VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP1568/2015

CATCHWORDS

DOMESTIC BUILDING – application for security for costs – *s79 Victorian Civil and Administrative Tribunal Act 1998 relevant considerations – security ordered.*

APPLICANT	A.C.N. 067 266 488 (In Liquidation) formerly trading as D.J. Rice Pty Ltd (ACN 067 266 488)
RESPONDENT	Mr Garth Davis
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Directions hearing
DATE OF HEARING	25 October 2016
DATE OF ORDER	5 December 2016
CITATION	A.C.N. 067 266 488 v Davis (Building and Property) [2016] VCAT 2041

ORDERS

1. Subject to further order, the applicant must provide security for the respondent's costs of this proceeding in the sum of $20,000 up to the first day of the hearing by lodging such sum with the principal registrar by 31 January 2017.

2. Should the applicant fail to comply with order 1 its application will be stayed until security is provided, or the proceeding is dismissed.

3. By 23 December 2016 or such later date as may be ordered, any application for directions hearing or orders must be filed and served together with supporting material and submissions.

4. By 31 January 2017 any reply material together with submissions must be filed and served.

5. **This proceeding is listed for a further directions hearing before Deputy President Aird on 14 February 2017 at 2:15 p.m. at 55 King Street Melbourne at which time any application for directions hearing or orders will be heard, and directions made for its further conduct – allow 2 hours.**

6. Liberty to apply.

7. Costs reserved with liberty to apply. Any application for costs will be heard at the directions hearing listed for 14 February 2017.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicant	Mr A Beck-Godoy of Counsel
For Respondent	Mr A Dickenson of Counsel

REASONS

1 This proceeding was commenced in December 2015 by the liquidator of the applicant builder seeking repayment of the retention sum of $82,735.81 from the respondent owner.

2 On 19 September 2016 the respondent filed an application for directions hearing or orders ('the Application') seeking orders that the applicant provide security of costs in the sum of $20,000 and that the proceeding be stayed until security is provided.

3 In support of the Application the respondent relies on the following affidavits:

- Jillian Johnston, solicitor, dated 23 September 2016
- Hayley Franklin, architect, dated 19 October 2016.

4 The applicant relies on an affidavit by the liquidator, Richard Trygve Rohrt dated 24 October 2016.

5 Mr Dickenson of Counsel appeared on behalf of the respondent and spoke to the Statement of Facts and Legal Contentions dated 19 October 2016, which he supplemented with oral submissions which I will discuss below. Mr Beck-Godoy of Counsel appeared on behalf of the applicant and spoke to the written submissions handed up at the directions hearing.

BACKGROUND

6 In March 2011, the applicant and the respondent entered into a contract for building works to a cottage in Brunswick. Before completing the contract works, the applicant was wound up in insolvency, on 6 August 2012, when Richard Trygve Rohrt was appointed as the liquidator.

7 After having the works completed by other builders, the respondent made a claim to the Victorian Managed Insurance Authority ('VMIA') and accepted the sum of $134,344.05 from VMIA on 13 December 2013, which sum included an allowance for the retention sum ('the settlement sum'). The respondent asserts that, after payment of the settlement sum, he continues to suffer a loss of approximately $250,000.

PRELIMINARY SUBMISSION

8 At the commencement of the directions hearing, Mr Dickenson, without notice to the applicant, submitted that the applicant's claim should be dismissed as it was not a claim that could be made under the contract. He referred to a number of clauses in the contract, and also to a certificate, issued on 12 October 2016, by Hayley Franklin, architect, of Sean Godsell Architects, the architects appointed under the contract.

9 The respondent has not made a formal application under s75 of the *Victorian Civil and Act 1998* ('the VCAT Act') for the summary dismissal of the applicant's claim, nor was this issue referred to in the respondent's Statement of Facts and Legal Contentions filed in support of the Application. As the

application was made without notice, despite the respondent being represented by experienced counsel and solicitor, I indicated to the parties that I would hear the respondent's application for security for costs, reserve my decision and refer the proceeding to an administrative mention on 11 November 2016, so that the applicant could consider the matters raised by the respondent. The applicant's solicitor advised the Tribunal by email on 11 November 2016 that the matter was proceeding and:

> In so far as the matter of the further without notice ground of "architect's further certification" matter relied by the respondent on the return, please note that my client requires an opportunity to make further written submissions in reply, either to any written submissions now proposed to be made by the respondent in support of the proposition or otherwise in reply to the vive-voce submission of the respondent made on 31 October 2016.

10 Having regard to the Tribunal's obligations under ss97 and 98 of the VCAT Act, it is appropriate that the respondent make a formal application if he wishes to proceed with an application under s75 of the VCAT Act, supported by appropriate material (which may include or reference material already filed), and submissions. The applicant should then have sufficient time to consider the material, and file and serve any reply material including submissions, with any application under s75 to be heard at the next directions hearing.

LEGISLATIVE FRAMEWORK

11 The Tribunal's power to order security for costs is set out in s79 of the VCAT Act which provides:

> (1) On the application of a party to a proceeding, the Tribunal may order at any time—
>
> (a) that another party give security for that party's costs within the time specified in the order; and
>
> (b) that the proceeding as against that party be stayed until the security is given.
>
> (2) If security for costs is not given within the time specified in the order, the Tribunal may make an order dismissing the proceeding as against the party that applied for the security.

12 The power to order security for costs is entirely within the Tribunal's discretion. As McHugh J said in *P S Chellaram & Co Ltd v China Ocean Shipping Co*[1]:

> To make or refuse to make an order for security for costs involves the exercise of a discretionary judgment. That means that the court exercising the discretion must weigh all the circumstances of the case. The weight to be given to any circumstance depends not only upon its intrinsic persuasiveness but upon the impact of the other circumstances which have to be weighed. A circumstance which may have very great weight when only two or three circumstances have

[1] [1991] HCA 36; (1991) ALR 321 at 323

to be weighed may be of minor significance when many circumstances have to be weighed.

13 Further, in *Ian West Indoor and Outdoor Services Pty Ltd v Australian Posters Pty Ltd*[2] Judge O'Neill VP said the Tribunal:

> …should generally be slow to make an order for security for costs as to do so would have the capacity to stifle the abilities of companies of modest means to bring proceedings in the Tribunal in the reasonable expectation that those proceedings would be determined promptly, efficiently, at a more modest cost than may be the case in the County or Supreme Courts.

RELEVANT CONSIDERATIONS

14 The discretion set out in s79 is very broad. There is no prescribed test, or even any indication as to the factors which might be taken into account by the Tribunal when deciding whether to order security for costs. In *Done Right Maintenance and Building Group Pty Ltd v Chatry-Kwan*[3] Walker SM said:

> In applying the section to an application such as this it is the practice of the Tribunal to have regard to the principles developed in the authorities relating to s1335 of the *Corporations Law* (see *C & J Mortgages Pty Ltd v. Neville* [2009] VCAT 984). However it must not be overlooked that this is a Tribunal set up by the Parliament to provide an efficient and timely remedy in those areas of jurisdiction that have been conferred upon it. It cannot be assumed that in every case where a court would order security this Tribunal will necessarily order security also.

15 In *Hapisun Pty Ltd v Rikys & Moylan Pty Ltd*,[4] Daly AsJ said:

> 35. …For even if the financial capacity of a plaintiff[5] to meet an adverse costs order is not a threshold issue, the ability of a party to meet an adverse order for costs must be an important, if not critical discretionary matter in the determination of each and every application for security for costs. After all, the policy behind provisions such as s 1335 and r 62.02(b)(i) is the recognition of the need to protect involuntary participants to litigation from the adverse financial consequences of defending claims against impecunious plaintiffs, particularly those who operate behind the shield of limited liability.[6]
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> 36. Indeed, it is difficult to contemplate a scenario in an application for security for costs where the financial position of a plaintiff was not a paramount consideration, or where security would be ordered where there was not a rational basis for believing that the plaintiff could not meet an order for costs. Perhaps that might arise in particularly unmeritorious claims, but there are other, more effective means of dealing with hopeless cases, under s 75 of the VCAT Act, or s 63 of the *Civil Procedure Act 2010*.

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[2] [2011] VCAT 2410
[3] [2013] VCAT 141at [18]
[4] [2013] VSC 730
[5] Known as "applicants" in VCAT, but referred to as "plaintiffs" here to avoid confusion with references to applicants for orders under s 79.
[6] *Ariss v Express Interiors Pty Ltd (in liq)* [1996] 2 VR 507 at 513-14.

16 There are a number of other factors which are also typically considered by the Tribunal when deciding whether to exercise its discretion under s79. These were set out by Senior Member Farrelly in *CSO Interiors Pty Ltd v Fenridge Pty Ltd*:[7]

- whether the claim brought by the Applicant in the proceeding can be said to be *bona fide* and not a claim that has little merit or prospect of success;
- whether the Applicant's lack of funds has been caused or contributed to by the conduct of the Respondent;
- whether an order for security for costs would stultify the Applicant's pursuit of legitimate claims;
- whether there has been any unreasonable delay in bringing the application for security for costs;
- the extent to which it is reasonable to expect creditors or shareholders of the Applicant to make funds available to satisfy any order for security which may be made.

17 I will consider each of these factors in turn.

The applicant's financial position

18 The applicant is insolvent and is in liquidation. The liquidator deposes in his affidavit at [7]

> I am aware that during the external administration of [the applicant] the books and records of the [applicant] indicated substantial debtors including the respondent. These sums totalled approximately $816,000.

19 Surprisingly, no reference is made to the annual report to creditors dated 30 October 2015 lodged with ASIC on 5 November 2015, a copy of which is attached to Ms Johnson's affidavit. That report shows that the liquidator anticipates a dividend to creditors of the applicant, who are owed approximately $5.6m, of 3.32 cents in the dollar, and that the liquidator had cash on hand of $11,634.41 as at 5 August 2015.

20 However, this report is over 12 months old, and the liquidator has not filed any evidence as to the current financial situation.

Can it be said that the applicant's claim is *bona fide*?

21 Whilst the respondent clearly has a defence to the applicant's claim this does not mean the claim is not *bona fide*. From the material before me, it is clear that the liquidator for the applicant has commenced this proceeding on legal advice. Whilst the respondent has a defence to the claim, and there are significant legal and factual issues to be determined at the final hearing, this does not mean that the claim is not *bona fide.* There is no evidence, for example, that it was brought for some ulterior motive.

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[7] [2013] VCAT 1175 referring to *Urumar Marble Pty Ltd v Thiess Pty Ltd* [2005] VCAT 2081

Can it be said that the applicant's lack of funds has been caused by or contributed to by the respondent?

22 There is no evidence that the respondent in any way contributed to the applicant's insolvency. There appears to be no dispute that he paid all amounts claimed under the contract as and when they were due and payable. At the time the applicant was placed into liquidation it had creditors of approximately $5.6m.

Will an order for security stultify the applicant's pursuit of legitimate claims?

23 As discussed above, I am not able to determine whether the applicant's claims are legitimate. It is clear, however, from the affidavit material relied on by both parties that there are significant disputes between the parties as to the calculation of the respondent's loss. In his affidavit, the liquidator takes issue with the respondent's position in relation to a number of items and states at [14]:

> Based upon my investigations I believe that the reasoning set out in the respondent's solicitor's correspondence of 20 July 2016 makes several incorrect assumptions about the status of the provisional sums, which are a major point of contention. Both the logic and the figures said to support the respondent's argument are incorrect. Other points where that reasoning is deficient are in respect of the additional works carried out by the replacement builder and claimed as completion of the [applicant's] works, claims for loss of rent on the cottage, liquidated damages and legal fees. The [then] claimed loss of $150,581.12 can be demonstrated to be reversed on a proper construction of the provisional sums alone [which he then addressed].

24 In circumstances where the applicant is in liquidation and there are a significant number of issues in dispute, I am not persuaded, on balance, that any possible stultification of the applicant's claim, if it is ordered to provide security, militates against the making of an order for security.

Has there been any unreasonable delay in the bringing of the application for security?

25 The applicant contends that the respondent has unreasonably delayed in bringing the Application, which it contends should have been brought before the completion of the mediation process. Mediation commenced on 8 June 2016. The respondent did not attend personally but was represented by his solicitor and architect. The mediation was adjourned by consent to 4 August 2016. This Application was filed on 16 September 2016.

26 Since the respondent instructed his solicitors to act for him in February 2016, there has been considerable correspondence passing between the parties, including a detailed letter from the respondent's solicitor dated 20 July 2016 setting out the respondents position in relation to the claim, and a reconciliation calculating the respondent's loss at that time, at $168,615.67 (excl. GST) after taking into account the retention. Ms Johnson states in her affidavit that on 2 September 2016 the respondent provided the applicant with

199 documents categorised in 8 Schedules and cross referenced evidencing his loss.

27 In circumstances where it is clear that the parties were involved in continuing negotiations including the provision by the respondent to the applicant of a significant amount of material in support of his position,[8] I am not persuaded that there has been any unreasonable delay in the making of the Application.

The extent to which it is reasonable to expect creditors or shareholders of the Applicant to make funds available to satisfy any order for security which may be made.

28 It is apparent that the parties will incur substantial legal costs in prosecuting and defending this proceeding. If the liquidator believes the applicant's claim has a strong prospects of success then it is, in my view, not unreasonable to expect him to seek the support of creditors to provide security for the respondent's costs. As discussed above, the liquidator appears to have, at best, limited cash in hand. The report to creditors is more than 12 months old, and there is no evidence before me as to the liquidator's current cash in hand, if any.

29 In his affidavit of 24 October 2016 the liquidator states:

> 8. The company is currently engaged in litigation to recover those sums, including this proceeding. Based on my understanding of those various claims, I believe, and have reported to creditors, that there is likely to be a dividend to unsecured creditors in the liquidation. Any such dividend would only be paid and payable after all the costs of the liquidation, including any adverse costs Order in this proceeding, were paid.
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> 9. The company under my administration has budgeted sufficient sums in consultation with its lawyers retained in those matters to underwrite the cost of the various proceedings. No provision has been made for security for costs in circumstances where the liquidity of the administration is tight. Were the company required to provide security for costs in each of the proceedings it is unlikely that the litigation could be so readily pursued and this in turn would materially limited, and most probably extinguish, the prospect of a dividend being paid to unsecured creditors.

30 There are no details included in this affidavit as to the 'budgeted sufficient sums'. I am not persuaded that the possibility that being ordered to provide security for the respondent's costs in this and/or any of the other proceedings referred to, might materially limit or *most probably extinguish the prospect of a dividend being paid to unsecured creditors* is a relevant consideration. In any event, this is a curious statement by a liquidator who contends that the claim is meritorious and likely to succeed. If the liquidator is correct, and the claim is successful, then any amount provided by way of security will be returned to the applicant.

[8] Ms Johnston states in her affidavit that 199 groups of documents, categorised in 8 schedules and cross referenced, were provided to the applicant on 2 September 2016.

The likelihood of a costs order being made

31 In *Hapisun* her Honour indicated that the likelihood of an order for costs being made under s109 of the VCAT Act is a relevant consideration. Although s109 provides that each party bear their own costs, unless the Tribunal is minded to exercise its discretion under s109(2) and then only if it is satisfied it is fair to do so, in a matter such as this, where there are complex factual and legal issues to be determined, there is a likelihood that costs will be ordered in favour of the successful party.

The amount of the security sought

32 The respondent seeks an order for security of his costs up until the hearing in the sum of $20,000, without providing any supporting details including the 'Fee Agreement' or an assessment of costs. Mr Dickenson submitted that the costs were estimated by his solicitor on the basis of her experience representing parties in building disputes for many years. Whilst it is preferable that an estimate of costs be filed in support of an application for security, I am not satisfied that the failure to do so is fatal to the Application. In my view, having regard to the issues in dispute identified by the liquidator for the applicant in his affidavit, and by the respondent's solicitor in correspondence with the applicant and in her affidavit, it is apparent that both parties will incur substantial costs in prosecuting and defending this proceeding.

CONCLUSION

33 I am satisfied it is appropriate to exercise the Tribunal's discretion under s79 of the VCAT Act and order the applicant to provide security for the respondent's costs of this proceeding up to the hearing, and consider the amount sought of $20,000 to be reasonable. If the applicant fails to provide security, the proceeding will be stayed, and I will consider whether to dismiss the proceeding under s79(2).

DEPUTY PRESIDENT C AIRD