors, including the ATO with a debt of about $270,000, ready to be substituted as the petitioning creditor. He was not in a position to satisfy these creditors. Therefore, the bankruptcy hearing proceeded and a sequestration order was made.

[9] The bankruptcy resulted in Mr Vadasz being automatically categorised as an excluded individual under section 56AD of the QBSA Act, with the immediate effect that his building license was cancelled. As he was entitled to do, he immediately applied to the Commission to be categorised as a permitted individual so that he could retain his license. Upon considering his application, the Commission was not satisfied that he took all reasonable steps to avoid the coming into existence of the circumstances that resulted in his bankruptcy[2] and refused to categorise him as a permitted individual. Mr Vadasz then applied to the Tribunal to review the Commission's decision.

[10] It is against this background that the Tribunal was required to examine, by way of a fresh hearing on the merits[3], whether Mr Vadasz took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event, here the relevant event is his bankruptcy. The Tribunal made certain findings satisfying itself that Mr Vadasz did take all reasonable steps and made the order setting aside the Commission's decision on 8 February 2013.

The Appeal

[11] The application for leave to appeal or appeal sets out six (6) grounds of appeal. The first ground of appeal is generic in the way it is expressed and contends the learned Member erred in law by failing to properly consider whether Mr Vadasz '*took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event*', that is the bankruptcy.

[12] The second ground is more specific and is directed to s 56AD(8A)(f) contending that the learned Member erred in law by not properly considering whether Mr Vadasz made '*appropriate provision for Commonwealth and State taxation debts*'. Ground three follows on from ground two in challenging his finding of fact that 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 (the respondent) was making 'appropriate provision''.*

[13] Ground four alleges an error of law in failing to provide any or any sufficient reasons for not considering the financial statements of the

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1 Transcript page 23.

2 *Queensland Building Services Commission Act* s 56AD(8).

3 QCAT Act s 20.

business for the financial years 2005 to 2009, in preference to the Independent Review Report in determining that the business, during the relevant period, was not undercapitalised.

[14] Ground five alleges another error of law by not dealing with or considering the effect of the substantial drawings taken from the business in the years preceding the bankruptcy.

[15] Finally, it is contended that the learned Member erred in fact and law by accepting the evidence of the respondent when it was contradicted by the documentary evidence before him.

[16] There is a contest between the parties as to whether leave to appeal is necessary. The various grounds of appeal raise both questions of law and fact. Section 142(3)(b) provides that leave of the Appeal Tribunal is necessary if the appeal is on a question of fact or mixed law and fact. Leave is not necessary if the appeal is on a question of law. Whether leave to appeal will be necessary will depend on whether there is any substance to any of the grounds of appeal.

[17] As the learned Member acknowledged[4], his function was to decide the review application afresh, standing in the shoes of the decision maker. He had considerably more material before him than the original decision maker to consider. In considering this material, the learned Member was required to make findings of fact[5] as to the steps taken by Mr Vadasz to discharge the onus on him by s 56AD(8) that he took reasonable steps to avoid the coming into existence of the circumstances that resulted in his bankruptcy.

[18] Because the nature of the inquiry undertaken by the learned Member necessarily involved making findings of fact, any findings of fact will not usually be disturbed on appeal if the facts inferred by the Tribunal, upon which the finding is based, are capable of supporting its conclusions, and there is evidence capable of supporting any inferences underlining it.[6] An appellate tribunal may interfere, however, if the conclusion at first instance is '*contrary to compelling inferences*' in the case.[7] As the High Court said in *Fox v Percy*:

> In such circumstances, the appellate court is not relieved of its statutory function by the fact the trial judge has, expressly or implicitly, reached a conclusion influenced by an opinion concerning the credibility of witnesses. In such a case, making all due allowances for the advantages available to the trial judge, the appellate court must "not shrink from giving effect to" its own conclusion.[8]

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4 Reasons paragraph [20].
5 *Flegg v Crime and Misconduct Commission and Anor* [2013] QCA 376.
6 *Dearman v Dearman* (1908) 7 CLR 549 at 561; *Fox v Percy* (2003) 214 CLR 118 at 125-126.
7 *Chambers v Jobling* (1986) 7 NSWLR 1 at 10.
8 *Fox v Percy* (2003) 214 CLR 118 at 128 per Gleeson CJ, Gummow and Kirby JJ.

[19] There are particular matters that have to be addressed in section 56AD(8)(A) in deciding whether the applicant has discharged the evidentiary onus cast upon him by the section, they are:

a) Keeping proper books of account and financial records;

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

c) Reporting fraud or theft to the police;

d) Ensuring guarantees provided were covered by sufficient assets to cover the liability under the guarantees;

e) Putting in place appropriate credit management for amounts owing and taking reasonable steps for the recovery of the amount; and

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

[20] The Commission contends that it is mandatory that these matters be considered by a decision maker. This is obviously correct if they are at all relevant to the application.

The decision below

[21] It is evident from the learned Member's reasons that he was acutely aware of what he had to consider in the review application. He made specific reference to the wording of s 56AD(8) and then went on to deal with each of the matters in s 56AD(8A) under the heading of "Specific Matters".

[22] He made specific findings of fact with each of the matters in subsections (a) to (e) insofar as they related to Mr Vadasz.

[23] In summary, the Tribunal found:

- there was no issue as to the manner in which the books of account of the business were kept, proper financial returns were prepared by the business accountant and all staff entitlements were paid;
- appropriate legal and financial advice was obtained and litigation reasonably pursued to recover outstanding debts;
- there were no issues concerning the reporting of fraud etc; and
- there were appropriate measures in place to recover outstanding debts, including the Bloomer debt.

[24] The only contentious issue arising under subsection (8A) is whether proper provision was made for the payment of tax debts. Here, the learned Member took into account the submission of the Commission that the financial statements demonstrate that there were outstanding tax debts with penalties and interest in the years preceding the bankruptcy, and there was no explanation from Mr Vadasz as to why this occurred or what provision was made for these debts. However, it was accepted there was an '*ongoing dispute with the ATO*' in relation to a substantial amount and

this '*was being handled by his solicitors and accountant*'. This was his only response to this contention.

[25] The learned Member found that it was '*significant*' that the ATO was not a petitioning creditor and that the subsection refers to making '*appropriate provision*' as opposed to actually making payment and therefore 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. Therefore the learned Member concluded that in these circumstances he had made appropriate provision within the meaning of that term in the subsection.

[26] There was one other matter addressed by the Tribunal, relating to how the business was operated generally. To the general submission that the business was undercapitalised and that the business relied on credit and future work to pay the debts as and when they fell due, the Tribunal found that in normal trading circumstances, having regard to the past years, the approach taken was not unreasonable, as most businesses rely on credit '*to operate and expand*'. The learned Member also found support for this position in that the business met the financial requirements of the Commission to retain a building licence because the Independent Review Reports for 2008 and 2009 showed a ration of 1.11:1 and 1.03.1 respectively.

[27] It was the extraordinary global circumstances, the delinquent debtor, Bloomer Constructions, and the subsequent conduct of CBFC that largely resulted in the failure of the business. All of these findings of fact are challenged by the applicant in this appeal.

Discussion

[28] It is evident from the submissions of the applicant that there is no serious challenge to the learned Member's findings in respect of the matters referred to section 56AD(8)A(a)-(f) inclusive. These factual findings were open on the evidence and there is no basis upon which these findings could be disturbed by the Appeal Tribunal.[9]

[29] The contentious issue is whether the Tribunal's finding that the respondent made proper provision for the payment of tax is supported by the evidence put before the Tribunal by the respondent.

[30] Relevantly, the financial accounts of the business between 2005 – 2009 demonstrate quite conclusively that there were ongoing arrears of income tax, goods and services tax payments to the ATO, interest on outstanding GST, and penalties.

[31] Importantly, as already noted, Mr Vadasz did not provide any independent evidence to support the contention that there were '*arrangements made*' with the tax office. The learned Member, in his reasons made reference to

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[9] *Fleg v Crime and Misconduct Commission and Anor* supra.

this.[10] Mr Vadasz said there was an ongoing dispute with the ATO in relation to a substantial amount of '*hundreds of thousands of dollars*'. At the time of his bankruptcy there was a tax debt of $270,000.00. The Member also found that the ATO was '*fully informed of his financial status and at no time did the ATO indicate it was concerned about his provision for taxation debts*'. With reference to subsection (f), the learned Member said:

> The subsection refers to making "appropriate provision" for tax debts, not actually making payment. It is arguable that if Mr Vadasz had a realistic anticipation of being able to pay the amount of claim tax, if required to do so, once the tax dispute was resolved, that he was making appropriate provision.

[32] It is difficult to reconcile this statement with the evidence that was before the Tribunal concerning Mr Vadasz's tax liability. Although reference to "provision" does not necessarily mean *actual* payment of any tax liability, it should nevertheless be given its ordinary meaning. This would mean that there should be an existing fund or mechanism in place to ensure that payment of any tax liability could be made when required. To this extent, I agree and adopt what was said in *Hyndman v Queensland Building Services Authority*[11]*:*

> That some form of priority being given tax debts by an entity, whether that be by setting aside a fund or an appropriate amount in cash flow arrangement, which will enable the settling of Commonwealth and State taxes when same fall due.

[33] Provision within the meaning of the section would also include the entering into an arrangement with the relevant taxation authority to pay outstanding tax by instalments in circumstances where the cash flow of a business has been interrupted as a result of events outside the control of the business. Those events might include, as was the case here, the failure of a debtor to pay money due for work done or an unpredictable event such as the global financial crisis. They could also include the insolvency of debtor/s, illness of a key person or failure of plant and equipment. These examples are obviously not meant to be exhaustive.

[34] Where such an arrangement has been entered into, it would also be reasonable to have regard to the payment plan to ensure that it is reasonable and achievable having regard to the past performance of the business and reasonable future cash flow projections in the particular circumstances of the business. There would be an evidentiary onus on the applicant, in these circumstances, to satisfy the decision maker of these matters.

[35] The financial accounts show that in the years preceding the bankruptcy there were ongoing issues with the ATO, including outstanding GST payments, penalties and interest and late lodgement fees. Also, the ATO was present at the bankruptcy hearing and, according to Mr Vadasz, was prepared to be substituted as a creditor should the respondent settle his debt with Holcim. It is significant that Mr Vadasz said that there was no

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10 Paragraph [61] – [65].

11 [2009] QCCTB 240.

point is paying Holcim because of the preference implications and, secondly that he could not pay the ATO. This would also suggest that there was no arrangement in place with the ATO.

[36] Even though it might be accepted that the taxation debt was not the direct cause of the relevant event for the purposes of section 56AD(8), it was a significant debt and Mr Vadasz had no financial means to clear this debt and was part of the overall matrix of circumstances that led to his bankruptcy.

[37] His obligation under subsection (f) to show he took reasonable steps to avoid the coming into existence of the circumstances which led to his bankruptcy was to make a proper provision for the payment of outstanding tax. There is simply no evidence that he made any such provision in the years preceding the bankruptcy in fact, the evidence is to the contrary because the tax debt continued to accumulate as did other consequential tax liabilities. Even the learned Member acknowledged that the basis of the dispute with the ATO was "unclear". By simply stating that the negotiations with the ATO were left with his accountant and that, as far as he knew, the ATO did not express any concern over the taxation debts, does not, of itself, discharge the onus on the respondent to satisfy the Tribunal, as decision maker, that appropriate provision has been made. That's not to say, that in certain circumstances, only the oral evidence of the applicant of how provision has been made would not satisfy the evidentiary burden but here that evidence is vague and more is required.. Further there was no evidence as to the likely amount he would have to pay, nor that he had cash reserves to meet any liability in this regard. There was also no evidence that some sort of repayment plan was being negotiated, if that was the case. Also there was no evidence going to the type of provision that might be made and referred to in paragraphs 33 and 34 above. There was therefore, simply no evidence to give support to Mr Vadasz's stated confidence that he could meet any liability when the dispute was resolved.

[38] All of this must also be considered in light of the overall financial circumstances of the business that is, Mr Vadasz's financial circumstances. The accounts reveal that in the years preceding the bankruptcy he withdrew significant drawings and in fact the financial year immediately before the bankruptcy he took total drawings of $501,000.

[39] Although Mr Vadasz submitted to the Tribunal that he was unaware that so much money had been taken out in drawings and he could not account for all of that, the financial records are conclusive in the absence of any other evidence as to what the drawings might consist of. These drawings were taken in circumstances where there was significant ongoing lease costs of $45,000 per month, debts to Holcim, the Australian Taxation Office and other creditors, and income from the business was significantly reduced as a result of the global financial crisis. It is difficult to comprehend how Mr Vadasz could be said to be taking reasonable steps with respect to taxation liabilities in the absence of specific evidence when

drawings of this magnitude were being taken in preference to paying creditors.

[40] It follows from the above discussion that a finding that Mr Vadasz has discharged the evidentiary onus imposed on him by s 56AD(8A)(f) in respect of the provision for Commonwealth taxes was not reasonably open on the limited evidence before the Tribunal and therefore, the appeal should be allowed. Because this conclusion involves a question of mixed fact and law, leave to appeal should be granted and in accordance with s 142(3) of the QCAT Act, the decision of the Tribunal should be set aside and instead there will be an order that the decision of the Commission dated 8 February 2013 refusing to categorise Mr Vadasz be confirmed.

Dr Cullen, Member

[41] I have had the advantage of reading the reasons of Senior Member Oliver in draft and agree with them, and the conclusions he has reached and the orders he proposes.

[42] In addition to the comments and conclusions made by Senior Member Oliver, it bears mention that the drawings taken by Mr Vadasz from the business were quite significant. This takes on some importance, in my view, in that this money might properly have been instead utilised to provide for a fund of the sort contemplated by Senior Member Oliver in paragraph 32, above.

[43] The Learned Member below preferred the Independent Review Report to the financial statements of the business for the financial years 2005 to 2009, in determining that the business, during the relevant period, was not undercapitalised. Appeal ground four alleges that this amounts to an error of law in that the learned Member has not provided any, or any sufficient reasons, for not considering the financial statements. I agree, and consider that on this basis, although Senior Member Oliver has determined to allow the appeal, ground four provides an additional basis upon which the appeal should be allowed, and for which leave is not required.

[44] The natural starting point in determining whether a business is undercapitalised should naturally commence with a review of the financial statements, particularly when they are before the Tribunal. Had this been done, it would have revealed that there was a substantial net deficit in each of the financial years from 2005 through 2009, inclusive.

[45] This trend of undercapitalisation does not reconcile with the aspirational position taken by Mr Vadasz in relation to his taxation issues. There is no explanation provided by the learned Member below in relation to net deficits in capitalisation that are disclosed by the financial statements. It is my view that this is problematic for two reasons: (1) it cannot be logically disputed, looking at the available evidence as a whole, that the business was undercapitalised; and (2) it is apparent that funds were available from which provision for tax could have been met and was not.

[46] Mr Vadasz should have considered the possibility that the taxation issues may not have resolved in his favour – there is no evidence before the Tribunal to suggest that his position in relation to the taxation issues was one of strength, and the intent of 56AD(8)(A)(f) must surely require more than the existence of a dispute with the ATO, self-assessed to be one that will result in the eventual debt being capable of being paid.