VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D916/2006

CATCHWORDS

Application for asset preservation order – test to be applied – no evidence of intention to dissipate assets

APPLICANT/FIRST RESPONDENT TO COUNTERCLAIM	Seachange Management Pty Ltd (ACN 091 443 211)
FIRST RESPONDENT/ APPLICATION BY COUNTERCLAIM	Bevnol Constructions & Developments Pty Ltd (ACN 079 170 577)
SECOND RESPONDENT	Bruce Jamieson
THIRD RESPONDENT	Louis Allain
SECOND RESPONDENT TO COUNTERCLAIM	Giuseppe De Simone
THIRD RESPONDENT TO COUNTERCLAIM	Paul Marc Custodians Pty Ltd
FOURTH RESPONDENT TO COUNTERCLAIM	Martin Jurblum
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Hearing
DATE OF HEARING	19 November 2008
DATE OF ORDER	26 November 2008
CITATION	Seachange Management Pty Ltd v Bevnol Constructions & Developments Pty Ltd & Ors (Domestic Building) [2008] VCAT 2404

ORDER

1. The first respondent's application dated 30 October 2008 seeking an asset preservation order is dismissed.

2. Costs reserved with liberty to apply. Any application for costs will be heard at the next directions hearing, the date and time of which the parties will be advised.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For Applicant	Mr E. Riegler of Counsel
For First, Second and Third Respondents	Mr B. Reid of Counsel
For the Second Respondent to Counterclaim and the intervener, De Simone Nominees Pty Ltd:	Mr G. De Simone in person
For the Third and Fourth Respondents to Counterclaim, and the intervener, Dark Star by the Sea Pty Ltd:	Mr M. Biviano of Counsel

REASONS

1 This proceeding concerns a dispute over the development of a retirement village in Ocean Grove. The background is set out in previous decisions of the tribunal and it is not necessary to repeat it here. The land is owned by the applicant ('Seachange'). The first respondent ('Bevnol') has recently become aware that expressions of interest are being sought for its sale by tender.

2 Bevnol seeks orders

(i) restraining Seachange from selling, charging, mortgaging, encumbering or otherwise disposing of or dealing with the land [the development of which is the subject of this proceeding] without first giving Bevnol 21 days written notice;

(ii) in the event of a sale [pending determination of the proceeding] Seachange giving Bevnol 21 days written notice of settlement.

(iii) in the event of a sale, retaining and depositing out of the proceeds of the sale $4 million in an interest bearing account in the joint names of the solicitors for Bevnol and Seachange.

(iv) liberty to apply for an amendment to the sum to be deposited subject to the tribunal's determination of a strike out application by Seachange (which has been heard, and the decision reserved).

3 Bevnol was represented by Mr Reid of counsel, Seachange by Mr Riegler of counsel and Mr De Simone (the second respondent by counterclaim and sole director of Seachange) appeared on his own behalf, and on behalf of De Simone Nominees Pty Ltd which was given leave to intervene.

4 The third and fourth respondents by counterclaim and Dark Star by the Sea Pty Ltd, which was granted leave to intervene, were represented by Mr Biviano of Counsel.

5 De Simone Nominees Pty Ltd and Dark Star by the Sea Pty Ltd are apparently involved directly or indirectly in the Seachange Development partnership.

Jurisdiction

6 Seachange contests the tribunal's jurisdiction to grant an asset preservation order (previously known as *Mareva* injunctions/orders, and also known as 'freezing orders'). The tribunal has previously held that it has jurisdiction under ss80 and 97 of the *Victorian Civil and Administrative Tribunal Act* 1998 ('the VCAT Act') and under s53 of the *Domestic Building Contracts Act* 1995 ('the DBC Act')[1].

7 I am satisfied that the tribunal has jurisdiction and refer particularly to s53 of the *Domestic Building Contracts Act* 1995. Section 53(1) provides:

> The Tribunal may make any order it considers fair to resolve a domestic building dispute.

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[1] *Dura (Aust) Constructions Pty Ltd v Vilacon Corporation Pty Ltd* [1999] VCAT 44, *Shelcon v Duhovic* [2007] VCAT 960

Counsel for Seachange contends this means that the tribunal can only make orders which will resolve a domestic building dispute and that this does not include interim orders of the type sought. I do not accept that the tribunal's powers are so limited under s53. Section 53(2) provides: '*Without limiting this power, the Tribunal may do one or more of the following*' as set out in s53(2)(a) – (h). Many of these are in the nature of interim orders which will not *resolve* the dispute. For instance, the referral of a proceeding to mediation (s53(2)(a)), or the ordering of payment of any amount in dispute into the Domestic Builders Fund pending resolution of the dispute (s53(2)(bb)). I am satisfied an asset preservation order falls within the ambit of s53.

Should an asset preservation order be granted?

8 Bevnol relies on two affidavits of its solicitor, Mr Brendan Archer, and Seachange relies on an affidavit of its solicitor, Peter Lustig. For reasons which are unclear to me neither party has considered it necessary to file affidavits deposed to by its principals. Mr Lustig was cross examined at length about his understanding of Seachange's financial affairs and records. Not surprisingly he was unable to provide any financial or accounting evidence.

9 As observed by their Honours (Mason P, Sheller JA and Sheppard AJA) in *Frigo v Culhaci* [1998] NSWCA 17

> "A mareva injunction ... is a drastic remedy which should not be granted lightly."

10 In *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 280 the majority said at [403]:

> ... the granting of a Mareva order is bound to have a significant impact on the property of the person against whom it is made: in a practical sense it operates as a very tight 'negative pledge' species of security over property, to which the contempt sanction is attached. It requires a high degree of caution on the part of a court invited to make an order of that kind. An order lightly or wrongly granted may have a capacity to impair or restrict commerce just as much as one appropriately granted may facilitate and ensure its due conduct.

11 As became apparent during the hearing Bevnol's primary concern is the securing or quarantining of the sum of $4 million from the proceeds of any sale of the land. The relevant test was conveniently summarised by Stone J in *Donnelly (Trustee) in the matter of the bankrupt estate of Hancock v Porteous* [2001] FCA 345 at [9]:

> An applicant seeking *Mareva* orders must show:
>
> * that he has a "good arguable case" (*Glenwood Management Group Pty Ltd v Mayo* [1991] 2 VR 49 at 49) or "a sufficiently realistic prospect of success in the proceedings" (*Pearce v Waterhouse* [1986] VR 603 at 605); and
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> * that refusing the order would involve a real risk that a judgment or award in his favour would remain unsatisfied because of the

concealment or dissipation of assets by the defendant (*Jackson v Sterling Industries Ltd* [1987] HCA 23, (1987) 162 CLR 612); and

* that the balance of convenience requires that such an order be made; *Pearce v Waterhouse* [1986] VR 603 at 607

12 It is not necessary in the circumstances of this proceeding to consider all the elements of the test as Bevnol is unable to clear the first hurdle. I am not satisfied that there can be any reasonable belief that there will be a concealment or dissipation of assets by Seachange if the property is sold. Mr Archer has exhibited to his second affidavit a number of flowcharts setting out his understanding of the various corporate structures behind the Seachange development. He deposes to these being his understanding of the structures derived from an affidavit of Alan Gordon Griffiths, a director of Pital Business Pty Ltd (which I understand is a former partner in the Seachange development project). This affidavit was prepared for a Supreme Court proceeding concerning a dispute related to the Seachange development.

13 Mr Griffith's affidavit was sworn on 12 November 2007, almost 12 months ago. Selected extracts have been exhibited to Mr Archer's affidavit. I have no knowledge as to the accuracy of the contents of his affidavit then, or now, although Mr Archer deposes in his second affidavit to having read the contents of other affidavits filed in the Supreme Court proceeding disputing Mr Griffith's evidence in relation to unit entitlements. Mr Archer confirmed under cross-examination that he has not checked the current corporate structures, nor does it seem has he carried out any recent company searches of each of the entities involved in those structures. A seemingly intricate corporate structure established for the development of the project is evidence of no more than a commercial arrangement.

14 Further, it is clear that an asset preservation order should not be made where its primary aim is to provide security for any judgement sum[2], and that such orders are appropriate only where there is a strong possibility that a judgement debtor will take deliberate steps to render the judgement nugatory. In *Frigo* their Honours 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.

15 Whether there will be sufficient funds to meet any judgement sum is not a matter with which I am concerned in considering this application. As Hamilton J said in *Electric Mobility Company Pty Ltd v Whiz Enterprises Pty Ltd* [2006] NSWSC 580 at [7]

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2 *Pearce v Webster* [1986] VR 603

> …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 not to be used to give plaintiffs security for the satisfaction of their judgements. (emphasis added)

16 Mr Lustig said his instructions are that Seachange has made a commercial decision to seek expressions of interest for the sale of the land so that it can minimise its holding costs, pay off its creditors and fund continuing litigation arising from the development. There is nothing underhand or suspicious in a company's prudent conduct of its commercial and business affairs.

17 Although it has not influenced me in making this decision I note Bevnol's failure to offer any undertaking as to damages in support of its application until its 'Outline of Submissions' were handed up at the commencement of the hearing where at [7]

> Bevnol also provides the usual undertaking in relation to damages:
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> *"Bevnol undertakes to abide by any order the VCAT may make as to damages in case the VCAT should hereafter be of the opinion that Seachange shall have sustained any damage by reason of this order which Bevnol ought to pay."*

Counsel for Bevnol did not agree to an amendment to the undertaking by the inclusion of 'by its counsel' after 'Bevnol undertakes'. A director from Bevnol was not in attendance at the hearing to give the undertaking on its behalf, nor were personal undertakings by the directors offered. Concern was expressed by the other parties as to the adequacy of any undertaking from Bevnol where the financial position of Bevnol is unknown. The provision of a bank guarantee in lieu of the undertaking was suggested by counsel for the third and fourth respondents to counterclaim. On 20 November 2008 Bevnol's solicitors advised its client was prepared to procure the provision of a Conditional Undertaking from its Bank, in substantially the form annexed to that letter, but that the maximum payable under the guarantee would be limited to $100,000. There has been ensuing correspondence from the solicitors for Seachange, Bevnol and the third and fourth respondents to counterclaim. I make no comment about whether this is an appropriate limit but note the apparent reluctance of Bevnol to address the issue of an undertaking and its adequacy until pressed to do so.

18 I am not persuaded that there is any merit in the application and it will be dismissed. Further, I am not persuaded that, in the event of a sale of the land, Seachange should be obliged to give Bevnol 21 days written notice of settlement.

DEPUTY PRESIDENT C. AIRD