VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST **VCAT Reference: D152/2009**

CATCHWORDS

Domestic building – Unconditional bank guarantee – Injunctive relief – Whether serious questions to be tried – Unconscionability – Least injustice.

APPLICANT:	Brady Constructions
RESPONDENT:	Everest Project Developments Pty Ltd (ACN 094 703 661)
WHERE HELD:	Melbourne
BEFORE:	Senior Member D. Cremean
HEARING TYPE:	Hearing
DATE OF HEARING:	8 April 2009
DATE OF ORDER:	1 May 2009
CITATION	Brady Constructions v Everest Project Developments Pty Ltd (Domestic Building) [2009] VCAT 720

ORDER

1. Application refused.

2. Reserve liberty to apply. Reserve costs.

3. Principal Registrar to list for directions.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the Applicant:	Ms P. Neskovcin of Counsel.
For the Respondent:	Mr V. A Morfuni, SC.

REASONS

1. On 17 March 2009 I adjourned the application in this matter to a hearing to be held on 8 April 2009.

2. On that occasion the Respondent, by its Counsel, gave an undertaking not to action the guarantee in issue in the proceedings until the matter was determined.

3. The matter did, in fact, come on for hearing on the latter date and, having heard Counsel for both sides, I reserved my decision. I announced I would give my decision, and the reasons for it, in due course.

4. These are now the reasons for the decision I have made - which is, that the application should be refused. Before arriving at my decision, I should add, I have carefully considered the affidavit materials and the submissions of the parties together with the authorities.

5. The relief sought is succinctly stated as follows: "The Applicant, Brady Constructions Pty Ltd (Brady), seeks an order, until the final hearing and determination of the proceeding, that the Respondent, Everest Project Developments Pty Ltd (Everest), whether by itself, its servants or agents or otherwise, be restrained from calling on the banker's undertaking dated 4 October 2007 by Westpac Banking Corporation in the sum of $1,243,883.50".

6. In support of its application, the Applicant's Counsel, on behalf of the Applicant, has given the appropriate undertaking as to damages.

7. The particular guarantee is addressed to Everest (care of Becton Queens Rd Pty Ltd) at the request of Brady: it says Westpac Banking Corporation "unconditionally undertakes to pay on demand any amount or amounts which may from time to time be demanding in writing purporting to be signed by or on behalf of [Everest] up to a maximum aggregate sum of $1,243,883.50"

8. It is not unusual that the guarantee should be expressed to be "unconditional": however, I note that it *is* expressed in those terms and make the observation that, unless some other counterveiling consideration applies, the guarantee, ordinarily, should be allowed to operate according to its tenor. Why, otherwise, it may fairly be asked, was the guarantee ever entered into? It was entered into for a purpose: and it is not expressed as qualified in any way. It is expressed as unconditional. Everest and Brady - and Westpac - *must* have known what they were doing when they, by their agents, entered into the guarantee. Why should it now not be allowed to operate according to its terms - and "unconditionally"?

9. Brady argues, however, that Everest should be restrained from calling on the guarantee. I have been referred to numerous authorities in support of its position. Brady is opposed by Everest which argues it should not be enjoined.

10. It was agreed, I think, that the relevant test I should apply is that set out in *Bradto Ply Ltd v State of Victoria* (2006) 15 VR 65. In the first place, I must be satisfied there is a "serious question to be tried". As to that test the Court of Appeal in that case said this:

> Whether there is a "serious question to be tried" requires a judgment to be made, for the purpose of which the court or tribunal will examine both the legal foundations of the claim(s) made in the proceeding and such of the evidence in support as is exposed on the interlocutory application. Unless upon such examination the court concludes that the applicant's claims are not reasonably arguable, that is, they do not have "any real prospect of succeeding", then the court will ordinarily be satisfied that there is a serious question to be tried.

I must then be satisfied that the "balance of convenience" lies in favour of the grant of the injunction. However, the Court in *Bradto* reformulated this test as follows:

> In our view, the flexibility and adaptability of the remedy of injunction as an instrument of justice will be best served by the adoption of the Hoffmann approach. That is, whether the relief sought is prohibitory or mandatory, the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong", in the sense of granting an injunction to a party who fails to establish his right at the trial, or in failing to grant an injunction to a party who succeeds at trial.

11. I do not need to recite all the very detailed facts which lie behind the parties' dealings with one another. They are complex and multifaceted.

12. It is submitted, however, that there is a serious question to be tried in two considerations:

    (a) the pre-condition for the beneficiary's entitlement to call on the guarantee under the construction contract between the parties has not been satisfied. Reference is made to *Rejan Constructions Pty Ltd v Manningham Medical Centre Pty Ltd* [2002] VSC 579

    (b) the conduct of Everest in calling up the guarantee constitutes unconscionable conduct. Reference is made to *Olex Focas Ply Ltd v Skodaexport Co Ltd* [1998] 3 VR 380 and to *Boral Formwork v Action Makers* (2003) 1 BFRA 34.

13. The first of these considerations raises clause 42.9 of the construction contract which states: -

> Where, within the time provided by the Contract, a party fails to pay the other party an amount due and payable under the Contract, the other party

may, subject to Clause 5.6, have recourse to security under the Contract and any deficiency remaining may be recovered by the owner as a debt due and payable.

14. My answer to the Applicant is that it is not obvious to me, having heard from Everest, that clause 42.9 has not been satisfied, in all its requirements, in this case. It is not obvious to me, therefore, that clause 42.9 does not allow "recourse" to the security. If it does allow recourse, there is no serious question to be tried on this point and Everest should not be enjoined.

15. I am, however, prepared to assume, for argument's sake, that I am wrong in this and that there is a serious question to be tried in the first of the considerations advanced in the way the matter was put by the Applicant. In accordance with *Bradto*, I am prepared to say, therefore, that I cannot be satisfied that the Applicant's case is not reasonably arguable on the first of those considerations.

16. Turning to the second of the considerations, which was pressed by the Applicant, I am not satisfied there is a serious question to be tried. The argument is that a ground of unconscionability may be enough to prevent an unconditional guarantee being resorted to - despite it being unconditional. The argument was not strongly opposed, as a proposition of law, but I must express my misgivings about it.

17. In this regard I am mindful of what was said by Byrne J in *Rejan*'s case, above, at [4]. His Honour said: "A banker's bond imposes upon the surety the obligation to pay on demand up to the limit of the security. The court will not interfere in this obligation except in very limited circumstances which include, and may even be limited to, a clear case of fraud of which the surety is aware". His Honour does not mention unconscionability. Nor is unconscionability mentioned by Callaway J A in *Fletcher Construction Australia Ltd v Varnsdorf* [1998] 3 VR 712. At p839 his Honour says only this: "In the absence of fraud or illegality, Varnsdorf cannot be restrained from acting in conformity with the contract". Fraud was expressly disavowed by the Applicant. A valiant effort was made to characterize unconscionability as "illegality" but this may not have been what his Honour had in mind when the decision in that case was given. In any event, whether that be so or not, I would not characterize unconscionability necessarily as illegality except tenuously. Unconscionability, as I see it, relates to something which offends good conscience - not to something which contravenes law. And I am not satisfied, in the way it was put to me, that a case of unconscionability would be reasonably arguable in this case, in any event, I should add.

18. I consider I am bound by these Victorian authorities in preference to anything said to the contrary in *Clough Engineering Ltd v Oil and Natural Gas Corp Ltd* [2008] FCAFC 136. The result is I am not prepared to say the Applicant has shown a "serious question to be tried" based on unconscionability. It is true that in *Olex Focas Pty Ltd v Skodaexport Co Ltd* [1998] 3 VR 380 at 404 Batt J found there was a serious question in the allegations being made about the defendant's

unconscionable conduct in that case; but it seems to me that his Honour's finding was dependant on the facts of the case. The facts in this case are not the same as those in that case.

19. I must next consider the "balance of convenience" as it is still conventionally called.

20. In my view the evidence on this was weak - particularly after I excluded paragraphs 12 and following from the Emmett affidavit sworn on 1 April 2009. I did that at the Applicant's request after opposition from the Respondent.

21. At best, as the Applicant's typed submissions indicated, I was left only to speculate on this aspect of the case. For example, what can I make of the statement - "There is some form of standstill arrangement involving Becton to keep Everest and the related companies going"? This is hardly something on which I can place great reliance. What is "some form" of a standstill arrangement? What, exactly, is a "standstill arrangement"? Is it a contract or not? This is vague, imprecise and fetching. And why should I draw any adverse inference out of Everest's failing to dispute its lack of capacity to pay, as was submitted I should? It is for the Applicant to establish its case for injunctive relief. It is not for the Respondent to help it along its way. The Respondent does not have to do anything. And, if it does nothing, then so be it: I must still deal with what the Applicant advances.

22. Speculation, and suspicion, are not enough for me to find the balance of convenience test has been satisfied. Or, that there is a lower risk of injustice in enjoining the Respondent. A lower risk of injustice needs to be shown, in my view, by more than I was shown in this case. An injunction is a serious step to take - even though an undertaking as to damages is given. I am not prepared to take that step on evidence lacking sufficient or proper probative strength.

23. It must follow that the application for an injunction must fail.

24. I reserve liberty to apply. I reserve costs.

25. I direct this matter be referred to a directions hearing.

SENIOR MEMBER D CREMEAN