VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP1322/2018

CATCHWORDS

Victorian Civil and Administrative Tribunal Act 1998 – s.79 – application for security of costs – relevant considerations – substantial counterclaim involving same issues – order for security refused

APPLICANT	K & C Constructions (ACN:163 726 234)
RESPONDENT	Qiang Feng Hi Sushi PTY LTD (ACN 135 970 017)
WHERE HELD	Melbourne
BEFORE	Senior Member R Walker
HEARING TYPE	Application for Security for Costs
DATE OF HEARING	17 May 2019
DATE OF ORDER	28 May 2019
CITATION	K & C Constructions Pty Ltd v Qiang Feng Hi Sushi Pty Ltd (Building and Property) [2019] VCAT 844

ORDERS

1. The application is dismissed.
2. Costs reserved.
3. Direct that the proceeding be listed for directions to determine its future conduct

SENIOR MEMBER R. WALKER

APPEARANCES:

For Applicant:	Mr P. Franzese, Solicitor
For Respondent	Mr A. Rollnik, of Counsel

REASONS FOR DECISION

The proceeding

1. The Applicant ("**the Builder**") is a builder. The Respondent ("**the Developer**") is the owner of land in West Geelong ("**the Land**").
2. By a building contract dated 17 August 2016 ("**the Contract**"), the Respondent agreed to construct 6 dwelling units on the land for the Developer for a price of $1,700,000.00 inclusive of GST.
3. By this proceeding, the Builder claims from the Developer monies said to be due to it under the Contract and the Developer counterclaims for damages for defective workmanship and for breach of contract.
4. By the present application, the Developer seeks an order that the Builder provide security for its costs of this proceeding and that its claim be stayed until such time as it is provided. The application is resisted by the Builder.

The hearing

5. The matter came before me for hearing on 17 May 2019. Mr Franzese, solicitor, appeared for the Builder and Mr Rollnik of counsel appeared for the Developer.
6. Evidence was given by affidavit. There were two affidavits by the Developer's solicitor, Mr Edgar in support of the application and two affidavits on behalf of the Builder by its director, Mr Taxidis, in opposition.
7. After considering the affidavits and hearing submissions, I informed the parties that I would provide a written decision.

Background

8. Under the terms of the Contract, payment of the price was to be made as the work reached specified stages, as set out in s.40(1) of the *Domestic Building Contracts Act* 1995 ("**the Act**") save that the base stage frame stage and lock up stage payments were each equally divided into Stage I and Stage 2, with half the payment assigned to each half-stage. No entitlement to payment arose until such time as the work should reach the relevant stage.
9. The work was to be done in accordance with architectural and engineering plans provided by the Developer and was to be completed in 365 days. The Developer was to be entitled to liquidated damages at the rate of $250 per week if the construction was not completed within the specified period.
10. Work did not commence until the end of October 2016 and then appears to have proceeded slowly.
11. There were defects in the work. In October 2017 and again in January 2018, the Building Surveyor served upon the Builder written Directions To Fix Building Work pursuant to s.37F(1) of the *Building Act* 1993. The work referred to in these notices concerned the construction of the frame. Despite

what Mr Taxidis said in his second affidavit, it is clear from the documents produced that, although some work appears to have been done, the notices were not complied with to the satisfaction of the Building Surveyor.

12. On 26 January 2018, the Building Surveyor served a further Notice To Fix Building Work which required the Builder to stop work except for the works required to get frame approval. The required works were never completed to the satisfaction of the Building Surveyor and the frame was never passed.

13. It is alleged on behalf of the Developer that five notices from WorkSafe as to unsafe work practices on the site were also not complied with. Copies of these notices were produced.

14. On 8 May 2018 the Developer's solicitors served a notice to remedy on the Builder, purportedly under the terms of the Contract, to be complied with within 10 days. On 31 May 2018, the solicitors served a notice of termination on the Builder alleging that the earlier notice had not been complied with and saying that the Developer terminated the Contract. It said that, in the alternative, the Developer accepted the Builder's repudiation of the Contract.

15. On about 16 June 2018 the Builder served on the Developer a document described as a "receipt", seeking payment of $245,454.55 for materials, labour and scaffold hire until 31 May 2018, as well as $16,000.00 for two variations.

16. Although not described as such in the document, the larger amount related to work done in relation to the Lock up stage. The contract provided that the two instalments for the lock up stage were $297,000 for "Lock up Stage I" and $297,000 for "Lock up Stage 2".

17. The term "Lock up" is defined in the contract as being:

    > "…the stage when a home's external wall cladding and roof covering is fixed, the flooring is laid and external doors and external windows are fixed (even if those doors or windows are only temporary);"

    There is no definition in the contract of "Lock up Stage I" or "Lock up Stage 2".

18. The payment sought by this document was not made by the Developer.

The respective claims

19. On 7 September 2018 the Builder commenced these proceedings seeking to recover from the Developer $245,545.46 plus $17,600.00 for variations. These sums were sought, either as money due under the Contract or alternatively, on a quantum meruit basis. It also claimed interest.

20. It does not seem to be disputed that the Developer has paid to the Builder $1,085,955.00 under the Contract, although some of this may be related to variations, as alleged by the Builder.

21. The expert's report filed on behalf of the Developer lists numerous defects and items of incomplete work and the Developer has entered into a contract with another builder to rectify the defects and complete the project for a contract price of $1,180,000, of which $325,000 is said to be the cost of rectifying defects. It counterclaims for payment of this sum together with other expenses, totalling $498,992.17. It also seeks liquidated damages for delay and interest.

The law

22. The application for security is brought under s.79 of the *Victorian Civil and Administrative Tribunal Act* 1998 which, where relevant, provides as follows:

> "Security for costs
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> (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.
>
> (3) The Tribunal's power to make an order under this section in a proceeding is exercisable by—
>
> (a) the presiding member; …"

Ground of the application

23. The Developer claims that it is concerned about the Builder's ability to meet any costs order made against it on the following grounds. Below each of these grounds, I have added some comments drawn from the material relied upon:

    (a) It has continually delayed the conduct of this proceeding by failing to comply with directions of the Tribunal.

    The Builder was ordered to file and serve Amended Points of Claim and its experts' reports by 10 December 2018, which was extended until 16 January 2019, but they were not filed until 24 January 2019. Mr Taxidis alleges that this was because the Builder was denied access to the site.

    (b) It does not currently have any ongoing construction projects and is therefore generating limited or no revenue.

    The basis of this belief is not given in Mr Edgar's affidavit and it is denied in the answering affidavit of Mr Taxidis who says that it has three current projects.

(c) It has a significant number of creditors that are unpaid and chasing payment.

Again, the basis of this belief is not stated.

(d) Winding up proceedings were taken against it in the Supreme Court of Victoria.

The claim was satisfied by the Builder and the application was dismissed.

(e) One of the shareholders of the Builder recently had strike off action against it up to 7 February 2019.

It is not suggested that the shareholder was dissolved.

(f) The Builder does not have any significant assets in Victoria.

A search of the office of titles revealed that no land is registered in the name of the Builder or either of its corporate shareholders.

24. It was also alleged that the Builder’s claim is weak and has little or no chance of success. In this regard:

(a) The existence of the Directions to Fix Building Work that were given by the relevant building surveyor were not denied and, although it was asserted that many of the items referred to in the direction had been addressed, the Builder did not claim to have attended to all of them.

(b) It seems doubtful whether, under the terms of the Contract, the Builder would have been entitled to claim payment of any part of the lock up stage, because the frame stage was not passed by the Building Surveyor, and the photographs in the experts’ reports that have been filed appear to indicate that the external cladding has not been completed.

(c) The expert report filed on behalf the Builder lacks particularity and is vague. It does not suggest that lock up stage was reached or provide any calculation as to the value of the work done. There is also no suggestion that the value of the work done exceeds what the Developer has already paid.

(d) The Developer claims that it has paid the Builder $150,000.00 in advance. In his affidavit Mr Taxidis acknowledged that the payment was made but said that it was on account of the frame stage. Since the frame was not passed by the Building Surveyor it seems unlikely that the Builder would have been entitled to receive such a payment.

(e) The lengthy delay in the construction was substantial and no satisfactory explanation has been offered, apart from a claim that there were design problems. If there were any such problems, the

Builder does not appear to have suspended work until they were resolved.

25. Cumulatively, these factors raise significant concerns as to the strength of the Builder's case. It is neither possible nor appropriate for me, on an application such as this, to form any concluded opinion as to the outcome of the proceeding. The most that can be said is that, on the limited information provided, the Builder's case does appear to be a weak one and the prospect of an ultimate order for costs in favour of the Developer is very real.

Request for proof of solvency

26. Mr Edgar wrote to the Builder's solicitors demanding evidence that it would be able to meet an adverse order for costs. The Builder's solicitors initially responded that they would seek instructions and subsequently provided what is said to be a set of accounts for the Builder.

27. This document, comprising seven pages, does not bear the name of any accountant although it certainly appears from its contents to have been prepared by some outside person upon information provided by the directors.

28. It has a number of features which call for explanation, such as:

    (a) the description of revenue in the income statement as "Sale of Goods";

    (b) describing expenses of the business as "Cost of Goods Sold";

    (c) from the proceeds of the "sale of goods", which are said to have been $971,065.00, an alleged "Profit" of $616,387 is said to have been earned. Since it is notorious that profit margins for domestic building work are usually between 10% and 30%, this level of profit seems most unlikely;

    (d) no wages or employment expenses are listed for any employees, suggesting that the Builder has no employees;

    (e) the balance sheet shows that the Builder has no assets, apart from "Accounts Receivable" of $453,527.00 and various loans to directors and related parties. The Accounts Receivable would presumably include the amount claimed in this proceeding because the Builder alleges that it is owed. Significantly, there is no figure given for works in progress which one would expect if the Builder really did have three current building projects, as Mr Taxidis deposed.

29. It does not look like the accounts of a building company engaged in building operations. I am not an accountant and the maker of the document was not available to explain it. However, when a document such as this is produced in answer to a request for proof as to the capacity of a party to meet an order for costs, any concern as its financial capacity is increased rather than allayed.

How should this section be applied?

30. In the case of *Red Earth Building Maintenance Services Pty Ltd v. Dura (Australia), Constructions Pty Ltd* [1999] VCAT 54, the Tribunal said (at para 8):

> "8. The role of a court (or a tribunal) on a security for costs application was set out by Street CJ in *Buckley v Bennell Design and Constructions Pty Ltd* (1974) 1 ACLR 301 at 304. He spoke of the need to achieve a balance between 'ensuring that adequate and fair protection is provided' to a defendant or respondent and 'avoiding injustice to impecunious companies by unnecessarily shutting them out or prejudicing them in the conduct of litigation'. It is doubtful, however, whether full force and effect can be given to all of these remarks: compare *J & M O'Brien Enterprises Pty Ltd v Shell Co* [1983] FCA 96; (1983) 7 ACLR 790 at 792,793. The ordering of security is plainly a discretionary matter and factors relevant to the exercise of that discretion were listed by Smart J in *Sydmar Pty Ltd v Statewide Developments Pty Ltd* (1987) 73 ALR 289 at 299-300. McDonald J in *Tenth Anemot Pty Ltd v Colonial Mutual General Insurance Co Ltd* [1993] VicRp 56; [1993] 2 VR 48 at 55, referring to these factors, and listing them, noted that a court's discretion to order security is 'unfettered'. Not only is it unfettered, he said, as to whether it will make the order but, if it should do so, it is unfettered also on what terms. The factors listed by Smart J (without the authorities) are as follows:
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> '(A) Whether the plaintiff's claim is made bona fide and has reasonable prospects of success;
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> (B) Whether the plaintiff's lack of funds has been caused or contributed to by the conduct of the defendant;
>
> (C) Whether the plaintiff's proceedings are merely a defence against 'self-help' measures taken by the defendant;
>
> (D) Whether the making of the order would unduly stultify the plaintiff's ability to pursue the proceedings;
>
> (E) The extent to which it is reasonable to expect creditors or shareholders to make funds available to satisfy any order for security which is made;
>
> (F) Whether the defendant has delayed in making the application for security;
>
> (G) Further, in Heller Factors, Mitchell J said that a consideration of whether the company in question is a true plaintiff or not: '... is one matter which may be placed in the scales in making the decision as to which way the discretion should be exercised';
>
> (H) Whether substantially the same facts are likely to be canvassed in determining the action and the cross-action. The court would be slow to allow a situation where the action is stayed because of the inability to

provide security but the cross-action covering substantially the same factual areas proceeds.

31. In *Mortise & Tenon Construction Pty Ltd v Rong Qi Pty Ltd* [2018] VCAT 1907, Deputy President Aird said (at para 16 et seq.):

> "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* Senior Member Walker said:
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> - '... 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.'
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> 17 Although an applicant's financial position, and in particular its ability to satisfy any order for costs is a relevant consideration, it is not determinative. In *Hapisun Pty Ltd v Rikys & Moylan Pty Ltd,* [2013] VSC 730, Daly AsJ said:
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> - '35..For even if the financial capacity of a plaintiff 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.
> - 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*.' "

32. The various factors referred to in the cases should not be regarded as a checklist. They are simply relevant matters to be taken into account in the exercise of a very wide discretion. However, it is worthwhile looking at each of them in the context of the present case.

33. There has been no delay on the part of the Developer in pursuing this application for security for costs. It cannot be said on the material before me that any lack of funds of the Builder has been caused or contributed to by the conduct of the Developer. The Builder claims that it is owed money but that will usually be the case.

34. It is not appropriate to call upon creditors or shareholders to make funds available for security unless the facts would support the ordering of security, save for the possibility of the order stultifying the claim. It has not

been suggested that if I were to order security for costs in the sum sought, that would have the effect of stultifying the Builder's claim.

35. I have already commented on the apparent lack of strength of the Builder's case and the concerns that I have about the evidence that has been presented of its financial position.

36. The factor militating against the ordering of security is the existence of the Developer's very substantial counterclaim. There is no doubt that substantially the same facts are likely to be canvassed in determining the Builder's claim and the Developer's counterclaim. It seems clear to me that it is and was always the intention of the Developer to pursue a very substantial claim in damages against the Builder and it is a matter of chance that the Builder has issued first.

37. To stay the Builder's claim in circumstances where the Developer's claim is to proceed would not achieve the very object that the section is intended to address that is, to protect an unwilling respondent from having to incur substantial legal costs in proceedings initiated by an impecunious applicant with the risk of then being unable to recover those costs.

38. Further, even if I were to stay the Builder's claim, the same issues and argument could be raised as a set off against the Developer's counterclaim. The only difference would be that, if the Builder was successful, an order could not be made in its favour.

Conclusion

39. The exercise of the discretion to order security for costs involves a balancing exercise. If I were to order security for costs, I cannot see that any protection would be afforded to the Developer by preventing the Builder from proceeding with its claim if it should fail to provide the security ordered. It seems to me the same costs would still be incurred by it in order to present and prove its own counterclaim.

40. In the present case I have considerable doubt as to the strength of the Builder's case and some doubt as to its financial capacity. However, as pointed out by Smart J in the quotation referred to, a court or tribunal should be slow to allow a situation where the claim is stayed because of the inability to provide security but the counterclaim covering substantially the same factual areas proceeds.

41. I am not satisfied that it would be an appropriate exercise of the discretion to order security for costs in the present case. The application will therefore be dismissed. Costs will be reserved. I shall also direct that the proceeding be listed for directions to determine its future conduct.

SENIOR MEMBER R. WALKER