VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST **VCAT Reference: D131/2005**

CATCHWORDS

Domestic building, security for costs, set off, security for defence distinguished from security for prosecution, document marked "without prejudice" containing no offer, delay in seeking security until after mediation, insolvency contributed to by loans to directors of applicant.

APPLICANT:	Urumar Marble Pty Ltd (ACN 071 757 401) (in liquidation)
RESPONDENT:	Thiess Pty Ltd (ACN 010 221 486)
WHERE HELD:	Melbourne
BEFORE:	Senior Member M. Lothian
HEARING TYPE:	Hearing
DATE OF HEARING:	30 August 2005
DATE OF ORDER:	5 October 2005

MEDIUM NEUTRAL CITATION: [2005] VCAT 2081

ORDERS

1. The application under s79 for security for costs is dismissed.

2. Costs are reserved and there is leave to apply.

3. The proceeding is referred to a directions hearing.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For the Applicant:	Mr A P Dickenson, Counsel
For the Respondent:	Mr D J McAndrew, Counsel

REASONS

1. This is an application by the Respondent for security for costs against the Applicant, which is in liquidation.

2. The Applicant was a tiling sub-contractor to the Respondent builder for "Bayview Apartments" at 78-92 Bay Street, Port Melbourne. The Application pleads that the sub-contract was for $438,400.00, for which the Applicant was to perform all tiling to the balconies and terraces at the apartments, which it says it has done.

3. The Applicant says that the Respondent has paid $398,697.50 and was entitled to retain 5% of the sub-contract sum, being $24,470.00 as security for proper completion of the sub-contract. The Applicant says that the Respondent is therefore indebted to it for $66,232.50. Further, the Applicant says that there was a variation for increase of depth of screed below the tiling to balconies at a cost of $87,904.65, of which $20,078.00 has been paid, leaving a balance of $67,826.65 ("the screed variation").

4. The Applicant also pleads that it carried out "additional work" at the request of the Respondent, the value of which is $77,833.50. The Applicant's claim against the Respondent is therefore $210,704.15 plus interest and costs, although there are alternate claims for quantum merit to both the variation claim and the "additional work" claim.

5. The Applicant filed its application on 1 March 2005 and the proceeding went to a directions hearing on 26 April 2005. It was sent to mediation on 2 June 2005, which was unsuccessful. At the directions hearing of 21 July 2005, following the failed mediation, orders were made only regarding the Respondent's application for Security for Costs. No direction was made that a defence and/or counterclaim be filed and none has been filed. No drafts have been provided either, although a

brief outline of the matters to be canvassed appears in the affidavit of Mr Stewart Nankervis of 5 August 2005 ("Nankervis 1").

6. The Respondent seeks security for costs of $113,000.00, which was described in Nankervis 1 as "the costs of both defending the application and running the counterclaim".

7. The Tribunal's power to order security for costs is set out in s79 of the *Victorian Civil and Administrative Tribunal Act* 1998 ("the 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.
>
> (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.

8. The Tribunal has an unfettered discretion, but in exercising it I am guided by previous decisions of the Tribunal, particularly that of Associate Professor D J Cremean in *Red Earth Building Maintenance Services Pty Ltd v Dura Australia Constructions* [1997] VCAT 54. He, in turn, drew on the list provided by Smart J in *Sydmar Pty Ltd v Statewide Developments Pty Ltd* (1987) 73 ALR 289 at 299-230 which recommends consideration of:

> (A) Whether the plaintiff's claim is made bona fide and has reasonable prospects of success.
> (B) Whether the plaintiff's lack of funds has been caused or contributed to by the conduct of the defendant.
> (C) Whether the plaintiff's proceedings are merely a defence against 'self-help' measures taken by the defendant
> (D) Whether the making of the order would unduly stultify the plaintiff's ability to

pursue the proceedings;

(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;

(F) Whether the defendant has delayed in making the application for security;

(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 maybe placed in the scales in making the decision as to which way the discretion should be exercised';

(H) Whether substantially the same facts are likely to be canvassed in determining the action and cross-action.

9. As it is in liquidation, the Applicant's insolvency is sufficiently established. Although Mr Dickenson did not concede that the Applicant cannot pay $113,000.00, he admitted that by the end of the trial it is unlikely to be able to do so.

Bona fides and Chance of Success

10. There is no reason to believe that the Applicant's claim is not made bona fide and Mr McAndrew said for the Respondent that approximately $2,500.00 is payable under the contract and that the Tribunal 'might find the Applicant has an arguable case' for part or all of the screed variation. The Respondent says that the amount already paid for this variation is fair payment for it. Mr McAndrew said that the Respondent was unsure what the additional work claim was for.

11. The Respondent also bases its assertion that the Applicant will not succeed on the set-off and/or cross-claim which, it assets, is more than sufficient to eliminate any amount which would be ordered in favour of the Applicant. It is noted that Mr McAndrew said early in the hearing that the Respondent was not intending to pursue the cross-claim, but the amount otherwise claimable was approximately $617,000.00.

12. Of this, approximately $72,000.00 is for alleged non-completion of work under the Contract, in particular, of caulking.

13. The remainder of the cross-claim would have been for rectification of expansion joints (approximately $50,000.00) and mortar efflorescence or staining (approximately $490,000) and some minor items.

14. Apart from assertions that there are items for which the Respondent would be entitled to a set-off, or cross-claim should it care to pursue it, there was no support before me for the Respondent's argument on merits. It is noted Mr Shilton, liquidator of the Applicant, states in his affidavit that he has been informed by Mr Pinna, a director of the Applicant, that the problems complained of by the Respondent were not caused by the Applicant. This statement, also, is of little probative value, except to demonstrate that there are possible explanations for the Respondent's problems other than culpability on the part of the Applicant.

15. There was argument about whether I should have regard to exhibit GSJ 1 to the affidavit of Mr Shilton. It is a letter from Solicitors for the Respondent to Mr Shilton of 1 December 2004. It encloses an informal proof of debt and a "Summary of Claim against [the Applicant] by [the Respondent]" which supported the amount claimed by the Respondent. Apparently the original is headed "without prejudice", although the copy has been made in such a way that the top of the page has been cut off. The covering letter states in part:

> "Our client considers the nature of its claim, and the circumstances which give rise to its claim, to be commercially sensitive and we request that you do not disclose this information to any third party (other than to satisfy your obligations to report the amount claimed and the name of the creditor as part of your duties as administrator)".

16. There is no indication, part from the inclusion of the words "without prejudice", that any part of the document is an offer or supports an offer, to settle a matter in dispute between the parties. Mr Dickenson for the Applicant referred to *TPC v Arnotts* 88 ALR 69 at 70 where Beaumont J quoted the High Court decision in *Field v Commissioner for Railways* (NSW) (1957) 99 CLR 285 where the nature and purpose of a privileged communication was described as:

> "to enable parties *engaged in an attempt to compromise litigation*[1]" to communicate with one another freely…. It is concerned with the use of the negotiations or what is said in the course of them as evidence by way of admission".

And at page 70

> "The rule excluding documents marked "without prejudice" has no application "unless some person is in dispute or negotiation with another and terms are offered for the settlement of the dispute or negotiation"."

17. Mr McAndrew's submission is accepted that marking a document "without prejudice" is not without effect. It shows the intention of the author, but the document must first be of a nature that is able to be protected by privilege.

18. I find that I can have regard to the document. It supports my view that Applicant has an arguable case with a reasonable prospect of success, rather than being the basis for that view.

19. Paragraphs 9 to 13 of the "Summary of Claim" state:

> 9. Thiess' counterclaim presently totals $384,505.81.
> 10. In addition, Thiess presently estimates it will incur further costs of $67,000.00.
> 11. Accordingly, Thiess presently estimates its total counterclaim will be $451,505.81.
> 12. To be deducted from Thiess' total counterclaim of $451,505.81 are the following sums:
> (a) $250.71 being the balance of the contract sum.
> (b) $24,470.00 being the retention monies withheld;
> (c) $66,084.50 being Thiess' estimate of UM's proper entitlement to the 'additional work' claim.
> (d) $19,037.50 being a reasonable figure for the Screed Variation Agreement works (having regard to the payment of $21,266 exclusive of GST made in PC10).
> 13. Accordingly, after accounting for UM's claims in a fair and reasonable manner, Thiess estimates its loss under the subcontract due to UM's breaches to be approximately $341,663.10.

20. It supports the fact that the Applicant has an arguable claim. It also shows that the respondent has previously raised its claim; it is not just a recent invention.

[1] Emphasis added

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

21. Mr Shilton's affidavit states:

> "I am further informed by Tony Pinna and believe that the refusal of the Respondent to pay the amount due to [the applicant] …. was a substantial cause of the financial difficulties that led to an administrator being appointed to [the applicant]".

22. I also note the Report to Creditors of Mr Shilton of 24 November 2004. At note 4(d) to paragraph 9, A & P Pinna, who are directors and shareholders, have a loan account with the Applicant of $153,052. Mr R Dosantos, a former director, also has a loan account of $153,080.

23. The Applicant is seeking approximately $210,000.00 but the current or former directors owe it $300,000.00. I am not satisfied in the circumstances that the Applicant's lack of funds has been caused by, or substantially contributed to by the conduct of the Respondent.

Whether the Applicant's proceedings are merely a defence against the Respondent's "self-help" measures.

24. There is no suggestion that the dispute should be characterised in this way.

Whether making an order would unduly stultify the Applicant's ability to purse the proceeding and the extent to which it is reasonable to expect creditors and shareholders to make funds available to satisfy any order for security.

25. No submissions have been put by the Applicant regarding these matters, although it is noted that in Mr Shilton's report to creditors, A & P Pinna and R Rosantos all said they had insufficient funds to repay their loans.

Whether there is delay in applying for security.

26. It is noted that the Respondent has not delayed in raising the possibility of an application for security for costs, and very sensibly delayed until after mediation, which, if it had resulted in settlement, would have made the interlocutory proceeding unnecessary. The period until after the mediation has not been taken into account in considering whether there has been a delay where the likelihood of such an application was notified.

Whether the company is the true applicant

27. It has not been put to me that it is not, and all indications demonstrate that it is.

Whether substantially the same facts are likely to be canvassed in determining the action and [any] cross action.

28. At paragraph 35 of his first affidavit, Mr Nankervis said:

> "After considering the costs of both defending the application and *running the counterclaim*[2] I estimate the Respondent's party/party costs to be approximately $113,000".

29. In *Sydmar Pty Ltd v Statewide Developments Pty Ltd* (1987) 73 ALR 289 at 399, Smart J said: "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".

30. Similarly, the Tribunal is slow to allow a respondent/cross-applicant to obtain security for costs of *prosecution* as distinct from security for costs of successful defence.

31. After consideration of its position, Mr McAndrew announced on behalf of the

Respondent that the claims the Respondent will make will only be as a set-off; that it would not be pursuing any amount greater than the Applicant's claim. This removes both the concerns expressed by Smart J in Sydmar, and the risk of providing security for prosecution costs.

33. Having considered all the above matters, it is found, as in *Ariss v Express Interiors* [1996] 2VR 507 at 514, the jurisdiction is to consider an application for security for costs is "enlivened" by the Applicant's apparent insolvency. However the strength of the Applicant's prima facie case against the Respondent and the paucity of support to date for the Respondent's assertion that it will successfully set off the Applicant's claim, tips the balance in favour of the Applicant.

SENIOR MEMBER M. LOTHIAN

[2] Emphasis added