VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. BP1728/2016

BUILDING AND PROPERTY LIST

CATCHWORDS

Victorian Civil and Administrative Tribunal Act 1998 – s.78 - power to dismiss or strike out proceedings for conduct of party causing disadvantage - failing to comply with directions in time – order should be a last resort - defaults remedied - application for order dismissed – s.79 - application for security for costs - relevant considerations - evidence that applicant would be unable to meet an adverse costs order - application for security dismissed

APPLICANT	ACN 115 918 959 Pty Ltd (ACN 115 918 959)
RESPONDENT	Alex Moulieris
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Injunction Hearing
DATE OF HEARING	1 May 2018
DATE OF ORDER	14 May 2018
CITATION	ACN 115 918 959 Pty Ltd v Moulieris (Building and Property) [2018] VCAT 740

ORDERS

1. The Respondent's application to strike out the proceeding is dismissed.
2. The Respondent's application for an order that the Applicant provide security for costs is dismissed.
3. The Respondent's application for an order for the costs of the directions hearing on 16 April 2018 that were reserved on that day is refused.
4. **Direct that the proceeding be listed for directions at 9.30am on 24 May 2018 at 55 King Street Melbourne in order to determine its future conduct.**
5. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr J. Nixon of Counsel
For the Respondent	Mr B.E. Barr of Counsel

REASONS

Background

1. In this proceeding, the Applicant builder seeks to recover from the Respondent the sum of $3,594,401.81 with respect to the construction of a new residence for the Respondent at Cromwell Road, South Yarra. The claim is based either on a building contract that the parties entered into or on a quantum meruit.

2. The Respondent denies that he is indebted to the Applicant in the amount claimed or in any other sum. He alleges that the Applicant repudiated the building contract and seeks by way of counterclaim to recover from the Applicant an amount in excess of a million dollars that he says was an overpayment as well as damages in an unspecified sum.

The Applications

3. The Respondent has brought three applications. One is pursuant to s.78(2)(a) of the *Victorian Civil and Administrative Tribunal Ac*t 1998 ("the Act") seeking that the proceeding be dismissed or struck out, the second is for security for costs pursuant to s.79 of the Act and the third is for the costs of a compliance hearing on 16 April 2018 where the presiding Senior Member reserved costs.

4. All three applications came before me for hearing on 1 May 2018. Mr J. Nixon of counsel appeared on behalf of the Applicant and Mr B.E. Barr of counsel appeared on behalf of the Respondent. In regard to the application for security for costs, I was to determine only whether an order should be made. If I did find that security should be provided, there was to be a further hearing to determine the amount.

5. At the commencement of the hearing, Mr Barr informed me that he was instructed to request written reasons for my decisions on the applications. I informed the parties that, since written reasons were requested, I would give a written decision rather than an ex tempore oral one.

6. The Respondent's application was supported by:

   (a) an affidavit of Patrick John Walsh, sworn 3 April 2018;
   (b) two affidavits of Kier Piet Svenndsen sworn 13 and 30 April 2018.

   The affidavits had a number of exhibits.

7. In answer, the Applicant relied upon three affidavits of Leonard Adrian Warren, sworn 13, 23 April and 30 April 2018, again with a number of exhibits.

The application to dismiss or strike out the proceeding under s.78

8. The power to summarily dismiss or strike out a proceeding is conferred by s.78 of the Act, which (where relevant) is in the following terms:

"**Conduct of proceeding causing disadvantage**

(1) This section applies if the Tribunal believes that a party to a proceeding is conducting the proceeding in a way that unnecessarily disadvantages another party to the proceeding by conduct such as—

(a) failing to comply with an order or direction of the Tribunal without reasonable excuse; or

(b) failing to comply with this Act, the regulations, the rules or an enabling enactment; or

(c) asking for an adjournment as a result of (a) or (b); or

(d) causing an adjournment; or

(e) attempting to deceive another party or the Tribunal; or

(f) vexatiously conducting the proceeding; or

(g) failing to attend mediation or the hearing of the proceeding.

(2) If this section applies, the Tribunal may—

(a) order that the proceeding be dismissed or struck out, if the party causing the disadvantage is the applicant; or

(b) if the party causing the disadvantage is not the applicant—

(i) determine the proceeding in favour of the applicant and make any appropriate orders; or

(ii) order that the party causing the disadvantage be struck out of the proceeding;

(c) make an order for costs under section 109".

9. The application focussed mainly on subsection (1)(a), failing to comply with an order or direction of the Tribunal without reasonable excuse. The orders not complied with were for interlocutory steps in the proceeding.

10. The proceeding was issued on 5 January 2017. The Tribunal fixed a directions hearing which came before me on 9 March 2017. I adjourned the matter to an administrative mention on 31 May 2017 because there was a pending hearing before the Building Practitioners Board. On 30 May 2017 the Applicant's solicitor informed the tribunal that the hearing had concluded and the matter was ready to proceed.

11. A directions hearing was fixed but in the meantime the parties had submitted minutes of consent order and, in accordance with those minutes, orders were made (inter alia) for the filing and service of Amended Points of Claim by 16 August 2017 and Points of Defence to the Amended Points of Claim by 18 October 2017.

12. The Amended Points of Claim were received by the Tribunal on 21 August 2017, which was five days late. No Points of Defence to these were filed or served by the Respondent. Instead, on 26 or 27 September 2017, his

solicitors served upon the Applicant's solicitors a request for further particulars comprising 13 pages. By reason of the VCAT Practice Note PNBP1, further particulars were required to be filed and served within 14 days.

13. A number of requests were made by the Applicant for an extension of time in which to provide the particulars which were agreed to but not met.

14. At the request of the Respondent's solicitors there was a compliance hearing on 27 November 2017 at which the tribunal extended the times for filing and service of:

    (a) the further particulars that had been requested, to 22 January 2018;

    (b) the Respondent's Points of Defence and Counterclaim, to 19 February 2018;

    (c) Points of Defence to the foreshadowed Counterclaim, to 13 March 2018.

15. It was also directed that any application for security for costs should be filed and served by 3 April 2018 and any material in opposition to such an application be filed and served by 23 April 2018. The Applicant was ordered to pay the Respondent's costs of the compliance hearing, fixed at $1,350.00. Those costs have now been paid.

16. The Applicant's further particulars were received by the Tribunal on 5 February 2018, which was 14 days late.

17. The Respondent's Points of Defence and Counterclaim were received by the Tribunal on 28 February 2018, which was 9 days late.

18. Mr Barr said in his submission that the Applicant "failed to comply" with the order to file and serve any Points of Reply and Defence to Counterclaim by 19 February 2018. That is true, but since no Points of Defence and Counterclaim had been filed and served by that date, it would not have been possible for it to have done so.

19. By 12 April 2018, the Applicant's Reply and Points of Defence to Counterclaim not having been filed and served, the Respondent's solicitors requested another compliance hearing, although at that time only 12 days had elapsed since the filing of the Points of Defence and Counterclaim.

20. The compliance hearing took place on 16 April 2018. On that day, the Applicant was represented by his solicitor, Mr Warren, and the Respondent was represented by Mr Barr.

21. The Respondent sought an order striking out the proceeding pursuant to s.78 of the Act. Mr Warren said in his affidavit that, although no such application had been served upon him he was ready to meet it but the presiding Senior Member said that, since the proceeding was only listed for a compliance hearing he would not hear a strike out application on that day.

22. The Tribunal extended the time for filing and service of the Reply and Points of Defence to Counterclaim and directed that the strike-out application be dealt with at the hearing for the application for security for costs, which had been fixed for 1 May. Directions were given for the filing and service of material in support of the strike out application and the costs of the hearing were reserved.

Submissions

23. Mr Barr stated that the Applicant had failed to file and serve its Reply and Defence to Counterclaim by 15 November 2017, as ordered by Senior Member Riegler on 18 July 2017 and said that this was dilatory conduct. He said that they were finally filed and served more than five months after they were originally due to be served. Since there had been no Points of Defence and Counterclaim filed and served by the Respondent until 28 February 2018, there was no such default. The Reply and Defence to Counterclaim were filed and served late, but they were five weeks late, not five months late.

24. Reasons given by the Applicant for the delays were:

    (a) The Applicant's sole director, Mr Mimmo, was unable to locate his site diaries;
    (b) Records were on an old computer and were not able to be accessed;
    (c) Mr Mimmo had an operation on his left (non-preferred) hand on 27 February 2018 and was unwell afterwards.

25. Mr Barr described these explanations in his submission as "…at best, red herrings, and at worst, misleading…", justifying this description by saying that there was only one reference in the further particulars to an inability to locate the site diaries and only three references in that document to an inability to locate the computer system. That does not enable me to conclude that the reasons given are either a red herring or misleading. Whether they amount to a reasonable excuse is another matter.

26. Mr Warren deposed that he sent the draft Reply and Defence to Counterclaim to Mr Mimmo for instructions of 28 February, which was the day following the operation on Mr Mimmo's hand. He said that when he chased Mr Mimmo up about it he learned of the operation and that Mr Mimmo was in a great deal of pain and had not returned to work. He said that he successively chased the matter up with Mr Mimmo and finally saw him in conference on 29 March but he said the conference was rushed and he believed Mr Mimmo was distracted by his medical condition. Mr Warren was then absent until 11 March, first on religious leave and then with a back injury. Thereafter he continued to seek instructions from Mr Mimmo and had great difficulty contacting him.

27. Mr Barr said that there was no adequate excuse for the delays. He said that some particulars could have been supplied and they could have been supplemented later. That may be so, but providing further particulars in a

piecemeal way might not have advanced the preparation of the case. The Respondent's request for particulars was far reaching and required the Applicant to fully detail the whole case, including full details of every conversation, request, document and figure. That is unlikely to have been a simple task. The particulars, when provided, were highly detailed and occupied 20 pages.

28. It is credible that the operation on Mr Mimmo's hand caused him some pain and discomfort and it might be expected to have limited his activities afterwards for an unknown period. A medical certificate said that he would be limited in his ability to drive. It appears from the material that, before the operation, his hand had been injured since some time in 2016 and that might have caused him some discomfort for some time before the operation. However as to all this there is only Mr Warren's second-hand account and so it is impossible to assess to what extent, if at all, that explains the non-compliance.

29. Mr Nixon submitted that there had been compliance with the directions given on 16 April and there were no outstanding orders. That is correct. He said that the costs ordered had been paid. He acknowledged that there had been what he referred to as "slippage" in the late provision of some of the material but said there was no disadvantage to the Respondent.

30. Evidence of any disadvantage to the Respondent from the delay that has occurred is slight. Mr Barr complained that it was almost 18 months since the proceeding commenced and the parties have only just completed pleadings. That is true, but over four months of that delay was due to the proceedings in the Building Practitioners Board.

31. Certainly delay in litigation is a disadvantage and any disadvantage caused by non-compliance will trigger the power under the section. However, that does not necessarily mean that an order striking out or dismissing the proceeding should be made as a matter of course.

32. Generally, parties are entitled to have their respective rights determined at a full hearing in accordance with the evidence and the applicable legal principles. To deprive a party of that right due to a procedural non-compliance is a very serious matter.

33. In this regard, Mr Nixon referred me to the case of *Bell Corp v. Stephenson* [2003] VSC 225 where Ashley J said (at para 51):

> "In my opinion, bearing in mind the submissions of counsel directed to the provision here under scrutiny, the subject matter, scope and purpose of the Act show that if the Tribunal forms a belief concerning the matters required by s. 78(1)(a) of the Act the following matters must be considered in the exercise of the discretion under sub-s. (2):
>
> * The subject matter of the belief formed by the Tribunal for the purposes of sub-s. (1).

* The nature of the power conferred by sub-s. (2) in the context of the armoury of power conferred upon the Tribunal by ss. 75-77. By this I mean, particularly, that s. 78(2) operates in circumstances which at least do not require that the proceeding be frivolous, vexatious, misconceived, lacking in substance or otherwise an abuse of process; and which at least do not require that the circumstances demonstrate want of prosecution. Put another way, the sub-section contemplates the making of an order with very serious consequences in circumstances that very probably would not fit the templates set up by ss. 75 and 76. Whilst it can rightly be said that the creation of such a remedy in the situation contemplated by s. 78(1) shows that an intention that orders be made in some cases where the situation exists, it should also be firmly concluded, in statutory context, that the remedy should be of last resort and not first resort.

* The requirement imposed upon the Tribunal by s. 97. That section should be considered to import the concept that, ordinarily, the interests of case management should not be employed so as to shut a party out of litigating its case. The ultimate aim of the Tribunal, as much as of a court, must be the attainment of justice in respect of issues joined.

* The requirement imposed by s. 98(1)(a), to the extent that a party should ordinarily be given an opportunity to be heard upon the merits. That opportunity is not absolute. It may be lost without breach of the rules of natural justice. But the consequence that the making of an order under s. 78(2) will deprive a party of an opportunity to be heard upon the merits is surely relevant to exercise of the discretion whether to so order.

* The power to make costs orders conferred by ss. 109(2)(3) and 78(2)(c). The last-mentioned, it appears, might be exercised even though no order is made under s. 78(2)(a) or (b).” (emphasis added).

34. The purpose of directions and interlocutory steps is to prepare a case for hearing and the purpose of the hearing is to determine the rights of the parties in accordance with the evidence and the applicable legal principles. The Tribunal expects its orders and directions to be complied with but the procedural tail must not wag the substantive dog. Substance in this context means the interests of justice. Once the door to making an order is opened the question should be whether the interests of justice are better served by making or refusing such an order. This will require consideration of any detriment that may have been suffered by the innocent party as a result of the non-compliance.

35. Generally, a party who fails to comply with directions will pay with an order for the costs the disadvantaged party has wasted as a consequence, although orders for costs are compensatory and not punitive. The purpose of s.78 is also not punitive but rather, to avoid injustice to the innocent party arising from the misconduct complained of. However, as the learned

judge said in the passage quoted, an order striking out or dismissing a proceeding is a remedy of last resort and not first resort. It is also a remedy to avoid injustice, not an inexpensive means of obtaining a determination at the expense of the defaulting party by shutting it out of litigating its case.

36. There has been default in this case but that has since been remedied and costs have been paid. I am not satisfied that there has been any substantial disadvantage to the Respondent or that justice requires the severe remedy provided by this section. There is no reason at all for exercising the power under s.78 in the present circumstances. The application pursuant to s.78 will therefore be dismissed.

37. Mr Warren said in his affidavit that, at the 16 April hearing, Mr Barr informed the Tribunal that the only ground upon which a strike out order was sought was the failure to file and serve the Reply and Defence to Counterclaim and that if this were filed and served by 27 May 2018 the application would not be proceeded with. This was disputed. It is unnecessary for me to resolve that conflict because the application fails in any event.

The application for security for costs

38. Power to order a party to provide security for another party's costs is found in s.79 of the Act, which is as follows;

> "**Security for costs**
>
> (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.
>
> (3) The Tribunal's power to make an order under this section in a proceeding is exercisable by—
>
> (a) the presiding member; or
>
> (b) a presidential member."

The relevant principles

39. The section itself provides no guide as to the circumstances in which the discretion to order security should be exercised.

40. I was referred to *Sydmar v. Sttatewidse Developments Pty Ltd* (1987) 73 ALR 289 at p.299-300, where the relevant factors were said to include the following:

"The factors relevant to the exercise of the discretion to order security include:

"(A) Whether the plaintiff's claim is made bona fide and has reasonable prospects of success: *Lynnebry Pty Ltd v Farquhart Enterprises Pty Ltd* (1977) 3 ACLR 133; *J & M O'Brien Enterprises Pty Ltd v Shell Co of Australia Ltd* [1983] FCA 96; (1983) 7 ACLR 790; *Triplan, supra* (Lord Denning).

(B) Whether the plaintiff's lack of funds has been caused or contributed to by the conduct of the defendant: *Lynnebry, supra; Triplan, supra; Spiel, supra.*

(C) Whether the plaintiff's proceedings are merely a defence against "self-help" measures taken by the defendant: *Heller Factors, supra.*

(D) Whether the making of the order would unduly stultify the plaintiff's ability to pursue the proceedings: *M A Productions Pty Ltd v Austarama Television Pty Ltd* (1982) 7 ACLR 97; *Spiel v Commodity Brokers Australia Pty Ltd* (1983) 8 ACLR 410.

(E) The extent to which it is reasonable to expect creditors or shareholders to make funds available to satisfy any order for security which is made: *National Bank v Donald Export Trading Ltd* (1980) 1 NZLR 97.

(F) Whether the defendant has delayed in making the application for security: *Buckley v Bennell, supra; Loreva Pty Ltd v CEFA Associated Agencies Pty Ltd* (1982) 7 ACLR 164.

(G) Further, in *Heller Factors,* Mitchell J said that a consideration of whether the company in question is a true plaintiff or not: "...is one matter which may be placed in the scales in making the decision as to which way the discretion should be exercised" (at 496).

(H) Whether substantially the same facts are likely to be canvassed in determining the action and the cross-action. The court would be slow to allow a situation where the action is stayed because of the inability to provide security but the cross-action covering substantially the same factual areas proceeds."

41. I was also referred to a number of other authorities, to the effect that the discretion to order security is broad and unfettered and that the policy behind awarding security is to protect involuntary participants in litigation from adverse financial consequences of defending claims by impecunious applicants, particularly these sheltering behind limited liability. I accept the correctness of these general propositions.

42. Applications for security for costs against a company in the Supreme Court of Victoria are brought under r 62.02(1)(b) of the *Supreme Court (General*

Civil Procedure) Rules 2005 and 1335(1) of the *Corporations Act 2001*, each of which creates an independent power to grant security.

43. Rule 62.02(1)(b) provides (where relevant) as follows:

> "(1) Where –
>
> (b) the plaintiff is a corporation ...and there is reason to believe that the Plaintiff has insufficient assets in Victoria to pay the costs of the defendant if ordered to do so;
>
> the Court may, on the application of a defendant, order that the plaintiff give security for the costs of the defendant of the proceeding and that the proceeding as against that defendant be stayed until the security is given."

Section 1335(1) of the *Corporations Act* 2001 provides:

> "Where a corporation is plaintiff in any action or other legal proceeding, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in his, her or its defence, require sufficient security to be given for those costs and stay all proceedings until the security is given."

44. In *Livingspring Pty Ltd v Kliger Partners* [2008] VSCA 93, the Court of Appeal said (at para. 10) that although these two provisions are differently worded, the same principles apply. It said (at para14-15):

> "14 The language of the statutory test is clear. The court must address the question which the section poses:
>
> Is there reason to believe that the corporation will be unable to pay the defendant's costs?
>
> 15 The phrase 'reason to believe' is the touchstone of jurisdiction. It requires a rational basis for the belief – and no more…. The wording adopted may be contrasted with other familiar formulations such as 'If the court is satisfied that ... 'or If in the view of the court it is likely that ...'. The section requires the making of a judgment, a risk assessment: is there a risk that the corporation will be unable to pay? (It adds nothing, in our view, to say that it must be a "real risk".) A risk assessment is, of necessity, imprecise. The section calls for a practical, common sense approach to the examination of the corporation's financial affairs.
>
> 16 It may be said, with justification, that this is a low threshold. But the test simply reflects the policy of the provision, which is to protect a defendant against the risk of the plaintiff corporation's impecuniosity…. The provision equips the court with the means to require that the defendant be secured against that risk."

> 17 The power being enlivened, the court must consider whether it should be exercised. Foremost amongst discretionary considerations will be any contention on behalf of the plaintiff that an order for security would work an injustice.

45. The Court then considered the question of onus of proof and said (at para 20:

> "On ordinary principles, it is for the defendant-applicant to persuade the court that the discretion should be exercised in its favour."

46. In *Amcor v. Barnes* [2015] VSC 90, a case relied upon by Mr Nixon, Vickery J noted the two-stage process referred to in *Liverspring* and, after considering the evidence as to the "threshold issue", said (at para 56-8):

> "56. I am not satisfied that the material before the Court is sufficiently persuasive to permit a rational belief to be formed that, if ordered to do so, Achilla would be unable to pay the costs of the Amcor parties, if it was to be unsuccessful in its counterclaim. The absence of real estate assets, combined with a low share capital, and the fact that it has ceased to trade, are all based upon credible testimony, however, together they do not provide reason to believe that Achilla will be unable to meet an adverse costs order if made against it in its counterclaim proceeding.
>
> 57 The 'threshold question' is therefore not satisfied in favour of the Amcor Parties.
>
> 58 In arriving at this conclusion, the absence of any financial records put on by Achilla in the face of reasonable requests by the Amcor Parties for the provision of such information, is not sufficient to fill the gaps in the evidence."

47. In an application for security under s.79, there is no "two-stage process" because the section does not provide that the applicant for security must show that there is "…reason to believe that the Plaintiff has insufficient assets in Victoria to pay the costs…" or "…credible testimony that there is reason to believe that the corporation will be unable to pay the costs…". Nevertheless, the onus is on the Applicant to show that the discretion to award security should be exercised in his favour.

48. In *East Kew Construction Pty Ltd v. Landspec Investments Pty Ltd* [2001] VCAT 2457, the Tribunal noted there were doubts as to whether the Tribunal could entertain an application under s.1335 of the Corporations Act 2001 and continued (at paras 13-14:

> "13. Nonetheless, although s79 of the VCAT does not conveniently stipulate the need for credible evidence, in my view, a decision under s79 can only be made on the basis of credible evidence provided by the party seeking an order for security for costs against another. In my view, the evidence relied on by the Respondent as outlined in paragraph 6 above, does not amount to credible evidence of the Applicant's impecuniosity and

> inability to satisfy a costs order. The Respondent's position on this appears to be based on conjecture and speculation. In the words of Lee J, "It is enough to say that speculation as to insolvency or financial difficulties likely to confront the corporation will be insufficient to grant the exercise of the discretion." (*Warren Mitchell Pty Ltd v Australian Maritime Officers' Union,* supra, p5)
>
> There is nothing in the material provided by the Respondent in support of its application that distinguishes the Respondent from the hundreds of solvent companies trading successfully and responsibly throughout the country."

49. In *Sarandas v. Mulberry's Australia Pty Ltd & Ors* [2002] VCAT 390 (at para 16) the Tribunal accepted that the Tribunal should be slow to make security for costs orders because of the tendency to stifle proceedings and that orders should only be made in relatively clear cases. A similar statement is to be found in the judgment of Judge O'Neill VP in *Ian West Indoor and Outdoor Services Pty Ltd v. Australian Posters Pty Ltd* [2011] VCAT 2410.

50. An order for security for costs was made in *Mt Holden Estates Pty Ltd v. Lanigan Baldwin Pty Ltd* [2005] VCAT 1442 where the Applicant was already indebted to the Respondent in over $200,000 for unsatisfied costs orders. In some cases where security has been ordered the Applicant was a foreign company. In others there has been evidence of a deficiency of assets.

51. Mr Barr referred me to *Hapisun Pty Ltd & Anor v. Munro & Anor* [2013] VSC 730 where Daly AsJ confirmed that there was no "threshold test" in applications under s.79, although she said (at para 35-36):

> "35 However, this is an error which, in most cases, including the current case, has no particular practical consequences, except perhaps in the manner in which applications are conducted, and reasons for decision formulated. For even if the financial capacity of a plaintiff …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….
>
> 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."

(some citations omitted)

The evidence

52. In his affidavit, Mr Walsh deposed that on 7 March 2018 he wrote to the Applicant's solicitors of the Applicant stating (inter alia):

> "…we are concerned that your client will be unable to satisfy any costs order made against it in the event that its claim against our client is unsuccessful. We note the following matters:
>
> Your client has paid up share capital of $1 and does not appear to own any assets which would be capable of satisfying any order made against it. If your client does own assets capable of satisfying an order please tell us.
>
> Your client owes substantial debts which have remained outstanding for a considerable period of time. In particular, there is an outstanding judgment against your client in the sum of around $850,000, plus costs and interest, in favour of Concorp Group Pty Ltd. That debt remains outstanding despite the judgment having been handed down in March 2011. We understand that your client is also indebted to other contractors who have performed work on our client's house.
>
> Having regard to these matters, it is appropriate that your client provide security for our client's costs or satisfy our client of its capacity to meet an adverse costs order. Please advise us whether your client will provide security or provide us with your detailed reasons as to why security should not be provided by 4pm on 31 March 2017. We will otherwise apply for security for costs at the next hearing."

53. According to Mr Warren's affidavit of 23 April, the judgement referred to was as a result of a determination in favour of a subcontractor pursuant to the *Building and Construction Industry Security of Payment Act 2002* and was set aside following a settlement between the Applicant and the subcontractor.

54. The Applicant declined to provide the security requested in Mr Walsh's letter. The matter was then in abeyance by agreement of the parties pending resolution of the other proceedings before the Victorian Building Authority.

55. On 18 July the Tribunal gave directions for the filing and service of material in regard to the foreshadowed application for security. The time for the Respondent to file and serve material was initially 20 December but was later extended to 3 April 2018 with answering material from the Applicant to be filed and served by 23 April 2018.

56. Mr Walsh deposed that he was informed by his employee solicitor that, in a directions hearing before me on 9 March 2017, the Applicant's solicitor told me that the Applicant was not carrying on business and that its business

was this piece of litigation. I do not recall what was said to me on that day and no transcript or recording has been produced to establish what was said.

57. Mr Walsh further deposed that:

    (a) the Applicant has a paid-up capital of $1;

    (b) Mr Mimmo, who is the Applicant's registered builder, is the sole director shareholder and secretary of the Applicant;

    (c) on 8 April 2011 the Applicant changed its name from "Pearl Hill Pty Ltd";

    (d) a "GlobalX National Ownership Property Search" shows that neither the Applicant nor Mr Mimmo owns any real property in Australia;

58. Exhibited to his affidavit is a Commercial Bureau Report dated 21 March 2018 prepared by Dun and Bradstreet, a well-known commercial agent. This shows:

    (a) no court actions recorded against the Applicant;

    (b) no collections activity or default data recorded against the Applicant;

    (c) no Director court actions recorded concerning Mr Mimmo;

    (d) that the "financial strength rating" of the Applicant was "O", which means that its net worth is undetermined;

    (e) the Applicant's credit appraisal was rated as "Good", "Low Risk", "Proceed with transaction".

59. Mr Walsh deposed that, having regard to the foregoing matters, he did not believe that the Applicant had the capacity to satisfy an adverse costs order of the kind and quantum that would be made in this proceeding.

Submissions

60. Mr Barr submitted that security should be ordered because:

    (a) The Applicant is unlikely to have the ability to satisfy an adverse order for costs of the kind and quantum likely to be made in this proceeding;

    (b) The Applicant's claim lacks bona fides or, at least, is severely exaggerated;

    (c) There is no evidence that the Applicant's "lack of funds" was caused by the Respondent or that an order for security would stultify the proceeding or that Mr Mimmo could provide funds;

(d) The application for costs was made at the first opportunity; and

(e) It is likely that an order for costs would be made in this proceeding.

61. It has not been alleged that an order for security would stultify the claim or that there has been delay in applying. It was also not suggested that, given the nature and complexity of this proceeding, the size of the claim and the likely duration of the hearing, it is unlikely that an order for costs would be made if the Applicant were unsuccessful.

62. Mr Barr said that there was no evidence that the Applicant's lack of funds was caused by the Respondent. He is right in saying that the Applicant does not make that allegation and it does not allege that it is lacking in funds, although quite obviously, if the Respondent really owes the amount claimed he has deprived the Applicant of the money by not paying it, and it is a very substantial sum.

63. Argument focussed on factors (a) and (b) above.

Whether the Applicant is unlikely to be able to satisfy an adverse costs order

64. On this issue, Mr Barr referred me to the facts deposed to by Mr Walsh concerning his enquiries as to the Applicant's solvency.

65. Dealing with these, the fact that the Applicant has a paid-up capital of $1 was not considered significant by Vickery J in *Amcor*, nor was the fact that the Plaintiff in that case was not found to own any land.

66. That Mr Mimmo, is the Applicant's registered builder, and its sole director shareholder and secretary says nothing about the Applicant's finances.

67. Mr Barr pointed to the change of the Applicant's name and submitted that I should infer that the Applicant was to be deregistered. There could be other reasons for changing the company's name.

68. The Commercial Bureau Report dated 21 March 2018 did not show anything adverse concerning the Applicant's financial position. The few things that it did show were positive.

69. Mr Barr also referred me to the following sentence in the Amended Points of Claim dated 17 August 2017:

> "The moneys claimed herein in relation to the additional works are a very significant percentage of the assets of the Plaintiff."

70. Considering the amount claimed, that is unsurprising. However the mere fact that the Applicant might lose a very significant percentage of its assets if it is unsuccessful does not mean that it would be unable to meet an adverse order for costs.

71. Mr Barr noted that the Applicant had not filed any material to demonstrate that it was solvent. He said that its silence as to its financial position is deafening. Although the Applicant had been invited to provide such

material it had not done so. As to that, Vickery J said in Amcor (at para 39-43:

> "39 I accept the approach of White J in Blackbird Entertainment,…in reasoning that the rule in Jones v Dunkel …is limited to assisting the court to draw an inference which is available from circumstantial evidence. The absence of evidence to the contrary may not, however, be directly converted into circumstantial evidence itself tending to prove the fact in issue against the silent party. In other words, the rule cannot be used to fill gaps in the evidence or to convert conjecture or suspicion into evidence in the nature of inference.
>
> 40 Accordingly, a failure to provide financial information in the face of a valid Court process, either in answer to a subpoena or a notice to produce, or in response to a reasonable request on the part of a defendant, may assist or fortify a conclusion based on direct evidence or upon inferences to be drawn from the other evidence as to the inability of the plaintiff to pay the defendant's costs should the defendant be successful. But it cannot of itself provide such evidence or give rise to that conclusion.
>
> 41 In any event, Achilla seeks to explain its failure to put on evidence as to its financial position by reason that:
>
> (a) In circumstances where a defendant has not proffered evidence of the plaintiff's financial position, the plaintiff is entitled to decline to provide an account of its financial position; and
>
> (b) Achilla's reluctance to expose its financial information to the Amcor Parties in this case is explicable on the basis that it is the confidential information of a privately-owned family company, when the Amcor Parties have been aggressively pursuing Achilla and its director and a related company in litigation since 2007.
>
> 42 In Christou v Stanton Partners Australasia Pty Ltd …Newnes JA, with whom Murphy JA agreed, said:
>
> 'I also do not accept that the filing by the appellants of an application for security for costs gave rise to some obligation on the second respondent to provide a full account of its financial position. That is to put the cart before the horse. In order to enliven the court's discretion there must be material before it which is sufficiently persuasive to permit a rational belief to be formed that, if ordered to do so, the second respondent would be unable to pay the appellants' costs if the second respondent were to be unsuccessful in the action; mere speculation as to the second respondent's insolvency or financial difficulties is not sufficient: see *Warren Mitchell Pty Ltd v Australian Maritime Officers' Union* (1993) 12

> ACSR 1; *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 744 [60]-[61]. In circumstances where the appellants had not troubled themselves to put any material before the court relating to the second respondent's financial position, it was not incumbent upon the second respondent to fill that gap. The second respondent apparently took the view (rightly, in my opinion) that the discretion had not been enlivened and was content to leave the matter at that. It was entitled to do so.'
>
> 43 I respectfully adopt this analysis of Newnes JA in Christou"
>
> (Some citations omitted)

72. If the Respondent is seeking an order for security on the ground that it is unlikely that the Applicant would be able to meet an adverse order for costs it is for the Respondent to lead evidence to that effect. In the present case, I have no evidence as to the assets and liabilities of the Applicant beyond its share capital and the fact that it is not the registered proprietor of any land.

73. Mr Barr pointed to the evidence as to Mr Mimmo's hand operation and questioned whether he would have the capacity to run the Applicant's business and derive income from it. That is no more than speculation.

What can I infer from the evidence?

74. In order for an inference to be drawn the circumstances relied upon must give rise to a reasonable and definite inference. If there are conflicting inferences of equal probability so that the choice between them is a matter of conjecture, an inference cannot be drawn (*Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125 at p. 141).

75. The matters referred to, whether taken individually or collectively, are not sufficient to give rise to a reasonable and definite inference that the Applicant would be unable to meet an adverse costs order.

The bona fides of the Applicant's claim

76. Mr Barr submitted that, on any view the Applicant's claim for $3,594,401.81 was extraordinary, given that the contract price was $2,310,000.00. He also referred to the overruns of the prime cost items and provisional sums which again are substantial. He said that, even without an enquiry into the evidence, I am able to conclude that the Applicant's allegations are unusual and infer that the claim is not bona fide, lacks merit and is severely exaggerated.

77. Although unusual, the Applicant's case is not on its face inherently improbable. The Applicant claims that what was contracted for and what was supplied were two very different things. Extensive particulars of the reasons for that and the calculation of the amounts claimed are set out in the 20 pages of further particulars supplied and there is nothing that I can see in that document that appears to be improbable or implausible. I cannot assume that the Applicant will be unable to prove its case.

78. A further odd feature of the case is that, although the Respondent is seeking in his counterclaim to recover over one million dollars that he paid to the Applicant above the contract price as well as unquantified damages for alleged defects, I was informed by Mr Barr that the Respondent was content for the counterclaim to be stayed as well with the practical consequence that, if security is ordered and none is provided, it will be permanently stayed. One might wonder why a party would be prepared to abandon such a substantial claim in exchange for avoiding the Applicant's claim if the Applicant's claim were thought to have no substance.

79. Mr Barr pointed out that Mr Mimmo had not offered to provide any undertaking or security. In itself, that is not a relevant consideration. It is for the Respondent to establish first that it is appropriate in the circumstances to make an order for security.

Conclusion as to the application for security for costs

80. For the reasons stated I am not satisfied that it has been demonstrated that it would be an appropriate exercise of the discretion conferred by s.79 to order security for costs in the present case. The application for security for costs is therefore dismissed.

Costs of the Compliance hearing on 16 April 2018

81. Mr Barr submitted that the Applicant should be ordered to pay the Respondent's costs of the compliance hearing of 16 April 2018. As stated above, that hearing was requested by the Respondent quite soon after the Points of Defence and Counterclaim had been served.

82. The presiding Senior Member reserved the costs. No reason for that order was given in the signed order but, according to Mr Warren's affidavit, the Senior Member heard submissions as to costs and refused the Respondent's application at the time, saying that he would simply reserve costs. That means that they will be dealt with at the conclusion of the hearing.

83. Whatever the reason, the Senior Member was present and in a better position to know what order for costs should be made than I am now. I have no grounds for making any other order or interfering with what he has done, even if I were disposed to do so. The application for an order for those costs is refused. The costs will remain reserved.

SENIOR MEMBER R. WALKER