VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO D776/2009

CATCHWORDS

BUILDING DISPUTE – Application for security for costs – s 79 *Victorian Civil and Administrative Tribunal Act 1998* – Whether delay in bringing application is fatal to application.

APPLICANT	Charterarm Investments Pty Ltd (ACN 054 052 934) (in external administration)
RESPONDENT	Clynton Roberts
RESPONDENT BY COUNTERCLAIM	George Bougioukas
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Interlocutory Hearing
DATE OF HEARING	19 March 2015
DATE OF ORDER	23 March 2015
CITATION	Charterarm Investments Pty Ltd v Roberts (Costs) (Building and Property) [2015] VCAT 323

ORDER

1. The First Respondent's application for security for costs is dismissed.
2. The hearing listed to commence on 30 March 2015 is confirmed.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	Mr S Smith, of counsel
For the First Respondent	Mr I Szmerling, solicitor

For the Respondent by Counterclaim	No appearance

REASONS

INTRODUCTION

1. This interlocutory hearing concerns an application by the respondent home owner (**'the Owner'**) for an order pursuant to s 79 of the *Victorian Civil and Administrative Tribunal Act 1998* (**'the VCAT Act'**) that the applicant builder (**'the Builder'**) give security for the Owner's costs in the amount $40,700. The application is made in circumstances where the Builder, which is under external administration, concedes that it would not have capacity to meet any adverse costs order made against it.

2. Mr Szmerling, the solicitor who appeared on behalf of the Owner, submitted that the admission made by the Builder that it would not be able to meet any adverse costs order, of itself, justified an order that the Builder give security for the Owner's costs. He relied on a number of authorities in support of that submission.[1] Mr Smith, the solicitor who appeared on behalf of the Builder, submitted that the peculiar circumstances surrounding this proceeding militated against any security for costs order being made.

3. I accept that the present application is made in unique circumstances. In particular, this proceeding has already been the subject of a curial determination made on 8 March 2013, where I ordered that the Owner pay the Builder $217,716.91 (after setting off the Owner's counterclaim). Moreover, on 23 May 2013, after a further hearing on the question of costs, I ordered that there should be no costs ordered in the proceeding.

4. My determination was the subject of an appeal to the Supreme Court of Victoria. The upshot of that appeal was that part of my finding was overturned, with the result that orders were made setting aside my determination and giving the parties the right to have the proceeding remitted for further hearing, to enable a re-assessment of the Builder's claim on a different footing. In particular, in the Supreme Court appeal, it was found that the Builder had failed to comply with s 13(2) of the *Domestic Building Contracts Act 1995* (**'the Act'**), which provides:

> **13. Restrictions on cost plus contracts**
>
> …
>
> (2) A builder must not enter into a cost plus contract that does not contain a fair and reasonable estimate by the builder of the total amount of money the builder is likely to receive under the contract.

[1] *Snowy Corner Pty Ltd & Anor v Sperling & Ors* [2013] VCAT 955; *CSO Interiors Pty Ltd v Fenridge Pty Ltd* [2013] VCAT 1175.

(3) If a builder fails to comply with this section –

(a) the builder cannot enforce the contract against the building owner; but

(b) the Tribunal may award the builder the cost of carrying out the work plus a reasonable profit if the Tribunal considers that it would not be unfair to the building owner to do so.

5. In my determination of the Builder's claim, I assessed damages pursuant to the contract between the parties. This was done because I found that the Builder had not infringed s 13(2) of the Act. However, on appeal, that finding was reversed. This meant that any entitlement on the part of the Builder had to be assessed by reference to s 13(3)(b) of the Act, rather than solely by reference to the contract.

6. On 27 March 2014, an *Application for Directions/Orders* was filed by the Builder, in which it sought to have its claim re-assessed on that different footing. The proceeding was first returned before me on 2 May 2014, at which time interlocutory orders were made to enable the matter to be listed for hearing. After some delay, the hearing was eventually listed to commence on 30 March 2015, with three days allocated.

7. On or about 3 November 2014, the Owner filed an application in the Tribunal seeking an order that the Builder give security for the Owner's costs. This was the first occasion where security for costs was sought. At no time prior to that date had any application been made or foreshadowed that the Owner would seek an order for security for costs. This is despite the proceeding having been stayed for nearly 12 months after it was discovered that an order had been made by the Supreme Court of Victoria on 22 September 2010 that the Builder be wound up in insolvency under the provisions of the *Corporations Act 2001*. That revelation occurred after the expiration of 13 hearing days. What followed was litigation in the Supreme Court of Victoria, whereby the former director of the Builder sought an order to terminate the winding up of the Builder. That litigation was unsuccessful. However, on 7 February 2012, the liquidator advised the Tribunal that the Builder was poised to enter into a Deed of Company Arrangement, which would hand back control of the company to its former director, the Respondent by Counterclaim. The Deed of Company Arrangement was executed on 3 May 2012 and the hearing recommenced in August 2012, ultimately occupying nearly 5 weeks of hearing time.

SECTION 79

8. Section 79 of the VCAT Act states:

79 Security for costs

(1) On the application of a party to the 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.

9. In *Ian West Indoor & Outdoor Services Pty Ltd v Australian Posters Pty Ltd*,[2] Judge O'Neill VP stated:

> [T]he 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 modest cost that may be the case in the County or Supreme Courts.[3]

10. The exercise of the Tribunal's discretion is unfettered; although guidance is gained by numerous decisions of superior courts in dealing with applications for security costs under the *Corporations Act 2001* (Cth) or the Supreme Court Rules. However, s 79 of the VCAT Act is expressed differently to s 1335 of the *Corporations Act 2001* (Cth), such that it *cannot be assumed that in every case where a court would order security, this Tribunal would order security also*.[4]

11. In *Hapisun Pty Lrd v Rikys & Moylan Pty Ltd*,[5] Daly AsJ observed:

> The statements made in *Ian West Indoor & Outdoor* and *Done Right Maintenance* demonstrate that the Tribunal appreciates the need to exercise the broad discretion under s 79 in the particular legislative and institutional context in which it operates, and, as such, while the language of s 79 seemingly expands the circumstances in which VCAT may exercise its discretion to make an order for security for costs beyond those available to the courts under s 1335 or rule 62.02(1)(b), there are particular features of its jurisdiction which will, in appropriate cases, influence the exercise of discretion. By way of example, the fact that VCAT is, by presumption imposed by s 109 of the VCAT Act, a "no-costs" jurisdiction, means that part of any analysis of the question of whether a security for costs order be ordered needs to include some assessment of the likelihood of whether, even if a defendant were successful in defending the claim, that an order for costs would be made in its favour.[6]

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[2] (2011] VCAT 2410.
[3] Ibid at [17].
[4] *Done Right Maintenance and Building Group Pty Ltd v Chatry-Kwan* [2013] VCAT 141 at [18].
[5] [2013] VSC 730.
[6] Ibid at [43].

SHOULD SECURITY FOR COSTS BE ORDERED?

12. In my view, too much time has elapsed before the application for security for costs was first foreshadowed and made to justify exercising my discretion to order that the Builder provide security for the Owner's costs..

13. I am at a loss to understand why no security for costs application was ever made during the running of the proceeding in 2011-2012, especially after the Owner became aware that the Builder was under external administration and functioning under a Deed of Company Arrangement. In fact, at a directions hearing on 7 February 2012, orders were made listing the proceeding for the resumption of the main hearing, following the stay caused by the Building being in liquidation. Order 4 of the orders made on that day specifically stated:

> 4. Any interlocutory application by any party is to be made no later than 13 April 2012.

14. Surprisingly, no application for security for costs was made despite the liberty given to the Owner to make an interlocutory application. Moreover, even after the Builder sought to have the proceeding remitted to enable it to prosecute its claim under s 13(3)(b) of the Act, no application for security of costs was foreshadowed until November 2014, nearly 8 months after the proceeding was re-enlivened and significant work undertaken by both parties in preparing for that remitted proceeding.[7]

15. Mr Szmerling provided no explanation for the delay in making the application for security for costs. He submitted, however, that the delay should not be counted from when the proceeding was first commenced but rather, from when the remitted proceeding first commenced. He argued that the remitted proceeding is, in essence, a fresh proceeding and no regard should be had to the fact that the main proceeding commenced in 2009.

16. I do not accept that submission. In my view, the mere fact that a part of the proceeding has been remitted back to the Tribunal for further determination does not, thereby, constitute a fresh proceeding. Having said that, I accept that delay is not a bar to successfully bringing an application for security for costs. In particular, there may be factors which occurred during the course of a proceeding which justifiably delay a party from promptly initiating a security for costs application. For example, it may not be immediately apparent that a party will be unlikely to pay for the other party's costs, should an adverse costs order be made against it.

[7] All interlocutory steps have been completed by the parties, save for witness statements in reply.

17. In the present case, however, that circumstance became patently clear in April 2011, when the Owner became aware that the Builder was in liquidation. That should have been at the forefront of the Owner's mind when the main proceeding resumed in early 2012.

18. Moreover, even if I accept the argument that the remitted proceeding constitutes a fresh proceeding, no explanation was given as to why no application for security for costs was foreshadowed at or around the time when the Builder sought to relist the proceeding in April 2014. Again, I consider that the delay is unacceptable and ultimately weighs heavily against making the orders sought, notwithstanding the admission made by the Builder that it would not be able to meet any adverse costs order made against it, should that situation arise.

19. I further note that on 27 November 2014, orders were made listing the Owner's application for security for costs for hearing on 30 January 2015. On that day, the Owner advised the Tribunal that he was not in a position to proceed with his application because he was not, at that time, legally represented. Consequently, his application for security for costs was stayed. On 25 February 2015, a further directions hearing was convened to deal with, amongst other things, the Owner's failure to comply with procedural orders previously made by the Tribunal. The Owner's application for security for costs was, again, not heard on that day, principally because the Owner was still unrepresented and still not ready to proceed. Consequently, orders were made on that day to list another directions hearing on 19 March 2015, in order to hear the Owner's security for costs application. In my view, the delay between the first listing of the application to the date when the application was ultimately heard is largely due to the Owner failing to prosecute his application. I consider that to be another factor weighing against the exercise of my discretion to order security for costs.

20. Mr Smith submitted that the admission made by the Builder that it would not be able to meet any adverse costs order made against it raises a strong inference that the Builder would not have funds immediately at hand to satisfy any order for security for costs. He argued this would have the effect of stifling its ability to prosecute its claim and defend the counterclaim made against it.

21. There is no evidence going to that issue. Nevertheless, as I have already indicated, the delay in making the application is inexcusable. In my view, that is a significant factor in the exercise of my discretion. In particular, I consider that it would be unfair to now order that the Builder provide security for the Owner's costs of conducting what is the last leg of a very long and protracted hearing. For the Owner to permit the Builder to incur substantial costs in conducting the original proceeding and then in preparing for the remitted proceeding has the

potential to unduly prejudice and oppress the Builder if there is a risk that the security for costs order will stifle the action.

22. It is beyond question that the Builder has incurred significant costs in prosecuting the matter that would not have been incurred had the application for security been made successfully at the outset, or at the very least when the remitted proceeding was first returned before the Tribunal. Those costs will effectively be wasted if the security order threatens the Builder's financial ability to continue with the action. In the present case, the consequences of the delay, when weighed in the balance, persuade me that it would not be fair to exercise my discretion in favour of granting the orders sought.

23. Finally, I note that in the main proceeding, costs were not ordered despite the hearing occupying nearly 5 weeks of hearing time. Although it is difficult to gauge whether costs would or would not be ordered if the Owner ultimately succeeded in defending the Builder's claim, the fact that s 109 of the VCAT Act starts with the presumption that costs will not follow the event is a further factor which I take into consideration.

24. Therefore, I decline to exercise my discretion to order security for the Owner's costs of the proceeding.

SENIOR MEMBER E. RIEGLER