VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING & PROPERTY LIST VCAT REFERENCE NO BP938/15

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 against a trustee company – Relevant factors – Difficulty for respondent in executing for costs order – Whether right to indemnity out of trust fund is sufficient.

APPLICANT	J Janta Pty Ltd (ACN 144 722 270)
RESPONDENT	VIP Benevolent Society Incorporated (Registered Number A0052423K)
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Interlocutory Hearing
DATE OF HEARING	29 September 2015
DATE OF ORDER	7 October 2015
CITATION	J Janta Pty Ltd v VIP Benevolent Society Incorporated (Building and Property) [2015] VCAT 1606

ORDER

1. **This proceeding is listed for a further directions hearing before Senior Member Riegler at 9.30 AM on 29 October 2015 at 55 King Street, Melbourne, 3000, at which time the Tribunal will consider the form of order to be made, having regard to the Tribunal's determination of the Respondent's application for security for costs**.
2. Liberty to apply.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	Mr B Carr, of counsel
For the Respondent	Mr A Morrison, of counsel

REASONS

INTRODUCTION

1. This interlocutory hearing concerns an application by the respondent 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 Applicant's costs in the amount $155,160 or such other amount as the Tribunal deems appropriate.

2. The proceeding concerns a claim by the Builder against the Applicant, who is the owner of a residential dwelling located in North Caulfield (**'the Owner'**). Pursuant to a contract dated 22 May 2012, the Builder agreed to renovate and extend two existing buildings on the Owner's property. The Builder alleges that the Owner unlawfully purported to terminate the building contract and by that action, repudiated the contract. The Builder claims lost profit on the building works remaining to be completed under the contract in the amount of $138,456. At present, there is no counterclaim.

SECTION 79

3. 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.

4. 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, and at more modest cost that may be the case in the County or Supreme Courts.[2]

5. 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

[1] (2011] VCAT 2410.
[2] Ibid at [17].

that it *cannot be assumed that in every case where a court would order security, this Tribunal would order security also*.[3]

6. 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 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?

7. A number of affidavits had been filed in support and in opposition to the security for costs application. The principal contention made by the respondent is that the Builder does not own any assets of its own, save for its share capital of $1,000. This is despite the fact that a number of financial documents have been tendered in evidence to show that the Builder has achieved a trading profit or net income of $190,848 in the financial year 2013 to 2014 and $83,698.99 in the financial year 2014 until March 2015. However, Mr Morrison of counsel submitted that as the Builder is a trustee of a trust fund, all assets or equity disclosed in those financial documents are assets or equity held by the trust fund for the benefit of the beneficiaries under that trust fund and not by the Builder beneficially.

8. In that sense, Mr Morrison submitted that the Builder has no assets of its own, and in those circumstances, one may reasonably infer that it would not be able to meet any adverse costs order made against it, should that occur. Therefore, he submitted that it was appropriate that an order for security for costs be made.

9. Mr Carr of counsel contended that Mr Morrison's categorisation of the assets and equity described in the financial documents tendered in evidence is incorrect. He submitted that the Builder wore two hats. On one hand, it was the trustee of a trust. On the other hand, however, it was also a financially viable trading company in its own right. Mr Carr

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

referred me to the affidavit of Ante Filipovic, the sole director of the Builder, who deposed to the following:

> 11. At present the Applicant has a number of current building projects in train and I can say that the Applicant is trading profitably. These projects are:
>
> i) a fit-out at the head office of L'Oreal of Paris in St Kilda Road. The value of the project is some $1,000,000.00.
>
> ii) a retail fit-out at 185 Station Street, Aspendale. The value of the project is some $30,000.00.
>
> iii) a warehouse renovation and fit-out at 21 Cotter Street, Richmond. The value of the project is some $150,000.00.
>
> iv) the fourth project is a home renovation at 114 Vale Street, East Melbourne. The value of the project is some $31,000.00.

10. Mr Morrison reiterated that the financial documents and the trading activities of the Builder simply show assets or potential assets beneficially owned by the trust fund but demonstrate that the Builder, of itself, does not hold those assets other than as trustee. Mr Morrison further submitted that the mere fact that the Builder might be entitled to be indemnified out of the trust fund is no answer to the question whether security for costs should be ordered. He referred me to a number of authorities in support of that submission.

11. In *Laundry Coin-Wash Nominees Pty Ltd v Dunlop Olympic Ltd & Ors*,[6] Smithers J considered an application that the applicant in Federal Court proceedings, give security for costs. In that case, the applicant was a trustee of a unit trust, established pursuant to a deed of trust. Some of the unit holders of that trust were also the directors of the applicant. It was common ground that although the applicant had assets in its hands which were of some value, its entitlement to those assets was only as trustee. His Honour stated:

> … Because the beneficial ownership of the assets, so far as they are in the form of tangible assets, is in the trust, any attempt to execute against those assets and to realise on the right title and interest of the applicant company therein would be an unproductive exercise…
>
> With respect to the indemnity, unless the applicant itself cooperated, or the applicant company was wound up, benefit could not be obtained by the respondents thereunder. No direct process of execution would be available for the purpose of obtaining that benefit. Further, the extent to which the indemnity would in any event be productive would depend upon the state of the finances of the trust. And the possibility of some defence cannot be ignored.

[6] (1985) ATPR 40-584.

> Where the only tangible assets of an applicant company are held in trust for another entity and its solvency depends on its right as trustee to indemnity against that entity it is necessary for the Court to have in mind the difficulties which a successful respondent would face in attempting to execute in respect of an order for costs. Indeed, unless some step is taken to alleviate those difficulties it is reasonable and just to treat the applicant company as if it were without assets to meet such a liability.[7]

12. In *Laundry Coin-Wash*, the Court declined to order security for costs. This was principally because the Court accepted that an undertaking given by the applicant and its directors not to dispose of capital assets pending the outcome of that proceeding provided sufficient security. In that way, sufficient equity or assets could be held by the trust fund in order to indemnify the applicant out of the trust fund, in the event that it was ordered to pay costs of the proceeding.

13. Similarly, in *Appleglen Pty Ltd v Mainzeal Corporation Pty Ltd*,[8] Pincus J commented on the difficulties of an impecunious trustee being able to be indemnified out of the trust assets:

> As a general rule, it appears to me undesirable that those interested in a small applicant trustee company – small in the sense of having no significant capital – should be able to defeat applications for security merely on the basis that the applicant company may well be able to obtain indemnity out of the trust assets, including assets such as stock and goodwill, to meet an order for costs. Trustee companies of this sort are usually formed to reduce the impact of income tax which may, from the point of view of those interested in them, be a laudable objective. If the applicant's submissions here are accepted, trading in this way is accorded another advantage, namely one with respect to costs. Were there no trustee company interposed between Mr and Mrs Oram and the second respondent, the two of them would, of course, simply be liable for costs.[9]

14. Mr Carr argued that the cases referred to above are to be distinguished from the present case. He submitted that those cases presented a different situation; namely, the trustee did not own any assets in its own right. Mr Carr contended that in the present case, the Builder is a trading entity in its own right with a number of building projects on foot. In that sense, it enters into those contractual arrangements and it receives commission under those contracts, which it then distributes to the beneficiaries of the trust.

15. Mr Morrison submitted that there was no difference between what Mr Carr described as a bare trustee and a trading trustee. He contended that the real issue was who held the assets. Mr Morrison pointed to the balance sheets and the profit and loss statement tendered in evidence,

[7] Ibid at 46,729.
[8] (1988) 79 ALR 634.
[9] Ibid at 635-6.

which clearly showed that the assets were held by the trust. Indeed, Mr Morrison pointed to the categorisation of expenses set out in the trust's profit and loss statement for the year ending 30 June 2014, which described expenses such as payments to subcontractors, plant and equipment hire, WorkCover premiums, insurance premiums, licenses, fees and permits, motor vehicle expenses, office supplies, protective clothing, rent and other matters which were consistent with expenses usually associated with a trading building company. Mr Morrison submitted that these documents reinforced his contention that everything done by the Builder, in terms of its trading activities, was done as trustee for the trust fund and not in its own right.

16. I do not accept Mr Carr's contention that the proper categorisation of the Builder is that it wears two hats. In that regard, I am not persuaded that the trading activities of the Builder are carried out in its own right, rather than on behalf of the trust. Although it may be (and I am prepared to assume) that the Builder is entitled to be indemnified out of the trust fund, the beneficial ownership of trust assets legally held by the Builder as trustee, may be passed at any time. This scenario was considered by Smithers J in *Laundry Coin-Wash*, where his Honour stated:

> The method by which the parties concerned construct the entities by which their interests are pursued has, no doubt, positive benefits for them, and is a matter for decision by them. But the trust structure does not involve that persons dealing with a company playing the part of trustee in the adopted business structure, necessarily deal with an entity, the beneficial ownership of all property in whose hands is in another entity to whom the legal estate therein may be passed at any time. The accountability of such a company for amounts for which it may be legally liable is inherently less stable and reliable than would be the case if it were in a business on its own behalf. For reasons mentioned above a creditor with a judgment against the applicant should not normally be restricted to reliance upon the applicant's indemnity under the trust deed.[10]

17. In my view, the failure to provide any undertaking that trust assets will be preserved pending the outcome of the proceeding leads me to conclude that it is at least foreseeable that the Builder would not be able to meet any adverse costs ordered against it. I find this to be a factor to be considered in the exercise of my discretion. However, as the cases above indicate, a finding that a party may not be able to meet an adverse costs order is only one factor to consider in the exercise of the Tribunal's discretion under s 79 of the VCAT Act.

[10] *Laundry Coin-Wash Nominees Pty Ltd v Dunlop Olympic Ltd & Ors* (1985) ATPR 40-584 at 46,730.

18. In *Ian West Indoor & Outdoor Services Pty Ltd*, Judge O'Neill VP conveniently set out the legal principles which typically apply to applications made under 79 of the VCAT Act:

> 14. From the submissions of counsel, and the authorities to which I was referred, in my view, the following legal principles apply to this application:
>
> (1) The financial viability of the applicant and its capacity to pay any costs order which may be made against it, is the first matter to be considered in a security of costs application…
>
> (2) Once the threshold issue is passed, then the tribunal has a wide and unfettered discretion which ought be exercised balancing on the one hand the rights of companies of modest financial means to bring proceedings in the tribunal undeterred by the threat of having to provide security for costs, and on the other hand giving protection to litigants against an impecunious company determined to press a claim of little merit without regard to any costs order that may be made against it.[11]
>
> (3) If it appears to the tribunal, based upon the pleadings, and any other matter before it, that the application is not bona fide or has little merit or prospect of success, the tribunal may more readily make an order.[12]
>
> (4) Section 1335 of the *Corporations Act* 2001 does not provide VCAT with jurisdiction to bring an application for security of costs. Any such application must be brought pursuant to and abide the provisions of s 79 of the VCAT Act. However, regard may be had to s 1335, and the cases determined thereunder when considering the exercise of the discretion.[13]
>
> (5) Regard should be had to the purpose for which VCAT was established, and the manner in which hearings in the tribunal are conducted. The introduction of the VCAT Act was designed 'to achieve expeditious and cost-effective resolution of … disputes'.[14] The emphasis as to the manner in which hearings are conducted is prompt, efficient and inexpensive disposition of applications.[15] Proceedings are

[11] *Red Earth Building Maintenance Services Proprietary v Dura Australia Constructions* [1999] VCAT 54 paragraph 8, *Buckley v Bennell Design & Constructions Pty Ltd* (1974) 1 ACLR 301 at 304.

[12] *Sydmar Pty Ltd v Statewise Developments Pty Ltd* 73 ALR 289 at 299-30.

[13] *East Kew Construction Pty Ltd v Landspec Investments Pty Ltd* (Unreported VCAT, O'Dwyer M, 24 January 2001).

[14] *Rabel v Eastern Energy* [1999] 3 VR 45.

[15] *Magazzu v Business Licensing Authority* (2001) 17 VAR 266.

conducted where possible without undue legal formality.[16] Parties are often self-represented. Directors often represent companies...[17]

(6) Section 109 of the VCAT Act provides that subject to that section, each party is to bear its own costs in a proceeding. There is thus a presumption that unless circumstances exist such as are referred to in s 109(3) that each party should bear its own costs. Unless, upon the material before the tribunal, there is a reasonable basis to suggest the party seeking the order for security for costs is likely to be awarded costs, the tribunal ought again be reluctant to make an order.

(7) In appropriate cases, the various other factors referred to in *Sydmar*[18] may be taken into account. Such matters include:

- whether the plaintiff's (applicant's) lack of funds has been caused or contributed to by the conduct of the defendant (respondent);
- whether the plaintiff's (applicant's) proceedings are merely a defence against 'self-help' measures taken by the defendant;
- whether the making of the order would unduly stultify the plaintiff's (applicant's) ability to pursue the proceedings;
- the extent to which it is reasonable to expect creditors or shareholders to make funds available to satisfy any order for security which may be made;
- whether the defendant (respondent) has delayed in making the application for security;
- whether the plaintiff in question is a true plaintiff or not;
- whether any cross-action or counterclaim has been mounted and whether the same facts are likely to be canvassed in determining that cross-action or counterclaim.

19. In the present case, it is not contended that the application for security for costs was brought late.

20. The arguments presented by both parties have focused primarily on the Builder's ability to meet any adverse cost order made against it. As I

[16] *Kearney v Legal Services Board* [2006] VCAT 2303.
[17] See further the Second Reading Speech – *Parliamentary Debates – Legislative Assembly – 1998* – Ms Wade (Attorney-General).
[18] *Sydma Pty Ltd v Statewide Developments Pty Ltd* [1987] ALR 289.

have already indicated above, that question is problematic because the financial documents clearly show that the Builder is trading profitably, albeit that its profits are for the benefit of the beneficiaries of the trust fund and, seemingly, not for its own use.

21. In balancing all the factors referred to above, I am of the opinion that, in the absence of an undertaking from the Builder and those beneficiaries who stand to benefit under the trust it administers, security for costs should be ordered. I have formed this view because of a number of factors.

22. First, the equity or assets legally held by the Builder, are, in one sense, illusory. They are illusory because those assets or equity can at any time be dissipated for the benefit of the beneficiaries under the trust, leaving the Builder without any funds to indemnify it in the event that an adverse costs order is made against it. I have formed this view notwithstanding correspondence dated 11 September 2015 from the trust's accountant, Luntz & Co Pty Ltd, which states:

> I refer to the financial statements of the trust which I sent to you yesterday which corroborate that as of June 30, 2014 and March 31, 2015 the trust had in excess of $100,000 in cash or realizable receivables. On that basis it appears that it would be able to meet a costs order against its trustee company J Janta Limited in your matter referred to yesterday.
>
> In addition I am informed that one of the directors of the trustee company Mrs Filipovic is the sole beneficiary of her late mother's estate and would be in a position to inject up to $100,000 quite easily from her inheritance if she were required to do so.

23. A similar observation was made by Tadgell J in *Lagarna Pty Ltd & Ors v Bridge Wholesale Acceptance Corporation (Australia) Ltd*,[19] where his Honour stated:

> … Lagarna is the only defendant with assets and these it holds as trustee.
>
> … It was contended for the defendants that an order for security for costs of the appeal should be refused because Lagarna holds unencumbered real estate the value of which exceeds the likely cost of the appeal and over which it has a right of recourse as trustee by way of indemnity. These facts, however, by themselves seem scarcely to meet the plaintiff's contention.
>
> … For all that appears the trustee may, and I am prepared to assume that it would, be required at any time to transfer its legal interest in the unencumbered property to the beneficiaries of the trust or to encumber it.[20]

[19] [1995] 1 VR 150.
[20] Ibid at 153-4.

24. Having regard to the above correspondence and the assets or equity held by the fund, it is surprising that no undertaking was given by the Builder or the beneficiaries under the trust that the fund would not be dissipated, especially in light of the matters raised in the letter from the trust's accountants referred to above.

25. Second, there is no evidence before me to indicate that having to provide security for costs would in any way stultify the Builder's ability to prosecute its claim.

26. Third, it is not contended that the acts or omissions on the part of the Respondent have in any way contributed to the Builder being deficient of funds.

27. Fourth, the Builder's claim is not insignificant, in terms of quantum, and raises complex legal issues concerning repudiation of the contract, which have required the parties to be legally represented. In those circumstances, it is possible that an order for costs might be made under s 109 of the VCAT Act, should the Builder's claim be dismissed.

28. Finally, at present there is no cross-claim or counterclaim, notwithstanding Mr Morrison's comments that the Respondent is yet to form a concluded view on that issue.

29. As I have indicated, the foreseeability of the Builder not being able to meet an adverse costs order arises from the fact that trust funds could be transferred. Obviously, that scenario would be answered if the Builder or the beneficiaries under the trust gave adequate undertakings. That being the case, I consider it appropriate that orders should be fashioned similar to the approach taken by the court in *Laundry Coin-Wash Nominees*.[21] Obviously, if the Builder was unable or unwilling to provide such undertakings, further consideration can be given to the quantum of security to be provided. That being the case, the appropriate course is for the proceeding to be returned to me by way of a further directions hearing, at which time I will hear further submissions as to the appropriate form of order to be made, having regard to my findings set out above.

SENIOR MEMBER E. RIEGLER

[21] *Laundry Coin-Wash Nominees Pty Ltd v Dunlop Olympic Ltd & Ors* (1985) ATPR 40-584 at 46,731.