VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP399/2014

CATCHWORDS

DOMESTIC BUILDING – application for costs – s109 *Victorian Civil and Administrative Tribunal Act 1998* – relevant considerations

APPLICANT	Johns Lyng Commercial Builders Pty Ltd (ACN 088 343 453)
RESPONDENT	Carrington International Pty Ltd (ACN 127 201 709)
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	In Chambers
DATE OF ORDER	5 August 2016
CITATION	Johns Lyng Commercial Builders Pty Ltd v Carrington International Pty Ltd (Building and Property) [2016] VCAT 1323

ORDER

1. The respondent must pay the applicant's costs of preparation of Mr Bidychak's further affidavit dated 9 March 2016, the Submissions in support of the Application for Security for Costs handed up at the commencement of the directions hearing, and 80 per cent of its costs of representation at the directions hearing (counsel and solicitor). In default of agreement such costs are to be assessed by the Victorian Costs Court on a standard basis on County Court Scale. The applicant's application for costs is otherwise dismissed.

2. The respondent's application for costs is dismissed.

DEPUTY PRESIDENT C AIRD

REASONS

1 On 29 January 2016 the applicant Builder filed an Application for Directions Hearing or Orders ('the Application') seeking orders that the Developer provide security for its costs of defending the Developer's counterclaim in the sum of $200,739.70 (or such other amount as the Tribunal consider appropriate).

2 The Application was heard at a directions hearing on 9 March 2016. On 17 March 2016 I made the following orders:

> **OTHER MATTERS**
>
> 1. Further to the directions hearing on 9 March 2016 of the applicant's Application for Directions Hearing or Orders dated 29 January 2016, in making the following orders, the Tribunal has given consideration to:
>
> (a) the email correspondence between the parties' solicitors between 1 March and 8 March 2016 inclusive;
>
> (b) the copy Deed of Acknowledgement and Undertaking dated 1 March 2016 and executed by the directors of the respondent exhibited to the affidavit of Alan Maxwell Bidychak (the applicant's solicitor) affirmed 8 March 2016;
>
> (c) the email dated 8 March 2016 from the applicant's solicitors to the respondent's solicitors in which they advised:
>
> > We will be proceeding with the application.
> >
> > Our client is prepared to accept your client's undertaking providing it is made to and accepted by the Tribunal. I note that the undertaking itself expressly states that it is made to the Tribunal.
> >
> > If that were agreed our client would also accept orders dismissing the application with no orders as to costs.
> >
> > We also suggest that the parties appear tomorrow to determine orders for the future conduct in the proceeding.
> >
> > Please confirm whether your client agrees with the above orders to resolve the application.
>
> (d) the inability of the respondent's solicitor, Mr Bowers-Taylor to obtain instructions from the directors of the respondent during the directions hearing to make the undertaking to the Tribunal on their behalf. Mr Bowers-Taylor indicated after the lunch break that he had only been able to contact one of the directors. He repeated his earlier submission that the Tribunal could have regard to the Deed of Acknowledgement and Undertaking; and that it was given in the terms mentioned and that 'says what it

says', and that the Tribunal could note the undertaking without it being given to it directly; and

(e) the findings by Barker J in *Oswal v Burrup Holdings Ltd (ACN 097 138 353) and Another (No 2)* [2012] FCA 1187 that for an undertaking to be enforceable it must be given to and accepted by the court [or tribunal].

ORDERS

Subject to the respondent filing the original Deed of Acknowledgement and Undertaking dated 1 March 2016 executed by the directors of the respondent by **4:00 p.m. on 24 March 2016** the Tribunal orders:

1. The Deed of Acknowledgement and Undertaking dated 1 March 2016 is to be accepted as an undertaking given to the Tribunal in the form as set out in that document.
2. The applicant's Application for Directions Hearing or Orders dated 29 January 2016 is dismissed.
3. The proceeding is listed for a directions hearing before Deputy President Aird on 26 April 2016 commencing at 12:00 noon at 55 King Street Melbourne. At the directions hearing the Tribunal will consider the applicant's Application for Directions Hearing or Orders dated 8 March 2016 in which it seeks leave to amend its Points of Claim and to file amended Points of Defence to the respondent's amended Points of Defence and Counterclaim, and to make directions for the further conduct of the proceeding.
4. Costs reserved with liberty to apply.
5. In the event the respondent does not file the Deed of Acknowledgement and Undertaking by **4:00 p.m. on 24 March 2016** then:
   (a) the Tribunal will determine that no undertaking (in the form set out in that document) has been given to the Tribunal; and
   (b) the Tribunal's determination of the applicant's Application for Directions Hearing or Orders dated 29 January 2016 is reserved.

3 The Deed of Acknowledgement and Undertaking ('the Undertaking') was filed on 18 March 2016.

4 At a directions hearing on 26 April 2016 orders were made for the filing of any applications for costs of the Builder's security for costs application. Both parties have applied for their costs and have filed written submissions.

Background

5 On or about 19 March 2013 the Builder entered into a contract with the Developer for the construction of 25 apartments with basement carparking.

The total price was $5,720,000 including GST. Under the terms of the contract the Builder was required to provide security for the performance of its contractual obligations. In July 2013 the Builder provided the Developer with security in the form of two unconditional bank guarantees, each in the sum of $130,000.

6 On or about 17 September 2014 the Developer presented the bank guarantees to a branch of the ANZ Bank and received payment of the sum of $260,000 ('the security sum').

7 On 24 September 2014 the Builder commenced this proceeding. The application was accompanied by Points of Claim and an urgent Application for Orders (the injunction application) in which it sought orders that the Developer pay the $260,000 into the Builder's solicitors' trust account, or an interest bearing account in the joint names of the parties. Further, that the Developer pay the Builder's costs of the injunction application.

8 The injunction application was heard the same day, and upon counsel for the Developer undertaking that the Developer and its directors would not dispose of or dissipate the security sum, orders were made for the filing of further material and the injunction application listed for hearing on 2 October 2014.

9 On 2 October 2014 the injunction application was heard by Judge Macnamara VP who ordered that the security sum was to be paid into the Domestic Builders Fund, to be held pending further order of the Tribunal.

10 Since 2 October 2014 there have been a number of directions hearings and a compulsory conference.

11 The Application, filed on 29 January 2016, was accompanied by a supporting affidavit by the Builder's solicitor, Alan Bidychak, also dated 29 January 2016. The Developer did not file any material in reply. Further, although written submissions were handed up by Mr Sedal of Counsel, who appeared on behalf of the Builder, no written submissions were filed by the Developer.

12 Mr Sedal advised that the Builder had been late in filing its material as the parties had been in discussions to try to resolve the issue of security, which, he said, had failed. After Mr Bowers-Taylor indicated he believed the issue had been resolved, Mr Sedal handed up a further affidavit by Mr Bidychak dated 8 March 2016. In this affidavit Mr Bidychak deposes to and exhibits correspondence between the parties since 1 March 2016, when he stated he had followed up the Developer's solicitors seeking the reply material.

13 The email correspondence between the parties' solicitors is indicative of the attitude of the parties to the Application and it is helpful to include it here. For ease of reference I have included the date of the email and whether it is 'from' the Builder or the Developer – all emails having been directed to the other party's solicitor – in the case of the Developer's solicitor many of the

emails are addressed to Clare Jordan but the responses are all from Mr Bowers-Taylor.

14 On 1 March 2016 the Developer sent the following email:

> I note that your client has not filed any submissions opposing our client's application for security for costs.
>
> As our client's submissions are due this Friday, we are proceeding on the basis that your client will not be filing any submissions. Please advise us immediately if that is not the case and your client intends on filing material in opposition to our client's application.[1]

15 The Developer responded:

> Clare will send you a substantive email shortly, but your email below is ridiculous.
>
> Kindly read paragraph 6 of the Orders. Both parties submissions are due on the 4th.

16 The Developer enclosed a further copy of a letter dated 3 September 2015 setting out its position in relation to the application, and a *Deed of Acknowledgement and Undertaking* signed by the directors of the Developer. The Developer sought confirmation that the Builder would consent to its application for security for costs being dismissed with no order as to costs.

17 The Builder responded by email dated 3 March 2016, two days later:

> I refer to your email below and the attached deed of Acknowledgement and Undertaking from Tony Wang and Xin Cao.
>
> In order for our client to properly consider the proposal, can you please provide details of any assets and real property owned by Tony Wang and Xin Cao in Victoria and advise whether they are willing to undertake not to divest those assets until any costs order made in the proceeding in favour of my client have been satisfied.
>
> …

18 The response from the Developer by two emails dated 3 March 2016:

> Go and do you own property searches.
>
> No further undertaking required.

And

> You can't have a freezing order for security. Please don't waste more of our time.

19 By email dated 4 March 2016 the Builder set out the results of its searches showing that three properties are registered to a Xin Cao and asking for confirmation which properties were owned by the Xin Cao who had signed the Undertaking.

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[1] Mr Sedal conceded that references in this email to 'submissions' should have been to 'material'

20 The email response from the Developer was less than conciliatory:

> We ordinarily do our own diligence, and respectfully suggest you do to. (sic)
>
> The reason we say this is, for the reasons stated in our letter, the application for security for costs has always been hopeless and we decline to incur further cost or waste any more time in relation to it.
>
> Let me expand on the reason already given as to why the application is hopeless. What do you say would happen to your client's claim for return of the security if only our counterclaim was stayed? That you would be entitled to judgement? Well the tribunal is not going to do that, is it?

21 On 4 March 2016 the Builder emailed proposed consent orders, confirming in the accompanying letter:

> …
>
> Our client reserves its right to reinstate the application or bring a further application if your client's directors intend to dispose of or further encumber the real property in Victoria that is currently owned by them.

The proposed Consent Orders provide for acceptance by the Tribunal of the Undertaking, and further that the Developer's directors *must notify the Applicant/Defendant by Counterclaim in writing no less than 30 days before Tony (aka Ming He) Wang or Xin Cao dispose of, encumber or otherwise deal with any of the following properties* [four properties are listed]. And for the Builder's application for security for costs to be struck out with a right of reinstatement with costs reserved.

22 The Developer responded the same day, by email:

> The orders our clients will agree to are those stated in the email enclosing the undertaking.

23 The Builder responded, the same day, by email setting out the reasons it considered the proposed consent orders were necessary, including in relation to the requirement that the directors give the Builder 30 days notice of any intention to dispose of, or otherwise deal with any of the properties:

> …the undertaking is worthless and effectively no security at all if the people giving the undertaking dispose of their assets.

24 On 8 March 2016 the Developer sent the following email:

> We refer to your client's application for security for costs returnable tomorrow and the enclosed email chain in respect of same.
>
> We note we have not received any submissions in support of your client's application. We take it that your client does not intend to press its application tomorrow.

> For the reasons which we have previously set out (repeatedly and at length) we consider your client's application to be hopeless and bound to fail.
>
> We can only reiterate that the appropriate orders in the circumstances are that the application be dismissed with no order as to costs. Please find enclosed signed minutes of consent to that effect. Kindly sign ad forward them to the Tribunal so that we may avoid the costs of an appearance tomorrow.
>
> Please note that if an appearance is required tomorrow, an order for indemnity costs will be sought by our client and this email together with all relevant correspondence may be produced to the Tribunal on the question of costs.

25 The Builder responded:

> We will be proceeding with the application.
>
> Our client is prepared to accept your client's undertaking provided it is made to and accepted by the Tribunal. I note that the undertaking itself states that it is made to the Tribunal.
>
> If that were agreed our client would also accept orders dismissing the application with no orders as to costs.
>
> We also suggest that the parties appear tomorrow to determine orders for the future conduct in the proceeding.
>
> Please confirm whether your client agrees with the above orders to resolve the application. [underlining added]

26 Surprisingly, the Undertaking was not given to the Tribunal, despite me enquiring of Mr Bowers-Taylor on a number of occasions during the directions hearing whether he had instructions to give the Undertaking on behalf of the directors, or could obtain those instructions. Following the luncheon adjournment, he advised he had only been able to speak to one of the directors over lunch, although he did not disclose those instructions. Rather, he repeated his earlier statements to the Tribunal that I could have regard to the Undertaking, that was given in its terms and had been executed as a Deed Poll.

27 In circumstances where the directors had executed the Undertaking and the Builder indicated on 8 March 2016 that it was prepared to accept the Undertaking if it was given to the Tribunal, and noting that the Builder was prepared to accept Directors' Guarantees in respect of the building contract, I considered it appropriate to provide the directors of the respondent with the opportunity to give the Undertaking to the Tribunal, before determining the Application. As noted above, the Undertaking was filed on 18 March 2016. Consequently, on 1 April 2016 orders were made confirming orders 1 to 4 of the Orders dated 17 March 2016, including that the Builder's application for security for costs was dismissed.

Section 109

28 In considering any application for costs I must have regard to s109 of the *Victorian Civil and Administrative Tribunal Act* 1998 ('the VCAT Act') which provides that each party must bear its own costs of a proceeding unless the Tribunal is persuaded it should exercise its discretion under s109(2) having regard to the matters set out in s109(3), and then, only if it is satisfied it is fair to do so. Section 109 provides:

> The Tribunal may make an order under sub-section (2) only if satisfied that it is fair to do so, having regard to—
>
> (a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as—
>
> (i) failing to comply with an order or direction of the Tribunal without reasonable excuse;
>
> (ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;
>
> (iii) asking for an adjournment as a result of (i) or (ii);
>
> (iv) causing an adjournment;
>
> (v) attempting to deceive another party or the Tribunal;
>
> (vi) vexatiously conducting the proceeding;
>
> (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;
>
> (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;
>
> (d) the nature and complexity of the proceeding;
>
> (e) any other matter the Tribunal considers relevant

29 In *Vero Insurance Ltd v The Gombac Group Pty Ltd* [2007] VSC 117, Gillard J set out the approach to be taken by the Tribunal when considering an application for costs under s109:

> i. The prima facie rule is that each party should bear their own costs of the proceeding.
>
> ii. The Tribunal may make an order awarding costs, being all or a specified part of costs, only if it is satisfied that <u>it is fair to do so</u> having regard to the matters stated in s109(3). <u>That is a finding essential to making an order</u>. (emphasis added)

THE BUILDER'S APPLICATION FOR COSTS

30 The Builder applies for its costs of and incidental to the Security for Costs application on a standard basis on the County Court scale. It relies on ss109(3)(b), (c), (d) and (e).

31 The Builder submits it is entitled to its costs of the Application because:

i it was forced to make it by the Developer's refusal to offer security or an alternative means of satisfying any adverse costs order;

ii in order to make the Application, the Builder incurred the costs of engaging a costs consultant to provide evidence as to the Builder's likely *in futuro* costs;

iii as a result of matters in relation to the Builder's delay in making the Application, raised in the Developer's letter of 3 September 2015, the Builder was put to the expense of making the Application and preparing a lengthy affidavit in support, even though the issue of delay was not pressed at the hearing of the Application;

iv the need to make the Application meant the proceeding was unreasonably prolonged;

v despite the lengthy email correspondence in the week prior to the hearing of the Application (set out, in part, above) the Developer *steadfastly refused to provide an undertaking to the Tribunal, even after the Builder's representatives had pointed out that this was required in order to make the undertaking effective.*[2]

32 The Builder also relies on what it describes as the *unnecessarily adversarial* attitude of the Developer's solicitor in the week leading up to the hearing, which it submits increased the Builder's costs.

Section 109(3)(b) – is the Developer responsible for prolonging unreasonably the time taken to complete the proceeding (c), (d) and (e)

33 The Builder's application is primarily based on the proposition that it was forced to make the Application, because the Developer refused to agree to give such security, or provide an alternative to ensure that any adverse costs order would be paid. Consequently, the Developer is responsible for prolonging unreasonably the time taken to complete the proceeding.

34 However, the Developer, like the majority of parties to litigation in the tribunal and in the courts, was not obliged to provide the Builder with security for its costs of defending the counterclaim, simply because it was asked to do so. Despite the right of a respondent to a substantive application, to make an application for security for costs, there can never be any certainty as to whether such an application will be successful. As was determined in *Hapisun Pty Ltd v Rikys & Moylan Pty Ltd*[3] the Tribunal has a broad, unfettered discretion whether to order security.

35 Any prolongation of the proceeding is the responsibility of the Builder in exercising its rights to make the Application.

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[2] Applicant's submissions at [9]
[3] [2013] VSC 730

Section 109(3)(c) – the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact of law

36 The Application was dismissed upon the Developer filing the Undertaking It would not, in my view, be appropriate to now consider the merits of the Application, and, in effect determine it, when considering the parties' cost applications.

Section 109(3)(d) – the nature and complexity of the proceeding

37 I accept that the Application raised some complex issues, and it was appropriate that both parties be legally represented at the hearing. I am not persuaded that in this instance, complexity alone warrants an order for costs in favour of the Builder.

Section 109(3)(e) – any other matter the Tribunal considers relevant

38 I am concerned by the correspondence passing between the parties in the week leading up to the hearing of the Application. The Builder complains that the Developer's solicitor was unnecessarily adversarial causing the Builder to incur additional costs. However, the correspondence from the Builder demonstrates that the Builder would accept the Undertaking providing it was made to the Tribunal, and the directors agreed to give certain additional undertakings which would not have been available to it had the Application been successful. Much of the correspondence was related to these demands.

39 However, on 8 March 2016 the Builder advised the Developer it would accept the Undertaking providing it was given to the Tribunal. If given to the Tribunal it would consent to the Application being dismissed with no orders as to costs. At the commencement of the directions hearing Mr Bowers-Taylor stated that the parties had resolved the issue. However, when pressed he advised he did not have instructions, and was unable to obtain those instructions during the course of the directions hearing, to give the Undertaking to the Tribunal on behalf of the Developer. He persisted in his submissions that the Undertaking was in its terms, which I could have regard to, and that in those circumstances it was unnecessary to insist that the Undertaking be formally given to the Tribunal. At no time during the directions hearing did he seek to file the original signed Undertaking.

40 Ultimately, having regard to the Builder's email of 8 March 2016, and the findings by Barker J in *Oswal v Burrup Holdings Ltd (ACN 097 138 353) and Another (No 2)*[4] that, for an undertaking to be enforceable, it must be given to and accepted by the court [or tribunal].I ordered that if the Undertaking were filed, it would be accepted by the Tribunal and that would dispose of the Application.

[4] [2012] FCA 1187

41 If the Developer had accepted the proposal put in the Builder's email of 8 March 2016, and then given the Undertaking to the Tribunal at the commencement of the directions hearing, the Builder would not have incurred the costs of preparation for the hearing, nor being represented at a one day hearing. I anticipate that the issue could have been dealt with, and directions made in an hour (or approximately 20% of a day's hearing time). Accordingly, having regard to s109(2), I consider it fair to order the Developer to pay the Builder's costs of preparation of Mr Bidychak's further affidavit dated 8 March 2016, the Submissions in support of the Application handed up at the commencement of the directions hearing, and 80 per cent of its costs of representation at the directions hearing (counsel and solicitor). In default of agreement such costs are to be assessed by the Victorian Costs Court on a standard basis on County Court Scale. I otherwise dismiss the Builder's application for costs.

THE DEVELOPER'S APPLICATION FOR COSTS

42 The Developer relies on ss109(3)(c) and (a)(vi): that the application had no tenable basis in fact or law; and that it was conducted vexatiously by the Builder.

Section 109(3)(c) – whether the Application had no tenable basis in fact or law

43 The Developer's submissions in support of its application for costs are primarily concerned with the merits of the Application. The Application was dismissed upon the Developer filing the Undertaking. Therefore, it would not, in my view, be appropriate to now determine Application when considering the Developer's cost applications.

Section 109(a)(vi) – whether the Application was conducted vexatiously

44 I am not persuaded that the Application was conducted vexatiously by the Builder. Notwithstanding my comments about the Application, the Builder was entitled to make it. I have commented in relation to its application for costs about its insistence on restrictive conditions before it would accept the Undertaking (noting, in any event the requirement for it to be given to the Tribunal to be effective).

CONCLUSION

45 Accordingly, I will make the limited order referred to above in relation to the Builder's application for costs, and otherwise dismiss its, and the Developer's, applications for costs.

DEPUTY PRESIDENT C AIRD