

CITATION: Queensland Building and Construction Commission v Jensen [2014] QCATA 028

PARTIES: Queensland Building and Construction Commission
(Applicant/Appellant)
v
Jan Boss Jensen
(Respondent)

APPLICATION NUMBER: APL171-13

MATTER TYPE: Appeals

HEARING DATE: On the papers

HEARD AT: Brisbane

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

DELIVERED ON: 19 February 2014

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. Leave to appeal granted**
- 2. The Tribunal's decision of 25 March 2013 is set aside.**
- 3. The decision of the applicant dated 8 February 2013 not to categorise the applicant 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 licence – where Tribunal must consider the matters referred to in section 56AD(8) and section 56AD(8A) of the *Queensland Building and Construction Commission Act* – whether the business operated by the respondent was sufficiently capitalised – whether the cause of the relevant event of the company related to external factors resulting in the insolvency of the business – whether the evidence established that the respondent made any provision or appropriate provision for

Commonwealth or State taxation debts

Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 142(3)
Queensland Building and Construction Commission Act 1991 (Qld) ss 56AD(8), 56AD(8A)

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
Fox v Percy (2003) 214 CLR 118

APPEARANCES and REPRESENTATION (if any):

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009 (Qld)* (QCAT Act).

REASONS FOR DECISION

- [1] On 25 March 2013 the Tribunal made orders setting aside a decision of the former Queensland Building Services Authority refusing to categorise Mr Jensen as a permitted individual pursuant to section 56AD(8) of the now *Queensland Building and Construction Commission Act 1991 (Qld)* and ordered that he be categorised as a permitted individual. The effect of this decision meant that Mr Jensen could keep his licence as a registered builder.
- [2] On 23 April 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 properly consider the requirements of sections 56AD(8) and 56AD(8A) of the *Queensland Building and Construction Commission Act 1991 (Qld)* (the QBCC Act) in deciding that Mr Jensen '*took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event*', and also that he had made proper provision for Commonwealth and State taxation debts.
- [3] The relevant event was the appointment of liquidators to JAD Building and Constructions Pty Ltd ("JAD"), a company of which Mr Jensen was a director on 4 May 2010. Section 56AC of the QBCC Act provides that in these circumstances Mr Jensen is categorised as an excluded individual and thereby his building licence is automatically cancelled unless he applies to the Commission to be categorised as a permitted individual.

Background

- [4] Mr Jensen holds a builders licence – low rise. He operated his building business through the company JAD Building and Constructions Pty Ltd. He was a director of the company and its nominated licensee.
- [5] Mr Jensen applied for his builder's licence in 2007 by making a written application to the Commission. There was a question on the form inquiring whether he had been a bankrupt or '*entered into a debt agreement under Part IX of the Bankruptcy Act 1966*'. He answered '*no*' to this question. The truth of the matter was that he had entered into a debt arrangement but he says he was advised by a person at the Master Builders Association, who was helping him with the application for a licence, that he should put '*no*' to the question because a debt arrangement was not bankruptcy. On the basis of the application as lodged with the Commission, Mr Jensen was granted his licence.
- [6] The Commission subsequently became aware that the information on the application form was incorrect and as a consequence there has been ongoing conflict between the Commission and Mr Jensen. Mr Jensen claims that he has been unnecessarily harassed by the Commission since the granting of the licence. He has been the subject of numerous notices of intention to suspend his licence and the issuing of infringement notices, which have been contested. He has also filed applications in the former Commercial and Consumer Tribunal to review administrative decisions made by the Commission. Throughout all of this, and despite of it, Mr Jensen has been able to maintain his licence. However, because of this ongoing conduct by the Commission and its threat that it was going to cancel his licence in correspondence to Mr Jensen on 9 March 2010, Mr Jensen said that he could not continue to operate the business and so after taking advice from an accountant he decided to appoint Ian Currie of BRI Ferrier as liquidator to JAD Building and Construction Pty Ltd.
- [7] There were other external factors that impacted on the viability of the business conducted by the company. The company was involved in the home installation under the Commonwealth Government's home insulation scheme which was abruptly scrapped on 23 April 2010. Insulation stock was purchased from an associated company, Three Stooges Pty Ltd, which was caught with a quantity stock that became virtually worthless after the scheme was scrapped. However this financial impost is not reflected in the accounts of the company. Even so the scrapping of the scheme, in these circumstances, had an immediate impact on the company's cash flow which put an obvious strain on the company's profitability.
- [8] At the same time, cash flow was also affected by two delinquent debtors who refused to pay money owed to the company for work done under contracts entered into in September 2009 and October 2009. Although one debt was compromised by JAD agreeing to reduce it from \$31,309.39 to \$20,940.00 to ensure payment, the other debt for \$57,000.00 remained outstanding at the time of the appointment of the liquidator on 2 May 2010.

- [9] The appointment of the liquidator resulted in Mr Jensen being automatically categorised as an excluded individual under section 56AD of the QBCC Act, with the immediate effect that his building licence 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 licence. 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 the relevant event and refused to categorise him as a permitted individual. Mr Jensen then applied to the Tribunal to review the Commission's decision. Mr Jensen retains his licence until the review proceedings are concluded.
- [10] It is against this background that the Tribunal was required to examine, by way of a fresh hearing on the merits¹, 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, being the appointment of the liquidator. The Tribunal made findings of fact satisfying itself that he did take all reasonable steps and made the order accordingly and set aside the Commission's decision on 8 February 2013.

The decision below

- [11] 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 set this out under the heading "What does the Tribunal consider" and identified the relevant event for the purposes of the section being the appointment of the liquidator to the company which occurred on 4 May 2010². Later in his reasons he specifically addressed each of the matters listed under s 56ADA(8A) under the heading "Prescribed matters". 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".
- [12] He made specific findings of fact with respect to each of the matters in subsections (a) to (e) insofar as they related to Mr Jensen.
- [13] In summary, the Tribunal found:
- The applicant had engaged a chartered accountant to prepare the accounts and maintain financial records which was adequate for the size of the business.
 - The criticism of not obtaining legal advice in respect of the notices to suspend or cancel Mr Jensen's licence was not necessary because he seemed capable of dealing with this issue himself. The submission concerning the advice in respect of the notices is confusing because the subsection speaks of obtaining advice *'before entering into financial or business arrangement or*

¹ QCAT Act s 20.

² Reasons paragraphs [9] – [11].

conducting business'. It seems that this subsection, as the learned Member seemed to say, had little if any application to the issuing of the notices.

- There were no issues concerning the reporting of fraud etc; and
- It was reasonable for Mr Jensen to compromise on of the outstanding debts the subject of dispute and as for the other, there was not sufficient time for him to take any steps to avoid the consequences of that debt because of the appointment of the liquidator.
- The learned Member also addressed the issue as to whether there was appropriate provision for taxation debts. He made findings, based on the cash flow of the business, that appropriate provision had been made by entering into an arrangement with the Australian Tax Office to pay outstanding tax in instalments. He found, based on cash flow, that the business would have sufficient funds to pay the first payment due on 12 April 2012 of \$2,191.75 and would have paid this instalment had the liquidator not been appointed.

[14] As to reasons for the JAD's insolvency the learned Member made a finding that the company had sufficient assets to meet its liabilities and it had sufficient ongoing income to meet its expenses. He then made this specific finding:

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.

[15] The Tribunal found that the circumstances that resulted in the happening of the relevant event were threefold: the Commission's proposal to cancel his licence; the failure of the home insulation scheme; and, the non-payment of two outstanding business debts³.

The Appeal

[16] The application for leave to appeal or appeal sets out a number of grounds of appeal. The first ground of appeal is rather generic in the way it is expressed and contends the learned Member erred in law by failing to properly consider 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*'⁴, that is the appointment of the liquidator.

[17] The other grounds of appeal allege errors of law and fact including:

- a finding that a Trust '*underpinned the company financial position*' and profit and loss of the Trust and its assets meant the company could meet its liabilities when they fell due;

³ Also see paragraphs [31], [37] and [41] of the Reasons.
⁴ QBCC Act s 56AD(8).

- the failure to properly consider whether under s 56AD(8A)(f), Mr Jensen made ‘*appropriate provision for Commonwealth and State taxation debts*’;
- a finding that Mr Jensen was not required to inject his own funds into the company in circumstances where the company was continuing to trade and to incur debts;
- a finding that the Mr Jensen had made provision for the payment of taxation debts by entering into an arrangement with the Australian Taxation Office to pay outstanding taxation debts;
- a finding that it was not the insolvency of the company which resulted in the appointment of the liquidator, but other reasons;
- whether Mr Jensen took reasonable steps to avoid the non payment of outstanding debts;
- a general assertion that in accepting the evidence of the respondent he failed to have regard to compelling objective evidence contradicting that evidence;
- that the company was wound up in insolvency at the relevant time Mr Jensen had an ‘*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’.*’

[18] The various grounds of appeal raise both questions of law and fact. Section 142(3)(b) of the QCAT Act 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.

[19] In considering the matter afresh the learned Member was required to make findings of fact⁵ as to the steps taken by Mr Jensen to discharge the evidentiary onus cast 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. Findings of fact will not usually be disturbed on appeal if the facts as found or 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

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.

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

- [20] The Commission contends that it is mandatory that the matters set out in s 56AD(8A) must be considered by a decision maker. This is obviously correct however some of the matters referred to in the subsection can be immediately dismissed as having no relevance to the particular application, for instance here; reporting fraud or theft to the police and the matter of guarantees. The matters to be considered 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.
- [21] It is difficult to reconcile the finding that the circumstances that resulted in the relevant event included both the sudden scrapping of the home insulation scheme and the threatened cancellation of Mr Jensen’s licence. Firstly, although the findings that the scrapping of the insulation scheme had an impact on the cash flow of the company, there is no evidence that this gave rise to any debt that was not covered by income from the scheme. In other words the company was not left with excess insulation stock and presumably was paid for all work done.
- [22] As to the cancellation of licence the only direct impact this had on the company was a refusal of one debtor to pay an outstanding debt of about \$50,000.00 because of the involvement of the Commission. Mr Jensen retained his licence until the liquidator was appointed which means, despite threats made about cancellation, the company could have continued to trade. There is no evidence of work lost because of the threatened cancellation nor income not recovered apart from the outstanding debt.
- [23] The evidence establishes that as at 2 May 2010, the company was hopelessly insolvent with debts to outstanding creditors totalling some \$283,000.00 at the time the liquidator was appointed. The statement of affairs signed by Mr Jensen listed the company’s outstanding creditors at \$296,000.00. By reference to the statement of affairs the ‘estimated realised value’ of assets to meet these debts amounted to \$59,141.00 which included the debt referred to above.

⁸ *Fox v Percy* (2003) 214 CLR 118 at 128 per Gleeson CJ, Gummow and Kirby JJ.

- [24] The company was wound up in insolvency. Therefore the inquiry before the Tribunal was whether the Mr Jensen took all reasonable steps to prevent the circumstances that resulted in the company finding itself in a position whereby it became insolvent, that is getting to a point, where it accumulated debts to the extent of \$296,000.00 with only \$59,000.00 in assets to cover these liabilities. This situation is generally picked up in ground one in the grounds of appeal.

Grounds 1 and 2 – was the company sufficiently capitalised to meet liabilities?

- [25] This ground generally contends that the learned Member failed to properly consider the question before him, that is, whether Mr Jensen took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the insolvency of the company. It is also generally contends that he failed to have regard to the matters listed in s 56AD(8A) of the Act. The basis of the submission is that the company was, from commencement, under capitalised and was never in a positive cash flow position and could not withstand the slightest disruption to its normal trading pattern. It relied on future cash flow to pay past debts, including taxation debts.
- [26] The Financial Requirements of Licensing under the QBCC Act⁹ impose an obligation on a licensee to ensure there are sufficient assets to cover the business liabilities of the licensee at all times. This is commonly referred to as the FRL Ratio, which must be 1:1. JAD operated the building business as trustee of the JJ & JD Family Trust. The financial accounts of the Trust for the year ending 2008 showed the value of assets at \$4,810.88 and liabilities at \$11,741.60. The accounts for JAD showed net assets of \$10 with liabilities of \$11,741.80. For the 2009 financial year, the Trust assets were \$27,877.63 with liabilities \$27,877.63. The accounts for JAD showed assets of \$10 and liabilities of \$27,877.63.
- [27] The figures changed dramatically by the time of the appointment of the liquidator. JAD had debtors being the only asset, of \$59,141.00 with liabilities, being unsecured creditors, of \$296,000.00.
- [28] This evidence supports the Commission's contention that the company was never capitalised sufficiently so it could meet the FRL ratio in any given year and therefore was not in a position to pay creditors, even if the outstanding debt of \$50,000.00 was paid from existing assets. This conclusion is inevitable. Further, in so far as it might be relevant, the Trust never had sufficient assets to meet the company's liabilities in the period 1 July 2009 to 2 May 2010.
- [29] It also seems that during this period the company continued to incur liabilities without any assurance of future work to generate cash flow.

⁹ QBCC Act s 35(3) and section 2.5 of the QBCC Board's policy of Financial Requirements for Licensing.

It would be understandable if liabilities were incurred, e.g. to trade suppliers, if contracts were in place to generate income to pay those suppliers but that is not the case here. There is further evidence that the company was experiencing difficulties because it did not pay its taxation liabilities when they fell due and was effectively forced into an arrangement with the ATO to pay off arrears of tax, interest and penalties as no provision had been made for these expenses. The Commission complains that trade creditors were paid when money came into the company's accounts in preference to the ATO, however the only significance of this is whether, under s 56AD(8A), the applicant made appropriate provision for the payment of taxation liabilities which will be dealt with later. Otherwise it is difficult to see the relevance of how the payments to creditors were prioritised.

- [30] The applicant contends that the learned Member's conclusion that there were sufficient assets in the Trust to meet the liabilities of the company cannot stand in the face of Mr Jensen's evidence that the company could not pay its debts, including taxation debts in 2009 and also in early 2010 before the appointment of the liquidator¹⁰. This contention must be right for the reasons set out above.
- [31] As I have said there is little doubt that at the time of the appointment of the liquidator the company was insolvent. That fact cannot be ignored and to make a finding inconsistent with this is against the weight of all the evidence.

Grounds 3 and 5 – did the respondent make appropriate provision for taxation debts?

- [32] There is an evidentiary onus on the applicant to satisfy the decision maker that the company made appropriate provision for taxation debts. The applicant contends that the undisputed evidence before the Tribunal was that the respondent failed to:
- (a) lodge his business activity statement when it was due;
 - (b) to pay goods and services tax and pay as you go tax when it was due;
 - (c) failed to put monies aside to pay taxation liabilities when they arose;
 - (d) was reliant on future income to meet past and future taxation liabilities;
 - (e) entered into a payment arrangement with the ATO because overdue tax debts could not be met; and
 - (f) relied on future income to meet the payments under the payment arrangement with the ATO.
- [33] The applicant contends that "as a question of law" the learned Member fell into error in deciding that the entering into a repayment program

¹⁰ Transcript Page 13.

constituted “appropriate provision”. As I have said previously in *Queensland Building and Construction Commission v Vadasz*¹¹ whether the entering into a repayment program satisfies the test of making appropriate provision must be considered in the circumstances of the particular case.

- [34] The evidence here establishes that Mr Jensen did fall behind in his taxation liabilities as alleged above as a result of the loss of cash flow from the home insulation scheme and the failure of a debtor to pay an outstanding debt. However the evidence also demonstrates that JAD was mindful of the obligation to pay taxation debts and to that end made provision with the ATO to pay outstanding taxation debts in March 2010. The total amount outstanding was \$25,519.64. JAD was to repay to the ATO monthly instalments of \$2,191.75. The first such payment was to be made on 12 April 2010.
- [35] The learned Member had regard to the operating profit of the business in the previous year and the cash flow up to the time of liquidation. He found in the months preceding the first instalment to the ATO that receipts exceeded the monthly payment to the ATO and therefore there was some confidence that the company could make the promised payments. He found it was unrealistic to look at the projected profit for the 2010 financial to decide if the arrangement with the ATO was realistic. These findings were open on the evidence before him and I see no reason to interfere with them.
- [36] However, at the time the company entered into the arrangement with the ATO, there were considerable outstanding creditors and, on the evidence, Mr Jensen and the company had no hope of meeting these liabilities. There was no future work in the pipeline to generate cash flow which would enable the company to meet these liabilities or for that matter the repayments to the tax office. Obviously, in these circumstances, as Mr Jensen was advised, for the company to continue to trade when it was insolvent would be in breach of the Corporations Act.
- [37] In considering whether the company made provision for taxation debts it is necessary to have regard to all the circumstances and in particular the Company’s financial position at the time of the entering into the arrangement and relevant event. The findings of fact made by the learned Member that at the time the agreement was entered into, there was nothing to suggest that the first instalment could not be made is contrary to the evidence before the Tribunal.
- [38] This conclusion is reinforced by the Commission’s contention that the business was always undercapitalised and relied on future income to pay past debts, including taxation debts. Again, although there is nothing novel in the proposition that most building companies necessarily operate on credit, have to do work and supply materials first then submit

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a draw for payment, it is also expected that the business would have at least some cash reserves or assets to cover these debts to comply with the FRL requirements. That is to ensure that it has sufficient assets to cover the annual allowable turnover under the QBCC Act.

- [39] The only reasonable conclusion from this evidence must be that the company did not make appropriate provision for the payment of taxation debts. This conclusion alone is sufficient to dispose of the appeal.

Ground 4 – Was the respondent required to inject personal funds into the company?

- [40] The criticism here is an observation by the Member that Mr Jensen was '*not required to inject his own personal funds*' into the company. As a general proposition the statement is obviously correct. Indeed, the Commission does not directly submit to the contrary. It does submit that Mr Jensen, as a director, has a duty to ensure that the company does not, under s 588G of the Corporations Act, trade whilst insolvent. There is no suggestion that the company was trading whilst insolvent. In fact, as soon as it became apparent that the company was getting into difficulty, steps were taken to appoint the liquidator in discharge of Mr Jensen's responsibility as a director.

- [41] It is therefore difficult to see how this ground of appeal, even if made out, could vitiate the decision other than, if it is contended that this is one of the reasonable steps that could have been taken to avoid the circumstances that resulted in the happening of the relevant event, as part of the consideration as to whether Mr Jensen should be categorised as a permitted individual.

Balance grounds of appeal

- [42] The remaining grounds of appeal traverse similar contentions about the learned Member's findings about solvency, the applicant's proposal to cancel Mr Jensen's licence and whether the steps taken to recover outstanding debts to the company were reasonable. There is also a challenge to the finding that the company stood to recover substantial sums in the future (\$200,000 to \$300,000). These matters have been dealt with above and in particular the liquidator's report did not identify any assets other than the outstanding debt of \$57,000. Although the scrapping of the home insulation scheme resulted in an abrupt reduction in cash flow which impacted on the financial position of the company, there is no suggestion in the evidence that this resulted in any direct financial loss.

Conclusion

- [43] The inevitable conclusion must be that the learned Member's findings that Mr Jensen took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the liquidation of the appointment of the liquidator and the insolvency of the company was not

supported by the evidence. Mr Jensen, on behalf of the company, did not make appropriate provision for the payment of taxation debts and did not take reasonable steps to prevent the accumulation of significant debts resulting in the company becoming insolvent. It was not the proposed cancellation of the licence, not the scrapping of the home insulation scheme that led to the company's demise but lack of capital to fund the operation of the building business and the incurring debts when there was no income, assets or financial accommodation to pay them.

- [44] Leave to appeal is granted. The appeal is allowed and the decision below is set aside. The decision of the Commission dated 8 February 2013 is confirmed.

Member Gardiner

- [45] 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.