VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING & PROPERTY LIST VCAT REFERENCE NO BP1286/2016

CATCHWORDS

BUILDING DISPUTE – Application for security for costs – s 79 *Victorian Civil and Administrative Tribunal Act 1998* – Whether order for security for costs should be ordered if the party against whom security is sought has failed to put forward evidence of its means to pay an adverse costs order – Who bears the burden of proof.

APPLICANT	Jah Thomas Pty Ltd (ACN 168 912 212)
RESPONDENT	Carmack Nominees Pty Ltd (ACN 003 724 696)
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Interlocutory Hearing
DATE OF HEARING	20 April 2017
DATE OF ORDER	27 April 2017
CITATION	Jah Thomas Pty Ltd v Carmack Nominees Pty Ltd (Building and Property) [2017] VCAT 578

ORDER

1. The Respondent's application under s 79 of the *Victorian Civil and Administrative Tribunal Act 1998* is dismissed.
2. The costs of this interlocutory application are reserved, with liberty to apply.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	Mr P Lithgow of counsel
For the Respondent	Mr J D Catlin of counsel

REASONS

INTRODUCTION

1. The Respondent seeks an order, pursuant to s 79 of the *Victorian Civil and Administrative Tribunal Act 1998* (**'the VCAT Act'**), that the Applicant give security for the Respondent's costs in the amount $58,630 or such other amount as the Tribunal deems appropriate.

SECTION 79

2. Section 79 of the VCAT Act states:

> **79 Security for costs**
>
> (1) On the application of a party to the 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.

3. In *Ian West Indoor & Outdoor Services Pty Ltd v Australian Posters Pty Ltd*,[1] Judge O'Neill VP stated:

> [T]he Tribunal should generally be slow to make an order for security for costs as to do so would have the capacity to stifle the abilities of companies of modest means to bring proceedings in the Tribunal in the reasonable expectation that those proceedings would be determined promptly, efficiently, at modest cost that may be the case in the County or Supreme Courts.[2]

4. The exercise of the Tribunal's discretion is unfettered; although guidance is gained by numerous decisions of superior courts in dealing with applications for security costs under the *Corporations Act 2001* (Cth) or the Supreme Court Rules. However, s 79 of the VCAT Act is expressed differently to s 1335 of the *Corporations Act 2001* (Cth), such that it *cannot be assumed that in every case where a court would order security, this Tribunal would order security also*.[3]

SHOULD SECURITY FOR COSTS BE ORDERED?

Would the Respondent be able to meet any adverse costs order?

5. Mr Catlin of counsel appeared on behalf of the Respondent. He submitted that there are a number of factors which reasonably lead to an inference that the Applicant would not be able to meet any adverse costs order made against it, should it be unsuccessful in the proceeding. He drew my

[1] (2011] VCAT 2410.
[2] Ibid at [17].
[3] *Done Right Maintenance and Building Group Pty Ltd v Chatry-Kwan* [2013] VCAT 141 at [18].

attention to the affidavit of Aimee Revelle-Thomas dated 28 January 2017, filed in support of the Applicant's application that security for costs be ordered against the Respondent, which set out those factors as follows:

> 14. The applicant:
>
> (a) is a company of limited liability and paid up capital of $10; &
>
> (b) has as its principal place of business, a residential address in FAIRFILED, [sic] which is also the modest home of that sole director and secretary, J Anthony Honeychurch Thomas; &
>
> (c) has Mr Thomas as its sole shareholder; &
>
> (d) is not a registered builder; &
>
> (e) has no employees; &
>
> (f) is not registered for G.S.T.

6. By contrast, Mr Lithgow of counsel, who appeared on behalf of the Applicant, referred me to the affidavit of Jay Thomas, the director of the Applicant, who deposed to the following:

> 13. The Applicant is solvent.
>
> 14. There are no demands or winding up proceedings on foot nor have there been any in the past in relation to the Applicant.
>
> 15. The Applicant has access to financial resources including lines of credit.
>
> 16. The Applicant is a trading entity involved in building and development projects.
>
> 17. The Applicant is registered for GST and has no outstanding liabilities as this time.
>
> 18. If called upon, the Applicant has the resources to meet any adverse cost order that may be made against it in this proceeding.
>
> 19. Now produced and shown to me and marked "JT-4" is a copy of a letter from the Commonwealth Bank dated 9 December 2016 with respect to available funds in my bank account. The current available balance is $72,550.00.
>
> 20. The applicant has already paid to the Respondent (or as directed by the Respondent) $30,000, with sum has not been returned to the Applicant.

7. Mr Catlin submitted that the factors raised in the affidavit of Aimee Revelle-Thomas suggest that the Applicant would not be able to pay any costs order made against it. He submitted that the Applicant had no assets and that this, of itself, raised a strong inference that it would not be able to meet any adverse costs order. He drew my attention to the following

extract of the joint judgment of Winneke P and Phillips JA in *Epping Plaza Fresh Fruit & Vegetables Pty Ltd v Bevendale Pty Ltd*:

> Thus, whilst it may be said that "[t]he basic rule that a natural person who sues will not be ordered to give security for costs, however poor he is, is ancient and well-established" (*Pearson* at W.L.R. 902; All E.R. 533), it is also true that "the whole concept of the general practice with regard to companies is just the opposite. It is the poverty of the company that attracts the power:"…[4]

8. The affidavit of Aimee Revelle-Thomas does not go so far as to say that the Applicant has no assets, although I note that this submission was not disputed by Mr Lithgow. Nevertheless, Mr Catlin argued that it was open for the Applicant to put forward credible evidence of any assets held by the Applicant but has chosen not to do so. This, he submits, fortifies his argument that the Applicant has no assets. Indeed, the affidavit of Aimee Revelle-Thomas deposes to a request being made of the Applicant to provide details of the Applicant's financial standing. In response to that request, the Applicant stated in correspondence to the Respondent that:

> Further, I am instructed that the Applicant is solvent and it is otherwise unnecessary for the Applicant to provide any further details of its "financial standing".

9. Mr Catlin submitted that once allegations are raised as to the impecuniousity of a party resisting a security for costs application, the onus shifts, such that the responding party must produce some evidence of its ability to meet any adverse costs order.

10. I do not accept that proposition. The onus of proof was considered by Vickery J in *Amcor v Barnes & Ors*,[5] where is Honour stated:

> 17. The consideration of this question [where the evidentiary burden lies] by the Court of Appeal in *Livingspring* calls for the submission as to onus advanced by the Amcor Parties to be clarified. It is not the case that once the threshold condition is satisfied the power to grant security will be exercised in the defendant's favour unless the plaintiff corporation persuades the court (by reference to discretionary factors) that it should not be so exercised.
>
> 18. In the following passage in *Livingspring* Maxwell P and Buchanan JA made it clear that an applicant for security, which is a defendant, bears the ultimate onus on both elements throughout:
>
> > While the satisfaction of the threshold question in the relevant sense "calls for" the exercise of the power, this does not alter the fact that the burden rests on the

[4] [1999] 2 VR 191, 195.
[5] [2015] VSC 90.

> defendant, from first to last, to persuade the court that the order for security should be made.
>
> 19. However the Court of Appeal in *Livingspring* also made the observation that there are particular discretionary matters of which the plaintiff must necessarily have carriage. These are matters which lie uniquely within the knowledge of the plaintiff and are asserted by the plaintiff to persuade the Court to exercise the discretion in its favour. As observed by the Court of Appeal: 'If, for example, the plaintiff corporation asserts that an order for security would impose on it such a financial burden as would stultify the litigation, the plaintiff must establish the facts which make good that assertion'. Two other examples referred to by the Court of Appeal in *Livingspring*, where a plaintiff resisting the application is to have the courage of establishing the necessary facts, are where it is part of the case of a company seeking to resist the order that the granting of the security will frustrate the litigation and does so by relying upon the impecuniousity of those whom the litigation will benefit, and secondly where it is contended by a resisting plaintiff that its impecuniousity was caused by the defendant. In these cases an evidentiary burden falls on the plaintiff to prove the necessary facts.[6]

11. In *Amcor*, the plaintiff refused to provide a full account of its financial position. Vickery J found that this did not lead to an inference being drawn that the uncalled evidence would not have assisted the plaintiff. His Honour stated:

> 39. I accept the approach of White J in *Blackburn Entertainment*, in reasoning that the rule in *Jones v Dunkel* is limited to assisting the court to draw an inference which is available from circumstantial evidence. The absence of evidence to the contrary may not, however, be directly converted into circumstantial evidence itself tending to prove the fact in issue against the silent party. In other words, the rule cannot be used to fill gaps in the evidence or to convert conjecture or suspicion into evidence in the nature of inference.[7]

12. Later in his judgment, Vickery J cited the following extract of the judgment in *Christou v Stanton Partners Australasia Pty Ltd*,[8] where Newnes JA stated:

> I also do not accept that the filing by the appellants of an application for security for costs gave rise to some obligation on the second respondent to provide a full account of its financial position. That is to put the cart before the horse. In order to enliven the court's discretion there must be material before it which is sufficiently persuasive to permit a rational

[6] Ibid 4-5 (footnotes omitted).
[7] Ibid 8 (footnotes omitted).
[8] [2011] WASCA 176.

> belief to be formed that, if ordered to do so, the second respondent would be unable to pay the applicant's costs if the second respondent were to be unsuccessful in the action; mere speculation as to the second respondent's insolvency or financial difficulties is not sufficient.[9]

13. The material put forward by the Respondent does not persuade me that the Applicant would be unable to meet any adverse costs order, if such an order were made against it. As highlighted in the affidavit material filed on behalf of the Applicant, the Applicant is not insolvent and has access to financial resources, including lines of credit. Further, the affidavit material deposes to the Applicant being a trading entity involved in building and development projects. The mere fact that the Applicant has not furnished financial information, including any assets which it may own, is not a factor which I consider leads to an inference that it would be unable to pay any adverse costs order.

14. Nevertheless, unlike applications for security from costs made under s 1335 of the *Corporations Act 2001* (Cth) or under the relevant Court Rules, the Tribunal's discretion to order security for costs is not fettered by the adoption of any threshold test. Therefore, the mere fact that a Respondent is unable to satisfy the Tribunal that an Applicant would be unable to meet an adverse costs order does not, of itself, mean that the application for security for costs fails.

15. In *Hapisun Pty Ltd v Rikys & Moylan Pty Ltd* ,[10] Daly AsJ made the following observations regarding the Tribunal's unfettered discretion to order security for costs:

> 34 Of course, it is proper that VCAT, as the Tribunal did in this case and in other cases referred to me by the parties, has regard to the principles developed in the general jurisprudence when exercising its discretion under s 79. However, it appears from this proceeding and the other authorities referred to me by counsel for both parties that the Tribunal has, as a matter of practice, gone beyond seeking guidance from these principles to incorporating wholesale into s 79 a threshold pre-condition to the exercise of the otherwise unfettered discretion imposed by the terms of s 79. This is impermissible, and amounts to jurisdictional error. Accordingly, the importation of a threshold test into s 79 of the VCAT Act offends the principle stated by Kirby J above.
>
> 35 However, this is an error which, in most cases, including the current case, has no particular practical consequences, except perhaps in the manner in which applications are conducted, and the reasons for decision formulated. For even if the financial capacity of a plaintiff to meet an adverse costs order is not a threshold issue, the ability of a party to meet an adverse

[9] Cited in *Amcor v Barnes & Ors* [2015] VSC 90, [42].
[10] [2013] VSC 730.

> order for costs must be an important, if not critical discretionary matter in the determination of each and every application for security for costs.…
>
> 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 the plaintiff could not meet any 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]

16. With that in mind, I set out below other factors which fortify my view that security for costs should not be ordered in this particular case.

Other factors to consider

17. Mr Lithgow submitted that the nature of the claim made by the Applicant is another relevant factor to consider. In particular, Mr Lithgow described the claim as being a failed joint venture, in which the Applicant was to project manage the development of the Respondent's residential property and ultimately share in the profit upon sale. As part of that arrangement, it is alleged that the Applicant paid the Respondent $30,000, presumably for a share in the joint-venture scheme. Those allegations are set out in the Applicant's *Points of Claim* as follows:

> 3. By an agreement made 19 January 2016 the Applicant and the Respondent agreed that they would enter into a joint venture for the purpose of renovating and selling the Property ("the Agreement").
>
> …
>
> 4. There were terms and conditions of the Agreement that, inter alia:
>
> …
>
> (d) the Applicant would pay the Respondent:
>
> (i) $15,000; and
>
> …
>
> 5. By a variation to the Agreement made on or about 1 April 2016 the Applicant:
>
> (a) paid a further sum of $15,000 to the Respondent; and
>
> …
>
> 6. The Applicant has paid the sum of $30,000 to or at the direction of the Respondent.

[11] Ibid 14-15.

18. Mr Lithgow submitted that that the Respondent has, effectively, admitted receiving at least $15,000 from the Applicant. He drew my attention to the *Amended Response to the Applicants Claim of 8 September 2016*, which now stands as the Respondent's *Points of Defence*. It states:

> 3. As to the allegations in paragraph 3 of the Claim the Respondent admits a written agreement was signed but says consent to the agreement by the principal of the Respondent, Diarne Revelle, was vitiated by physical and psychological duress and unconscionability.
>
> …
>
> 4. Further to the allegations in paragraph 3 of the Claim the Respondent says the contract is void by reason of the matters set out in paragraphs 14(b) and (g).
>
> …
>
> 6. As to the allegations in paragraph 4 of the Claim the Respondent admits the written terms of the Agreement document and says that insofar as there was an agreement, which is denied, there were implied terms that…
>
> …
>
> 8. As to the allegations in paragraph 5 of the Claim the Applicant purported to vary the terms in the manner alleged but did not make a further additional payment of $15,000.00
>
> 9. The Respondent does not admit the allegations in paragraph 6.

19. The Respondent has not filed any counterclaim, nor does it seek to set off any damages allegedly suffered by it against the claim made by the Applicant. Therefore, in those circumstances, Mr Lithgow submits that the Respondent is holding at least $15,000 which, if ultimately successful in defending the proceeding against it, might be used on account of costs incurred by it.

20. It is difficult to definitively assess the merits of the Applicant's claim or the Respondent's defence in the context of this interlocutory application. However, the Respondent's *Points of Defence* does not deny that at least $15,000 was paid to it by the Applicant, under whatever arrangement was in place between the parties. As there is no counterclaim or set-off pleaded, this appears to be money in hand.

21. This is a relevant factor as it may ultimately weigh against the imposition of a costs order in favour of the Respondent, should it ultimately succeed in defending the claim made against it. In *Hapisun Pty Ltd*, Daly AsJ also observed that the likelihood of a costs order being made in favour of a successful Respondent was another factor to consider in the exercise of the Tribunal's discretion to order security for costs:

> The statements made in *Ian West Indoor & Outdoor* and *Done Right Maintenance* demonstrate that the Tribunal appreciates the need to

> exercise the broad discretion under s 79 in the particular legislative and institutional context in which it operates, and, as such, while the language of s 79 seemingly expands the circumstances in which VCAT may exercise its discretion to make an order for security for costs beyond those available to the courts under s 1335 or rule 62.02(1)(b), there are particular features of its jurisdiction which will, in appropriate cases, influence the exercise of discretion. By way of example, the fact that VCAT is, by presumption imposed by s 109 of the VCAT Act, a "no-costs" jurisdiction, means that part of any analysis of the question of whether a security for costs order be ordered needs to include some assessment of the likelihood of whether, even if a defendant were successful in defending the claim, that an order for costs would be made in its favour.[12]

Conclusion

22. For the reasons set out above, I decline to order the Applicant to provide security for the Respondent's costs of defending the claim made against it. I have formed this view, principally because of two factors. First, I am not persuaded that the Applicant would be unable to meet an adverse costs order. Second, there is a question as to whether costs would be ordered in favour of the Respondent, even if it successfully defended the claim made against it. Consequently, I will order that the application be dismissed.

SENIOR MEMBER E. RIEGLER

[12] Ibid at [43].