QCAT

Queensland Civil and Administrative Tribunal

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| **CITATION:** | *Queensland Building and Construction Commission v Mudri* [2016] QCATA 183 |
| **PARTIES:** | Queensland Building and Construction Commission<br>(Applicant/Appellant)<br>v<br>Miroslav Mudri<br>(Respondent) |
| **APPLICATION NUMBER:** | APL474-15 |
| **MATTER TYPE:** | Appeals |
| **HEARING DATE:** | 21 June 2016 |
| **HEARD AT:** | Brisbane |
| **DECISION OF:** | **Justice Carmody**<br>**Member Gardiner** |
| **DELIVERED ON:** | 24 November 2016 |
| **DELIVERED AT:** | Brisbane |
| **ORDERS MADE:** | **IT IS THE DECISION OF THE APPEAL TRIBUNAL THAT:**<br>**1. The appeal is allowed.**<br>**2. The tribunal decision dated 14 October 2015 is set aside and substituted with an order that the respondent is not a permitted individual.** |
| **CATCHWORDS:** | PROFESSIONS AND TRADES – BUILDERS – APPEALS – where the respondent was a director of a company – where the company was liable to pay an adjudicated amount – where the company was wound up for insolvency – where the company failed to pay the adjudicated amount relying on its claim in Supreme Court proceedings – whether or not paying the adjudicated amount constitutes a reasonable step for the purposes of s 56AD(8) – where the tribunal found the respondent had taken all reasonable steps to avoid the winding up |

APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – POWERS OF COURT – SUBSTITUTED VERDICT OR JUDGMENT – where a review tribunal held that the respondent was a permitted individual within the meaning of the *Queensland Building and Construction Commission Act* 1991 (Qld) s 56AD – where the appeal tribunal allowed the appeal – where the appeal tribunal found the respondent had not taken all reasonable steps to avoid the happening of the relevant event – where the appeal tribunal remitted the matter for rehearing "according to law and the findings disclosed in these reasons for judgment" – where the rehearing tribunal reached a different conclusion to the appeal tribunal – whether the rehearing tribunal erred in law

*Judicial Review Act* 1991 (Qld) Parts 3, 5

*Building and Construction Industry Payments Act* 2004 (Qld) ss 29, 31, 100, 26

*Queensland Building and Construction Commission Act* 1991 (Qld) ss 31, 56AC, 56AD, 56AE

*Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ss 146, 147

*Anisminic v Foreign Compensation Commission* [1969] 2 AC 147

*Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139

*Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* (2004) 61 NSWLR 421

*Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389

*Craig v State of South Australia* (1995) 184 CLR 163

*Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd & Anor* [2008] QCA 83

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

*Mudri v Queensland Building and Construction Commission* [2015] QCAT 412

*Queensland Building and Construction Commission v Mudri* [2015] QCATA 78

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

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| **APPLICANT/APPELLANT** | Mr R Anderson QC of Counsel instructed by Robinson Locke Litigation Lawyers |
| **RESPONDENT** | Mr M Mudri |

**REASONS FOR DECISION**

[1] At issue in this appeal is the legal status of the respondent as a 'permitted individual' under the *Queensland Building and Construction Commission Act* 1991 (Qld) (QBCC Act) which, in turn, hinges on a question of fact; namely, whether he took 'all reasonable steps' to avoid the happening of a 'relevant event'.

[2] However, the grounds of appeal raise questions of law only. Errors of fact (or mixed law and fact) cannot be corrected on appeal except with leave by way of rehearing.

[3] In light of the litigation history, it is desirable for the subject matter to be finally determined, if possible, by the appeal tribunal under either ss 146 or 147 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) (QCAT Act), rather than sent back for reconsideration for a third time.

[4] To this end, at our invitation, the commission applied for leave to challenge the conclusion of fact that the respondent had indeed taken all reasonable preventative steps. The parties filed a statement of undisputed facts[1] "sufficient to see this tribunal finally determine the matter and (obviate) the need for it to be remitted".

**The context**

[5] The QBCC Act regulates the building industry within the state. It has a role in issuing building licences to individuals and construction companies if satisfied that they are not excluded[2] because, for example, a related company was wound up by an unpaid creditor.[3]

[6] An excluded individual used to be able to apply to the commission under s 56AD QBCC Act to be classed as a 'permitted individual' for the 'relevant event'. If an individual is categorised as a permitted individual, he or she is deemed not to be excluded for the relevant event.

[7] Until changes in the legislation from mid-2015, the commission could classify an applicant as a permitted individual for the relevant event in its discretion under s 56AD(8)(b);[4] only if satisfied he or she "took all

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1 On 22 August 2016.
2 QBCC Act ss 31(1)(e), 56AE.
3 Ibid s 56AC(2).
4 Repealed since 1 July 2015.

reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event", having regard to the matters mentioned in ss 56AD(8A) and (8B).

[8] The adverse economic consequences of a mis-categorisation as an excluded (instead of a permitted) individual can be ruinous.

**The litigation history**

[9] The respondent previously 'owned' a profitable construction company called Bridgeport Pty Ltd (Bridgeport) under QBCC licence.

[10] In 2008, Bridgeport hired V&ME Pty Ltd (V&ME) to construct houses at Kingaroy. V&ME later terminated the contract and claimed progress payments for work done. Bridgeport accused V&ME of defective work and other breaches.

[11] An adjudicator later determined that Bridgeport was liable to V&ME for $613,025 plus interest under the *Building and Construction Industry Payments Act* 2004 (Qld) (Payments Act).

[12] Under the Payments Act, Bridgeport was required to pay the adjudicated amount within five business days of service of the determination.[5] Bridgeport refused to pay. It was dissatisfied with the adjudication process mainly because it was not allowed to raise a counterclaim or a set-off under the construction contract.[6]

[13] The grounds for setting aside a judgment for a statutory debt based on a filed adjudication certificate are limited.[7] Despite being an administrative decision made under an enactment, an adjudication determination is not reviewable pursuant to Part 3 of the *Judicial Review Act* 1991 (Qld) (JR Act) and cannot otherwise be 'challenged'.[8]

[14] Relief in the nature of a prerogative order under Part 5 JR Act is discouraged as incompatible with the objects of the Payments Act which itself provides the most appropriate remedy in s 100.[9]

[15] However, on rare occasions, determinations have been declared void for jurisdictional error or fundamental defect e.g. where the error causes the adjudicator to identify a wrong issue, to ask the wrong question, ignore relevant material, to rely on irrelevant material or, at least in some circumstances to make an erroneous finding or reach a mistaken conclusion contrary to irresistible contrary inferences or compelling logic.[10]

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5 Payments Act s 29.

6 Ibid s 31(4)(a)(i),(ii).

7 *Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd & Anor* [2008] QCA 83; *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* (2004) 61 NSWLR 421, 436.

8 Payments Act s 31(2)(a)(iii).

9 That is, civil action on the construction contract.

10 *Craig v State of South Australia* (1995) 184 CLR 163, 179; *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147, 171.

[16] It is usually sufficient to avoid invalidity if an adjudicator either considers only the matters mentioned in s 26(2) Payments Act in deciding an adjudication application or bona fide addresses them.[11]

[17] As a consequence of the adjudicated amount not being paid by Bridgeport within time, V&ME filed an adjudication certificate as an enforceable judgement for a debt in the Supreme Court. The respondent consulted lawyers for Bridgeport. He later threatened, but did not ever move to, overturn the adjudication determination and the judgment based on it.

[18] Bridgeport did, however, issue a Supreme Court claim against V&ME for $1.5m. V&ME counterclaimed $2.8m. The matter was ultimately transferred to the abeyance list unresolved because neither side actively progressed it to trial.

[19] V&ME then applied to wind up Bridgeport in reliance on the unpaid balance of the adjudicated amount, which had been reduced to $424,000 in the meantime via enforcement proceedings. This put the respondent at risk of being declared an excluded person and losing his building licence. However, the winding up application lapsed unheard; probably because of the grounds in which Bridgeport opposed it.

[20] In October 2009, Bridgeport ceased trading, paid off its creditors and divested itself of $5.5m worth of assets, including forgiving a debt of $4.4m to a related entity. Its only remaining liability was the judgment debt for the adjudicated amount and only residual asset was the potential value of its damages claim against V&ME. The respondent resigned as a director in April 2012, but continued on as an 'influential person'. Thereafter, the sole director of the company was the respondent's 80 year old mother and its registered office was care of his estranged wife's residential address.

[21] In 2010, the respondent acted on legal advice to 'let sleeping dogs lie' insofar as the idle Supreme Court litigation was concerned, based on the understanding that V&ME was insolvent and proceeded on the assumption that the winding up proceedings would shortly expire under the *Corporations Act* 2001 (Cth). Bridgeport later withdrew instructions from his lawyers.

[22] Liquidators were finally appointed to Bridgeport in June 2013 based on a winding up order made ex parte in default of appearance due to a failure to notify a change in its address for service. Thus, the respondent had managed to stave off winding up from 2008 to 2013 (or four and a half years) but in the end lost on a technicality.

[23] The commission initially refused to categorise the respondent as a permitted individual because of Bridgeport's failure to take 'all reasonable steps' to avoid the appointment of liquidators. In its view, none of the steps taken by the respondent could be clearly identified as aimed at preventing the circumstances leading to the appointment of liquidators to the company

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11 *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* (2004) 61 NSWLR 421, 442.

and, even if that is what the respondent intended, his actions did not have that capacity or practical effect. Rather, they served only to ensure that if further demand for the adjudicated amount were to occur, there would be no assets available to meet it.

[24] That decision was reversed by a review tribunal in OCR229-13[12] but reinstated by the appeal tribunal in APL257-14. The appeal tribunal held:[13]

> "The (review tribunal) did not correctly apply the test in s 56AD because he did not consider whether all reasonable steps were taken to avoid the relevant event. In this case we have identified all of the steps taken. None of these steps could have avoided the relevant event so it was not open to conclude that all reasonable steps were taken to avoid the event. Many of the steps taken were such that if the relevant event happened there would be no company assets to pay the debt.
> …
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> The (review tribunal) did not consider all of the circumstances that resulted in the happening of the relevant event, such as the nature of the statutory debt. This was important because even if Bridgeport was successful in the Supreme Court proceedings (against V & ME), any judgment could not relieve the obligations to pay. Even if the Supreme Court proceedings were successful so that any amount could be 'set off' against the debt, the steps taken to start, but not pursue, the proceedings were not all reasonable steps because the proceedings were effectively stopped.
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> The (review tribunal) has misapplied the test in s 56AD because he took a narrow view of the test and he did not consider all of the circumstances, as they were known to Mr Mudri at the time, that resulted in the happening of the relevant event, so that he could be satisfied (on review) that Mr Mudri took all reasonable steps.
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> In this case the relevant event was the appointment of liquidators. The circumstances leading to this event were the failure to pay the adjudicated amount, the failure to respond and appear in the winding up proceedings. The starting point which set in train the circumstances which lead to the relevant event was the adjudicated decision.
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> The nature of the adjudicated decision was essentially that there was no defence and the debt had to be paid. This was the statutory framework for adjudicated awards under the B&CIP Act.
>
> Mr Mudri obtained legal advice because he believed that the adjudicated decision was wrong and he did not want to pay it. He issued Supreme Court proceedings but did not pursue the proceedings. Mr Mudri divested company assets and forgave debts owed to Bridgeport before resigning as a director. He was also absent from Bridgeport's registered office and did not respond to the notice (to appear) and appear in the winding up proceedings. An obvious step which could

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12 *Mudri v Queensland Building and Construction Commission* [2014] QCAT 222.

13 *Queensland Building and Construction Commission v Mudri* [2015] QCATA 78 [43], [46]-[50].

> have been taken was to pay the adjudicated amount. The steps taken by Mr Mudri were not all reasonable steps to avoid the circumstances coming into existence."

[25] In other words, the review tribunal was held to have failed to properly consider whether the respondent took *all* reasonable steps to avoid the circumstances that resulted in the relevant event (the winding up) because it omitted to have proper regard to the judgment debt's indefensible nature.

[26] Having found vitiating legal error in the review tribunal's decision the appeal tribunal had to consider whether to grant relief itself or send it back for rehearing. It could (and should) have set aside it and, on the basis of its undisturbed fully found facts, replaced it with the decision it should and would have made in the first place if it had correctly understood and applied the legal test.

[27] Remitting it with a direction risked different conclusions being reached on the same material and would have finally resolved the matter because no other order was legally open if the right answer is given to the right question in the first place.

[28] However, for some reason, the matter was remitted by the appeal tribunal for rehearing "according to law and the findings disclosed in these reasons for judgment".[14] The problem with that phrase is that it suggests the appeal tribunal has power to give legally binding directions to the rehearing tribunal about what facts to find and inferences to draw; when it doesn't.

[29] The rehearing tribunal decided[15] that the correct and preferable decision was to categorise the respondent as a permitted individual based on findings that:[16]

> "(a) [T]he relevant event was the order of 21 June 2013 winding up the company in insolvency and the appointment of the liquidator in the same order.
>
> (b) The circumstances which resulted in the happening of the relevant event were:-
>
> > (i) An adjudication against the company under the *Building and Construction Industry Payments Act* 2004 (Qld) requiring it to pay $613,025 which was later entered as a judgment against the company.
> >
> > (ii) A decision by Mr Mudri that the company would not pay the judgment but would resist it in various ways including starting separate Supreme Court contra proceedings.

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14 *Queensland Building and Construction Commission v Mudri* [2015] QCATA 78 [51].
15 *Mudri v Queensland Building and Construction Commission* [2015] QCAT 412.
16 Ibid [86].

> (iii) A failure by the company to pursue the litigation to its conclusion so that the final position between the company and the judgment creditor could be established.
>
> (iv) A failure by the company to arrange its affairs in such a way that it could respond to the application to wind up the company in May 2013 and appear at the hearing of this application.
>
> (c) Of the above circumstances, my findings are:-
>
> (i) In the light of the dispute which had arisen between the two parties reasonable steps were taken by the company to put its case forward for the adjudication.
>
> (ii) The decision taken by Mr Mudri about how to deal with the judgment was reasonable in 2009, and remained reasonable at all times thereafter.
>
> (iii) It was reasonable for the company not to try to bring the litigation to a conclusion.
>
> (iv) In the circumstances, the company acted reasonably in the arrangements it had in place for receipt of official documents (at its registered office). Because of these arrangements, however, it did not have notice of the winding up application and so could not respond to it.
>
> (d) Other circumstances which fall for consideration but which on my findings did not result in the happening of the relevant event were causing the company to cease to trade and to divest its assets so that its only asset was the claim against the judgment creditor and its only debt was the judgment debt."

[30] The rehearing tribunal went on to conclude that:[17]

> "…Mr Mudri did take all reasonable steps that were available to him to avoid the circumstances resulting in the relevant event. There is no other reason not to categorise him as a permitted individual. So I set aside the QBCC's decision and categorise Mr Mudri as a permitted individual."

[31] In contrast to the review tribunal, the rehearing tribunal did consider the nature of the statutory debt but, contrary to the strong "finding" of the appeal tribunal, held that the respondent had met the 'all reasonable steps' test.

## The parties' rival contentions

[32] The commission asserts that the rehearing tribunal ignored the appeal tribunal's direction to reconsider the matter "according to law and the findings disclosed in these reasons for judgment" and went off on a tangent to reach the wrong legal conclusion on the basis of opposite inferences.

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17 *Mudri v Queensland Building and Construction Commission* [2015] QCAT 412 [88].

[33] The alleged legal error is identified as "to purportedly negate the finding of the appeal tribunal" at [37] by inferring, contrary to the view of the appeal tribunal at [80], that paying the adjudicated amount was an obvious preventative step that could and should have been but wasn't taken.

[34] The commission gives the respondent no credit at all for taking steps to avoid attempts to wind up Bridgeport in 2009, "as the final blow (in 2013) was delivered without any resistance partly because he had dropped his guard, resigned as director and failed to take precautions against the risk of a surprise attack by ensuring that he knew exactly what documents served on the company".

[35] The respondent, however, says the rehearing tribunal adhered to the appeal tribunal's directions "… by casting a wide net over the circumstances which resulted in the happening of the relevant event in accordance with paragraphs [20], [44] and [46] of the decision of the appeal tribunal delivered on the 12th June 2016 as set out in paragraphs [36]-[42] inclusive of its decision".

[36] He says the commission seems to be attempting to mischaracterise the QBCC Act requirements to make the payment of (an adjudicated amount or) a judgment debt as the only reasonable step in the circumstances capable of satisfying the test and misconstrues the appeal tribunal's description[18] of the nature of the adjudicated decision as being essentially indefensible and one that had to be paid regardless.

[37] Alternatively, he says that on a proper interpretation of its reasons, the appeal tribunal did not try to compel the rehearing tribunal to reach exactly the same conclusions and rhetorically asks: "Otherwise, what is the point of taking up tribunal time and incurring further legal expenses in returning the matter to be reconsidered?".

[38] The respondent claims that on a fair analysis of the totality of the available evidence it was legally open to the rehearing tribunal to decide that he did take reasonable (albeit unsuccessful) steps which were only brought undone by the 'oversight' in not contesting the final winding up application.

**The appeal function**

[39] In deciding an appeal on a question of law only the appeal tribunal may confirm, amend or set aside the decision and substitute its own or return the matter to the tribunal for reconsideration with any directions the appeal tribunal considers appropriate.

[40] An erroneous conclusion that facts fully found do or do not satisfy a statutory test will ordinarily be an erroneous conclusion of fact, but where there is no

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18 *Queensland Building and Construction Commission v Mudri* [2015] QCATA 78 [49].

other application reasonably open, the statutory test is either satisfied or not as a matter of law.[19]

[41] On the agreed or otherwise established facts, the 'all reasonable steps' test in s 56AD QBCC Act did not allow the rehearing tribunal to answer the ultimate question of fact either way without committing an error of law. The only conclusion possible, according to the appeal tribunal, was that 'all reasonable steps' had not been taken, because an obvious one that had not been taken was paying the statutory debt to avoid the risk of Bridgeport being wound up for default.

[42] As well as the indefensible nature of the statutory debt and Bridgeport's failure to pay it, the circumstances that resulted in the happening of the event (the appointment of liquidators) admittedly included "the fact that (the respondent) had no knowledge of the (2013 winding up) hearing and did not attend "and, more broadly, the entry of judgment for unpaid adjudicated amount in 2008".

[43] The respondent's strategy to frustrate the adjudication determination was a high-risk one. The statutory test required him to take all reasonable steps to prevent the appointment of liquidators. He could not afford to simply rest on his laurels. Just because nothing had happened for a few years did not mean something wouldn't be done in the near future. It was unacceptably risky after the company was divested of assets and financially incapable of paying the debt for the respondent to allow a situation to arise where Bridgeport could be served with a winding up application without him knowing about it. Leaving it to chance that your estranged wife or 80 year old mother would warn you of impending disaster falls short of taking 'all reasonable steps' in the circumstances as the respondent knew them to be.

[44] Having regard to all the fully found facts, the only inference legally open on the evidence is that the respondent did not meet the s 56AD(8) test because as a matter of fact he had not taken *all* reasonable steps to avoid the circumstances resulting in the appointment of liquidators to wind up Bridgeport's affairs.

[45] On this basis, there was nothing to remit for reconsideration. The appeal tribunal should have substituted its own decision under s 146 or, alternatively, under s 147.

[46] Even if he was able to pass the threshold test, there is no evidence of the respondent's current suitability for categorisation as a permitted person and the protective steps he did take were calculated to economically incapacitate Bridgeport so that, if and when liquidators were ever appointed, V&ME had a worthless and unenforceable judgment debt for the adjudicated amount which, prima facie, is contrary conduct from the QBCC Act perspective. The commission submits that these circumstances clearly demonstrate the respondent does not deserve a favourable exercise of the

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19 *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139, 156, *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389, 395.

discretion to allow his application to be a permitted instead of an excluded individual. We agree.

[47] Accordingly, the rehearing decision is set aside and substituted with an order that the respondent is not a permitted individual within s 56AD QBCC Act for the appointment of liquidators to wind up Bridgeport Pty Ltd in June 2013.

**ORDERS**

1. **The appeal is allowed.**

2. **The tribunal decision dated 14 October 2015 is set aside and substituted with an order that the respondent is not a permitted individual.**