VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. D423/2014

CATCHWORDS

Application for freezing order – relevant principles – application refused

APPLICANT	Radcraft Pty Ltd (ACN: 005 998 498)
RESPONDENT	Allenbrae Properties Pty Ltd (ACN: 101 272 780
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Directions hearing
DATE OF HEARING	15 September 2014
DATE OF ORDER	22 September 2014
CITATION	Radcraft Pty Ltd v Allenbrae Properties Pty Ltd (Building and Property) [2014] VCAT 1165

ORDER

1. The applicant's application for a freezing order is refused.

2. The directions hearing listed for 10.30am on 21 October 2014 is to be listed before Deputy President Aird.

3. Costs reserved – any application for costs will be heard at the directions hearing on 21 October 2014, time permitting.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicant	Mr S Stuckey of Counsel
For Respondents	Mr B Carr of Counsel

REASONS

1 In October 2011 the respondent owner acquired a property in Hadfield which had previously been used for church accommodation, with the intention of redeveloping the block into 22 residential apartments. The respondent entered into a building contract with the applicant builder in May 2013. The contract price was $1,450,000 plus $50,000 for pre-approved variations. The practical completion date under the contract was 9 November 2013. Mr Paul Chiodo of Pure Development and Project Management Pty Ltd was appointed by the respondent as the superintendent of the works under the Contract.

2 The works were not completed by the contracted date for practical completion, and on 14 March 2014 the respondent's solicitors wrote to the applicant's previous solicitors giving notice that the contract was terminated pursuant to clause 45A.1 of the building contract. Clause 45A provides for *Termination by the Principal for Convenience.* Under clause 45A.2 the builder is entitled to payment for the value of all work carried out under the contract to the date of termination, less amounts already paid, *as evaluated in accordance with the Contract.*

3 The applicant submitted a Final Claim dated 24 March 2014 for $70,905.14. The applicant commenced these proceedings on 12 May 2014 claiming $228,106.83. By Points of Claim dated 5 August 2014 the applicant claims the value of the work performed by it prior to the termination of the building contract by the respondent was $1,910,695.03 (inclusive of GST and variations) with $1,682,588.40 having been paid, leaving a balance of $228,106.83. It also claims return of the security of $36,250 which it alleges the respondent called upon when it was not entitled to do so.

4 By Application for Directions Hearing or Orders dated 5 September 2014 the applicant seeks the following orders:

> Within 7 days of the date of the hearing the respondent pay into the Domestic Builders Fund the sum of $400,000 or such other sum as the Tribunal determines pursuant to section 53(2)(bb) of the *Domestic Building Contracts Act* 1995, such sum to be held pending the resolution of this proceeding.
>
> Alternatively, the Respondent be restrained from not disposing of, dealing with or diminish the value of its assets up to the unencumbered value of $400,000,[1] until the hearing and determination of the proceeding. [sic]

5 The applicant indicated that the application was urgent because of:

> The Respondent's indication that it will dissipate assets and be wound-up.

[1] On account of the claim and costs

6 The application was supported by an affidavit by Jodie Fay Anderson, solicitor acting on behalf of the applicant. At the directions hearing listed to hear the application, the applicant was represented by Mr Stuckey of Counsel and the respondent was represented by Mr Carr of Counsel who advised the application was opposed.

7 For the reasons which follow, this application is refused as I am not satisfied on the evidence before me that the respondent is taking steps to dissipate its assets.

The applicant's position

8 In her affidavit Ms Anderson states that various progress payments were not made on time and that after a cheque for $50,000 paid by the respondent on 16 December 2013 was dishonoured, Mr Cometti, director of the applicant spoke with Mr Chiodo and at [8]

> I am instructed and believe that Mr Chiodo said words to the effect that Mark Beiser, the sole director of the Respondent, had cash flow problems but that the Applicant would be paid when he could afford to. He said that Mark Beiser had the money, he just didn't want to pay the Applicant. Mr Chiodo said that if the Applicant commenced legal proceedings Mark Beiser would make sure that it took months or years for the Applicant to get its money, and asked what the Applicant would recover when Mark Beiser wound up the company. He further stated that payment of the Applicant was linked to sales: if the Applicant finished the job Mark Beiser could sell the properties and pay the Applicant.

and at [9]

> I am instructed and further believe that on 28 February 2014 in the course of another meeting between Mr Cometti and Paul Chiodo about the Respondent's failure to make payment…he [Mr Chiodo] again asked the question who the Applicant was going to chase when the Respondent company did not exist any more.

9 After deposing that the works were approximately 90% complete at the date of termination, and that a search of the Register of Land Titles reveals that the respondent does not own any other real property in the State of Victoria, Ms Anderson states at [13]:

> The units the subject of the Applicant's work have all been placed on the market for sale. The Applicant is deeply concerned that, in line with the threats communicated by Mr Chiodo, the Respondent will sell all of its real property, distribute the proceeds and leave an empty corporate shell which will be unable to meet the Applicant's claim for payment.

10 I find it surprising that an affidavit by Mr Cometti deposing to his conversation with Mr Chiodo was not filed and that the only evidence proffered in support of this application is as set out in Ms Anderson's

affidavit, in which she deposes to matters about which she has been informed by Mr Cometti.

11 Mr Stuckey submitted that as 11 of the 22 apartments have been sold, there is a real possibility that the remaining 11 apartments will be sold and settled before the proceeding is determined.

The respondent's position

12 The respondent relies on two affidavits: one by Mark Beiser, sole director of the respondent, and the other by Paul Chiodo, the superintendent. I understand that unsworn copies of both affidavits were served on the Friday prior to this directions hearing. Sworn copies were handed up at the commencement of the directions hearing.

Mark Beiser's affidavit

13 In his affidavit Mr Beiser states at [3];

> Allenbrae was incorporated in 2002 for the purpose of acquiring real estate and developing properties for the purpose of sale. Since that time it has carried out three projects: the construction of two luxury houses in Field Street Caulfield completed in or about 2004; the construction of a luxury house in Holstead Street Caulfield completed in or about 2010 and the present development…which is the subject of this dispute.

and at [12]

> The Occupancy Permits for the units were issued on 22 May 2014 and the Plan of Subdivision was registered on 19 August 2014.

14 Mr Beiser states that 11 of the 22 units have been sold. Eight were sold 'off the plan'. Another 3 units have been sold and are due to settle in October and November 2014. The remaining 11 units are on the market for sale by private sale and at [16]:

> I have been referred to a copy of the affidavit affirmed by Jodie Fay Anderson dated 5 September 2014 and as to the allegations therein I say that the Respondent has no intention to dissipate its assets other than by sale on the open market of the units for the best price that can be obtained.

He states that he anticipates that it could take 12 to 18 months to sell the remaining 11 apartments.

Mr Chiodo's affidavit

15 In his affidavit, Mr Chiodo denies the allegations made by Ms Anderson that he made any comments to Mr Cometti to the effect that the respondent company would be wound up. He states at [11(b)] that at a meeting with Mr Cometti in February 2014 which he arranged in an attempt to resolve issues in relation to the applicant's extension of time requests:

> …Mr Cometti was quite angry with my position and stated "I will see you in court" before walking out on me. During this conversation I did say in general terms that on the basis of my own experience disputes such as this one would take a long time to be resolved if dealt with through the Courts.

Should a 'freezing' order be granted?

16 The principles to be applied when considering whether a freezing order should be granted were set out by J Forrest J in *Zhen v Mo*[2] and repeated in *Deputy Commissioner of Taxation v AES Services (Aust) Pty Ltd*:[3]

> First, that a freezing order, by its very nature, is a drastic remedy and a court must exercise a high degree of caution before taking a step which will interfere with a party's capacity to deal with his or her assets.[4]
>
> Second, the order is not designed to provide security for the applicant's claim.[5] It is solely directed to preserving assets from being dissipated, thereby frustrating the court process.[6]
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> Third, the applicant bears the onus both in satisfying the Court that the order should be continued and in satisfying the Court as to the amount which is to be the subject of the order.
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> Fourth, that an order can only be made on the basis of admissible evidence which supports the contentions made by the party seeking the order. Speculation and guesswork is no substitute for either the facts or inferences properly drawn from proved facts.[7]
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> Fifth, that before such an order can be made it is necessary that the applicant establish –
>
> (a) an arguable case against the defendant[8]; and
>
> (b) that there is a danger that the prospective judgment will be wholly or partly unsatisfied as a result of the defendant's actions in either removing the assets or disposing or dealing with them so as to diminish their value.[9]
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> Sixth, the balance of convenience must favour the granting of the freezing order.[10]
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> Seventh, that there is no set process determining the exact nature of an order. The order will be framed according to the circumstances of the case.[11]

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[2] *Zhen v Mo* [2008] VSC 300 at [22]-[30]
[3] [2009] VSC 418 at [20] (including citations)
[4] *Cardile v LED Builders Pty Limited* (1998) 198 CLR 380, [51]; Practice Note 3 of 2006
[5] *Jackson v Sterling Industries* (1987) 162 CLR 612, 621, 625
[6] *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1, [73]
[7] *Hartwell Trent (Aust) Pty Ltd v Tefal Societe Anonyme* [1968] VR 3, 13
[8] *Glenwood Management Group Pty Ltd v Mayo* [1991] 2 VR 49, 49
[9] R. 37A.02(1) Under the general law the plaintiff must establish that there is a real risk of assets being disposed of: *Cardile* [122]
[10] *Consolidated Constructions Pty Ltd v Bellenville Pty Ltd* [2002] FCA 1513

> Eighth, the applicant must establish with some precision the value of prospective judgment. The order should not unnecessarily tie up a party's assets and property.[12]
>
> Finally, there may be discretionary considerations which militate against the granting of a freezing order, such as delay in bringing the application on before the court or a lack of candour in the materials placed before the court.[13]

17 The first four principles are self evident and I adopt these without further discussion although I will refer to them as appropriate.

Danger of dissipation of assets

18 Having regard to the third principle enunciated by J Forrest J it is clear that the applicant bears the onus of persuading the Tribunal that there is a real likelihood of the respondent dissipating its assets such that a freezing order should be made.

19 Mr Beiser deposes in his affidavit to 8 of the apartments having been sold 'off the plan' which I understand to mean, sold before the works commenced, with a further three sold subsequently with settlement of those three sales due in October and November this year. Eleven apartments remain unsold. Although Mr Stuckey submitted there was a possibility the apartments could all be sold within the next two to three months, this seems to me to be no more that mere speculation.

20 There is simply no evidence before me that in all probability the remaining apartments will be sold before these proceedings are determined. Rather Mr Beiser states in his affidavit that he believes that in the current market there is a likelihood that the remaining apartments will not all be sold for another 12 to 18 months. In any event, this is not a situation where a respondent has taken active steps to rearrange its affairs and dispose of assets after the commencement of litigation, or even after the dispute the subject of the litigation arose.

Has the applicant demonstrated that it has an arguable case?

21 The applicant's claims to be entitled to payment of the sum of $228,106.83 and return of the security of $36,250. Mr Carr submitted on behalf of the respondent that the applicant has not demonstrated that it has a good arguable case because:

(a) the amount claimed of $228,106.83 has not been determined by the superintendent in accordance with clause 45A.2 of the contract;

(b) the applicant has commenced these proceedings without first complying with the Dispute Resolution provisions as set out in clause 47 of the contract;

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[11] *Jackson v Sterling Industries* (1987) 162 CLR 612, 621
[12] *Cardile* [124]
[13] *Cardile* [58]

(c) the amount claimed by the applicant is seemingly based on 100% of the works being complete as at the date of termination, yet Ms Anderson in her affidavit deposes to having been instructed by Mr Cometti that the works were 90% complete as at the date of termination;

(d) the respondent has spent in excess of $200,000 in having the works completed;

(e) on the face of it, the Tribunal should not be satisfied that the applicant will be successful in obtaining judgement for anything near the amount claimed.

22 Whether the amount claimed has been determined in accordance with the provisions of the contract, or whether the dispute resolution provisions of the contract apply and should have been followed, are not matters which I am required to determine in considering this application. Whilst the issues raised by the respondent might support an application under s75 of the *Victorian Civil and Administrative Tribunal Act* 1998 or its defence to the claims brought by the applicant, it would be inappropriate to make findings and finally determine those issues in the hearing of this application.

23 There are issues in dispute in all cases, and on the face of the material before me I satisfied that the applicant has an arguable case that it is entitled to payment of an amount yet to be determined. In this regard, I note that in the Prayer for Relief in the Points of Claim dated 5 August 2014, the applicant claims *$228,106.62 (inclusive of GST) or such other sum as the Tribunal determines is due to it in respect of the contract.* In considering this application, I do not need to be satisfied that the applicant has an arguable case that it is entitled to payment of the sum of $228,106.62 but rather that it has an arguable case that it is entitled to payment under the contract of an amount to be determined.

Has the applicant demonstrated that there is a danger that the prospective judgement will be wholly or partly unsatisfied?

24 Although satisfied that the applicant has demonstrated it has an arguable case that it is entitled to payment of an amount yet to be determined, I am not satisfied that there is a danger that any prospective judgement will be wholly or partly unsatisfied as a result of the respondent's actions in selling the apartments. Whilst Mr Beiser freely concedes on behalf of the respondent that it intends selling the remaining 11 apartments, there is no evidence before me to indicate that it is doing anything more than liquidating its real property assets consistent with what I understand to have been its intention in redeveloping the site into 22 apartments. There is no evidence that the assets in the form of the proceeds of sale will be dissipated and that the respondent will be unable to satisfy any judgement.

Balance of Convenience

25 Mr Stuckey submitted that in circumstances where Mr Beiser deposes that he expects the sale of the remaining apartments could take 12 to 18 months, the balance of convenience favours the applicant. In the expectation that the proceeding could be finalised within the next 12 months, he submitted that if the freezing order were made there would be no overburdening of the respondent.

26 He also submitted that if the assets are liquidated and dissipated, then the applicant will be left with a worthless judgement: the respondent will have taken the benefit of the applicant's labour and left behind an empty shell.

27 These submissions demonstrate that this application is in reality an application for an order to provide security for any judgement sum and costs. It is clear that a freezing order should not be made where this is its primary intent.[14] Such orders are only appropriate where there is a strong possibility that a judgement debtor will take deliberate steps to render the judgement nugatory. In *Frigo v Culhaci*[15] their Honours (Mason P, Sheller JA and Sheppard AJA) said:

> A plaintiff must establish, by evidence and not assertion, that there is a real danger that, by reason of the defendant absconding or removing assets out of the jurisdiction or disposing of assets within the jurisdiction, the plaintiff will not be able to have the judgement satisfied if successful in the proceeding.
>
> and
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> …a mareva injunction is not designed to stop a person from sliding into insolvency.

28 Further, as Hamilton J said in *Electric Mobility Company Pty Ltd v Whiz Enterprises Pty Ltd*[16]

> …the appellate courts have reminded primary judges that they must always be vigilant to ensure that parties' assets are not frozen and their business lives impeded lightly and that Mareva relief is <u>not to be used to give plaintiffs security for the satisfaction of their judgements.</u> (emphasis added)

CONCLUSION

29 For the above reasons, the application for a freezing order must be refused. When a builder enters into a contract with a developer for the construction of an apartment building, or the redevelopment of an existing building into apartments for sale, the time to negotiate and ensure security for payment of the contract sum, is when the contract is signed, not once a dispute has arisen and legal proceedings commenced.

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[14] *Pearce v Webster* [1986] VR 603
[15] *Frigo v Culhaci* [1998] NSWCA 17
[16] [2006] NSWSC 580 at [7]

30 I will reserve the question of costs, with any application for costs to be considered at the next directions hearing, time permitting.

DEPUTY PRESIDENT C AIRD