VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. BP1289/2015

BUILDING AND PROPERTY LIST

CATCHWORDS

Domestic Building –*Victorian Civil and Administrative Tribunal Act 1998* - ss79, 97, 98 and 109 - application for security for costs – relevant principles – application for freezing order – relevant principles – application for costs – adjournment of hearing.

APPLICANT	I J R Homes Pty Ltd (ACN 121 875 956)
FIRST RESPONDENT	Mr Isam Toma
SECOND RESPONDENT BY COUNTERCLAIM	Mrs Adeeba Toma Matti
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Directions Hearing
DATE OF HEARING	14 September 2016
DATE OF REASONS	29 September 2016
CITATION	I J R Homes Pty Ltd v Toma (Building and Property) [2016] VCAT 1626

REASONS

1 In June 2014 the applicant builder and the respondent owner entered into a contract for the construction of a new home in Roxburgh Park for the sum of $250,000. The builder commenced these proceedings in September 2015 seeking payment of the outstanding balance of the contract price and variations. In March 2016 the owner filed a counterclaim claiming damages for rectification and completion costs, liquidated damages, additional rental payments and finance costs. From the various documents which have been filed it seems the builder's claim is for a little less than $100,000 and the owner's counterclaim is for approximately $300,000.

2 There have been a number of directions hearings and extensions to the timetable. Following an unsuccessful compulsory conference on 22 July 2016 the proceeding was listed for a 5 day hearing commencing on 19 September 2016.

3 On 1 September 2016 the owner filed an Application for Directions Hearing or Orders ('the Application') seeking the following orders:

1. The proceedings be immediately stayed pending the Applicant paying $30,000 into the Domestic Building fund as security for the Respondent's costs; and
2. That in default of the payment the Applicant's claim be struck out.
3. The Applicant comply with orders requiring Witness Statements to be filed which have not been complied with.

4 The reason given for this application was:

> The Applicant has their prime asset for sale, witness statements have not been complied with. The applicant [for the security for costs order] will file an affidavit for basis for the security of costs application and the freezing order of funds from the potential sale of their home and security of costs within 24 hours. Please file attached title search and advertisement of house for sale in the interim, affidavit will be lodged shortly.

5 A supporting affidavit by Adam Maric, the owner's solicitor, sworn 1 September 2016 was filed the same day. In the Affidavit he states that the owner is seeking orders that the builder provide security for its costs in the sum of $20,000 (not $30,000 as set out in the Application) and that the builder be restrained from *disposing of or dealing with the property [the address]*. This is quite different to the relief sought in the Application where an order for security for costs only was sought, although it seemed from the Reasons given that the owner was also seeking a freezing order in respect of the proceeds of sale of the property.

6 The proceeding was listed for a telephone directions hearing on 5 September 2016 to make orders for the hearing of the owner's application. I made the following orders relevant to this application:

1. The respondents application for directions hearing or orders dated 31 August 2016 is listed for hearing before any member on 14 September 2016 at 10.30am at 55 King Street, Melbourne, allow 90 minutes.
2. **By 9 September 2016**, the applicant must file and serve any affidavit material in reply.
3. **By 8 September 2016**, the respondent must file and serve statement of facts and legal contentions.
4. **By 12 September 2016**, the applicant must file and serve statement of facts and legal contentions.

7 On 6 September 2016 the tribunal received a Notice of Solicitor Ceasing to Act from the builder's former solicitor, and a request from the builder for an adjournment of the hearing. This application, and a further application for an adjournment of the directions hearing received on 10 September 2106 were refused. On 13 September 2016 an affidavit by the builder's new solicitor, Gary David Goldsmith, was filed in response to the applications for security for costs, and a freezing order. The builder did not file the Statement of Facts and Legal Contentions as ordered on 4 September 2016.

8 At the directions hearing on 15 September 2016, Mr Maric, solicitor appeared on behalf of the owner and Mr McCormick of counsel appeared on behalf of the builder.

9 After hearing from both, and considering the affidavit material which had been filed, I dismissed the applications for reasons given orally, and ordered the owner to pay the builder's costs of and incidental to the Application. I also adjourned the hearing scheduled to commence on 19 September 2106. On 14 September 2016 the owner's solicitors emailed the tribunal:

> We formally request written reasons for this decision.

10 Although under s117 of the *Victorian Civil and Administrative Tribunal Act 1998* the tribunal is not required to provide written reasons for an interim order which includes an interlocutory order, these Reasons are provided as a courtesy to the owner.

11 Unfortunately, the owner's solicitors have not indicated which decision they are seeking written reasons for, so I will deal with the Application, the costs orders, and the adjournment of the hearing.

12 In providing these written reasons I have had regard to the recent decision of *Negri v Secretary, Department of Social Services.*[1] When considering the degree of permissible departure in written reasons provided under s43(2A) of the *Administrative Appeals Tribunal Act 1975 (*(Cth) ('the AAT Act) in accordance with the requirements of s43(2B) of the AAT Act, which is not dissimilar to s117(2), (3) and (5) of the VCAT Act, from the oral reasons given at the hearing, Bromberg J said at [28],:

> …as long as the reasoning remains consistent, there can be no objection to the provision of a more-elaborate exposition of the same reasoning that was orally explained. What is not permitted is altered or new reasoning. The Tribunal is not permitted to substantially differ from the reasoning upon which its decision was made, but is permitted to explain the reasoning differently and, in doing so, is required to address the matters specified in s 43(2B).

LEGISLATIVE FRAMEWORK

13 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.

[1] [2016] FCA 879

(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.

14 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*[2]:

> 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.

15 Further, in *Ian West Indoor and Outdoor Services Pty Ltd v Australian Posters Pty Ltd*[3] Judge O'Neill VP said the 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 a more modest cost than may be the case in the County or Supreme Courts.

RELEVANT CONSIDERATIONS

16 The discretion set out in s79 is very broad. 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. In *Done Right Maintenance and Building Group Pty Ltd v Chatry-Kwan*[4] Walker SM said:

> In applying the section to an application such as this it is the practice of the Tribunal to have regard to the principles developed in the authorities relating to s1335 of the *Corporations Law* (see *C & J Mortgages Pty Ltd v. Neville* [2009] VCAT 984). However it must not be overlooked that this is a Tribunal set up by the Parliament to provide an efficient and timely remedy in those areas of jurisdiction that have been conferred upon it. It cannot be assumed that in every case where a court would order security this Tribunal will necessarily order security also.

17 In *Hapisun Pty Ltd v Rikys & Moylan Pty Ltd*,[5] Daly AsJ said:

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[2] [1991] HCA 36; (1991) ALR 321 at 323
[3] [2011] VCAT 2410
[4] [2013] VCAT 141at [18]
[5] [2013] VSC 730

35. …For even if the financial capacity of a plaintiff[6] 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 litigation from the adverse financial consequences of defending claims against impecunious plaintiffs, particularly those who operate behind the shield of limited liability.[7]

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*.

DISCUSSION

18 During the telephone directions hearing on 1 September 2016 I encouraged Mr Maric to review the relevant authorities, including In *Hapisun Pty Ltd v Rikys & Moylan Pty Ltd* and *Ian West Indoor and Outdoor Services Pty Ltd v Australian Posters Pty Ltd*. Unfortunately, Mr Maric did not address me as to any particular factors which might persuade me to exercise my discretion under s79 of the VCAT Act

19 This Application is misconceived. It is unfortunate that the Application was made on what appears to be a knee jerk reaction when the owner discovered that the builder had one of their properties for sale. At the directions hearing on 4 September 2016 I referred Mr Maric to the relevant authorities, and made an order for the owner to file a Statement of Facts and Legal Contentions. Unfortunately, the owner failed to comply with this order. As noted, during this directions hearing, I made theorder because I wanted the owner and his legal advisors to turn their minds to the authorities which set out the relevant matters to be taken into account by the tribunal when considering an application for security for costs. Unfortunately, the owner has only focussed on what he contends is the insolvency of the builder.

20 I also suggested that the owner conduct an index search which Mr Maric acknowledged at that time had not been done, and has still not been done by or on behalf of the owner, so that the owner could discover whether his apprehension that the builder's only asset was being sold was accurate.

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

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

21 The onus in relation to any security for costs application rests with the person who brings that application and there is nothing in any of the material that has been filed on behalf of the owner that supports the Application. The only material that gives any indication as to the current financial state of the builder is Mr Goldsmith's affidavit. In his affidavit he states that:

i the builder owns three properties and that the directors of the builder jointly own a residential property – title searches for each of the properties is exhibited to his affidavit;

ii the builder has paid legal costs to its former solicitors, in the sum of approximately $40,000, as and when the invoices were rendered;

iii on 1 September 2016, shortly prior to the scheduled commencement date for the hearing of 19 September, 2016, the builder was requested by its former solicitors for payment of funds into trust; (I anticipate on account of preparation and hearing fees);

iv on 6 September 2016, when funds were not paid into trust, the builder's former solicitor advised the builder they were withdrawing from acting for them;

v although the builder is asset rich it has a current cash flow issue, and has put one of its properties on the market to deal with that cash flow issue;

vi he conducted a credit watch search in respect of the builder which rates it at 700 which is the highest rating category possible;

22 The relevant factors to be considered by the tribunal have been discussed in many cases and it is true that the tribunal has a broad unfettered discretion under s79 of the *Victorian Civil and Administrative Tribunal Act 1998*. However as Daly AsJ said in *Hapisun,* whilst an ability to pay is not a threshold question, it is an important consideration. But in this case the owner has treated that as being the only factor that I should take into consideration and, seemingly has not turned his mind to the other matters, that are commonly taken into account when determining an application for security for costs. These were recently set out by Senior Member Farrelly in *CSO Interiors Pty Ltd v Fenridge Pty Ltd*:[8]

- 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;

[8] [2013] VCAT 1175 referring to *Urumar Marble Pty Ltd v Thiess Pty Ltd* [2005] VCAT 2081

- 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

23 The owner contends that as the builder is suffering cash flow issues it is technically insolvent under s95A(1) of the *Corporations Act 2001* (Cth) which provides:

> A person is solvent if, and only if, the person is able to pay all the person's debts, as and when they become due and payable.

24 Mr Maric referred me to the High Court's decision in *Sandell v Porter*[9] and the observations made by Barwick CJ at paragraph 15 when considering the meaning of insolvency:

> An essential step in making out that a payment is a preference within s. 95 is to establish by evidence to the satisfaction of the Court that the payer was at the time of the payment insolvent. Insolvency is expressed in s. 95 as an inability to pay debts as they fall due out of the debtor's own money. But the debtor's own moneys are not limited to his cash resources immediately available. They extend to moneys which he can procure by realization by sale or by mortgage or pledge of his assets within a relatively short time – relative to the nature and amount of the debts and to the circumstances, including the nature of the business, of the debtor. The conclusion of insolvency ought to be clear from a consideration of the debtor's financial position in its entirety and generally speaking ought not to be drawn simply from evidence of a temporary lack of liquidity. It is the debtor's inability, utilizing such cash resources as he has or can command through the use of his assets, to meet his debts as they fall due which indicates insolvency.

25 In my view, too much reliance has been put on the words *immediately available* by Mr Maric. In *Sandells* Barwick CJ made it clear that the debtor's own monies are not limited to his cash resources immediately available. They extend to monies which he can procure by realisation by sale or by mortgage or by pledge of his assets within a relatively short time relevant to the nature of the amount of the debts into the circumstances including the nature of the business of the debtor. Any insolvency ought to be clear from a consideration of the debtor's financial position in its entirety and I stress those words, in its entirety, and generally speaking ought not to be drawn simply from evidence of a temporary lack of liquidity.

26 In my view, putting property on the market to meet a current cash flow issue is not indicative of insolvency. It would be a strange situation indeed if every asset rich litigant was considered insolvent and required to give

[9] (1966) 115 CLR 666

security for costs. I am fortified in this view by Palmer J's comments in *Lewis v Doran*[10]:

> I conclude that s 95A of the CA has changed the pre-existing law as to the definition of insolvency as stated in cases such as *Sandell v Porter*, and that it is no longer necessary in order to assess solvency to ascertain whether the company is able to pay all of its debts "from its own monies", in the sense discussed in those cases. In my opinion, s 95A requires the court to decide whether the company is able, as at the alleged date of insolvency, to pay all its debts as they become payable by reference to the commercial realities. If the court is satisfied that as a matter of commercial reality the company has a resource available to pay all its debts as they become payable then it will not matter that the resource is an unsecured borrowing or a voluntary extension of credit by another party.

And by the comments of Deputy President Cremean in *Dura (Aust) Constructions Pty Ltd v Vilacon Corporation Pty Ltd*[11] at [16], to which I was referred by Mr McCormick:

> Concersion of assets into other assets is not necessarily their dissipation.

27 Not only has the owner failed to satisfy me that the builder would not be able to satisfy any order for costs in his favour, Mr Maric failed to address me on any of the other factors which are typically taken into account when considering an application for security for costs.

28 For the sake of completeness I will consider the other factors.

The merits of the applicant's case

29 There is no suggestion by the owner that the builder's case is lacking in merit. Rather, in the supporting affidavit, Mr Maric states at [19]

> The Respondent asserts that if the defects at the property are proven by the Tribunal, the Applicant's claim will be extinguished by merit of the defects at the Premises. Accordingly, the Respondent seeks security for costs in this matter.

30 Implicit in this statement is an acknowledgement that the builder's case does have merit. In his counterclaim, the owner claims damages for rectification and completion costs, liquidated damages, loss of rent and additional interest paid due to the alleged delay in completion of the works. His total claim is approximately three times that of the builder's claim. It is irrelevant that the quantum of its claim may be extinguished by the owner's counterclaim. It cannot be said in those circumstances, that the builder was lacking in *bona fides* in commencing this proceeding, or that its claim has little chance of success.

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[10] [2004] NSWSC 608; (2004) 208 ALR 385 confirmed on appeal in *Lewis v Doran* [2005] NSWCA 243; (2005) 219 ALR 555.

[11] Unreported, D404/1999, 23 July 1999

31 The reality is that the hearing of the respondent's counterclaim will take up at least half and possibly more than half of the hearing time because of the issues that are involved. There are claims for the cost of rectification of alleged defective works, for the cost of completion of allegedly incomplete works, for liquidated damages, for loss of rent and a few ancillary claims. Whereas the applicant's claims payment of the balance of the contract price and some variations.

32 Most of the hearing time will be in relation to the respondent's claim but at even at its highest, the hearing of the applicant's claim could occupy no more than 50% of the hearing time. It beggars belief that this application has been made seeking security for all of the hearing costs, without any acknowledgement of the costs of the hearing of the counterclaim. Had I been minded to accede to this application the maximum amount of any security awarded would have been at the most for $10,000 but probably for significantly less taking into account that the hearing of the counterclaim is likely to occupy more than 50% of the hearing time.

Whether the Applicant's lack of funds has been caused or contributed to by the conduct of the Respondent

33 There is no evidence before me as to the cause of the builder's current cashflow issues. However, in circumstances where the builder owns a number of properties, it cannot be said that it is lacking in access to funds.

Whether an order for security for costs would stultify the Applicant's pursuit of legitimate claims

34 This is not a relevant consideration in the circumstances of this proceeding.

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

35 Mr Maric relied on a recent decision of this tribunal in *Easton Builders Pty Ltd v Glyndon Developments Pty Ltd*[12] where an order for security for costs was made 18 months after the commencement of the proceeding. However, the circumstances in *Easton* were very different. In *Easton*, despite representations to the contrary, it became apparent to the owners in February 2016 that the builder had ceased trading 16 months after it commenced the proceeding, in October 2014. The application for security for costs was made soon after this discovery, in March 2016. Further, in *Easton* the builder confessed it was impecunious, and that its legal costs had been mostly funded by its parent company.

36 There has been significant delay in bringing this application, such that it is brought shortly prior to the due commencement date of the hearing for reasons which are still not explained, other than, as I said, it seems to be a knee jerk reaction to seeing an advertisement for one of the builder's property being for sale.

[12] [2016] VCAT 850

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

37 If I had been minded to accede to this application, there is no evidence before me that the builder would not have been able to provide the funds to satisfy the order.

Conclusion

38 I am not persuaded that the applicant is insolvent, or that it will be unable to satisfy any costs order that may be made in relation to its claim upon determination of the proceeding. In any event, given the provisions of s109 of the VCAT Act, it cannot be and will not be the case that in every instance where there is an apprehension that another party may not be able to pay any costs orders that might be made, an order for security will automatically be made.

THE APPLICATION FOR A FREEZING ORDER

39 The owner also applies for an order that the builder be restrained from disposing or dealing with the property which is for sale. Mr Maric sets out the reason for the application in his affidavit thus:

> 29. …The Respondent makes this request for a freezing order to prevent the frustration or inhibition of the proceedings by seeking to meet the risk that a prospective judgement made against the Applicant might be wholly or partially unsatisfied.
>
> 30. Due to the potential for the Respondent's counterclaim against the Applicant having the potential to extinguish their claim, the Respondent seeks that the asset be frozen until judgement is enforced in this matter so that the Respondent is not unduly financially burdened by the Applicant's potential inability to satisfy judgement.

40 In *Radcraft Pty Ltd v Allenbrae Properties Pty Ltd*[13] I set out the various principles to be taken into account when considering an application for a freezing order:

> 16. The principles to be applied when considering whether a freezing order should be granted were set out by J Forrest J in *Zhen v Mo*[14] and repeated in *Deputy Commissioner of Taxation v AES Services (Aust) Pty Ltd*:[15]
>
> > First, that a freezing order, by its very nature, is a drastic remedy and a court must exercise a high degree of caution before taking a step which will interfere with a party's capacity to deal with his or her assets.[16]

[13] [2014] VCAT 1165
[14] *Zhen v Mo* [2008] VSC 300 at [22]-[30]
[15] [2009] VSC 418 at [20] (including citations)
[16] *Cardile v LED Builders Pty Limited* (1998) 198 CLR 380, [51]; Practice Note 3 of 2006

> Second, the order is not designed to provide security for the applicant's claim.[17] It is solely directed to preserving assets from being dissipated, thereby frustrating the court process.[18]
>
> Third, the applicant bears the onus both in satisfying the Court that the order should be continued and in satisfying the Court as to the amount which is to be the subject of the order.
>
> Fourth, that an order can only be made on the basis of admissible evidence which supports the contentions made by the party seeking the order. Speculation and guesswork is no substitute for either the facts or inferences properly drawn from proved facts.[19]
>
> Fifth, that before such an order can be made it is necessary that the applicant establish –
>
> (a) an arguable case against the defendant[20]; and
>
> (b) that there is a danger that the prospective judgment will be wholly or partly unsatisfied as a result of the defendant's actions in either removing the assets or disposing or dealing with them so as to diminish their value.[21]
>
> Sixth, the balance of convenience must favour the granting of the freezing order.[22]
>
> Seventh, that there is no set process determining the exact nature of an order. The order will be framed according to the circumstances of the case.[23]
>
> Eighth, the applicant must establish with some precision the value of prospective judgment. The order should not unnecessarily tie up a party's assets and property.[24]
>
> Finally, there may be discretionary considerations which militate against the granting of a freezing order, such as delay in bringing the application on before the court or a lack of candour in the materials placed before the court.[25]

41 This application is also misconceived. First, it seems somewhat inconsistent with the application for security for costs, in circumstances where if I was minded to order security it would seem that the proceeds of sale might be required to satisfy any such order.

42 In any event, none of the relevant factors that are to be taken into account in determining whether or not a freezing order should be made were addressed by Mr Maric on behalf of the owner. Again, the onus rests with the person

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[17] *Jackson v Sterling Industries* (1987) 162 CLR 612, 621, 625
[18] *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1, [73]
[19] *Hartwell Trent (Aust) Pty Ltd v Tefal Societe Anonyme* [1968] VR 3, 13
[20] *Glenwood Management Group Pty Ltd v Mayo* [1991] 2 VR 49, 49
[21] R. 37A.02(1) Under the general law the plaintiff must establish that there is a real risk of assets being disposed of: *Cardile* [122]
[22] *Consolidated Constructions Pty Ltd v Bellenville Pty Ltd* [2002] FCA 1513
[23] *Jackson v Sterling Industries* (1987) 162 CLR 612, 621
[24] *Cardile* [124]
[25] *Cardile* [58]

who makes the application to persuade the tribunal that there is a real possibility of a dissipation of assets. The intended sale of a property is not evidence of an intended dissipation of assets. The mere fact that a party converts real property assets into cash does not mean that those monies will no longer be available to satisfy any orders that might be made by the tribunal. The builder owns three properties and the directors jointly own another property. There is simply no evidence that the sale of one property by the builder is indicative of active steps by it to rearrange its affairs, and dispose of assets such as to render any judgement by the owner nugatory.

43 In *Radcraft* the builder made an application for an order restraining the owner developer from disposing of 11 remaining apartments in a 22 apartment development. Although I was satisfied that the builder had demonstrated it had an arguable case that it was entitled to payment of an amount yet to be determined, I was not satisfied that there was a danger that any prospective judgement would be wholly or partly unsatisfied as a result of the respondent's actions in selling the apartments. Further, in *Radcraft* it was apparent that the application for a freezing order was in reality an application for an order to provide security for any judgement sum. As is apparent from Mr Maric's affidavit, this is the clear intent of this application. My comments in *Radcraft* are apt:

> 27. It is clear that a freezing order should not be made where this is its primary intent.[26] Such orders are only appropriate where there is a strong possibility that a judgement debtor will take deliberate steps to render the judgement nugatory. In *Frigo v Culhaci*[27] their Honours (Mason P, Sheller JA and Sheppard AJA) said:
>
> > A plaintiff must establish, by evidence and not assertion, that there is a real danger that, by reason of the defendant absconding or removing assets out of the jurisdiction or disposing of assets within the jurisdiction, the plaintiff will not be able to have the judgement satisfied if successful in the proceeding.
>
> and
>
> > …a mareva injunction is not designed to stop a person from sliding into insolvency.
>
> 28. Further, as Hamilton J said in *Electric Mobility Company Pty Ltd v Whiz Enterprises Pty Ltd*[28]
>
> > …the appellate courts have reminded primary judges that they must always be vigilant to ensure that parties' assets are not frozen and their business lives impeded lightly and that Mareva relief is <u>not to be used to give plaintiffs security for the satisfaction of their judgements.</u> (emphasis added)

[26] *Pearce v Webster* [1986] VR 603
[27] *Frigo v Culhaci* [1998] NSWCA 17
[28] [2006] NSWSC 580 at [7]

CONCLUSION

44 A good starting point for any application is to start with relevant provisions of the VCAT Act where applicable and to review the relevant authorities. It is surprising that the decision in *Easton Builders* was relied upon by the owner in apparent isolation of any consideration of the other authorities of both this tribunal and the Supreme Court. And that the relevant factors to be considered in relation to both types of applications were not addressed by or on behalf of the owner.

45 The Application is therefore dismissed.

COSTS

46 The builder applied for its costs of and incidental to the Application. Having regard to s109 of the VCAT Act, in circumstances where I have determined that both applications were misconceived, I am persuaded it is fair to exercise the tribunal's discretion under s109(2) and order the owner to pay the builder's costs of and incidental to the application. Mr McCormick submitted that it would be appropriate to make an order under s109(4) that the owner's solicitor be ordered to pay the costs. However, noting the owner was in the tribunal during the hearing of the Application, I cannot be satisfied that it was brought without instructions. Any concerns the owner has about the manner in which the hearing of the Application was conducted are matters between him and his solicitors.

47 Having heard from the parties, I fixed the costs in the sum of $2,500.

ADJOURNMENT OF THE HEARING

48 Following determination of the Application, Mr McCormick confirmed that the builder was seeking an adjournment of the hearing scheduled to commence on 19 September 2016. Mr McCormick confirmed that his instructor had been received instructions to act on behalf of the builder the previous day – 13 September 2016, and that they had yet to obtain the file from the builder's previous solicitors. They would then need time to review the file, and prepare witness statements on behalf of the builder, which had not been filed in accordance with previous orders made by the tribunal. The application for an adjournment was opposed by the owner. Having regard to the tribunal's obligations under ss87 and 98 of the VCAT Act I considered it would be a denial of natural justice to refuse the adjournment in the circumstances of this proceeding. Due to the tribunal's current listing commitments, the first available date for a five day hearing was 13 February 2017. Accordingly, the hearing was adjourned to that date. I also ordered the builder to pay the owner's costs thrown away (if any) occasioned by the adjournment of the hearing. In default of agreement such costs are to be assessed by the Victorian Costs Court on a standard basis on the County Court Scale.

49 It was apparent that the owner was disappointed by the adjournment of the hearing. After some discussion with the parties I listed a compulsory conference on 10 November 2016 to give the parties an opportunity to have further assisted settlement discussions.

NOTE:

For the sake of completeness, I note that on 20 September 2016 the owner's solicitors wrote to the tribunal expressing their client's dissatisfaction with the adjournment. As advised to the parties at the directions hearing, 13 February 2017 is the next available date for a five day hearing.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the Applicant	Mr G McCormick of Counsel
For the First Respondent	Mr A Maric, solicitor
For the Second Respondent by Counterclaim	Mr G McCormick of Counsel