VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP1728/2015

CATCHWORDS

DOMESTIC BUILDING – application for security for costs – *Victorian Civil and Administrative Tribunal Act 1998* - s79 – relevant factors – application refused

APPLICANT	Owners Corporation 1 PS615117A
FIRST RESPONDENT	Seascape Construction Pty Ltd (ACN 083 415 561)
SECOND RESPONDENT:	Akritidis Pty Ltd (ACN 104 109 131)
THIRD RESPONDENT:	Mr Ari Akritidis
FOURTH RESPONDENT:	Xtended Plumbing Services Pty Ltd (ACN 150 152 686)
FIFTH RESPONDENT:	PPM Pipeline Plumbing & Maintenance Pty Ltd (ACN 910 782 360)
SIXTH RESPONDENT:	Kraft Refrigeration & Air-conditioning Pty Ltd (ACN 109 452 066)
SEVENTH RESPONDENT:	Euro Build Pty Ltd (ACN 076 554 160)
EIGHTH RESPONDENT:	Mac Flooring and Construction Pty Ltd (ACN 159 528 328)
NINTH RESPONDENT:	Robert Luxmoore Project Management Pty Ltd (ACN 112 322 773)
TENTH RESPONDENT:	Gowdie Management Group Pty Ltd (ACN 110 619 460)
FIRST JOINED PARTY:	Pinnacle Tiles Pty Ltd (ACN 152 819 808)
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Directions hearing
DATE OF HEARING	26 October 2016
DATE OF ORDER	21 November 2016

CITATION	Owners Corporation 1 PS615117A v Seascape Construction Pty Ltd (Building and Property) [2016] VCAT 1870

ORDERS

1. The first respondent's application that the applicant provide security for its costs is dismissed.
2. Costs reserved with liberty to apply. **I direct the principal registrar to list any application for costs for hearing before Deputy President Aird for 1 hour.**

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicant	Mr B Reid of Counsel
For First Respondent	Mr N Phillpott of Counsel
All other parties excused	

REASONS

1 The applicant Owners Corporation ('the OC') commenced these proceedings on 23 December 2015 claiming $673,406 as the cost of rectification of defects in the common property. This claim was subsequently increased to $1,115,439 upon the filing of Amended Points of Claim dated 24 May 2016.

2 The first respondent builder ('Seascape') was not the only builder involved in construction of the works. The first builder, Lianou Building Group Constructions Pty Ltd ('Lianou'), entered into a contract with the developer, Marina Seaview Pty Ltd ('Marina'), and commenced works on 15 September 2009. In May 2010 Lianou was placed into liquidation. At that time it had completed some of the works. On 6 August 2010 Seascape entered into a contract with Marina for the *construction of 20 townhouses as per plans in place* for the sum of $3,500,000. Seascape asserts 90% of the basement carpark slab and ground floor slab for Units 11 to 16, and 30% of the precast basement walls had been completed by Lianou to an estimated value of $500,000.

3 In December 2012, Marina was placed into receivership and Seascape's contract came to an end. On 8 February 2013 ANZ Bank, a secured creditor of Marina, appointed KordaMentha Pty Ltd as receiver and manager. KordaMentha engaged others to complete the works, which were completed by 25 March 2013.

4 On 7 October 2016 Seascape filed an application seeking various orders, including an order requiring the OC to provide security for its costs up to and including a compulsory conference in the sum of $42,595.00.

5 The application for security for costs was heard at a directions hearing on 26 October 2016.

6 The application for security is supported by an affidavit by Seascape's solicitor, Marvin Lyle Ward, dated 7 October 2016. The OC relies on affidavits by its solicitor, Paul Rodriguez, dated 21 October 2019, and by Victor Kramarov of the OC manager dated 21 October 2016.

7 At the directions hearing the OC was represented by Mr Reid of Counsel, and Seascape was represented by Mr Phillpott of Counsel, both of whom spoke to the written Outlines of Submissions handed up during the directions hearing.

LEGISLATIVE FRAMEWORK

8 The Tribunal's power to order security for costs is set out in s79 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act') which provides:

> (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.

9 The power to order security for costs is entirely within the tribunal's discretion. As McHugh J said in *P S Chellaram & Co Ltd v China Ocean Shipping Co*[1]:

> To make or refuse to make an order for security for costs involves the exercise of a discretionary judgment. That means that the court exercising the discretion must weigh all the circumstances of the case. The weight to be given to any circumstance depends not only upon its intrinsic persuasiveness but upon the impact of the other circumstances which have to be weighed. A circumstance which may have very great weight when only two or three circumstances have to be weighed may be of minor significance when many circumstances have to be weighed.

RELEVANT CONSIDERATIONS

10 The discretion set out in s79 is broad and unfettered. 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. However as Daly AsJ said in *Hapisun Pty Ltd v Rikys & Moylan Pty Ltd,*[2] whilst an ability to pay is not a threshold question, it is an important consideration. Her Honour said:

> 35. …For even if the financial capacity of a plaintiff[3] 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.[4]
>
> 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

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[1] [1991] HCA 36; (1991) ALR 321 at 323

[2] [2013] VSC 730

[3] Known as "applicants" in VCAT, but referred to as "plaintiffs" here to avoid confusion with references to applicants for orders under s 79.

[4] *Ariss v Express Interiors Pty Ltd (in liq)* [1996] 2 VR 507 at 513-14.

> 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*.

11 There are a number of other factors which are also typically considered by the Tribunal when deciding whether to exercise its discretion under s79. These were set out by Senior Member Farrelly in *CSO Interiors Pty Ltd v Fenridge Pty Ltd*:[5]

- whether the claim brought by the Applicant in the proceeding can be said to be *bona fide* and not a claim that has little merit or prospect of success;
- whether the Applicant's lack of funds has been caused or contributed to by the conduct of the Respondent;
- whether an order for security for costs would stultify the Applicant's pursuit of legitimate claims;
- whether there has been any unreasonable delay in bringing the application for security for costs;
- the extent to which it is reasonable to expect creditors or shareholders of the Applicant to make funds available to satisfy any order for security which may be made.

12 Mr Phillpott referred me to *Timbercorp Finance Pty Ltd (in liquidation) v Tomes*[6] where McLeish JA said at [17]:

> It has regularly been held that the power of the Court [of Appeal] to order security for costs in relation to an appeal (including an application for leave to appeal) is unconfined but that the following matters are relevant to the exercise of the Court's discretion:
>
> (a) the prospects of success of the application, and any appeal
>
> (b) the extent of the risk that a costs order will not be satisfied
>
> (c) whether the making of an order for security would be oppressive by stifling a reasonably arguable claim;
>
> (d) whether any impecuniosity of the applicant/appellant arises out of the conduct complained of;
>
> (e) whether there are aspects of the public interest which militate against the making of an order for security; and
>
> (f) whether there are any particular discretionary matters peculiar to the circumstances of the case.

13 These indicia are relevant in circumstances where the discretion of the Court of Appeal is similarly unfettered. Relevantly, his Honour has included an additional factor to be considered – 'the public interest'.

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[5] [2013] VCAT 1175 referring to *Urumar Marble Pty Ltd v Thiess Pty Ltd* [2005] VCAT 2081
[6] [2015] VSCA 332

14 I will consider each of the ‘usual’ factors first before considering whether there are any aspects of the public interest which militate against the making of an order for security.

The OC’s financial situation

15 Seascape contends that the OC is impecunious as it

(i) owns no real property in the State of Victoria;

(ii) is not a proprietary company and therefore has no paid up share capital; and

(iii) does not carry out any business for which it derives an income.

16 Whilst it is true that an OC does not carry out any business, and is in fact prohibited from doing so by s13 of the *Owners Corporations Act 2006* (‘the OC Act’), this does not of itself mean that an order for security should be made.

17 Seascape relies on the quarterly financial reports exhibited to Mr Kramarov’s affidavit and contends that as the OC carried forward a liability of $18,020.23 as at 1 July 2016, and as at 30 September 2016 was showing a negative balance in administrative funds of $13,444.19, it is impecunious.

18 However, I accept Mr Reid’s submission that the quarterly financial reports cannot be read in isolation, but rather must be read in the context of the OC’s financial accounting year, not the financial year from 1 July 2015 to 30 June 2016, and with an understanding of the operation of an OC. A consideration of the financial records exhibited to Mr Karamov’s affidavit shows that the Financial Statement tabled at the Annual General Meeting on 2 June 2016 for the period ended 31 March 2016 reported accumulated funds of $17,869.96.

19 At the end of the most recent reporting year, 31 March 2016, the OC had accumulated member funds of $17,869.96. The OC currently raises $88,150 through annual levies or $22,037.50 per quarter. It has the power to borrow money under s25 of the OC Act, and it has the power to raise special levies under s24 of the OC Act – a special resolution is only required if the amount sought is more than twice the amount of its annual fees – in this case, more than $176,300. It is also noted the OC has struck a special levy for $36,400 for the current reporting year ending 31 March 2017.

20 Whilst the OC may have reported a negative balance at the end of each quarter, I note that each quarter ends just before payment of the next quarterly levy is due. Payment of each quarterly levy is typically due on 1 July, 1 October, 1 January and 1 April and the quarterly accounting period ends on 30 June, 30 September, 31 December and 31 March.

21 The builder places significant emphasis on the use of the word ‘may’ in s24 as indicating that the OC has a discretion as to whether or not to strike a special levy at all, including for the payment of any adverse costs order. However, when read with the other sections comprising *Division 1 of Part 3*

– *Financial Management* of the OC Act, the word 'may' is used in connection with each of the OC's powers to levy fees including in s23 which relevantly provides:

> (1) An owners corporation may set annual fees to cover—
>
> (a) general administration; and
>
> (b) maintenance and repairs; and
>
> (c) insurance; and
>
> (d) other recurrent obligations of the owners corporation. [underlining added]

22 Section 24 of the OC Act provides:

> (1) An owners corporation may levy special fees and charges designed to cover extraordinary items of expenditure.
>
> (2) Subject to subsection (2A), the fees must be based on lot liability.
>
> (2A) Fees for extraordinary items of expenditure relating to repairs, maintenance or other works that are undertaken wholly or substantially for the benefit of some or one, but not all, of the lots affected by the owners corporation must be levied on the basis that the lot owner of the lot that benefits more pays more.
>
> (3) The owners corporation may determine the times for payment of the special fees and charges.
>
> (4) A special resolution is required when exercising a power under subsection (1) if the amount involved is more than twice the total amount of the current annual fees set under section 23.
>
> (5) Subsection (4) does not apply if the fees are levied to pay for or recoup the cost of repairs or maintenance carried out to any part of the property for which the owners corporation is responsible where immediate expenditure is or was necessary to ensure safety or to prevent significant loss or damage to persons or property.

23 It would be unusual indeed, if an OC failed to exercise what is said to be a discretion, and levy fees to enable it to fulfil its obligations under the OC Act.

24 Mr Phillpott relies on an unreported decision of the New South Wales Supreme Court in *In the matter of Eastmark Holdings Pty Limited (receivers and managers appointed) and 1 Denison Street Holdings Pty Ltd (receivers and managers appointed)*[7] where an owners corporation was ordered to provide security for costs. Justice Brereton said at [6]:

[7] [2015] NSWSC 2071

> …it seems to me that, unless the plaintiff itself cooperates or unless it were wound up, the defendants could not enforce any right or duty of the plaintiff to raise an additional levy from the unit holders. The defendants would have no direct process of execution against the unit holders for the purposes of doing so. The extent to which the levy would be productive in any event would depend on the terms of the resolution determined at a general meeting of the Owners Corporation by the people liable to pay and it cannot be excluded that they, or some of them, might have some defence to a levy being struck.

25 His Honour's decision was given *ex tempore* and the context in which security was ordered is unclear. For instance, the extent of the owners corporation's impecuniosity is not set out. His Honour simply notes at [1]

> The evidence shows that, although it has some liquid assets, the plaintiff's liabilities exceeds its assets by a very substantial margin…

26 I cannot be satisfied on the evidence before me that the OC is impecunious. Further, I reject Mr Phillpott's submission that the funds under the s24 levy, may be exhausted, and therefore not available to pay any adverse costs order necessitating a special levy. This is mere speculation. There is no reason to contemplate that the s24 levy which can be as much as $176,300, plus the special levy being raised for the financial year to 31 March 2017 of $36,400 – a total of $212,700 – will be exhausted by the time of any compulsory conference. I note the application for security is for security to any compulsory conference and that the sum of $42,595 is sought.

27 In any event, if a lot owner, or a creditor believes that an OC is not complying with its legal obligations in the interests of the lot owners, or has failed to take all necessary steps to comply with an order of a court or the Tribunal, an affected creditor can apply to the Tribunal under s173 of the OC Act for the appointment of an administrator. Under s174, the Tribunal may appoint an administrator and set down the terms and conditions of their appointment and make any other order it thinks fit. Surprisingly, counsel for neither party addressed me on the Tribunal's powers under this section.

28 In *Webb v Owners Corporation PS621796Q*[8] Rowland M said:

> 9. As a consequence of the orders in OC2763/2015, the applicants, the three remaining individual lot owners, seek an order appointing an administrator to the owners corporation under section 173 of the *Owners Corporations Act 2006*. The appointment is sought because the owners corporation is unable to approve a levy to fund the legal and expert expenses, to continue the building proceeding against Eliana. Section 173 provides as follows:
>
> > An owners corporation, a lot owner, a creditor of an owners corporation or any person with an interest in land affected by an owners corporation may apply to VCAT for the appointment of an administrator for the owners corporation.

[8] [2016] VCAT 268

> 10 The administrator has the power to do anything an owners corporation can do including levying lot owners. The applicants contend that this is an appropriate case to appoint an administrator to the owners corporation and rely on Deputy Lulham's decision in *Owners Corporation 1 Plan PS 440878V and Ors v Dual Homes Victoria Pty Ltd* [2011], where an administrator was appointed in similar circumstances.
>
> 11 Some of the circumstances in which an administrator might be appointed to an owners corporation were set out by Bongiorno J in *McKinnon v Adams* [2003] VSC 116. His Honour said as follows:
>
> > To justify the appointment of an administrator the body corporation concerned must be affected by some incapacity, or must be acting so dysfunctionally as to render the provision of appropriate services to unit holders and/or care of the common property either non-existent, or so beset by difficulties as to render the body corporate unable to function at what the court considers to be a satisfactory level. There may or may not be financial difficulties or even financial impropriety affecting the body corporate's capacity to function but there must be some deficiency in its operational capacity sufficient to justify the Court's intervention in the interest of some or all of the unit holders.
> >
> > Thus the power to appoint an administrator pursuant to s 38(6) of the *Subdivision Act* 1988 may be ordered, in the Court's discretion, where the evidence discloses that the body corporate is failing to operate properly in the interests of its members, is being inefficiently or incompetently managed, or the appointment is necessary to protect the interests of the members.

29 In *Owners Corporation 1 Plan No. PS440878V & Ors v Dual Homes Victoria Pty Ltd*[9] Lulham DP appointed an administrator to prosecute a claim in the Domestic Building List in relation to defects. His orders included an order that:

> All proper costs and charges incurred by the administrator of and in connection with the proceeding, including the employment of suitably qualified solicitors and expert witnesses, be costs in the administration and payable by all Lot Owners in proportion to their lot liability.

The *bona fides* and merits of the applicant's case

30 Seascape concedes the OC's claims are *bona fides* but suggests that because of the complexity of determining who the builder was, at the relevant time, in relation to the claimed defects, that this is, in effect, a neutral consideration. The OC contends that on balance, at least some of the defects will be found to be the Seascape's responsibility. Mr Reid has set out in his submissions the following questions that will need to be determined:

a. the state of the building work at the time the builder entered into its building contract on 4 August 2010

[9] [2011] VCAT 211

b. whether the builder completed the contract works.

31 Although I am unable to make any finding as to who carried out the alleged defective works, I note that Seascape entered into the contract with Marina in August 2010 which contract continued until December 2012. The receiver and manager apparently engaged others to complete the development in early February 2013 and the development was completed on 25 March 2013.

32 It is suggested by Seascape that insofar as the OCs claim is founded in negligence that following the decision of the High Court of Australia in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 and Anor*[10], such claim has little or no prospects of success. However, the application of the decision in that case to matters such as this proceeding is yet to be considered in Victoria, and in my view it would be premature to make any determination as to its application without hearing full argument from the parties.

Whether the Applicant's lack of funds has been caused or contributed to by the conduct of the Respondent

33 There is no evidence that the OC is suffering from a lack of funds, or that its financial position is related to any conduct of the respondent.

Whether an order for security for costs would stultify the Applicant's pursuit of legitimate claims

34 This is unknown.

Whether there has been any unreasonable delay in bringing the application for security for costs;

35 Whilst delay is not a determinative factor in applications for security for costs before the Tribunal, it is a relevant factor. This application has been brought approximately 8 months after the commencement of the proceeding. Whilst in many respects the proceeding is still in its early stages: the OC has filed 10 expert reports, and Seascape has filed 2 expert reports, Seascape's application to join additional parties to the proceeding for the purposes of a proportionate liability defence under Part IVAA of the *Wrongs Act 1958* was heard on 11 November 2016.

36 I am not persuaded that there has been an unreasonable delay in the bringing of this application.

The extent to which it is reasonable to expect creditors or shareholders of the Applicant to make funds available to satisfy any order for security which may be made

This is not a relevant consideration as the OC is not a company.

[10] [2014] 254 CLR 185

The public interest

37 Whilst there may be circumstances where an order that an owners corporation provide security for a respondent's costs is appropriate, in my view the public interest militates against generally ordering owners corporations to provide security. The legislature has seen fit to provide owners corporations with certain powers so that they can fulfil their statutory obligations. Under s31A of the *Subdivision Act 1988,* except for some limited rights of a lot owner to deal with their share of the common property as part of dealing with their lot, only an owners corporation has the power to deal with the common property. The relevant owners corporation is the legal entity with power to make an application to the Tribunal in respect of defects in the common property, but only after it has obtained a special resolution as required by s18 of the OC Act.

The likelihood of a costs order being made

38 In *Hapisun* her Honour indicated that the likelihood of an order for costs being made under s109 of the VCAT Act is a relevant consideration. Although s109 provides that each party bear their own costs, unless the Tribunal is minded to exercise its discretion under s109(2) and then only if it is satisfied it is fair to do so, in a matter such as this, where the claim is for a significant sum and there are there are complex factual and technical issues to be determined, there is a likelihood that costs will be ordered. The extent of Seascape's liability, if any, will only be determined after the hearing of all of the evidence. It is therefore impossible to anticipate whether any order for costs might be made in Seascape's favour.

CONCLUSION

39 Even if I were satisfied that the OC is impecunious and unlikely to be able to meet any costs order that might be made, I would be disinclined to exercise the Tribunal's discretion under s79. Not only it is inconceivable that an OC would cease to exist, unlike a company which is a party to litigation, s173 of the OC Act enables a judgement creditor to seek an order from the Tribunal appointing an administrator should the OC fail to strike a levy to meet any adverse costs orders.

40 Security for costs will not be ordered lightly. Applications for security should not be made as an ordinary part of litigation, particularly in the Tribunal where the starting point is that each party bears their own costs. Parties should not be discouraged from bringing claims to the Tribunal because of a fear they may face an application for security for costs.

41 This is not a situation where the OC's claim is without merit, or lacking in *bona fides*. Whilst it may be that others contributed to or are solely responsible for the claimed defects, this is a matter which can only be determined after all of the evidence has been heard and tested.

42 Weighing up all the factors, I am not satisfied this is an appropriate case for the exercise of the Tribunal's discretion under s79 of the VCAT Act and the application will be dismissed.

DEPUTY PRESIDENT C AIRD