VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING & PROPERTY LIST VCAT REFERENCE NO BP449/14

CATCHWORDS

BUILDING DISPUTE – Application for security for costs – s 79 *Victorian Civil and Administrative Tribunal Act 1998* – Whether order for security for costs should be ordered when there has been a significant delay in making the application – Relevant factors – Whether the amount of security audit should be discounted where the proceeding comprises a counterclaim and cross-claim.

APPLICANT	~~Eastern~~ Easton Builders Pty Ltd (ACN 143 361 620)
FIRST RESPONDENT	Glyndon Developments Pty Ltd (ACN 120 378 181)
SECOND RESPONDENT	Pamela Faye Rickards
THIRD RESPONDENT	Robert Mills Architect Pty Ltd (ACN 069 299 430)
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Interlocutory Hearing
DATE OF HEARING	24 May 2016
DATE OF ORDER	26 May 2016
CITATION	~~Eastern~~ Easton Builders Pty Ltd v Glyndon Developments Pty Ltd (Building and Property) [2016] VCAT 850

CORRECTION ORDER MADE PURSUANT TO SECTION 119 OF *THE VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL ACT 1998*

1. **By 20 June 2016** and pursuant to s 79 of the *Victorian Civil and Administrative Tribunal Act* 1998, the Applicant must pay into the Domestic Building Fund the sum of $125,000 as security for the First and Second Respondents' costs of this proceeding up to and including Day 20 of the hearing.
2. Subject to Order 3 of these orders, this proceeding is stayed pending the lodgement of the security referred to in Order 1.

3. Should the Applicant fail to comply with Order 1 these orders, then orders will be made without further notice that the Applicant's claim against the First and Second Respondents and the First and Second Respondents' counterclaim against the Applicant will be struck out with no order as to costs.

4. Should an order be made pursuant to Order 3 of these orders, then I direct the Principal Registrar to list the proceeding for a further Directions Hearing at the Tribunal's earliest convenience to determine whether the First and Second Respondents' cross-claim against the Third Respondent is to proceed.

5. Liberty to apply.

6. Costs reserved.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	Mr R Craig of counsel, with Mr W Thomas of counsel
For the First and Second Respondents	Mr P Duggan of counsel
For the Third Respondent	No appearance

REASONS

INTRODUCTION

1. This interlocutory hearing concerns an application by the First and Second Respondents (**'the Owners'**) 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 $382,278.88 or such other amount as the Tribunal deems appropriate.

SECTION 79

2. 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.

3. In *Ian West Indoor & Outdoor Services Pty Ltd v Australian Posters Pty Ltd*,[1] 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.[2]

4. 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*.[3]

5. In *Hapisun Pty Ltd v Rikys & Moylan Pty Ltd*,[4] 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

[1] (2011] VCAT 2410.
[2] Ibid at [17].
[3] *Done Right Maintenance and Building Group Pty Ltd v Chatry-Kwan* [2013] VCAT 141 at [18].
[4] [2013] VSC 730.

> 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.[5]

SHOULD SECURITY FOR COSTS BE ORDERED?

6. Affidavits had been filed in support of and in opposition to the security for costs application. Based on that affidavit material, it is not in contention that the Builder, of itself, would not have sufficient funds to meet any adverse costs order.

7. Nevertheless, the Builder contends that security for costs should not be ordered, principally for the following reasons:

   (a) there has been a significant and inordinate delay on the part of the Owners in bringing its application;

   (b) the Owners have caused the Builder's present impecuniousity;

   (c) an order requiring the Builder to provide security would stultify its ability to continue the proceeding;

   (d) there is insufficient evidence filed by the Owners to support its application; and

   (e) a considerable amount of costs in the proceedings are attributable to the Owners' counterclaim and to the Owners' cross-claim against the Third Respondent.

Is the delay in making the application fatal to its success?

8. Mr Craig, counsel for the Builder, submitted that a critical factor relevant to the exercise of the discretion to order security for costs is whether the party applying for security has delayed in making its application. Referring to the judgment of Collier J in *Vantage Holdings Pty Ltd v Yong Huang*,[6] he submitted that the closer the proximity of the hearing of the trial to the time of the application, the greater the weight given to the delay factor. He also referred to the decision of Derham AsJ in *Colmax Glass Pty Ltd v Polytrade Pty Ltd*,[7] where his Honour stated:

> **(f) Delay in applying for security:** Delay in applying for security may be ground for refusing to order security. The company, which

[5] Ibid at [43].
[6] [2015] FCA 155, [11].
[7] [2013] VSC 311.

> can be assumed to be in financial difficulties, is entitled to know its position in relation to security at the outset, and before it embarks to any real extent on its litigation, and certainly before it makes a substantial financial commitment toward litigating the claim. See *Buckley v Bennell Design & Construction Pty Ltd*; *Smail v Burton; Re Insurance Assocs Pty Ltd (in liq)*; [29].[8]

9. In *Smail v Burton; Re Insurance Assocs Pty Ltd (in liq)*, Gillard J stated:

> First, it is well established an application for security of costs should be made promptly. If an appellant has expended sums of money preparing the appeal for hearing and all the matters necessary to be performed have already been performed and the appeal is ready for hearing, it would be patently unjust to permit a respondent who stood by and allowed that work to be done to come to court and to ask for security after such expenses have been incurred. Accordingly, it is well established by authority that applications for security of costs should be made promptly and before considerable expense is incurred by the appellant.[9]

10. His Honour's comments are apt in the present context. According to the affidavit of Adrian John Clifford dated 23 May 2016, the Builder's solicitor, the Builder had, at the time the security for costs application was first raised, expended approximately $233,418.51 in legal fees in prosecuting and defending the proceeding. This is hardly surprising given that the proceeding was first commenced in October 2014 and has proceeded to a point where it is listed for hearing commencing on 3 October 2016, with 20 hearing days allocated. Pleadings, discovery and the filing of numerous expert reports have been completed, with the result that a large component of the prehearing work has already been undertaken.

11. However, in *Smail v Burton*, Gillard J also placed the following caveat on the extract of his judgment cited above:

> On the other hand, if there are reasonable causes for delay, including the conduct of the appellant, then different considerations might well apply.[10]

12. In the present case, Mr Duggan, counsel for the Owners, submitted that the delay was explicable. In particular, he referred me to the affidavit of Aldo Dominic Russo dated 22 April 2016, solicitor for the Owners, wherein he deposes that the Builder's impecuniousity only recently came to light, when it was discovered that the Builder had ceased trading and was no longer answering telephone calls. According to Mr Russo, this information was first discovered by the Owner in February 2016. He states:

[8] Ibid at [20].
[9] [1975] VR 776, 777.
[10] Ibid.

> 4. Until approximately 5 February 2016 the Owners understood and believed that the Builder was actively carrying on business as it alleged. It then came to the Owner's attention that –
>
> a) the Builder's office had closed;
>
> b) the Builder's listed telephone number had been disconnected;
>
> c) the Builder was still purporting, inter alia, by its website to be engaged in "current projects" including the Owners' premises.

13. However, Mr Craig submitted the position of the Builder has not altered from when the proceeding was first issued to when the application for security for costs was first raised in March 2016. He again referred me to Mr Clifford's affidavit, who deposed:

> 18. I am instructed by Matthew Gilmore, a director of Eastern Builders, that in or about September 2013, a decision was made that Eastern Builders would not be undertaking any new projects. Accordingly, I am instructed that Eastern's financial and trading status has not changed since this proceeding started in October 2014.

14. Mr Craig submitted that, having regard to Mr Clifford's affidavit, the Builder had ceased trading in about September 2013, well before the proceeding was filed. He argued that the Owners' failure to discover this fact until February 2016 is of no consequence. Although Mr Craig conceded that a change in circumstance may excuse a delay in bringing an application for security for costs; that was not the case in this proceeding. He referred to the judgment of Mukhtar AsJ in *Beluga Developments Pty Ltd v Sobel Investments Pty Ltd*,[11] where his Honour considered the effect of a 'supervening event' as a mitigating factor against delay:

> 12. It is recognised that a supervening event, such as insolvency or a departure from the jurisdiction, may be a catalyst for, and justify a late application for security for future costs: *Tim Barr Pty Ltd v Naru Gold Coast Pty Ltd*.[12] In those situations, it is not so much a case of "delay", in the sense of delay despite knowledge of relevant facts, but a late application because of a supervening fact coming lately. And even then, such applications would normally be confined to future costs and not past costs, as in this application.

15. Mr Craig submitted that the revelation that the Builder was no longer trading; or that its parent company was no longer committed to funding its business activities, did not constitute a supervening event, in the sense contemplated by Mukhtar AsJ in *Beluga Developments*. He argued that

[11] [2010] VSC 303.
[12] [2009] NSWSC 563.

it was open for the Owners to have conducted their due diligence at the commencement of the proceeding and that their investigations would have revealed a set of facts that was no different to the facts as they presently exist.

16. Mr Duggan answered this submission by distinguishing the facts in *Beluga Developments* to what is presently before the Tribunal. In particular, he argued that it was not simply a matter of the Owners having failed to undertake due diligence but rather, the Builder had misrepresented and continues to misrepresent its true position, which Mr Duggan submitted had led the Owners into believing that the Builder was an entity with financial means.

17. Mr Duggan pointed to a number of factors which he submitted reinforced the previously held and reasonable belief that the Builder was a functioning entity with financial means. He set out those factors in his written submissions:

> a) the Builder (via its various points of claim and/or the Builder's website) has represented that –
>
> (i) it is currently trading; and
>
> (ii) it has 12 "current projects" listed on its website; and
>
> b) the Builder and its parent company have represented by the Builders information bulletin dated 11 March 2014 that "Funding to [the builder] from Winport International remains committed and represents a small investment in the bigger scheme."[13]

18. Mr Duggan's submissions are further supported by matters raised in Mr Russo's affidavit. In particular, he states:

> In or about March 2014 the Builder provided to the Owners of a document [sic] dated 11 March 2014 headed "Information Bulletin" which document –
>
> (i) had on its letterhead the words Eastern Builders Pty Ltd (a subsidiary of Winport International Ltd); and
>
> (ii) included the passage "*Funding to Easterns from Winport International remains committed and represents a small investment in the bigger scheme. Malcolm Dumenil and Matt Gilmore will continue as directors of the company.*"[14]

19. The *Information Bulletin* was exhibited to Mr Russo's affidavit. It further stated:

> Eastern Builders will continue trading and provides its customers and contractors an assurance that it is going to be around for the foreseeable future.

[13] Paragraph 15 of the Owners' written submissions dated 5 May 2016.
[14] Paragraph 16 of the affidavit of Aldo Dominic Russo dated 22 April 2016.

> Eastern Builders has chosen a different business model in light of difficult trading conditions in the building industry. It will tender for projects but will be selective in its choice based on certain criteria and suitability to its new business model.

20. Mr Duggan further pointed to the original *Points of Claim*, the *Amended Points of Claim* and the *Further Amended Points of Claim*, the last of which were filed on 24 March 2016, which all included the following allegations:

> 1. The Applicant (**the Contractor**) is and was at all material times:
>
> (a) a company duly incorporated pursuant to law.
>
> (b) carrying on business as a building contractor.

21. Mr Duggan submitted that even as recently as 24 March 2016, the Builder was still maintaining that it was a functioning entity. He argued this was in stark contrast to the reality of the situation, as conceded in Mr Clifford's affidavit. Mr Duggan submitted that the discovery of the Builder's financial and trading position being fundamentally at odds with what it had represented constitutes a significant supervening event.

22. Mr Duggan further referred to Mr Clifford's affidavit, wherein he confirmed that:

> **How Eastern Builders has funded its legal costs in this proceeding**
>
> 22. I am instructed by Mr Matthew Gilmore as follows:
>
> (a) this proceeding would not have been commenced had Glyndon Developments paid Eastern Builders the amount certified as payable in progress payment certificates numbers 25 & 26 and progress claim 27 which was issued at the time of practical completion being achieved;
>
> (b) that the legal costs of Eastern Builders in relation to this proceeding have mostly been funded by Winport;
>
> (c) periodically funding requests are made by Eastern Builders to Winport;
>
> (d) there is no guarantee that Winport will provide any security for costs that may be ordered to Eastern Builders; and
>
> (e) if security for costs were awarded Eastern Builders would not have sufficient funds to provide security and the amount sought.

23. Mr Duggan argued that the above statement absolutely confirmed that the representations made by the Builder were false.

24. By contrast, Mr Craig submitted that the representations were not false. He referred to the following extract of Mr Clifford's affidavit:

> 21. I am instructed by Matthew Gilmore that notwithstanding Eastern Builders has not undertaken any new projects since late 2013 that it has:
>
> (a) diligently attended to rectification of defects on other projects;
>
> (b) recovered retention monies owing on other projects.

25. Mr Craig submitted that the above statement demonstrated that the Builder was still a functioning entity carrying on business as a Builder. In my view, that proposition affords an overly generous definition to the term *carrying on business as a builder*. I do not accept that carrying on business as a builder could reasonably be understood in the way suggested by Mr Craig. In my view, carrying on business as a builder entails entering into commercial arrangements for the purpose of realising profit. The conduct referred to by Mr Craig relates to making good past contracts and does not entail future trading as no consideration is given for the work which the Builder now has confined itself to.

26. Therefore, I accept that the manner by which the Builder has represented itself is different to reality. I further accept that the discovery of the falsity is a supervening factor. In reaching this conclusion, I am mindful that positive representations were made by the Builder which, looked at objectively, were misleading. I also accept what Mr Russo's says in his affidavit – that the Owners understood and believed that the Builder was actively carrying on business, as it alleged; and that this belief continued until 5 February 2016 when the falsity was first discovered. In my view, the time by which to gauge the period before the security for costs application is made is from February 2016 and not from when the proceeding was first initiated.

27. In forming that view, I do not wish it to be thought that the mere realisation that a claimant is impecunious or that its trading status is different to what was first believed, is sufficient, of itself, to constitute a supervening factor. Parties should conduct their due diligence and weigh up at an early stage in the proceeding whether an application for security for costs should be made. However, I consider this case to be different. Here, positive representations were made and were continued to be made, which in my view would make it unfair for the Builder to rely upon as the basis for refusing to order security for costs.

28. Having said that, I further note that the authorities referred to above relate to applications for security for costs made under the relevant Supreme Court Rules or the *Corporations Law 2001* (or its predecessors). As I have already indicated, the application before me is

made under different legislation. That distinction was highlighted in *Hapisun Pty Ltd v Rikys & Moylan Pty Ltd*:[15]

> There are at least three material differences between the formulation of s 1335 and s 179 [sic] of the VCAT Act, namely:
>
> …
>
> (b) the inclusion of the words "at any time" in s 79 contemplates that a party may make an application for security for costs at any point in the proceeding, notwithstanding that in the general jurisprudence, any delay in making an application is a significant discretionary factor weighing against the making of an order for security for costs; and …

29. As highlighted in the above extract of *Hapisun*, s 79 expressly states that an application can be made "at any time". There is no restriction expressed in that section. Consequently, although delay may be a factor going to the Tribunal's discretion, I do not consider that the delay in bringing this application is determinative of itself.

Have the Owners have caused the Builder's impecuniousity?

30. A further ground relied upon by the Builder, as outlined in Mr Craig's written submissions, is to the effect that the Owners have caused the Builder's present impecuniousity. Mr Craig again referred to Mr Clifford's affidavit, which set out in summary form conduct on the part of the Owners which he contends was the catalyst for the decision that the Builder would not be undertaking any new projects from September 2013.

31. In my view, this statement is far too general to allow me to form a concluded view as to whether the Builder's current financial situation was caused by the Owners. This question is further complicated by the fact that the Builder's claims under the building contract amount to $459,901.11.[16] However, according to the cost estimates relied upon by the Owners, the cost to complete and repair the building works far exceeds that sum. Indeed, Mr Duggan submitted that even the Builder's own experts have estimated that the cost to repair or complete defective or incomplete work is close to that figure.

32. As I have already indicated, a general statement made by the Builder's solicitor, to the effect that he has been instructed that the current dispute was the catalyst for the Builder deciding not to undertake any new projects is insufficient for me to find that the Builder's impecuniousity was caused by the actions of the Owners. Consequently, I do not accept this factor as weighing heavily against the imposition of an order that security for costs be given.

[15] [2013] VSC 730.
[16] Or $588,652.

Would an order for security for costs stultify the proceeding?

33. Mr Craig submitted that an order requiring the Builder to provide security would have the effect of stultifying the proceeding because the Builder would be unable to continue to prosecute its claim against the Owners. He submitted, correctly in my view, that the consequences would be especially harsh given the late stage of the proceeding and the significant expense which the Builder (or its funder) have incurred in connection with the proceeding so far.

34. Mr Craig again pointed to Mr Clifford's affidavit, wherein he deposed that Winport International Ltd has previously assisted in the funding of litigation but there was no guarantee that the funding would continue, should security for costs be ordered.

35. In answer to that submission, Mr Duggan submitted that the situation is somewhat different to other cases. He stated that the Owners have undertaken not to pursue their counterclaim in the event that security for costs is ordered but subsequently not provided. In those circumstances, he submitted that the proceeding as between the Builder and the Owners would be stayed or struck out, leaving only the claim as between the Owners and the Third Respondent, being the architect to litigate. Therefore, he submitted that the prejudice often referred to in other cases resulting from a situation where one party is free to litigate while the other is barred, would not occur in the present case.

36. In my view, Mr Clifford's affidavit shows that the Builder has never had sufficient funds, of itself, to prosecute its claim or defend the counterclaim made against it. It seems, therefore, that the situation would be no different if an order for security for costs was made. As highlighted in Mr Clifford's affidavit, funding for this litigation *have mostly been funded by Winport*.[17]

37. Apart from Mr Clifford indicating that there was no guarantee that *Winport* would continue to fund the litigation if an order for security for costs was made, there is no evidence that unequivocally says that funding will be withdrawn. Similarly, there is no evidence that *Winport* or any other entity funding the litigation would not have sufficient means to meet an order for security for costs.

38. In the absence of such evidence, I do not consider that this factor weighs heavily against the imposition of an order that security for costs be paid.

Is the Owner's evidence adequate and satisfactory?

39. Mr Craig submitted that there was no evidence before the Tribunal to indicate that the Owners had ever sought to investigate whether the Builder was impecunious prior to March 2016. He said that the Owners gave no evidence to indicate what advice they had received, such as

[17] Paragraph 22 of the affidavit of Adrian John Clifford dated 23 May 2016.

whether they should seek security at some time prior to March 2016 or whether they had instructed their legal representatives not to pursue an application for security for costs prior to that time.

40. In my view, the submissions relate more to the question of delay than the sufficiency of evidence before the Tribunal. As I have already found, I do not consider the delay in this case to be determinative against an order for security for costs.

41. Mr Craig further criticised the sufficiency of the Owners' evidence in support of their application by reference to what they contend are the reasonable future costs of litigation. In that respect, Mr Craig's submissions crossover his final ground of objection; namely, that the amount sought by way of security for costs is excessive.

Are the costs sought by way of security excessive?

42. Mr Craig submitted that security for costs should not be ordered because the amount sought was excessive and further, uncorroborated by evidence substantiating that the activities and the time taken to undertake those activities are reasonable.

43. The evidence relied upon by the Owners, in support of their application that $392,278.88 should be ordered by way of security for costs, is contained in an exhibit to Mr Russo's affidavit. That exhibit is a letter from Antonella Terranova from *Castra Legal Costing Pty Ltd* dated 21 April 2016. The letter states that future costs have been estimated in accordance with the County Court costs scale on a standard basis. Ms Terranova was not called to give evidence nor am I aware of any request being made that she attend the hearing for cross-examination. The letter attaches to it a schedule, which appears to mimic a taxed bill of costs. As I have indicated, the total amount of costs and disbursements is estimated to be $392,278.88.

44. Mr Craig submitted that there was no evidence before the Tribunal to verify that the items of work described in the schedule attached to the letter were necessary or reasonable. He further submitted that there was no evidence before the Tribunal as to the reasonable amount of time required for each of those items of work. Mr Craig argued that in the absence of any evidence, it was not open to order security for costs.

45. Mr Craig referred me to a decision of Habersberger J in *Saint-Cobain RF Pty Ltd v Maax Spar Corporation Pty Ltd*,[18] where His Honour stated:

> 31. Nevertheless, I am quite satisfied that I should not accept as appropriate the figure of $734,013.57, or the lesser amount of $109,045.57 to the completion of discovery. Whilst Ms Hedstrom may be quite correct in her estimate of the appropriate amount on a party and party basis to allow for

[18] [2004] VSC 335.

> the hourly and daily rates for counsel's fees and the solicitors fees, there was no evidence before me in any way justifying the reasonableness of the time estimates on which her calculations are based. All I had was Ms Michael's list of steps and Ms Hedstrom's opinion that it was "a reasonable estimate of the steps likely to be conducted in a proceeding of this type." There was no verification by Ms Michael of her belief as to how long various steps would require nor any statement of advice she may have received from counsel about these matters.

46. Mr Duggan submitted that the best evidence is the only evidence before the Tribunal. He submitted that no contrary evidence was adduced to put into question the cost estimate prepared by Ms Terranova. He argued that the letter and schedule were simple and easy to follow. He distinguished *Saint-Cobaine* on the basis that the items of work in the schedule, moving forward, were very limited and uncomplicated.

47. In my view, more evidence should have been adduced in support of this aspect of the Owners' application. Although I accept that some parts of the cost estimate are self-evident, there are other parts which require further verification. In particular, $25,000 is allocated towards *General work*. This includes perusing documents, preparation of brief to counsel, preparation of court book, etc. Similarly, $160,000 is allocated towards *Preparation for hearing*. That includes reviewing discovered documents, expert witness reports drawing witness statements and finalizing the Tribunal Book of Common Documents. Forty days has been allocated at $4,000 per day. Although I accept that significant expense will be incurred for preparation, I am of the view that further evidence should have been given in relation to this aspect of the costing estimate in order to verify the activity, likely time to be taken and who would be undertaking the activity.

48. Having said that, there are other aspects of the costing which are self-evident. This includes the attendance by solicitor and counsel for the 20 day hearing. This amount alone adds up to $117,248. In addition, the amount estimated for expert witness expenses of $15,326.88 is largely self-evident, given that the schedule states:

> 2 days for each witness to give evidence - allowing for evidence to be given as part of a panel with the Applicant's corresponding expert witness in the same field - total 6 days @ $2,554.48 per day.

49. Further, the schedule states that the fee charged by three experts to prepare three further expert reports is $60,000. Presumably, that amount is based upon instructions and, in turn, quotations given by each of those experts.

50. Consequently, even if those three categories of expense were isolated from the remainder of the costing estimate, the costs would add up to

$192,574.88. In my view, some allowance, being a proportion of the amount allocated for preparation should be added to that figure. Consequently, and doing the best that I can with the evidence before me, I find that $250,000 represents the reasonable costs that the Owners will incur from this day up to and including day 20 of the hearing.

51. Mr Craig submitted it was erroneous to seek security for costs in respect of the whole cost of the proceeding in circumstances where the proceeding was divided between a claim, counterclaim and a cross-claim against the Third Respondent architect. He referred me to the affidavit of Mr Clifford who claimed that 75 per cent of the cost estimate was referable to the Owners' counterclaim and cross-claim. In his affidavit, he opined that the Builder's claim was relatively straightforward and consisted of the following:

    (a) unpaid progress claims amounting to $385,152;

    (b) release of retention monies totaling $203,500; and

    (c) delay costs totaling $336,000.

52. In my view, Mr Clifford's categorisation of the Builder's claim is too simplistic. In particular, the Builder also claims restitution on a quantum meruit basis as well as prolongation costs. The amount claimed by way of quantum meruit is $1,908,424.79. The particulars subjoined to paragraph 43 the *Further Amended Points of Claim*, states that the amount claimed for delay costs is calculated by reference to the weekly costs of maintaining the site, including the payment of staff. However, little detail has been provided as to how the works have been delayed and whether the delays have affected the critical path of the construction program. In my view, much time will be spent in dealing with this aspect of the proceeding.

53. In my view, at least 50 per cent of the proceeding should be allocated towards prosecuting and defending the Builder's claim. I consider that to be a reasonable estimate of the likely time spent in hearing the Builder's claim. The balance of the proceeding will likely be spent in prosecuting the remaining components of the proceeding, being the Owners' counterclaim and their cross-claim against the Third Respondent architect.

Other factors

54. As I have already indicated, the Tribunal's discretion under s 79 of the VCAT Act is unfettered and not strictly bound by decisions of superior courts dealing with security for costs applications made under court rules or Commonwealth legislation. Having said that, general jurisprudence clearly guides the Tribunal in the exercise of its discretion.

55. However, one must not overlook the fact that the Tribunal does not award costs to a successful party unless it is satisfied that it is fair to do

so, having regard to the various factors set out under s 109(3) of the VCAT Act.

56. In this proceeding, there are a number of factors which I consider would weigh in favour of a costs order being made at the end of this proceeding to the successful party. These include, the nature and complexity of the proceeding. In particular, this proceeding constitutes significant litigation, similar to that found in the County Court of Victoria or the Supreme Court of Victoria. There are numerous expert reports, complex legal issues, disputed facts and many expert witnesses, all of which add to the complexity of this proceeding.

CONCLUSION

57. Having regard to the matters discussed above, which include the self-confessed impecuniousity of the Builder, the fact that it has to date received litigation funding from its parent company or other funding source and importantly, that the delay in bringing the security for costs application is explicable by reason of a supervening event, I find that it would be appropriate to order that the Builder provide security for some the Owners' costs of the proceeding.

58. In forming that view, I accept that the proceeding occupies not one but three separate claims, albeit that they are all interconnected. In my view, the amount of $250,000 referred to above should be discounted by a further 50 per cent to take into account that factor.

59. Therefore, I will order that the Builder lodge with the Principal Registrar security for the Owners' costs of this proceeding from this day up to and including day 20 of the hearing in the sum of $125,000.

SENIOR MEMBER E. RIEGLER