IN THE COUNTY COURT OF VICTORIA

Revised
Not Restricted

AT MELBOURNE
CIVIL DIVISION
COMMERCIAL LIST
BUILDING CASES DIVISION

Case No. CI-08-05234

M B MARLOW ENGINEERING PTY LTD (ACN 096 412 6810) — Plaintiff

v

ALLIANCE CONSTRUCTIONS AUSTRALIA PTY LTD (ACN 106 939 904) — First Defendant

and

COMMERCIAL INDUSTRIAL CONSTRUCTION GROUP PTY LTD — Second Defendant

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JUDGE:	HIS HONOUR JUDGE SHELTON
WHERE HELD:	Melbourne
DATE OF HEARING:	10 June 2009
DATE OF JUDGMENT:	26 June 2009
CASE MAY BE CITED AS:	M B Marlow Engineering Pty Ltd v Alliance Constructions Australia Pty Ltd & Commercial Industrial Construction Group Pty Ltd
MEDIUM NEUTRAL CITATION:	[2009] VCC 0832

REASONS FOR JUDGMENT

Catchwords: Security for costs application – order for security until four weeks prior to trial – *Livingspring Pty Ltd v Kliger Partners* [2008] VSCA 93 – *FFE Minerals Australia Pty Ltd v Mining Australia Pty Ltd* (2000) 33 ACSR 739 – *Saint-Gobain RF Pty Ltd v Maax SPA Corporation Pty Ltd* [2004] VSC 335 – *Ariss v Express Interiors Pty Ltd (in liq)* [1996] 2 VR 507.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr P Bingham	Bayside Solicitors
For the First Defendant	Mr J Richardson	Noble Lawyers
For the Second Defendant	Mr P Rompotis	Macpherson + Kelley

HIS HONOUR:

1 This is an application for security for costs by each of the defendants. The applications are brought pursuant to Order 62 of the *County Court Rules of Procedure in Civil Proceedings* 2005 and/or s.1335 of the *Corporations Act* 2001 (Cth).

2 On 13 July 2007, the second defendant, as main contractor, entered into a sub-contract with the plaintiff, a steel fabrication and installation contractor, to supply and install steel at Boneo Primary School. The sub-contract price was $216,693 plus GST, which was subsequently varied to $237,388 plus GST. The plaintiff in turn sub-contracted the erection of the steel and associated works to the first defendant, a steel rigging contractor. The contract price was $29,500 plus GST, which was subsequently varied to $38,170 plus GST. The plaintiff alleges that the first defendant did not complete the works in accordance with plans and specifications and performed the works in a defective manner. As a result, it alleges that it had to carry out rectification works in the sum of $47,707 and rectification works performed by the second defendant were back charged to it in the sum of $166,597.59. Further, the plaintiff alleges that as a result of the excessive back charges imposed by the second defendant, and taking into account a reconciliation of other building works, the second defendant owes it the sum of $106,483. The matter was set down for trial on 9 November 2009 on an estimate of five hearing days.

The Threshold Issue

3 Rule 62.02(1)(b) provides that where the plaintiff is a corporation:

> "… and there is reason to believe that the plaintiff has insufficient assets in Victoria to pay the costs of the defendant if ordered to do so … the Court may … order that the plaintiff give security for the costs of the defendant of the proceeding and that the proceeding as against that defendant be stayed until the security is given."

4 S.1335(1) of the *Corporations Act* 2001 (Cth) provides:

> "Where a corporation is plaintiff in any action or other legal proceeding, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in his, her or its defence, require sufficient security to be given for those costs and stay all proceedings until the security is given."

5 In *Livingspring Pty Ltd v Kliger Partners* [2008] VSCA 93, the Court of Appeal (Maxwell P and Buchanan JA) stated, at paragraph 10, that although the wording of these two provisions is not identical, they are in practice so regarded and the same principles apply to each.

6 The Court stated, at paragraph 11:

> "The first question to be addressed is whether the threshold condition for the exercise of the power is satisfied, that is, whether
>
> there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful.
>
> That jurisdictional condition must be satisfied before the discretionary power to order security for costs is enlivened."

At paragraph 15, the Court stated:

> "The phrase 'reason to believe' is the touchstone of jurisdiction. It requires a rational basis for the belief — and no more. … The section requires the making of a judgment, a risk assessment: is there a risk that the corporation will be unable to pay? (It adds nothing, in our view, to say that it must be a 'real risk'.) A risk assessment is, of necessity, imprecise. The section calls for a practical, commonsense approach to the examination of the corporation's financial affairs."

At paragraph 16, the Court said:

> "It may be said, with justification, that this is a low threshold. But the test simply reflects the policy of the provision, which is to protect a defendant against the risk of the plaintiff corporation's impecuniosity. The provision equips the court with the means to require that the defendant be secured against that risk."

7 Relevant matters on the threshold issue are, in my view, the following:

- The plaintiff has a paid up capital of only $200;
- The plaintiff does not own any land in Victoria;

- An unaudited profit and loss statement for the financial year ending 30 June 2008 produced by the plaintiff shows that the plaintiff made a loss for that financial year of $142,010 compared to a profit for the preceding financial year of $117,265;
- Matthew John Marlow, a director of the plaintiff, in an affidavit sworn 2 June 2009, states that "on financial advice" the plaintiff registered new companies, Marlow Cranes Pty Ltd, on 31 March 2008, and on 12 August 2008, Marlow Steel Pty Ltd. He is sole director and shareholder of each company. He states that these companies were "registered as a strategy for risk management". Spreading the plaintiff's business over three companies would, on its face, diminish the cash flow and financial strength of each company, and particularly of the plaintiff.
- The plaintiff has a registered fixed and floating charge in favour of National Australia Bank Limited securing a loan from National Australia Bank which had a balance of $187,115.76 at 2 June 2009;
- Mr Marlow, in his affidavit of 2 June 2009, asserts that the plaintiff's assets "significantly exceed its liabilities". In the affidavit he states that the market value of the fixed assets of the plaintiff, consisting of various vehicles and equipment, is in excess of the depreciated value of $149,859.00 shown on the plaintiff's balance sheet. However, this needs to be looked at in the context of the monies owing to the National Australia Bank of $187,115.76;
- On 14 December 2007, the Supreme Court ordered judgment in favour of the first defendant against the plaintiff in the sum of $45,738.33. This sum was the total sum determined owing by the plaintiff to the first defendant pursuant to adjudication determinations made pursuant to the *Building & Construction Industry Security of Payment Act* 2002. The first defendant sought a garnishee order before Master Evans on 14 February 2008. This

application was opposed by the plaintiff. Master Evans made the garnishee order sought. On 28 February 2008, National Australia Bank paid to the first defendant the sum of $45,803.99 pursuant to the garnishee order. Mr Marlow, in an affidavit of 10 June 2009 states that he was unaware of the adjudication or of the judgment of 14 December 2007 until advised of this by the first defendant's solicitor late in December. I find this difficult to accept since failure to advise the plaintiff of the adjudication hearing or the Supreme Court application would have entitled the plaintiff to relief as of right. Mr Marlow then states that the judgment of 14 December 2007 was not paid since he "believed that the Plaintiff was entitled to an adjudication on the merits". None of these excuses explains why the plaintiff contested the application for a garnishee order. The actions of the plaintiff strongly suggest that it was not in a position to pay a judgment debt of only $45,738.33;

- Mr Bingham, who appeared for the plaintiff, referred to the fact that the plaintiff's turnover for the last two financial years had been approximately $800,000 and $750,000 respectively. This, in my view, is of limited relevance to the plaintiff's ability to meet a costs order against it;

- Mr Bingham relied on the fact that the plaintiff's audited profit and loss account for the year ended 30 June 2008 showed the sum of $142,289.00 paid by way of wages. He relied upon the comment of Nettle J in *AJ Espie Transport Pty Ltd v TNT Australia Pty Ltd* [2002] VSC 344, where His Honour was dealing with a one-man company. He stated, at paragraph 6:

> "… in order to gauge its profitability at a commercial level, … it is necessary to ask how much by way of wages or other drawings was taken in each year by the company's principal. …"

There is no evidence before me that here the sum of $142,289.00 was wages paid to Mr Marlow alone.

8 In *FFE Minerals Australia Pty Ltd v Mining Australia Pty Ltd* (2000) 33 ACSR 739, at 745, Pidgeon and Owen JJ, in the Full Court of the Supreme Court of Western Australia, stated:

> "… We consider that the absence of land combined with the low share capital does give rise to an appearance that there is reason to believe that there are no assets in this area to meet the costs. …"

9 Here, in addition to limited share capital and no land on the Register, there are other relevant factors as indicated.

10 In the circumstances, and in accordance with the above authorities, I am satisfied that "there is reason to believe that the corporation will be unable to pay the costs of the defendant[s] if successful".

Discretionary Factors

11 Having so concluded, my discretionary power to order security for costs is enlivened. This discretion "is unfettered and is to be exercised judicially having regard to all of the circumstances of the case" – see *Saint-Gobain RF Pty Ltd v Maax SPA Corporation Pty Ltd* [2004] VSC 335, per Habersberger J, at paragraph 29. There is no predisposition or bias either in favour or against the granting of the order for security – see *Ariss v Express Interiors Pty Ltd (in liq)* [1996] 2 VR 507, at 513-4, per Phillips JA (Ormiston and Charles JJA agreeing).

12 On the basis of the authorities, relevant matters to be considered by me in determining how to exercise my discretion are:

- ***Impecuniosity of the Plaintiff***

  The very fact that the plaintiff would be unable to pay the defendants' costs were the defendants successful – see *Ariss*, at 513-4, where Phillips JA stated that this could be "even a most significant factor".

- ***Delay***

Mr Bingham, who appeared for the plaintiff, submitted that there had been delay on the part of the defendants in bringing their application. It is well-established that security for costs applications should be brought promptly. The plaintiff originally issued proceedings against the first defendant in the Magistrates' Court. The Magistrates' Court Complaint was served on the first defendant on 16 April 2008 and a Notice of Defence was filed on 5 May 2008. On 17 June 2008, the first defendant's solicitors wrote to the plaintiff's solicitors requesting security for costs and enclosing a breakdown of costs sought, prepared by John White, a costs consultant.

In Further and Better Particulars of its Complaint served by the plaintiff on 10 June 2008, it indicated that it was about to issue proceedings against the second defendant and that it would be making application to consolidate the two proceedings. On 25 June 2008, the first defendant's solicitor wrote to the plaintiff's solicitors suggesting that the security for costs application be deferred until the two proceedings were consolidated. On the following day the first defendant's solicitors received a letter from the plaintiff's solicitors indicating that they were applying to transfer the Magistrates' Court proceedings to the County Court.

The proceeding against the first defendant was transferred to the County Court in December 2008. On 9 February 2009, I ordered that any application by the plaintiff to join a further defendant be made by 10 March 2009. On 25 February 2009, I ordered that the plaintiff have leave to join the second defendant as a defendant to this proceeding. The first defendant's solicitors advised the Court by letter of 31 March 2009 that it intended to apply for security for costs from the plaintiff. On 1 April 2009, I ordered that the matter be listed for a directions hearing on 22 April 2009

for the hearing of this application.

On 22 April 2009, I set the matter down for trial on 9 November 2009. The security for costs application was not heard on that day. The first defendant issued a Summons seeking security for costs on 13 May 2009 which fixed the hearing of the application on 10 June 2009.

In all the circumstances, there has not, in my view, been delay on the part of the first defendant in bringing its application. It would have been pointless for the first defendant to bring its application in the Magistrates' Court since a further application would have been necessary on transfer of the proceeding to this Court. The first defendant has, in my view, acted promptly since the proceeding was transferred to the County Court, particularly since it was desirable to defer the application until the joinder of the second defendant.

The second defendant entered an appearance on 17 March 2009 and issued its Summons seeking security on 2 June 2009, returnable on 10 June 2009. It was obviously desirable that its security for costs application be heard at the same time as that of the first defendant. In my view, the second defendant also has not delayed in bringing its security for costs application.

- ***Strength and Bona Fides of the Plaintiff's Case***

Mr Bingham submitted that the plaintiff had a strong case. In his written outline of submissions he stated:

> "It is most unlikely that the plaintiff will not succeed against at least one of the defendants."

In *Bryan E Fencott & Associates Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497, at 514, French J (as he then was) stated:

> "Where there is a claim prima facie regular and disclosing a cause of action, I see no reason why the court would, in the absence of evidence, proceed on the basis that the claim was other than bona fide or that it had no reasonable prospect of success."

Both Mr Richardson, who appeared on behalf of the first defendant, and Mr Rompotis, who appeared on behalf of the second defendant, conceded that the plaintiff's claim was "bona fide" with "a reasonable prospect of success". Mr Bingham submitted that the Defences lodged by the first and second defendants were without merit and that this was a relevant consideration. He relied upon a comment of Northrop J in *Jet Corporation of Australia Pty Ltd v Petres Pty Ltd* (1983) 50 ALR 722, at 733, and suggested that the strength of the Defences was a relevant consideration. However, it appears that Northrop J there only referred to the defences in the context of determining whether the plaintiff had a reasonable prospect of success. This is not an issue here.

- ***Self Help Measures***

Mr Bingham submitted that the first defendant had used "self help" measures by obtaining an adjudication in its favour under the provisions of the *Building & Construction Industry Security of Payment Act* 2002 without an adjudication on the merits. Mr Marlow, in his affidavit of 2 June 2009, states that there was not an adjudication on the merits since he and the other director of the plaintiff were not aware of the serious implications of the legislation. The first defendant should not be accused of "self help" in availing itself of rights open to it under the security of payment legislation, nor should it be a factor I should take into account in exercising my discretion against it.

- ***The Plaintiff's Impecuniosity Caused by the Defendant***

The authorities establish that the onus on this issue lies on the plaintiff and that there must be a solid foundation for that conclusion. Williams' *'Civil*

Procedure – Victoria' states, at page 5582, that discharging this onus may be quite difficult. Mr Bingham relied upon an assertion by Mr Marlow in his affidavit of 2 June 2009 that there had been "various significant cash flow deficits caused by the first defendant's actions and the back charges rendered by the second defendant". In a further affidavit sworn 10 June 2009, Mr Marlow states that with respect to the loss of $142,010.00 in the financial year ending 30 June 2008, legal costs of $21,614.00 were incurred with respect to this dispute with the first defendant, $47,707.00 was incurred in performing rectification works, and that the plaintiff should have been paid a further $138,388.00 by the second defendant in respect of the works carried out by it. These bald assertions are not, in my view, sufficient for me to be satisfied that the plaintiff's impecuniosity has been caused or contributed to by the defendants. In any event, any impecuniosity caused by the successful claim under the *Building & Construction Industry Security of Payment Act* 2002 was sixteen months ago.

- ***The Litigation Arose out of a Contractual Relationship between the Parties***

This factor might only be relevant so far as the second defendant is concerned. Mr Bingham relied upon comments of McDonald J in *Letore Pty Ltd v Associated International Finance Pty Ltd* (VSC, 28 May 1993, BC9303883). It is true, of course, that in most security for costs applications there is a contractual relationship between the parties. All cases turn on their facts and there there was a large sum of money involved there. It is, in my view, a factor, in favour of the plaintiff, but to a marginal extent.

- ***The Second Defendant's Set Off***

Under this heading, Mr Bingham relied upon *Sydmar Pty Ltd v Statewise Developments Pty Ltd* (1987) 73 ALR 289, where, at page 301, Smart J quoted, with approval, the comment of Hutley JA in *Stehar Knitting Mills v Southern Textile Converters* [1980] 2 NSWLR 514, at 521:

> "... I am of the opinion that claiming to set off a sum of money is commencing a proceeding against the company. ... The fact it is done by way of defence is immaterial. It is still a claim."

Here the set off is for the sum of $42,733.59, which the second defendant claims due from the plaintiff. I note that the amount of the set off is considerably less than the sum claimed by the plaintiff against the second defendant. Mr Bingham submitted that this set off rather than the claim would consume most of the hearing time at trial devoted to the dispute between the plaintiff and the second defendant yet asserted that the set off was vague and unparticularised.

13 In all the circumstances, and carrying out the appropriate balancing exercise, I have come to the conclusion that it is appropriate to order security for costs in favour of both defendants.

14 As to the quantum of such security, the first defendant relies upon an affidavit of John White sworn 11 May 2009. He has estimated the costs of the first defendant, to commencement of trial, at $68,235, and to conclusion of an eight-day trial, at $107,010. The second defendant relies upon Mr White's affidavit, the contents of which it submits should generally apply equally to it. I agree that similar securities should be given to each defendant.

15 As to Mr White's affidavit, Ms Alysia Mein, in an affidavit sworn 3 June 2009, in paragraphs 36 and 37, disputes various cost items which Mr White has allowed. I agree with her comments.

16 In my view, it is appropriate, in all the circumstances, to order that security be given by the plaintiff until a date four weeks prior to the trial date, i.e., to 12 October 2009. On the basis of Mr White's detailed estimate, and taking account of the matters referred to by Ms Mein, I require the plaintiff to give security to each defendant in the sum of $25,000.

17 I give leave to the defendants to make application to me for orders for further sums to be lodged by way of security.

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