

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

CIVIL CLAIMS LIST

VCAT REFERENCE NO. C4494/2004

CATCHWORDS

Civil claims – security for costs-application principles – discretionary considerations

APPLICANT	Mt Holden Estates Pty Ltd
FIRST RESPONDENT	Lanigan Baldwin Pty Ltd
SECOND RESPONDENT	Winslow Constructions Pty Ltd
WHERE HELD	Melbourne
BEFORE	Senior Member D Cremean
HEARING TYPE	Hearing
DATE OF HEARING	1 June 2005
DATE OF ORDER	11 July 2005
[2005] VCAT 1442	

ORDER

1. Pursuant to s79(1)(a) of the Victorian *Civil and Administrative Tribunal Act 1998* I order the Applicant to give security in the sum of \$48,000.00 by 4.00 pm on 1 August 2005. I order that such security be given by way of bank guarantee in a form approved by the Principal Registrar.
2. Under s79(1)(b) of the Act I stay the proceedings against the Second Respondent until such security is given. I do not stay the Second Respondent's counterclaim or cross-application.
3. Under s79(2) of the Act, in the event that such security be not given, and by the due date and time, I order that the proceedings as against the Second Respondent are to stand dismissed, reserving costs. The counterclaim or cross-application of the Second Respondent may, however, proceed.
4. Reserve liberty to the Second Respondent to make any application for costs arising out of this application.
5. Whether or not security is given, I direct the Principal Registrar to list this proceeding (including as against the First Respondent) before me for directions or

orders on a date after 8 August 2005. I direct that notification be given to all parties.

SENIOR MEMBER D CREMEAN

APPEARANCES:

For Applicant	Mr A Phillips of Counsel
For 1 st Respondent	Ms M Mancuso, Solicitor
For 2 nd Respondent	Mr L Sartori, Solicitor

REASONS

1. Application is made by the Second Respondent for an order for security for costs against the Applicant under s79 of the *Victorian Civil and Administrative Tribunal Act 1998*.
2. No application for security for costs has been made by the First Respondent to this point.
3. In support, the Second Respondent relies on the affidavit of Loris Francis Sartori, solicitor, sworn 26 April 2005. In opposition, the Applicant relies on the affidavit (filed late) of John Alderuccio, solicitor, sworn 31 May 2005.
4. Section 79 of the Act provides as follows:

79. Security for Costs

- (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; or
 - (b) a presidential member.
5. Factors relevant to the exercise of discretion under s79 to order security include those set out by Smart J in *Sydmar Pty Ltd v Statewise Developments Pty Ltd* (1987) 73 ALR 289 at 299-300 as follows:

“The factors relevant to the exercise of the *discretion* to order security include:

(A) Whether the plaintiff's claim is made *bona fide and has reasonable prospects of success*: *Lynnebry Pty Ltd v Farquhart Enterprises Pty Ltd* (1977) 3 ACLR 133; *J & M O'Brien Enterprises Pty Ltd v Shell Co of Australia Ltd* (1983) 7 ACLR 790; *Triplan, supra* (Lord Denning).

(B) Whether the plaintiff's lack of funds has been caused or contributed to by the conduct of the defendant: *Lynnebry, supra*; *Triplan, supra*; *Spiel, supra*.

(C) Whether the plaintiff's proceedings are merely a defence against "self-help" measures taken by the defendant: *Heller Factors, supra*.

(D) Whether the making of the order would unduly stultify the plaintiff's ability to pursue the proceedings: *M A Productions Pty Ltd v Austarama Television Pty Ltd* (1982) 7 ACLR 97; *Spiel v Commodity Brokers Australia Pty Ltd* (1983) 8 ACLR 410.

(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: *National Bank v Donald Export Trading Ltd* (1980) 1 NZLR 97.

(F) Whether the defendant has delayed in making the application for security: *Buckley v Bennell, supra*; *Loreva Pty Ltd v CEFA Associated Agencies Pty Ltd* (1982) 7 ACLR 164.

(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" (at 496).

(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."

6. I have duly considered each of these factors, so far as they arise within the context of this case, together with the submissions of the parties and the materials on affidavit.
7. Having done so, however, I have come to the conclusion, unhesitatingly, that I should exercise my discretion in favour of ordering that security be given.
8. I am not satisfied, on all the materials, that the Applicant has reasonable prospects of success against the Second Respondent. The Applicant's case against the Second Respondent is demonstrably weak even upon only a casual perusal of the Amended Points of Claim filed 11 May 2005. There are no particulars given

under para 3 of the same. The particulars under para 16 are inadequate. There are no particulars under para 18. The particulars under para 19 are not, in reality, particulars, but are merely a re-formulation of the sub-paras of para 17. There are no particulars under para 23, nor under para 24. The particulars under para 25 are incomplete. There are no particulars under para 30.

9. Further and Better Particulars provided on 30 May 2005 (in response to the Second Respondent's Request dated 10 May 2005) do not, in my view, greatly improve the Applicant's position. Some further details of the Applicant's case are given but, in other instances, the further particulars sought either are not or cannot be given. I refer to para 2(d) which says (as to the request under para 16) that "Further particulars may be provided prior to trial." The same is said under para 3(d) (as to the request under para 17). Similarly, see para 5(b)(iii) (as to the request under para 23) as to the elements of the duty of care which is alleged. However, para 4(c) (as to the request under para 22) says that "Further particulars will be provided prior to trial." To similar effect see para 4(a)(ii) saying that "Further particulars of the cost of rectification will be provided prior to trial." Para 6(a) (as to the request under para 25) is to similar effect also: "Further particulars will be provided prior to the hearing."

10. Considering the Amended Points of Claim and the Further and Better Particulars together, there is a strong inclination to say that the Applicant does not have a case which is properly able to be advanced in law. In various critical areas there are gaps in the allegations which are being made. Despite repeated attempts, those gaps either are unable to be filled or the Applicant is unwilling to fill them. But if the gaps are unable to be filled then the Applicant's case is in serious difficulty. If, however, the Applicant is disinclined to fill the gaps, then one is left to wonder why this is so. Why, it might be asked, would an Applicant be unwilling to expose its case? Could it be that it does not want others to know how weak its case is on material points?

11. I am not persuaded, therefore, about the strength of the Applicant's case against the Second Respondent. For the purposes of s79, however, I do not need to express a concluded view on this aspect of the matter. Security may be ordered even if a party's case is not hopeless but appears to be arguable. See *Marketlink Exhibitions & Events Pty Ltd v Talex Engineering Pty Ltd* [2004] ACTSC 52 at [13] – [15]. See also *Cuitivaust Pty Ltd v Grain Pool Pty Ltd* [2004] FCA 1366 at [19] – [29] where Finn J ordered security even though, as to chances of success, he was satisfied the Applicant in that case had a reasonably arguable case. I shall assume, therefore, for the purposes of the following that the Applicant has an arguable case.

12. A most telling factor in this case, however, is that the Applicant is already indebted to the Second Respondent in costs for amounts totalling \$200,495.17. This includes an amount of \$152,495.17 for Supreme Court proceedings and on appeal and an amount of \$48,000.00 ordered by this Tribunal on 7 February 2005. None of these sums has been paid and all are due and owing. The Second Respondent can have no confidence at all that it will recover any costs in these proceedings, should it succeed in its defence and should it be ordered costs as a result. Even an assurance by the Applicant could hardly be believed because the costs ordered on 7 February 2005 were ordered by consent. That is, the Applicant pledged its consent to an order for costs in the sum of \$48,000.00, yet those costs have never been paid. Counsel for the Applicant may have indicated to me, in the course of submissions, that this litigation is the Applicant's only asset. I shall assume I heard him incorrectly and I will not take into account what I thought I heard him say. If that were so, however, then that would be a particularly troubling circumstance.

13. The failure to pay any costs at all – even those ordered to be paid by consent – is a pre dominating consideration in the exercise of my discretion. The existence of a counterclaim or cross-application does not count decisively against it – although usually the existence of a counterclaim or cross-application would stand as a

consideration against ordering security. See *Red Earth Building Maintenance Services Pty Ltd v Dura (Australia) Constructions Pty Ltd* [1999] VCAT 54. The discretion under s79, however, is unfettered and the Tribunal in the exercise of that discretion should not lightly be indulgent to a corporate party failing to pay costs pursuant to orders. I have been given no or no satisfactory explanation as to why those costs have not been paid. I am left to speculate that perhaps the Applicant lacks the funding to do so.

14. It was put to me also that I should be disinclined to order security because I should view the Second Respondent as an aggressor. See *Classic Ceramic Importers Pty Ltd v Ceramica Antiga SA* (1994) 13 ACSR 263. I cannot agree, however, on the facts, that I should find that the Second Respondent is, in reality, the aggressor.
15. It is true that delay may defeat an application for security. See *Smail v Burton* [1975] VR 776 at 777. The Second Respondent's application in this case, however, of necessity in my view, could only have been made later rather than sooner. The Amended Points of Claim were only filed on 11 May 2005 and the Further and Better Particulars were only provided on 30 May 2005. Both dates come after the date of the application for security. In any event, the orders for costs were only made in recent times – the most recent being made by consent, as I have noted, on 7 February 2005. A delay until April – if a delay at all – is not, to my mind, of any significance at all.
16. I am satisfied, for the reasons I have given, that this is a proper case for me to act under s79 to order that security be given.
17. The case is a complex one and is likely to take some time to hear. A figure of estimated costs of \$65,000.00 was mentioned to me. I consider it proper that I should order that approximately two-thirds or so of that figure should be provided by way of security – namely, in a sum of \$48,000.00. That figure, I do not consider, is oppressive – considering it is in an amount equal to the orders made

by consent on 7 February 2005 which, presumably, the Applicant considered it could afford to pay. For, why else, I might ask, would it have pledged its consent?

18. Pursuant to s79(1)(a) of the Act I order the Applicant to give security in the sum of \$48,000.00 by 4.00 pm on 1 August 2005. I order that such security be given by way of bank guarantee in a form approved by the Principal Registrar.
19. Under s79(1)(b) of the Act I stay the proceedings against the Second Respondent until such security is given. I do not stay the Second Respondent's counterclaim or cross-application.
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21. I reserve liberty to the Second Respondent to make any application for costs arising out of this application.
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