VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. **BP161/2017**

CATCHWORDS

Costs – complexity of application for interlocutory injunction – *Victorian Civil and Administrative Tribunal Act 1998* s109.

APPLICANT	May Constructions (Residential) Pty Ltd (ACN 159 697 864)
RESPONDENT	Creative Property Developments Pty Ltd as Trustee for the Creative Property Developments Trust
WHERE HELD	Melbourne
BEFORE	Senior Member A. Vassie
HEARING TYPE	Costs Hearing
DATE OF HEARING	24 July 2017
DATE OF ORDER AND REASONS	28 August 2017
CITATION	May Constructions (Residential) Pty Ltd v Creative Property Developments Pty Ltd (Building and Property) [2017] VCAT 1314

ORDER

1 The applicant must pay to the respondent its following costs, to be assessed by the Costs Court on the standard basis and on the County Court scale:

(a) Counsel's fees, including senior Counsel's fees, upon the hearing on 17 March 2017 of the application for an interlocutory injunction and upon the hearing on 8 February 2017 when the application was adjourned with costs reserved;

(b) Counsel's fees upon the hearing on 24 July 2017 of the application for costs;

(c) the attendance of an instructing solicitor at each of those three hearings;

(d) the preparation of written submissions for any of those three hearings.

2 Otherwise the costs of the application for an interlocutory injunction are reserved.

3 If by 1 November 2017 the applicant has not filed and served Points of Claim the respondent may apply for an order dismissing or striking out the proceeding for want of prosecution and for an order in respect of the reserved costs.

A. Vassie
Senior Member

APPEARANCES:

For Applicant	Mr M. Stirling of Counsel
For Respondent	Mr A. Downie of Counsel

REASONS

1 This proceeding concerns a building contract between the applicant May Constructions (Residential) Pty Ltd, the builder, and the respondent Creative Property Developments Pty Ltd, a developer. The builder made an application for an interlocutory injunction restraining the developer from having recourse to two bank guarantees which, under the terms of the building contract, the builder was required to provide. I heard the injunction application and dismissed it, giving written reasons.[1] The Developer has applied for an order that the builder pay its costs of the injunction application.

2 An application for an interlocutory injunction to restrain recourse to a performance bond, such as the two bank guarantees in the present case, has complexities that many other applications for an interlocutory injunction do not have.

3 In the first place, even though such an application is interlocutory only, it is necessary for the Court or Tribunal hearing the interlocutory application to construe the building contract to determine whether or not a provision in it governing the availability of recourse to the performance bond is one which allocates to one party or the other the risk of being out of pocket pending resolution of the whole proceeding.[2] That is to say, the parties must argue, and the Court or Tribunal must determine, not whether there is a serious question to be tried as to the construction of the contract, but how the contract should be construed, once and for all time. I determined that there were provisions in the contract that allocated the risk to the builder.

4 Secondly, a contractual allocation of risk to one of the parties bears upon the balance of convenience.

> Such a contractual provision fundamentally alters the context in which the Court must exercise its discretion by changing the complexion of the status quo and raising the prospect of substantial injustice if the purpose of the provision is defeated. That is, the status quo in such circumstances becomes what the parties have agreed as to which of them should bear the financial risk pending final determination, not the continuation of where that risk would naturally fall in the absence of a performance bond to call upon.[3]

5 Thirdly, a determination of whether there is a serious question to be tried as to whether there was a right of recourse to the performance bond involves a consideration of all the facts upon which the party claiming the right of recourse relies; whether there was a serious question to be tried as to whether the claim was reasonably made.[4] The parties need to present, and

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1 [2017] VCAT 484

2 *Fletcher Construction Australia Limited v Varnsdorf Pty Ltd* [1998] 3 VR 812 at 821; *Sugar Australia Pty Ltd v Lend Lease Services Pty Ltd* [2015] VSCA 98 at [19]-[25] and at [123]

3 *Sugar Australia Pty Ltd v Lend Lease Services Pty Ltd* [2015] VSCA 98 at [31]

4 *Sugar Australia Pty Ltd v Lend Lease Services Pty Ltd* [2015] VSCA 98 at [153]

the Court or Tribunal needs to consider, a more than usually large body of affidavit evidence concerning those alleged facts. So it was in this case.

6 Section 109 of the *Victorian Civil and Administrative Tribunal Act 1998* governs the Tribunal's power to award costs. I set out only the parts of the section on which Mr Downie for the respondent relied when presenting the submission that there should be an order for costs of the application for the interlocutory injunction:

> **109. Power to award costs**
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> (1) Subject to this Division, each party is to bear their own costs in the proceeding.
>
> (2) At any time, the Tribunal may order that a party pay all or a specified part of the costs of another party in a proceeding.
>
> (3) The Tribunal may make an order under sub-section (2) only if satisfied that it is fair to do so, having regard to—
>
> …
>
> (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.

7 Mr Downie submitted that the claim for an interlocutory injunction was always weak, in view of the allocation of risk under the building contract. It is true that an applicant for an injunction restraining recourse to a performance guarantee always has a difficult task to achieve the injunction. But I do not consider that the builder's case for the injunction was so weak that it would be fair to depart from the general rule that parties should bear their own costs. There was a good deal to be said for the argument that the respondent did not suffer and would not suffer any loss as a consequence of any defects in the building. The argument involved a difficult question of law as to whether influential, but not majority, decisions of members of the House of Lords[5] should be accepted as the law in Australia. There is every chance that the builder's argument on that issue will be accepted at a final hearing of the proceeding. So I consider that s109(3)(c) does not assist the respondent in its application for costs.

8 Consideration of the applicability of s109(3)(d), "the nature and complexity of the proceeding", requires attention to the nature and complexity of the proceeding as a whole, not just to the nature and complexity of the interlocutory application for the injunction. The proceeding is, by nature, a building dispute, and like most building disputes will involve a detailed scrutiny of numerous factual allegations and of numerous alleged defects in

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5 *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd, St Martins Property Corp Ltd* [1994] 1 AC 85 and *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518. See [2017] VCAT 484 at [40]-[52].

the building. Many, but not all, building cases attract an award of costs for that reason. The proceeding is complex because it will probably involve a decision on the question of law to which I referred in the previous paragraph. The "nature and complexity of the proceeding" weigh in the balance in favour of the application for costs, but are not determinative.

9 I consider, however, that the complexities of the interlocutory application itself are a reason for departing from the general rule. In paragraphs 3, 4 and 5 above I described what I see as those complexities. They justified the presence of experienced Counsel for the parties, and of senior Counsel for the respondent .On the hearing of the application Counsel referred to numerous authorities, including the House of Lords authorities to which I have referred above. The applicant builder must have appreciated, before making the application for the interlocutory injunction, that there was a substantial risk of its being exposed to a claim against it for costs if the application failed. I am satisfied that it is fair to make an order for costs against the applicant builder.

10 Mr Stirling for the applicant builder submitted that the respondent's affidavit material had lacked candour and so the Tribunal ought not to depart from the general rule that each party should bear its own costs of the injunction application. The respondent, he submitted, had claimed to have suffered a loss, or to be likely to suffer a loss, because of defects in the building, but had not afforded any evidence of having rectified any of those defects. I do not accept that submission. I am not in a position to form a view as to what defects exist and whether their rectification will result in any loss to the respondent developer. The Tribunal member who presides at the final hearing of the proceeding will be in a better position than am I to form such a view.

11 There was, however, another submission by Mr Stirling which I do accept. It was that not all of the respondent's costs incurred in its opposition to the injunction application have been wasted. The respondent's affidavit material was extremely detailed. So was the applicant's. It may be possible for the parties to proceed to a final hearing on the footing that each affidavit stands as the witness's evidence in chief, with only a minimal need to supplement it with a witness statement. That, I consider, is why the costs relating to that affidavit material should be reserved, and why the costs ordered should be limited at present to Counsel's fees (including senior Counsel's fees) at the various hearings, the attendance of an instructing solicitor at the various hearings, and the cost of preparation of written submissions for the various hearings. By "the various hearings" I mean the hearing on 8 February 2017 when the injunction application hearing was adjourned with costs reserved, the hearing on 17 March 2017 when the injunction application was heard and argued, and the hearing on 24 July 2017 of the application for costs.

12 Arguing against the proposition that any costs should be reserved, Mr Downie submitted that the applicant builder had not taken any further steps

to advance the proceeding and that there were legal and practical reasons why it was unlikely that the applicant could or would advance the proceeding to a final hearing. The legal reason, he submitted, was the effect of s56 of the *Domestic Building Contracts Act 1995*, which provides in sub-section (1) that a party to a domestic building work dispute must not make an application to VCAT in relation to the dispute unless the chief dispute officer (as described in the Act) has issued a certificate of conciliation. The section commenced operation on 26 April 2017. This proceeding was commenced on 7 February 2017. The hearing of an application for costs is not an appropriate occasion for deciding whether the section has a retrospective operation and requires the applicant builder to obtain a certificate of conciliation before it can pursue the proceeding any further. All I say is that it is by no means obvious that the section has that effect. The practical reason, Mr Downie submitted, was that the utility of the proceeding to the applicant builder was spent once it failed to obtain the injunction it sought. The applicant builder contested that submission and expressed an intention to continue to pursue the proceeding. I accept that expression at face value, as I think I must; it is not obvious that the proceeding now has no utility for the applicant.

13 Nevertheless, the applicant has not taken any steps to pursue the proceeding since it lost the injunction application. If it does not take the proceeding to a final hearing there may be no opportunity for the respondent to seek a decision about the costs I am reserving. So I am ordering that if the applicant does not file and serve Points of Claim by 1 November 2017 the respondent may apply for an order dismissing or striking out the proceeding for want of prosecution and awarding it the reserved costs.

14 After I had already prepared the above reasons I became aware of a letter, sent by email as well as by hand, from the applicant's solicitors dated 21 August 2017 and an email from the respondent's solicitors dated 22 August 2017. The letter from the applicant's solicitors made further submissions on the issue of costs. The letter from the respondent's solicitors stated, correctly, that I had not invited or permitted any further submissions to be made after the costs hearing on 24 July 2017, and objected to my taking those further submissions into account. Those further submissions appeared to elaborate upon a matter about which, in paragraph 10 of these reasons, I indicated that I am not in a position to form a view. So I do not take those submissions into account; if I had taken them into account, I would not have wanted to change anything that I said in paragraph 10 above.

A. Vassie
Senior Member