VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D653/2008

CATCHWORDS

Domestic Building List; Application for security for costs against assignee of builder; Principle of assignee applicant offering undertaking; Assignee not having funds to meet adverse costs order; Proposed undertaking not a complete answer to application; Security ordered; *Victorian Civil and Administrative Tribunal Act* 1998 Section 79.

APPLICANT	C. & J. Mortgages Pty Ltd (ACN 129 821 094)
RESPONDENTS	Roderick Neville, Tanya Neville
WHERE HELD	Melbourne
BEFORE	M.F. Macnamara, Deputy President
HEARING TYPE	Hearing
DATE OF HEARING	9 June 2009
DATE OF ORDER	9 June 2009
CITATION	C & J Mortgages Pty Ltd v Neville (Domestic Building) [2009] VCAT 984

ORDER

1 The applicant is required on or before the expiration of 28 days from this day pursuant to Section 79 of the *Victorian Civil and Administrative Tribunal Act* 1998 to lodge with the Principal Registrar security for the respondents' costs of this proceeding up to and including the first day of trial in the sum of $60,000.

2 This proceeding is stayed pending the lodgement of the security referred to in Order 1.

3 Costs reserved.

M.F. Macnamara
Deputy President

APPEARANCES:

For Applicant	Mr P. Rompotis of Counsel
For Respondents	Mr A. McKellar, Solicitor

REASONS

1 This proceeding concerns a residential development at 11 Huntingfield Road, Brighton. The proprietors and respondents in this proceeding are Mr & Mrs Neville. They engaged a builder, D.J. Denman and Associates Pty Ltd to construct two houses at No. 11, one to be designated No. 11 Huntingfield Road, Brighton which was intended to be sold as an investment property. The other to be known as No. 11a Huntingfield Road, Brighton which would be used as their residence.

2 The builder originally quoted on the basis of an extensive bill of quantities treating the entire project as a single one and costing it at $2.4m. This proposed cost was accepted by the Nevilles but for Capital Gains Tax purposes the Nevilles stipulated that there should be separate contracts for the two properties. This was how the matter was documented. In retrospect it is suggested that there was something unusual and perhaps inappropriate in the manner in which this documentation took place. No. 11, the property to be offered for sale was I have been told, to be of 32 sq m and of a slightly lesser quality than the Nevilles' own house at No. 11A, yet it was designated as costing $1.4m and the larger 50 sq m house with a basement car park and a slightly higher level of finishes at No. 11A to be occupied by the Nevilles themselves was costed at $1m.

3 Work proceeded for some time and the Nevilles discharged the architect. The architect played a vital role in the contractual arrangements between the parties because he certified the amounts that were payable to the builder. The contract was not a contract for a fixed sum rather it was a cost plus arrangement whereby a guaranteed maximum price of $1m in the case of one house and $1.4m in the case of the other was stipulated. I was not taken to the detail of the contract but certainly the guaranteed maximum price was subject to adjustment. It was contended by Mr Rompotis who appears today for the applicant in the proceeding, an assignee of the builder, that this guaranteed maximum price was subject to revision and increase as final drawings were completed. Mr McKellar who appears for the Nevilles says that the guaranteed maximum price was subject to revision certainly but only for owner initiated variations. In the end I am not required to determine these questions today, I merely note the parties varying views. Matters did not end happily.

4 No. 11, the investment property was completed and sold. The Nevilles through their solicitor, Mr McKellar submit that it was not of the quality which had been contracted for and so the sale price was not as high as might have been expected. The sale price was in any event apparently approximately $3m. The Nevilles moved in to No. 11A without the benefit of an occupancy certificate. The building surveyor ordered them out and declared the building unfit for habitation. Apparently certain rectification works were done and an occupancy certificate has now issued. According to the builder, the contract was never terminated. According to the Nevilles

the contract with the builder was terminated because of default on the part of the builder.

5 An amount close to $3m was paid to the builder, it being remembered that the initial calculation was that the two properties could be constructed for $2.4m. The Nevilles denied liability for any further amounts. The builder went into insolvent liquidation earlier this year. Before having done that it brought the present claim which seeks $568,000.00 on a contractual or quantum mererit basis from the Williams. With the builder in financial difficulty a Mr Hopcraft who was an employee of the builder arranged for an assignment to be made of all of the builder's claims against the Nevilles to the present applicant, C. & J. Mortgages Pty Ltd. The consideration for this assignment was the forgiveness of a $200,000 debt which the builder already owed C. & J. Mortgages Pty Ltd. Once this assignment was made C. & J. was substituted as applicant in the proceeding.

6 The security for costs application had been made or threatened against the builder. Now the Nevilles make a security for costs application against C. & J. They say that C. & J. should not be permitted to proceed with its claim in this proceeding unless it lodges security in the sum of $111,000.00. This represents the costing as deposed to by the Nevilles' solicitor, Mr McKellar of bringing the matter to the first day of trial including brief fees for the first day.

7 Mr Rompotis, Counsel for C. & J. opposes the making of any order for security for costs against his client. He submits that in any event even if contrary to his primary submission an order were made it should be for a much lesser sum than is being sought.

8 The Tribunal's power to award security for costs is to be found at Section 79 of the *Victorian Civil and Administrative Tribunal Act* 1998. Sub-section (1) 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.

9 It will be seen that Section 79 as I have quoted it grants a completely open discretion and does not stipulate any particular circumstances which the section indicates are appropriate or for that matter inappropriate in considering whether an order should be made. The approach which the Tribunal has adopted over the years is to apply by analogy authorities from various courts given under Section 1335 of the *Corporations La*w now the

Corporations Act, Order 62 of the Rules of the Supreme Court and analogous provisions. One of the grounds on which the Supreme Court has power to order security for costs is where a plaintiff or party against whom security is being sought is a corporation and has insufficient assets in Victoria to pay the costs of the defendant if ordered to do so(Order 62(2)(b)). That is the basis upon which the present application is brought.

10 In *Livingspring Pty Ltd v Kliger Partners* (2008) 66 ACSR 455 [14] in a joint judgment the President of the Victorian Court of Appeal, Maxwell P. and Buchanan JA said:

> 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?

11 Their Honours were there quoting Section 1335 of the *Corporations Act.*

12 In my view the question for consideration here is similarly stark. There was an array of material placed before me. It indicated that the assignment to C. & J. which I have described was effected at the instance of Mr Hopcraft who is the principal of C. & J. and also of another company, Legal Finance which has in effect bankrolled C. & J.'s conduct of this proceeding to ensure that the value of the claim against the Nevilles was not simply lost or frittered away in an insolvent liquidation. It is an indication one would have thought, that Mr Hopcraft has a strong belief in the validity of the claim which has been made.

13 What then of the financial standing of C. & J.? The material which I have been shown indicates that C. & J. is dependant upon loan finance and the continuation of loan finance to bring this proceeding through to a conclusion. Its balance sheet shows a deficiency of assets as against liabilities of an amount exceeding $45,000. The cases on whether a company or an individual is insolvent for the purposes of considering whether a creditor's petition or winding up application should be successful focus on what one might describe as cash flow issues rather than balance sheet issues. They look at matters over a relatively short timeframe so that for instance, the traditional voidable preference provisions in both the *Bankruptcy Act* and the *Corporations Act* conceive that a company or an individual might move from a state of solvency to a state of insolvency over as short a period as six months.

14 In my view in considering an application such as this I am required to take a fairly long view of things rather than a short cash flow view such as those authorities would have one take. The present proceeding has not progressed beyond pleadings. There has been no discovery for instance and yet it has been on foot for about a year; hence the end of this proceeding where any final costs order might be in consideration may be a year or even longer off. In my view in those circumstances a consideration of balance sheet issues becomes more important than it would be on the short-term cash flow tests to be considered with respect to issues such as whether a

company can pay its debts as they fall due, whether a particular preference ought to be voidable or not. On that long term view it is clear that C. & J. simply does not have the resources to meet an adverse costs order in so complicated a proceeding as the present should one eventuate. In my view therefore the *prima facie* circumstances which would justify the making of an award or an order for security for costs has been made out here.

15 Mr Rompotis on behalf of the applicant in the proceeding opposing the making of any security for costs order submitted that I should analyse the exercise of the Tribunal's discretion in this matter in accordance with a number of considerations raised by McClellan CJ at CL of the Supreme Court of New South Wales as a member of the New South Wales Court of Appeal in *Jazzabas Pty Ltd v Haddad* [2007] NSWCA 291 [73] – [80].

16 Considerations appear in paragraphs numbered (a) to (g) in Mr Rompotis' submission and I respectfully adopt them as an appropriate framework for analysis. The first consideration that he says emerges from His Honour's judgment is the consideration that applications for security for costs should be brought promptly. Mr Rompotis conceded in the somewhat unusual circumstances which we confront here, that this application was brought promptly. Secondly, he said it is appropriate to have regard to the strength and *bona fides* of the applicant's case. As to this point Mr Rompotis said that the split in contracts which I referred to earlier was solely at the behest and for the benefit of the Nevilles. It had the rather unusual circumstance as to costing which I described earlier. The defence taken by the Nevilles amongst other things is that the claim which has been made here simply departs from the contract in so far as it is at odds with the guaranteed maximum price and relates to variations which are entirely oral and have not been documented in the manner which the *Domestic Building Contracts Act* requires. Mr Rompotis said that when one considered that the written arrangements in fact departed from underlying commercial reality from the very outset it was quite credible to regard his clients' claim as *bona fide* and the denial of it as other than *bona fide*. He referred to an affidavit sworn by Mr Hopcraft which said in effect that the Nevilles dispensed with the guaranteed maximum price once the architect was discharged by saying words such as *'it will cost what it will cost'*. The project manager, Mr McMurray gave evidence by affidavit to similar effect. Hence said Mr Rompotis this was a *bona fide* claim and not a claim which was to be regarded as lacking in *bona fides* because of its departure from the written arrangements between the parties.

17 The next consideration emerging from McClellan CJ's analysis is a consideration whether the applicant's impecuniosity was caused by the respondents' conduct the subject of the claim. Mr Hopcraft's view as expressed in his affidavit is that the building company was forced into liquidation by the actions of the Nevilles. To this Mr McKellar made two answers, first, he said that since the present proceeding has C. & J. as applicant and not the building company it will only be if it is demonstrated

that the respondents, the Nevilles, caused C. & J.'s financial situation that this consideration would be properly engaged. C. & J. was bought into this dispute after the event and therefore says Mr McKellar whatever C. & J.'s situation is, it's not the fault of the Nevilles. Mr McKellar went further and said that the statement of affairs filed with the Australian Securities and Investments Commission with respect to the building company showed a deficiency of over $1m. That deficiency he said showed that the builder had far greater difficulties than merely the present proceeding and it would be wrong to regard the builder's demise as wholly or even primarily flowing from its involvement with the Nevilles.

18 Mr Rompotis referred to a late supplementary affidavit by his instructor, the effect of which was to diminish on the views expressed in the affidavit the true deficiency of the builder to $551,000 odd. This it might be thought is almost exactly the amount which is claimed, hence said Mr Rompotis the view of things that it was this failure to pay that is the subject of the present claim that brought the builder undone is credible. Obviously there may be debate on these matters and there may be debate as to the appropriateness of all of the adjustments which are deposed to in the affidavit relied upon by Mr Rompotis.

19 One matter which the affidavit failed to take account of is that for present purposes the builder turned its claim to account for the sum of $200,000 by having its liability to C. & J. Mortgages reduced by that amount as consideration for the assignment. It seems to me that the situation on this point is obscure to say the least and whilst it is a matter frequently considered in security for costs matters, to pursue it to its logical conclusion would require me to conduct at this preliminary stage, an assessment of the underlying merits of the claim, something which is generally accepted as not being appropriate. I think the best view which I can take on this matter is that there are strong and conflicting views which are being advocated. The views advanced by neither party can be regarded as frivolous. I generally agree with Mr Rompotis that it is an artificial view of things simply to concentrate on the situation of C. & J. and pay no heed at all to the building company. C. & J. has become involved as an emergency measure in the circumstances which I have already described.

20 The next consideration according to McClellan CJ is to consider whether the Neville's application for security is oppressive in the sense of it being used to deny an impecunious applicant a right to litigate or to put it as it is sometimes put that an order of this type should not be made in circumstances where it will stultify the proceeding. Mr Hopcraft has deposed that he holds assets and that he is willing to fund C. & J. to bring this claim through to a final determination. Mr Hopcraft no doubt feels and Mr Rompotis submits that it would be unfair for any part of those resources to be detained as part of the security for costs regime rather than being made available to C. & J. for the benefit of its preparations. In my view however what the material from Mr Hopcraft demonstrates is that there is a

line of funding for C. & J. and once one accepts that it cannot be said that the making of this order would necessarily stultify C. & J.'s claim. The next relevant consideration according to McClellan CJ is to ask whether there are any persons standing behind C. & J. who are likely to benefit from the litigation and who are willing to provide necessary security. Putting to one side the willingness of Mr Hopcraft to provide security, it is clear that he stands behind C. & J. and seeks to benefit from the litigation. What I have said earlier indicates that he has the ability to provide security.

21 The next consideration is to ask whether persons standing behind the company have offered any personal undertaking to be liable for the cost and if so, the form of any such undertaking. It is clear that this is a relevant consideration and further, whilst the form of an undertaking has not been under discussion, Mr Hopcraft has offered such an undertaking. According to one view of the law the very tender of such an undertaking or to put it in the somewhat colourful metaphor that has been implied where parties express a willingness to come out from behind the skirts of limited liability, they are to be treated in the same way as a natural person litigant would be, that is, not excluded from participation in litigation by reason of insolvency. This approach was adopted in the Queensland Supreme Court in *Harpur v Ariadne Australia Limited* [1984] 2 Qd.R 523 and also in *Gentry Brothers Pty Ltd v Wilson Brown & Associates* (1992) 8 ACSR 405, 413-415 in the judgment of Cooper J. However this approach was not adopted and supported by the Court of Appeal of the Supreme Court of Victoria in *Epping Plaza Fresh Food and Vegetables Pty Ltd v Bevendale* [1999] 2 VR 191, 197, 202 [22] of the joint judgment of the President, Winneke J and Phillips JA and also paragraphs [40] and [41] of the judgment of Callaway JA [1999] 2 VR 191. In the *Jazzaba*s case the New South Wales Court of Appeal was inclined not to follow the Victorian Court of Appeal on this point and it is fair to say was critical of the Victorian Courts non-embrace of the *Gentry Brothers'* principle. The Court considered whether in terms of recent High Court authority it was incumbent upon it to follow what the Victorian Court had done rather than follow its own inclination in the interests of comity. In the end my duty is clear, I stand in the hierarchy, the penultimate level of which is the Court of Appeal of Victoria. The Court of Appeal of New South Wales stands nowhere in that hierarchy. I must follow the approach of our own Victorian Court of Appeal unless and until the High Court of Australia says otherwise. That Court says that the availability and the proffering of the undertaking mentioned is relevant but is not an overall determinant, and not a complete and total answer to the present claim.

22 The final of the considerations postulated by McClellan CJ is that security will only ordinarily be ordered against a party who is in substance a plaintiff and an order ought not to be made against parties who are defending themselves and thus forced to litigate. It is clear from the narrative that I have given that C. & J. Mortgages is not a party that has

been forced into litigation or that is defending itself, hence those matters are I think neutral in the present consideration.

23 So if I return then in summary to the various considerations, we note that this application has been brought promptly, that it is brought in a proceeding that on the face of it has been commenced *bona fide* and is being defended *bona fide* and which raises difficult issues and could conceivably go either way. I conclude that it is not possible on the material that I have before me without engaging in speculation to make a finding that the insolvency of C. & J. or indeed the builder, is caused by the Nevilles' conduct. I do not believe that the application for security is oppressive in the sense that it will necessarily stultify this litigation. There are people standing behind C. & J. who stand to benefit, at least one of them has offered a personal undertaking to be liable for costs and this is an application brought by a respondent or defendant and not brought against a party that is merely trying to defend itself. The matter is I think finely balanced and the thing that renders it most finely balanced is the offer which Mr Hopcraft makes. With some hesitation I decline to give the strongest weight to that offer. This is because it is unclear whether in the circumstances the Tribunal would have authority to enforce any undertaking which Mr Hopcraft might make. It may be that it has. It also may be that it has not. I have no authoritative guide. I note for instance that Section 123 of the *Victorian Civil and Administrative Tribunal Act* 1998 authorises the Tribunal to assess damages which have been incurred against an undertaking given to obtain an interim injunction. It might be that the existence of that power is indicative of a view on the part of Parliament that unlike a superior court of record, this Tribunal does not have any general jurisdiction to enforce undertakings given. This issue is particularly acute when one considers that the person offering the undertaking here is not a party and further, that the Tribunal's power to order the payment of costs is limited by Section 109 of the *Victorian Civil and Administrative Tribunal Act* to orders against a party or against the representative of the party. The Court of Appeal has told us in the case of *Tamas v VCAT* (2002) 12 VAR 128 that representative means not someone who happens to be a director, a controller or principal of a corporation but rather the person who sits at the bar table and advocates on its behalf.

24 Accordingly once I discount as I believe I should for the reasons given, the significance of the offer of an undertaking by Mr Hopcraft, the balance comes down in favour of granting this order for security of costs rather than refusing it.

25 The next question is in what sum should it be awarded? Both parties have put on some affidavit material though not of any very detailed type. There is no material for instance from a costs consultant. Mr McKellar as I have previously noted costs the relevant amount at $111,000. Mr Moss and Counsel for the applicant in the proceeding, C. & J. says that this is way too high. It notes for instance that allowance should not be made for costs

already incurred and the costs of the pleadings fall into that category. It expresses scepticism as to large allowances of $30,000 and $20,000 respectively for bills of quantities and witness statements. On one view this type of case might turn out to be a very straight forward one. It might turn on the simple hinge, did the Nevilles say to the builder *'don't worry about the guaranteed maximum price, this property will cost what it will cost'* or it could bog down in a very lengthy Scott schedule. I was not taken to the pleadings but apparently the particulars of defence leave open the possibility of the delivery by the Nevilles of a lengthy Scott schedule. Given that the figures that have been put to me are of the round variety and described in fairly broad terms I think it is appropriate for me to respond in similar kind and I think that a more conservative and realistic figure is the sum of $60,000.00 and I propose ordering that there be security for costs in that sum.

MFM:RB