RECENT LICENSING CASES
PERMITTED INDIVIDUAL DECISIONS

[based on a paper presented at the 2011 BSA conference]

Litigation Lawyers

Younan v QBSA [2011] QCA 1

1. It is submitted that the Court of Appeal decision in this case does not alter the test to be applied pursuant to section 56AD as stated by McGill DCJ in the District Court decision of *Younan*.

2. Points arising from the Court of Appeal decision are (my emphasis added):

   (a) The phrase "All Reasonable Steps" is not limited to steps that an individual was legally obliged to take. Rather, whether or not an individual is legally obliged to take a step is one of the relevant considerations. Therefore, the reasonableness of a step is to be based upon the perspective of a reasonable person in the shoes of the Applicant. In this regard, paragraphs 21 and 24 of the decision state:

> *"[21] The Authority argued that the primary judge wrongly derived from the terms of s 56AD(8A) that s 56AD was directed only to the prudent management of a company as an ongoing business or something done before the conduct of business or entry into financial or business arrangements; that the primary judge misconstrued s 56AD(8) by holding that the phrase "took all reasonable steps" was limited to steps that the individual was legally obliged to take; and that the primary judge addressed the wrong question by enquiring whether the relevant circumstances would not have arisen if Mr Younan had acted differently. The Authority also argued that the absence of an obligation in the shareholders to pay a company's debt was irrelevant, because the question was whether or not Mr Younan took reasonable steps to avoid the circumstance which gave rise to insolvency.*
> *[24] I think it quite clear that, in the determination of what are reasonable steps for the purpose of s 56AD(8), it is necessary to take into account the principle of limited liability enshrined in the Corporations Act 2001 (Cth). As the primary judge noted, there is no indication in the Queensland Building Services Authority Act that this fundamental and pervasive principle is to be disregarded.* ***It does not follow that the phrase "took all reasonable steps" refers only to legally mandated steps, and I do not accept that the primary judge held that it was limited in that way. Rather, whether or not an individual is legally obliged to take a step is one of the relevant considerations.*** *However, on the Tribunal's findings of fact, there was no consideration which indicated that Mr Younan's omission to do that which he was not obliged to do (to cause T & T to pay Cavalier's debt) was a failure to take a reasonable step. The relevant considerations, particularly that Cavalier's insolvency was outside Mr Younan's control, indicated that it was not a reasonable step."*

   (b) Consideration of reasonable steps therefore needs to be undertaken in the background of the general law. The general law includes the basic legal distinction between a company and its directors and shareholders. Hence, as it is commonly known that directors and shareholders are not liable for company debts, it is not reasonable to expect a director to pay same. In this regard I note paragraph 25 from the decision (emphasis added):

> *"[25] An error in the Tribunal's contrary approach was manifested in its statements, quoted earlier in these reasons, that Mr Younan's offer "effectively ignored" the New South Wales Tribunal's decision, that Mr Younan let the company fall without any opportunity for the claimant "to realise upon his legitimate expectation, given the Tribunal's unchallenged decision in his favour", and that Mr Younan avoided the reasonable steps "which became necessary as a result of the Tribunal's decision". Those statements assumed that the New South Wales Tribunal's order imposed an obligation of some undefined character upon Mr Younan, but the order was made only against Cavalier.* ***In light of the basic legal distinction between a company and the company's directors and shareholders, a distinction that was emphatically confirmed more than a century ago in Salomon v A Salomon & Co Ltd, the order cannot itself have engendered in the claimant or anyone else a reasonable expectation that his debt would be paid by or out of the assets of any person other than Cavalier.****"*

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(c) Accordingly, it could not be said that it is a reasonable step for a director to cause further money to be injected into a company that was not trading and "*when he knows it is irredeemably insolvent and the money would never be repaid*". In this regard, paragraph 26 of the decision states (emphasis added):

> *"[26] What circumstance then justified a conclusion that Mr Younan's failure to cause T & T to lend money to Cavalier was an omission to take a reasonable step to avoid "the continuation of an unsatisfied judgment and an unchallenged statutory demand, which gave rise to the liquidation of Cavalier"? As I have indicated, the principle of limited liability required rejection of the view that the mere fact that T & T owned most of the shares in Cavalier itself justified such a conclusion. The circumstance upon which the Authority's argument focussed was that Mr Younan had earlier caused T & T to lend money to Cavalier.* ***That could not itself make it reasonable for Mr Younan to cause T & T to lend further money to Cavalier once Mr Younan knew that it was irremediably insolvent and the money would never be repaid.*** *I would reach that conclusion even without reference to the possible consequences for Mr Younan in taking such a step in light of the statutory obligations applicable to him in his capacity as a director of T & T, but the primary judge's discussion of those possible consequences points in the same direction."*

(d) The statement by the Court of Appeal that it is not a reasonable step to inject funds into a company is a logical result from application of the corporate veil principle. However, that comment should be considered in the context of the operations of the company [note - at paragraphs [10] to [12] of the decision, it is clear that Cavalier Homes was not trading.]

(e) In a company that continues to trade, it would be insolvent trading to incur debts when the company was not able to pay those debts. Hence, in a going concern business, bearing in mind that further debts will be incurred, it must surely be a reasonable step to ensure that the business is adequately capitalised. This is enshrined in the concepts of insolvent trading in the Corporations Act, in the Net Tangible Asset and current ratio contained in the FRL. It is also a standard principle of accountancy. Hence, where a company is continuing to trade, there may well be a requirement to inject funds.

(f) If a director depleted the company's assets by taking from the assets of the company for inter-company loans, surely the reasonableness of making that loan is relevant. Hence, it is submitted that where a company's resources have intentionally been depleted for a purpose, then it is be a reasonable step to replenish the assets by injection of funds.

HENLEY v QBSA [2010] QCAT 242

3. Some factors, common to the general conduct of a business were discussed in *Henley v QBSA* [2010] QCAT 242 at 55:

> *"55. The Corporations Act 2001 requires all companies to keep written financial records that correctly record and explain their transactions and financial position and performance. In addition, the financial records must enable true and fair financial statements to be prepared and they must be able to be audited for all companies requiring audit. Financial records must be kept for seven years. The statutory duties not to trade while insolvent and to prepare true and fair financial statements give rise to personal liability. Breaches of duty about insolvent trading apply only to directors, not officers. Directors should ensure: the highest calibre of staff are employed; the company audit processes are defined and accurate; reports are accurate and timely; independent professional advice is obtained in the event of any concerns the directors have. It is crucial that directors understand what is required by the law and ensure the rigorous and transparent processes are in place so that effective decision-making can take place. If a Director has difficulty understanding the financial records than he needs to get advice because the onus is on him at all times to have a good understanding of the financial position of the company.*
>
> *56. A director should be vigilant to observe signs of insolvency. The earlier warning signs or signals are detected and acted upon, the more likely it is that the company will be able to survive. Some warning signals are: evidence of breakdowns in internal controls; financial reports not been provided to directors; evidence of worsening financial situation such as high and increasing gearing; deteriorating profitability or continuing trading losses and selling of significant assets to help provide needed a finance; evidence of negligent or incompetent management and lack of risk management planning.*
>
> *57. Directors can reduce the risk of trading while insolvent by the conduct of board meetings and provision of reports to the board should assist this. Individual director should obtain information about the company's operations and be active at board meetings. The Australian Securities and Investments Commission Practice Note 22 mentions the following for directors to consider in forming their opinion as to the company's solvency: review of profit and cash flow forecasts; ability to realize current assets, particularly inventories and receivables; ability to meet suppliers credit terms; removal of financial support by major lenders; and effects of contingent liabilities"*

and

4. In relation to the failure to pay the taxation Tribunal agrees with the reasoning of Mrs. Schaefer *in Kent v Queensland Building Services Authority CCT QR059 -08* that: *the failure to pay taxation is a matter which the legislation has, in section 56AD (8A), expressly stated that the Tribunal must have regard, in deciding whether reasonable steps were taken to avoid the circumstances that led to the bankruptcy. Persons engaged in the building industry... have a responsibility to make provision for the taxation so sufficient funds are available when taxation is due to be paid.*

Spasevski v QBSA [2010] QCAT 121

5. The relevance of cultural background of the Applicant was considered in *Spasevski v QBSA* [2010] QCAT 121 at [21]:

> *"[The Authority] submitted that a different test should not be applied to the applicant as English was his second language. I accept this submission and note that an objective test having regard to the circumstances of the applicant is applied and his language skills are one of those circumstances*
>
> *In considering this, it must be remembered that a licensee trades with the public. It is a requirement of the Domestic Building Contracts Act that contracts for residential building work be in English.*
>
> *Further, the Financial Requirements for Licensing apply regardless of language issues."*

6. Therefore, the steps that might need to be taken by a licensee whose English is poor might include ensuring translation of documents.

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