

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP859/2014

CATCHWORDS

DOMESTIC BUILDING – application for security for costs – *Victorian Civil and Administrative Tribunal Act 1998 – s79*

APPLICANT	Hotel Renovations & Maintenance Pty Ltd (ACN: 007 028 944)
FIRST RESPONDENT	Newmarket Tavern Pty Ltd (ACN: 070 743 761)
SECOND RESPONDENT	Stephen James Hay
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Directions hearing
DATE OF HEARING	10 October 2016
DATE OF ORDER	4 November 2016
CITATION	Hotel Renovations & Maintenance Pty Ltd v Newmarket Tavern Pty Ltd (Building and Property) [2016] VCAT 1846

ORDERS

1. Subject to any further order the tribunal may make, under s79 of the *Victorian Civil and Administrative Tribunal Act 1998*, the applicant must provide security for the first respondent's costs of the proceeding as and from the date of this order, by paying into the Domestic Builders Fund by 4:00 p.m. on the nominated dates:
 - (i) \$50,000 by 30 November 2016
 - (ii) \$50,000 by 31 March 2017 and
 - (iii) \$40,000 by 30 June 2017
2. If the applicant fails to make any of the payments as ordered in order 1, the proceeding as between it and the first respondent shall be stayed until the security is given.
3. Costs reserved with liberty to apply.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicant

Mr D. Collins of Queens Counsel

For First Respondent

Mr M. Whitten of Queens Counsel

For Second Respondent

Mr R. Lee, solicitor

REASONS

- 1 The applicant builder carried out building work for the respondent owner in Heidelberg between 2010 and 2014. The builder commenced these proceedings in December 2014 claiming payment of \$3,347,350 pursuant to a *quantum meruit*, alternatively \$3,072,501.52 pursuant to contract. Initially, the builder relied on two written contracts dated 25 November 2010 and 14 November 2012. An application by the owner for a preliminary hearing to determine which contract applies between the parties was refused on 18 December 2015.
- 2 The builder has subsequently conceded that the 25 November 2010 contract does not apply. It sought and was granted leave to further amend its Points of Claim on 10 October 2016.
- 3 On 15 July 2016 the owner filed an application seeking an order that the builder provide security for its costs in the sum of \$305,000. The builder relies on affidavits by its solicitors Paul Benedict Woods dated 14 July 2016 and Sophie Alexandra Cox dated 22 August 2016. The owner relies on two affidavits by its director John Gray dated 5 August 2016 and 6 October 2016.
- 4 For various reasons which are not relevant here, the application was not heard until 10 October 2016, when the owner was represented by Mr Whitten of Queens Counsel and the builder was represented by Mr Collins of Queens Counsel who spoke to the written submissions which had been filed.
- 5 For the reasons which follow I am persuaded that an order for security for costs should be made, with security to be provided in instalments.

LEGISLATIVE FRAMEWORK

- 6 The tribunal's power to order security for costs is set out in s79 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act') which 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.

- 7 The power to order security for costs is entirely within the tribunal's discretion. As McHugh J said in *P S Chellaram & Co Ltd v China Ocean Shipping Co*¹:

To make or refuse to make an order for security for costs involves the exercise of a discretionary judgment. That means that the court exercising the discretion must weigh all the circumstances of the case. The weight to be given to any circumstance depends not only upon its intrinsic persuasiveness but upon the impact of the other circumstances which have to be weighed. A circumstance which may have very great weight when only two or three circumstances have to be weighed may be of minor significance when many circumstances have to be weighed.

THE OWNER'S POSITION

- 8 The owner contends that the material relied on by the builder demonstrates that its ability to pay any costs order, which might be made, is compromised by its current financial position. Further that its claim is lacking in *bona fides* and is without merit.

THE BUILDER'S POSITION

- 9 Mr Collins conceded on behalf of the builder, that there was a very real possibility that it would not be able to satisfy any costs order which might be made in this proceeding. However, the builder says that the owner's delay in making this application is fatal to its application. If I am minded to allow the application, the builder contends that the order should only relate to future costs, and seeks that there be an order that security be provided in instalments.

RELEVANT CONSIDERATIONS

- 10 The discretion set out in s79 is broad and unfettered. There is no prescribed test, or even any indication as to the factors which might be taken into account by the Tribunal when deciding whether to order security for costs. However as Daly AsJ said in *Hapisun Pty Ltd v Rikys & Moylan Pty Ltd*,² whilst an ability to pay is not a threshold question, it is an important consideration. Her Honour said:

35. ...For even if the financial capacity of a plaintiff³ 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

¹ [1991] HCA 36; (1991) ALR 321 at 323

² [2013] VSC 730

³ Known as "applicants" in VCAT, but referred to as "plaintiffs" here to avoid confusion with references to applicants for orders under s 79.

litigation from the adverse financial consequences of defending claims against impecunious plaintiffs, particularly those who operate behind the shield of limited liability.⁴

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*.

11 There are a number of other factors which are also typically considered by the tribunal when deciding whether to exercise its discretion under s79. These were set out by Senior Member Farrelly in *CSO Interiors Pty Ltd v Fenridge Pty Ltd*:⁵

- whether the claim brought by the Applicant in the proceeding can be said to be *bona fide* and not a claim that has little merit or prospect of success;
- whether the Applicant's lack of funds has been caused or contributed to by the conduct of the Respondent;
- whether an order for security for costs would stultify the Applicant's pursuit of legitimate claims;
- whether there has been any unreasonable delay in bringing the application for security for costs;
- the extent to which it is reasonable to expect creditors or shareholders of the Applicant to make funds available to satisfy any order for security which may be made.

The builder's financial situation

12 Mr Collins conceded that there is a very real possibility that the builder will not be able to satisfy any order for costs which may be made. Although Mr Gray sets out in his affidavits details of current or expected projects, I note that there are no details about the anticipated profit which the builder might reasonably expect to realise from these projects.

The *bona fides* and merits of the applicant's case

13 This proceeding raises complex legal and factual issues. Although I am urged by the owner to find that the builder's case is weak and has little prospect of success, I am unable to make any real assessment of the *bona fides* or merits of the builder's claim without hearing all of the evidence. The legal complexity of the issues in dispute is highlighted by the recent application by the builder for leave to amend its Points of Claim.

⁴ *Ariss v Express Interiors Pty Ltd (in liq)* [1996] 2 VR 507 at 513-14.

⁵ [2013] VCAT 1175 referring to *Urumar Marble Pty Ltd v Thiess Pty Ltd* [2005] VCAT 2081

Whether the applicant’s lack of funds has been caused or contributed to by the conduct of the Respondent

- 14 There is no evidence that the owner has caused or contributed to the builder’s lack of funds.

Whether an order for security for costs would stultify the applicant’s pursuit of legitimate claims

- 15 There is no evidence before me that an order for security for costs would stultify the applicant’s pursuits of its claims.

Whether there has been any unreasonable delay in bringing the application for security for costs;

- 16 Delay is the primary basis on which the builder contends the application for security for costs should be refused.
- 17 Mr Collins referred me to *Ancor v Barnes & Ors*⁶ where Vickery J refused an application for security for costs made shortly before the scheduled commencement of a 4-6 week hearing. Although his Honour indicated he would have refused the application because the threshold test as to the plaintiff’s impecuniosity, as applied in the courts, was not satisfied, he indicated that delay would otherwise have been decisive. His Honour made the following observations:

64. Mason CJ said in *Devenish v Jewel Food Stores Pty Ltd*: ‘As a general rule applications for security for costs should be made promptly and before significant expense is incurred’.
64. This theme was reinforced by Derham AsJ when he observed in *Colmax*⁷

The company, which 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...

...

As a rule, the application for security should be made promptly once the defendant has knowledge of the facts that would justify the making of an order. Delay in applying brings with it the inevitable consequence that an order for security might unfairly prejudice Colmax, which has no doubt incurred considerable liability for costs so far.

- 18 In *Ancor* the application for security was made shortly before the scheduled commencement of a 4-6 week hearing – this application is made at a relatively early stage in the proceeding.

⁶ [2015] VSC 90

⁷ [2013] VSC 311 [20(f)], [44]

- 19 Mr Collins also referred me to *Christou v Stanton Partners Australasia Pty Ltd*⁸ where Newnes JA, with whom Murphy JA agreed, said:

It is, however, incumbent upon a defendant who wishes to obtain security for its costs to apply promptly for that relief once it is, or ought reasonably be, aware that the plaintiff would be unable to meet an order for costs. Security for costs is not a card that a defendant can keep up its sleeve and play at its convenience. Delay is an important consideration in the determination of an application for security for costs because it is capable of causing prejudice or unfairness to the plaintiff...

- 20 In many respects, although this proceeding was commenced in December 2014 it is still at a relatively early stage. The builder has amended its Points of Claim twice and has joined the architect as a party. The architect's application to join his previous employer as a party is yet to be determined. The hearing of that application was adjourned pending determination of the builder's application to further amend its Points of Claim, which was granted on 10 October 2016.
- 21 Mr Woods deposes in his affidavit of 14 July 2016 that the owner's solicitors first raised concerns about the financial capacity of the builder with the builder's former solicitors in April 2016. Further, that this was not responded to until this application was made.
- 22 Whilst the owner may have had some inkling of the builder's financial position for some time, any delay in making an application for security for costs is not necessarily fatal to an application in the tribunal. Although the owner was aware the builder was suffering financial difficulties in 2014,⁹ there is no evidence as to whether those financial difficulties were continuing, noting the builder continued, and is continuing to trade.
- 23 Although delay is a factor which is typically taken into account in considering an application for security for costs, as s79 provides that an order for security for costs may be made at *any time* in a proceeding, it is a relevant but not determinative factor to be considered.

The extent to which it is reasonable to expect creditors or shareholders of the Applicant to make funds available to satisfy any order for security which may be made

- 24 Not only do I not have any evidence before me as to their individual financial position, the directors of the builder have not made any offer, as far as I am aware, to provide a personal undertaking to be responsible for any order for costs which might be made in favour of the respondent.

⁸ [2011] WASCA 176

⁹ See affidavit of John Gray sworn 5 August 2016, paragraph 18 and Exhibit JG4.

The likelihood of an order for costs being made

25 In *Hapisun* Daly AsJ said at [43]

...the fact that VCAT is, by the presumption imposed by s 109 of the VCAT Act, a “no-costs” jurisdiction, means that part of any analysis of the question of whether security for costs ought to be ordered needs to include some assessment of the likelihood of whether, even if a defendant was successful in defending a claim, that an order for costs would be made in its favour. Also, considering the range of areas where VCAT has jurisdiction, different considerations will apply in different lists. One would anticipate there being a far greater willingness on the part of the tribunal to order security for costs in a dispute regarding the construction of a substantial apartment development than would be the case in an application in a guardianship matter.

26 In a proceeding such as this, where there is a multi-million dollar claim, involving complex factual and legal issues typical of commercial litigation in the Supreme Court, there can be a reasonable expectation that an order for costs will be made in favour of the successful party.

CONCLUSION

27 I am satisfied that in circumstances where it is conceded, on behalf of the builder, that there is a real risk it will be unable to pay any adverse costs order this is an appropriate case for the exercise of the tribunal’s discretion under s79 of the VCAT Act. I will therefore order the builder to provide security for the owner’s costs of this proceeding.

WHAT AMOUNT SHOULD BE ORDERED AS SECURITY?

28 In his affidavit of 15 July 2016 Mr Woods deposes that the owner’s costs, as at the date of that affidavit, were \$165,000 including \$35,000 for disbursements. He estimates the owner’s future costs to be \$140,000 including the costs of an estimated 10 day hearing. During the hearing of this application Mr Whitten conceded that any order for security for costs should only be for future costs.

29 For the sake of completeness, I comment that in my view it would be unreasonable to order the builder to provide security for the costs already incurred by the owner. Although s79 of the VCAT Act does not specify that any order for security for costs can only apply to costs incurred as and from the date of such application, the authorities I have referred to in considering the builder’s submissions on delay, are relevant in considering the date from which any order for security for costs should apply.

30 In my view it is appropriate that the order for security for costs be for future costs and that such costs be paid in instalments, with \$50,000 to be paid by 30 November 2016, a further \$50,000 to be paid by 31 March 2017 and the final amount of \$40,000 to be paid by 30 June 2017, noting it is unlikely there will be a hearing before the second half of 2017.

- 31 If the builder fails to provide security as and when each instalment falls due, the proceeding will be stayed until security is provided.

DEPUTY PRESIDENT C AIRD