Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division: TAXATION & COMMERCIAL DIVISION

File Number(s): **2018/5829**

Re: **Bora Kender**

APPLICANT

And **Australian Securities and Investments Commission**

RESPONDENT

DECISION

Tribunal: **Deputy President Bernard J McCabe**

Date: **28 November 2018**

Place: **Sydney**

Pursuant to section 41(2) of the *Administrative Appeals Tribunal Act 1975* (Cth), the Tribunal ORDERS:

1. Subject to the following conditions, the disqualification order made against the Applicant by notice dated 25 June 2018 (**Disqualification Order**) be stayed until the decision of the Tribunal on the application for review comes into operation or until further order of the Tribunal.

2. Until further order, the Applicant undertakes that he:

    2.1 will not be involved in the management of any company other than Sales Pond Pty Limited (**Sales Pond**) and its overseas subsidiaries;

    2.2 will arrange for the appointment of an independent director (viz. a director who is not an immediate family member, or related by marriage) for Sales Pond;

2.3 will arrange for the filing of documents with the Respondent giving effect to paragraph 2.2 within 7 days of the making of these orders;

2.4 will not use his shareholding(s) to remove the independent director;

2.5 will notify the Respondent within 7 days if the independent director referred to in paragraph 2.2 ceases to be a director of Sales Pond;

2.6 will retain and cause Hall Chadwick to provide ASIC every 3 months with a report expressing opinions, and stating the basis for such opinions, in relation to:

a. the solvency of Sales Pond, and

b. the compliance of Sales Pond with its obligations under section 286 of the *Corporations Act 2001* (Cth);

2.7 will provide to the Respondent, within 7 days of lodgement,

a. all Business Activity Statements of Sales Pond; and

b. annual income tax returns of Sales Pond;

2.8 will provide to the Respondent within 7 days of the date of these orders:

a. the Business Activity Statement of Sales Pond for the quarterly tax period ended 30 September 2018;

b. the income tax returns of Sales Pond for the financial years ended 30 June 2016 and 30 June 2017.

3. The stay referred to in order 1 shall not take effect unless and until:

a. the Applicant has notified the Respondent of the appointment of an independent director as referred to in paragraph 2.2;

b. the first of the reports referred to in paragraph 2.6 has been provided to the Respondent and the Tribunal;

c. the documents referred to in paragraph 2.8 have been provided to the Respondent.

4. Notwithstanding order 1, the operation of section 1274AA of the *Corporations Act 2001* (Cth) and regulation 9.1.02(b) of the *Corporations Regulations 2001* (Cth) as regards the Disqualification Order is not stayed, subject to a notation in the Respondent's Register that the Disqualification Order has been stayed.

Pursuant to section 33 of the *Administrative Appeals Tribunal Act 1975* (Cth), the Tribunal DIRECTS:

5. On or before **4:00pm** on **5 December 2018**, the parties are to file proposed directions by consent for the future conduct of the matter.

6. In relation to paragraph [5], in the absence of agreement between the parties, on or before **4:00pm** on **5 December 2018**, the Applicant and Respondent are to file and serve individual draft directions for the future conduct of the matter.

.....[SGD].....

Deputy President Bernard J McCabe

CATCHWORDS

PRACTICE AND PROCEDURE - application to stay decision of Australian Securities and Investments Commission - decision prohibited applicant from managing corporations for a period of 3 years - prospects of success - consequence for the applicant of the refusal of a stay - the public interest - consequences for the respondent in carrying out its functions - whether the application would be rendered nugatory if a stay were granted - length of time that the ban has been in place - time until the hearing of the application - stay application granted subject to undertakings of the Applicant

LEGISLATION

Administrative Appeals Tribunal Act 1975 s 41
Corporations Act 2001 ss 206F, 533, 597

CASES

Murdaca v Australian Securities and Investments Commission [2009] FCAFC 92
Rent to Own (Aust) Pty Ltd and Australian Securities and Investments Commission [2011] AATA 689
Scott and Australian Securities and Investments Commission [2009] AATA 798

REASONS FOR DECISION

Deputy President Bernard J McCabe

28 November 2018

1. Mr Bora Kender was the sole director of companies wound up in 2011 and 2013 with unmet liabilities. On 25 June 2018, a delegate of the Australian Securities and Investments Commission (ASIC, the respondent) made an order under s 206F(1) of the *Corporations Act 2001* disqualifying the applicant from managing corporations for a period of three years. The disqualification order came into effect on 9 October 2018. Mr Kender has asked the Tribunal to review that decision. He has asked the Tribunal to stay the operation or implementation of the reviewable decision pursuant to s 41(2) of the *Administrative Appeals Tribunal Act 1975* (AAT Act) pending the outcome of the review. ASIC opposes the application for a stay.

2. I am satisfied I should make an order under s 41(2) subject to the applicant providing undertakings with respect to a number of matters. The parties have already agreed on the form those undertakings might take. I explain my reasons below.

THE BACKGROUND TO THE APPLICATION FOR A STAY

3. Mr Kender was the sole director of two companies that were wound up in 2011. The liquidators filed reports pursuant to s 533 of the Corporations Act in 2013 advising there would be a zero return to creditors. Two other companies controlled by Mr Kender were wound up in 2013, and s 533 reports were filed by the liquidators in 2014 advising the unsecured creditors would not receive a return. All of the companies were involved in the recruitment and labour hire business.

4. In 2011 Mr Kender had set up another company, Sales Pond Pty Ltd, which conducted a telemarketing business. He continued as the sole director of that company - which he says is trading profitably – until the disqualification decision came into effect. Mr Kender points out the ASIC decision appears to have come very late in the day: it refers to events that occurred in 2011 and 2013. He notes ASIC has had the s 533 reports which triggered the process leading to the hearing and orders under s 206F of the Corporations Act for a significant period of time before it took regulatory action against him. He does not suggest

the delay invalidates the decision but he says there is no particular reason to rush to implement the decision now. He wants to remain involved in the management of Sales Pond Pty Ltd, at least, while the parties gather evidence and the Tribunal conducts its review.

THE POWER TO ORDER A STAY AND THE RELEVANT CONSIDERATIONS

5. The power in s 41(2) of the AAT Act is available "*to secure the effectiveness of the hearing and determination of the application for review*". That purpose must be kept in mind when considering a stay application. The power is not available simply because the applicant or anybody else will experience hardship. The Tribunal must be satisfied in every case that the stay is being sought for the requisite purpose.

6. The power in s 41(2) has been discussed in a number of cases. The decision of Downes J in *Scott and Australian Securities and Investments Commission* [2009] AATA 798 provides a convenient summary of the matters one would ordinarily address when considering whether to order a stay. But I should pause to refer to another decision which might help inform the Tribunal's approach. I refer to the decision of Downes J and Deputy President Hack in *Rent to Own (Australia) Pty Ltd and Australian Securities and Investments Commission* [2011] AATA 689. In that case, the Tribunal warned (at [47]) against "an overanxious desire to permit regulated activity wherever possible." The Tribunal in that case was pushing back against the suggestion it should address concerns about an applicant's performance as the holder of an Australian Credit Licence through the imposition of more extensive conditions rather than cancellation. It was not a 'stay' case, but the comment embodies a perspective on regulation that is equally applicable here. The Tribunal is not a wholly disinterested player in these disputes. It has a dog in the fight: as a tool of good government, its decisions must always be informed by the need to promote sound public administration. In this case, that means ensuring its decisions promote the efficacy of the regulatory regime and the objectives explained or implicit in the Corporations Act. The Tribunal is not simply a dispute resolution mechanism that works to resolve a dispute as between two parties. The Tribunal, informed by the *leitmotif* of good government, aims to reach the correct or preferable decision in every decision it makes, including interlocutory decisions.

7. In *Scott*, Downes J referred to the following considerations (at [4]):

1 *The prospects of success.*

2 *The consequence for the applicant of the refusal of a stay.*

3 *The public interest.*

4 *The consequences for the respondent in carrying out its functions depending upon whether a stay is granted or not.*

5 *Whether the application for review would be rendered nugatory if a stay were not granted.*

6 *Other matters that are relevant, amongst which I would include the length of time that the ban has already been in place and the gap between today and the hearing of the application.*

8. I will deal with each consideration in turn.

9. The submissions from Mr Pritchard SC on behalf of the applicant focused on the **prospects of success** in the substantive application. Mr Pritchard said there was serious doubt over whether ASIC had jurisdiction to make the order under s 206F because the discretion was not enlivened unless and until ASIC had received a valid report under s 533 from the liquidator. Mr Pritchard argued the reports (reproduced in exhibit one) were not valid because they did not appear to include a statement by the liquidator as to whether he proposed to seek an examination or order under s 597 of the Corporations Act. Mr Pritchard also referred to procedural problems with the delegate's decision-making process and other problems with the evidence.

10. Ms Hogan-Doran SC for ASIC relied on the Full Court's decision in *Murdaca v Australian Securities and Investments Commission* [2009] FCAFC 92 to argue it was inappropriate to focus too closely on the contents of the s 533 report. She also pointed out any procedural errors on the part of the original decision-maker would be cured through the Tribunal's review. She also argued the evidence in relation to intercompany loans was relatively clear-cut.

11. The applicant's point about the validity of the s 533 report is interesting, and I accept there is a genuine dispute in relation to the evidence. It is not necessary or appropriate to go beyond that at this point. I am not about to conduct a mini-trial in the course of an interlocutory hearing. Suffice to say the applicant has some prospects of success.

12. I turn next to the **consequences for the applicant – or any other person - if I do not grant a stay**. Section 41(2) requires that I take into account the interests of any person

affected by the decision under review. The person affected most directly is the applicant. I accept for present purposes that Mr Kender has already experienced significant embarrassment and reputational damage as a consequence of the disqualification decision. It is unclear how a stay will ameliorate that damage in the short term: the only way to be properly vindicated if the decision is wrong is for the Tribunal to make a decision under s 43 of the AAT Act following a hearing.

13. There is no doubt the applicant will be significantly inconvenienced if the decision under review is not stayed pursuant to s 41(2). Mr Kender wants to run his business. He has installed his wife as a director after he was disqualified but she may not have the experience to discharge the role. There is also a danger that putting his wife up as a director will draw him into a de facto management role which would be contrary to the disqualification decision. Mr Kender has been unable to identify another director who might take exclusive responsibility for the company in the short term although there was some discussion at the interlocutory hearing about appointing the company's chief financial officer to the board. Mr Kender said his absence from an active role in the company will complicate talks that have been going on with a potential investor. I was not provided with much in the way of detail about those discussions; the interests of potential investors may be relevant to my deliberations in any event. Mr Pritchard pointed out the potential investor was aware of the administrative action against the applicant.

14. It follows Mr Kender's interests will be impacted if the stay is not granted. It is unclear how extensive or enduring that impact will be: the company may be able to muddle through in his absence while the review proceeds. It also follows the company be deprived of his leadership and skill, which I accept might have indirect effects on its employees and customers. The evidence does not persuade me that the applicant, the company, its employees or its customers will experience *catastrophic* damage if the stay is not granted.

15. The **public interest** looms large in regulatory cases like this. The public expects to be protected from bad business practices like those which have been alleged against Mr Kender. But the applicant was disqualified under s 206F(1) because of his history, not because of specific concerns about the current operation of Sales Pond Pty Ltd. While s 206F is designed to weed out directors who have a track record of failure on the assumption that those individuals are a proven risk, the nature of the decision-making process under that section is such that there will often be a substantial delay between the

failure and the regulatory action. There was certainly delay in this case. The events which prompted the s 533 reports occurred in 2011 and 2013. The applicant has kept out of trouble since that time, and there is no evidence to suggest Sales Pond Pty Ltd is experiencing solvency issues or other serious management issues. To the contrary: the applicant provided a letter from its accountant dated 19 February 2018 opining that the company was in good shape and confirming the records were in a satisfactory state.

16. I am satisfied that, if the decision were stayed, the risk to the public – most obviously creditors - could be managed by requiring undertakings. I will have more to stay about that below.

17. I turn next to the **consequences for the respondent if a stay is ordered**. I have already explained I am not satisfied a stay would ameliorate the reputational consequences of the reviewable decision. But nor am I convinced that ordering a stay would have any impact on the respondent's credibility. A stay order is not in and of itself a rebuke to the regulator; it is a power intended to facilitate the review process. The fact of a stay decision does not inevitably compromise the integrity of the regulatory regime. I am not satisfied that ordering a stay will place ASIC in a position where it will have difficulty performing its role in the circumstances of this applicant and this case.

18. The consequences for the respondent might be more problematic if it were required, as the applicant suggests, to review the books and operations of Sales Pond Pty Ltd for itself in a quasi-supervisory role while a stay was in place. ASIC does not have the resources to monitor the performance of a company in this way, and it should not be required to do so if a were to be stay ordered. I am satisfied that undesirable situation can be avoided though the imposition of appropriate conditions.

19. The next consideration referred to in *Scott* is of central importance, as I have already explained: **would the application be rendered nugatory if a stay is not granted?** Mr Pritchard argued it will take months to get the matter on for a final hearing given the evidentiary challenges. He also said there is a real prospect of technical errors in the s 533 report invalidating the whole process. He added that, in any event, the period of disqualification that might be imposed would be somewhat shorter even if the Tribunal were minded to affirm the reviewable decision in other respects. Assuming all that in

favour of the applicant, Mr Pritchard argues there is a real chance the applicant will have served out a substantial period of disqualification before a final decision could be given.

20. I do not accept the review process would be rendered *entirely* nugatory if the stay was not ordered, but I accept there is a risk the hearing and determination of the review might be compromised in the sense that – depending on what view the Tribunal takes of the evidence and the arguments – the damage may be irrecoverable by that point. That will obviously be the case if the Tribunal decided to impose a disqualification for a shorter period.

21. What of the **other relevant matters**, such as the length of time that the disqualification has been in place and the length of time it will take to bring the matter on for hearing? As it happens, the applicant applied to the Tribunal very quickly after the notice of disqualification was served upon him. He has taken steps to comply with the decision but it is not clear whether those arrangements are sustainable.

22. This is not a case which can be quickly listed for a final hearing. The review process is likely to necessitate examination of events that occurred six or seven years ago. The applicant says it will be necessary to summons documents from the external administrators of the failed companies. That evidence-gathering process may take some time.

23. These other matters tend to support the applicant's case for a stay.

SHOULD A STAY BE GRANTED?

24. After considering all of these matters, I am satisfied, on balance, that the stay should be granted – albeit subject to the applicant providing (and fulfilling) certain undertakings that ensure adequate protection of the public, including creditors and others who deal with the company and might be affected by a corporate failure.

25. In anticipation of that decision, the applicant and the respondent have helpfully submitted a set of undertakings that can be incorporated into my decision by consent. I am satisfied those undertakings are appropriate and I will make orders in those terms.

I certify that the preceding 25 (twenty -five) paragraphs are a true copy of the reasons for the decision herein of Deputy President Bernard J McCabe

.....[SGD].....

Associate

Dated: 28 November 2018

Date(s) of hearing:	**26 November 2018**
Counsel for the Applicant:	**Mr D Pritchard SC with Mr D Allen**
Solicitors for the Applicant:	**Gardner Ekes Lawyers**
Counsel for the Respondent:	**Ms D Hogan-Doran SC with Ms M Ellicott**