CITATION:	*Karlovsky v Q-Built Constructions Pty Ltd, George Day & Jennifer Day [2008] NTMC 016*
PARTIES:	MERVYN KARLOVSKY Plaintiff v Q-BUILT CONSTRUCTIONS PTY LTD 1st Defendant GEORGE RONALD DAY 2nd Defendant JENNIFER MARGARET DAY 3rd Defendant
TITLE OF COURT:	Local Court
JURISDICTION:	Exercising appellate jurisdiction
FILE NO(s):	20518719
DELIVERED ON:	11 March 2008
DELIVERED AT:	Darwin
HEARING DATE(s):	30 November 2007
JUDGMENT OF:	Ms Sue Oliver SM

CATCHWORDS:

APPEAL - SECURITY FOR COSTS – PARTY IN POSITION OF PLAINTIFF.
DISCRETIONARY GROUNDS FOR MAKING ORDER – DELAY.
RULE 31.02 LOCAL COURT RULES.
Beach Petroleum NL v Johnson (1992) 7 ASCR 203
T Sloyan & Sons (Builders) Ltd & another v Brothers of Christian Instruction [1974] 3 All ER 715
Livingspring Pty Ltd v Kliger Partners (A Firm) [2007] VSC 443
Lexcray Pty Ltd v Northern Territory of Australia [2000] NTSC 24
Bruce Pie & Sons Pty Ltd v Mainwaring, English & Peldan [1985] 1QdR 401
Cosdean Investments Pty Ltd v Football Federation Australia Ltd & Soccer NSW Ltd [2006] FCA 1134
Bryan E Fencott Pty Ltd v Eretta Pty Ltd (1987) 16 FCR 497
Equity Access Ltd v Westpac Banking Corporation & Ors (1989) ATPR 40-972
Ravi Nominees Pty Ltd v Phillips Fox (1992) 10 ACLC 1313

REPRESENTATION:

Counsel:

1st Defendant:	Mr Christrup
2nd & 3rd Defendant:	Mr Morris

Solicitors:

1st Defendant:	Minter Ellison
2nd & 3rd Defendant:	Hunt & Hunt

Judgment category classification:	
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Number of paragraphs:	36

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20518719

[2008] NTMC 016

BETWEEN:

MERVYN KARLOVSKY
Plaintiff

AND:

Q-BUILT CONSTRUCTIONS PTY LTD
1st Defendant

GEORGE DAY
2nd Defendant

JENNIFER DAY
3rd Defendant

REASONS FOR DECISION

(Delivered 11 March 2008)

Ms Sue Oliver SM:

1. This is an appeal from a decision of the Judicial Registrar made on 10 July 2007. The Judicial Registrar declined to make an order for security of costs against the first defendant on an application by the second and third defendants ("the applicants"). The applicants seek orders that the order of the Judicial Registrar be set aside, that the first defendant's claim and third party proceedings against the applicants be stayed until the first defendant provides security for costs as ordered by the Court, that the first defendant provide security for costs to the applicants by paying into Court the sum of $80,000 within seven days and that the first defendant pay the applicants' costs of and incidental to the application before the Judicial Registrar and of

this appeal, at 100% of the Supreme Court Scale. Pursuant to Local Court Rule 4.04, such an appeal is by way of a hearing de novo.

2. It is well established that only a party who is in the position of a plaintiff is able to seek and obtain an order for security for costs. This principle is reflected by Local Court Rule 31.01 which defines a "defendant" as including a person against whom a claim is made in a proceeding and a "plaintiff" as including a person who makes a claim in a proceeding. The relevant provisions are Rule 31.02 (1)(b) and (f) which set out the relevant circumstances in which security for costs may be ordered:

> *(1) Where –*
>
> *(a) …*
>
> *(b) a plaintiff –*
>
> *(i) is a corporation; or*
>
> *(ii) is suing for the benefit of another person and not for the plaintiff's own benefit (other than a plaintiff suing in a representative capacity),*
>
> *and there is reason to believe that the plaintiff has insufficient assets in the Territory to pay the costs of the defendant if ordered to do so;*
>
> .....
>
> *(f) the Court may require security for costs under the Corporations Act 2001 or another Act,*
>
> *on the application of a defendant, the Court may order that the plaintiff give security for the defendant's costs of defending the proceeding and that the proceeding against the defendant be stayed until the security is given.*

3. The rationale for the rule is that a party should not be put to risk of not being able to recover costs in defending a claim against an impecunious party, where that party is ultimately unsuccessful in its claim. A party whose position is defensive will not be ordered to give security for costs

because the party who is the aggressor in the litigation takes upon itself the risk of not being able to recover costs.

4. These proceedings have their origin in a construction contract between the applicants and the first defendant under which the first defendant contracted to construct certain works in Berrimah upon land owned by the applicants. The plaintiff, Mervyn Karlovsky, commenced proceedings against both the first defendant and the applicants (as second and third defendants) by a Statement of Claim dated 4 August 2005. His claim may be summarised as being for monies owed pursuant to a contract, as a subcontractor to the first defendant, for additional works performed on the applicants' land for a further fire service. One of the issues to be determined is whether that service was required because of a fault in the design documented by a hydraulics consultant and if so, which party contracted and provided the services of the hydraulics consultant. The plaintiff claimed that the design consultant was either employed or engaged by the first defendant or alternatively, by the second and third defendants and not by himself. He therefore claimed the contract price owing to him (a sum of $36,765.05) against the first defendant, pursuant to the contractual agreement between them and orders pursuant to the *Workmen's Liens Act* against the second and third defendants as registered proprietors of the land on which the work took place. The second and third defendants have paid that amount into Court, but do not admit any liability in respect of that claim. Subsequently, a consent judgment was entered on 29 December 2006 in favour of the plaintiff against the first defendant in the sum of $36,765.05, together with interest. The question of the plaintiff's costs was adjourned to the hearing of the issues between the first defendant and the second and third defendant. The plaintiff has had no part in the application and appeal for an order for security for costs.

5. The first defendant has issued a notice of contribution against the applicants, by which it claims either $36,765.05 on the basis that the works

performed by the plaintiff were necessary because of the neglect of the hydraulics consultant engaged by the second and third defendants, or the sum of $42,279.82 as a variation to the head contract between the first defendant and the second and third defendants, approved by the second and third defendants. The first defendant also claims the sum of $40,441.56 as monies wrongly retained under the head contract and payable to the first defendant and the sum of $13,040.68 as an unpaid debt invoiced to the second and third defendants and payable to the first defendant. In total then, the first defendant's claim is for a sum of around $95,000 from the applicants. I am satisfied that to the extent of that claim, the first defendant should be regarded as in substance, a plaintiff in litigation with regard to an application for security for costs provided that the threshold ground is established and as a matter of discretion, the Court is of the view that an order for security should be made.

6. The threshold issue is that set out in Rule 31.02(1)(b), which provides that where a plaintiff is a corporation and there is reason to believe that the plaintiff has insufficient assets in the Territory to pay the costs of the defendant if ordered to do so the Court may order that the plaintiff give security for costs.

7. Likewise if reliance is placed on Rule 31.02(1)(f), the threshold issue becomes that set out in section 1335(1) of the *Corporations Act* which 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".*

8. There must be a proper and real basis for believing that the first defendant will be unable to meet an order for costs against it - *Beach Petroleum NL v Johnson* (1992) 7 ASCR 203 at 205. The applicants seek to rely on

affidavits filed by the first defendant in relation to the financial records of the first defendant corporation, to show that its assets are insufficient to meet a costs order that might be made if it is unsuccessful in its claim against the applicants. It is not in dispute that the corporation no longer carries on the construction business that it previously engaged in following the untimely passing of one of the directors. The corporation continues in existence however, to recover debts owing and to meet its liabilities. It is not suggested that it is without assets, but that it may be seen from the affidavits in question that the assets are insufficient to meet a costs order in the event that its claim against the applicants fails. It should be noted that the first defendant's action against the applicants is in fact made up of three distinct claims, the success or failure of which does not appear to me to necessarily depend one on the other.

9. As I have noted, an order for security of costs can only be made against a party who is in substance a plaintiff. The applicants, assuming they are able to satisfy the threshold issue of showing that the first defendant would be unable to meet a costs order, may only seek an order relative to the prospective cost of defending the first defendant's claim. They cannot require the first defendant to give security for costs they incur in pursuit of their own claim (*see T Sloyan & Sons (Builders) Ltd & another v Brothers of Christian Instruction* [1974] 3 All ER 715).

10. This issue is relevant because the applicants have counter-claimed against the first defendant. In submissions it was put that the counter-claim is for a sum of approximately $175,000 made up of a claim for liquidated damages pursuant to the terms of the contract between the applicants and the first defendant and damages for breach of the contract. Clearly the applicants' counter-claim is in excess of this Court's jurisdiction. The applicants were ordered on 16 August 2006 to elect to either transfer the proceedings to the Supreme Court or to abandon the excess of their claim in order to bring their proceedings within the jurisdiction of this Court. They have taken neither of

these actions. The applicants cannot be given an order for security of costs for an amount in excess of the Court's jurisdiction.

11. The applicants also bear the onus of showing that the first defendant does not have sufficient assets to meet a costs order. It is not suggested that the first defendant is insolvent. Even if that were the case, insolvency of itself would not attract a requirement that the first defendant give security for costs, it simply satisfies the threshold test that gives rise to a consideration of the exercise of the discretion to make an order (*Livingspring Pty Ltd v Kliger Partners (A Firm)* [2007] VSC 443). The applicants say that on the best picture presented by the financial reports attached to the affidavit of the first defendant's accountant, William Desmond Fong, that I can only be satisfied that the plaintiff has approximately $35,000 in the bank and an amount of $20,000 owed to them. They say that I can be satisfied that this would be insufficient to meet a costs order because on the basis of the affidavit of Murray Briggs dated 24 August 2007, the applicants' costs will be in the order of $80,000-$100,000. In determining whether a party has sufficient assets to meet a costs order, I must look prospectively to what the situation might be when the order is made using the current situation as a guide *Lexcray Pty Ltd v Northern Territory of Australia* [2000] NTSC 24 at [22]. The applicants say that relevant to this consideration is that the first defendant is no longer conducting business, but exists only to collect debts owing to it and to pay out its creditors and that there is hearsay evidence in the affidavit to the second defendant that tradespeople are complaining of non payment.

12. Mr Briggs deposes to having perused accounting records in relation to his file on this matter and on information supplied to him, that the costs incurred so far, that is up to 24 August 2007, is an amount of $50,709 plus an amount of $5,500 in disbursements. There was to be added to this an amount of $7,000 for work in progress which had not yet been rendered in a bill to the client. Mr Briggs estimates that the trial of the matter will be a

minimum of three days. Although not expressly stated, it seems implicit in the reference to amounts billed to the applicants that the costs referred to are costs on a solicitor/client basis, not on a party/party basis. The quantum therefore does not represent the costs that the first defendant might generally be expected to pay, if ultimately it is unsuccessful in its claim against the applicants. Significantly, the estimate of costs makes no distinction between costs that have been incurred in relation to the defence of the first defendant's claim and those costs which are associated with the applicant's counter-claim – see *Bruce Pie & Sons Pty Ltd v Mainwaring, English & Peldan* [1985] 1QdR 401 of 403. It is only the costs associated with the defence of a claim that may be the subject of a security for costs order.

13. In my view the issue of quantum becomes relevant at this point because the applicants assert not that the first defendant has no assets but that the assets that are disclosed by the financial statements of the first defendant will be insufficient to meet the costs of the first defendant. The relevant costs are those that have and will be incurred in the defence of the first defendant's notice of contribution, not costs associated either with the defence of the plaintiff's claim against the applicants' nor those associated with the applicants' counter-claim against the first defendant. It is against those likely costs that the assets need to be measured.

14. The financial statements attached to the affidavit of William Fong dated 6 June 2007 disclose the following:-

Share Capital and Reserves		
100 Ordinary Shares of $1		100
Unappropriated Profit		283,624
Total Share Capital and Reserves		283,724
Current Assets		
Petty Cash Imprest	500	
Loan – Halikos Roofing	1,795	
Other Debtors - Retentions	83,879	
Trade Debtors	193,032	

Cash at Bank – WBC	40,456		
Shareholders Current Account	112,453		
			432,115
Fixed Assets			
Plant & Equipment	40,946		
Less: Accumulated Depreciation	10,782		
		30,164	
Motor Vehicles	19,166		
Less: Accumulated Depreciation	6,317		
		12,849	
			43,013
Intangible Assets			
Formation Expenses		939	
			939
Total Assets			476,067
Current Liabilities			
Trade Creditors		192,343	
Shareholders Current Account			
Provision for Income Tax		-	
			192,343
Net Assets			283,724
Income			
Contract Building Revenues			-
Retentions Receivable			63,739
Sundry Income			-
Gross Profit from Trading			63,739
Less: Direct Costs			
Purchases		-	
Freight & Cartages		-	
Subcontractors		-	
Wages – Labour		-	
Gross Profit from Trading			63,739
Other Income			
Interest Received		374	
Asset Sale – GRD Building		-	
			374
			64,113
Expenditure			
Accountancy Fees		-	
Bank Charges		120	
Cleaning			
Corporate Affairs/ASIC		277	
Depreciation		-	
Donations		-	

Electricity	-	
Fees & Permits	-	
Hire of Plant & Equipment	-	
Interest Paid	410	
Leasing Charges	-	
Legal Costs	38,041	
Motor Vehicle Expenses	1,625	
Permits, Licences & Fees	-	
Postage/Printing/Stationery	137	
Repairs & Maintenance	-	
Superannuation – Employees	-	
Telephone & Mobiles	1,591	
Wages – Administration	600	
Waste Disposal	-	
		42,801
Profit from Ordinary Activities		21,312
Profit (Loss) from Ordinary Activities Before Income Tax		21,312
Income Tax Expenses	-	
Profit from Ordinary Activities		21,312
Retained Profits		262,312
		283,624

15. It is apparent that the assets at present are primarily represented by $40,456 cash at the bank and $43,013 of fixed assets being comprised of plant and equipment and motor vehicles. The figure of $193,032 shown as trade debtors primarily appear to be comprised of the claim against the second and third defendants and a claim against another party (the SSI Group), shown as $95,762 and $76,500 respectively. The claim against the SSI Group is contested (see affidavit of Chris Osborne dated 8 June 2007). No evidence of any proceedings having been commenced in respect to that claim was presented. Although the shareholders' current account item indicates an amount of $112,453, no itemisation of those monies due and how they arise, has been given.

16. The projected income for the period to which these accounts refer, that is the period ended 30 March 2007 is $64,113, primarily comprised of retentions receivable. This is consistent with the accepted position that the company is no longer actively engaged in the construction business.

Against that income is a projected expenditure of $42,801, leaving a profit of $21,312. The balance sheet attached to the affidavit of Mr Fong is at variance to one previously annexed to an affidavit of Elizabeth Theodore, sworn 24 May 2007 and is said to now represent the true picture of financial affairs of the company, rather than the earlier statement which contained errors. Ms Theodore's affidavit also annexed a balance sheet for the year ended 30 June 2006. Of some significance is the variation from the position at 30 June 2006 to the position at 30 March 2007 in retentions and plant and equipment. The balance sheet for the year ended 30 June 2006 shows retentions, as an asset, to be in the sum of $312,058. However, as at 31 March 2007 the retentions have been reduced to $83,879 with only $63,739 showing as expected income from receivable retentions during that period. The trading profit and loss statement for the year ending 30 June 2006 showed expected income from retentions receivable as $299,373. These figures do not seem to reconcile with the position in relation to retentions and expected income to be received from those retentions for the period ending 31 March 2007. It is not clear to me whether the 'errors' said to be contained in the early statement relate to the retention figure and if so, what the true comparative position might be.

17. Likewise, the trading profit and loss statement for the year ended 30 June 2006 shows income of $895,947 to be received from contract building revenues, giving a total income with the retentions receivable and a small amount of sundry income as $1,201,611. From that income was anticipated direct costs in relation to the contracts of $1,096,884, giving a gross profit from trading of $104,727 to which other income, namely interest and the proceeds of the sale of the GRD Building in the sum of $45,100 were to be received, giving a total of $49,297. The trading profit and loss statement therefore indicates an overall profit for the year ended 30 June 2006 of $154,024. This income does not appear to be reflected in any increase in the tangible assets as appear on the March 2007 balance sheet, other than an

unexplained increase in plant and equipment, which of itself raises some question, given that by a contract between the first defendant and GRD Building Pty Ltd, a copy of which is annexed to the affidavit of Elizabeth Theodore, the first defendant has sold to GRD Building a range of tools, equipment and office equipment. The second defendant in his affidavit dated 8 June 2007 asserts that the assets register incorrectly shows assets that were the subject of the sale.

18. In considering whether there is reason to believe that the first defendant has insufficient assets in the Territory to pay the costs of the applicant, if ordered to do so, I must consider not the current financial position of the first defendant but the financial position of the first defendant at the time of judgement and immediately thereafter. I may use the evidence of the current financial position as a guide, though not the sole consideration, for that finding (*Beach Petroleum NL & Another v Johnson & Others* 1992 10 ACLC 525). There are two matters that will affect the likely position of the first defendant at a time when judgement is given. First, the plaintiff in these proceedings now has a consent judgement for the sum of $36,765.05. The first defendant also concedes that there are trade creditors who are still owed monies by the company, but says that those creditors are willing to await the outcome of proceedings. The balance sheet to 30 March 2007 shows trade creditors as being owed $192,343. Taking each of these matters into account and heavily discounting the applicant's estimate of costs in order to separate out the cost of defence from the cost of pursuit of the counter-claim, in my view there is reason to believe that at the time when and if a cost order were to be made against the first defendant, it would have insufficient assets to meet that order. The existing liabilities outweigh by a considerable extent any tangible assets held by the first defendant. Debts shown as owing to the company are contingent on successful litigation (SSI) or have not been elaborated on in evidence sufficient so that I could be

confident that those monies would be available at the time of judgement in this matter.

19. That however does not conclude the matter. Once the threshold test has been met, I have an unfettered discretion as to whether in all the circumstances I should make an order for security for costs. See *Cosdean Investments Pty Ltd v Football Federation Australia Ltd & Soccer NSW Ltd* [2006] FCA 1134 at [2] citing *Reinsurance Australia Corporation Ltd v HIH Casualty & General Insurance Ltd* (in liq) [2003] FCA 803 at [66] – [67].

20. Although there is some earlier authority that once the impecuniosity of a company has been established, there should be a predisposition in favour of the making of an order for security of costs, the weight of authority in Australia, England and New Zealand is to treat the discretion as to be exercised according to the merits of each case without any particular predisposition. (See the discussion of that authority in *Bryan E Fencott Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497 at 505-511 per French J). I therefore approach the exercise of the discretion on that basis.

Discretionary Factors

21. A number of factors have been identified as relevant to the exercise of the discretion. In *Livingspring Pty Ltd v Kliger Partners (A Firm)* [2007] VSC 443 ("*Livingspring*") to which I was referred, Robson J identified six discretionary factors drawn from *Equity Access Ltd v Westpac Banking Corporation & Ors* (1989) ATPR 40-972 that may be taken into account. These are:

    1. The plaintiff's prospect of success; whether the claim is bona fide or a sham.

    2. The quantum of the risk that the plaintiff will be unable to satisfy a costs order in the event that it fails.

3. Whether the use of the power would be oppressive or would stultify prosecution of a genuine claim.

4. Whether the plaintiff's impecuniosity was caused by the conduct of the defendant in respect of which relief is sought in the proceeding.

5. Whether any public interest considerations bear on whether or not an order should be made.

6. Whether the application has been brought sufficiently promptly.

Not all factors will in each case be relevant to the exercise of the discretion. There may be some factual interrelationship of relevant factors. What is necessary is to approach the exercise of the discretion in terms of a balancing of the respective parties' interests and positions so as to do justice between them. I consider the following to be of relevance here.

Merit and prospects of success of the claim

22. Although in *Livingspring* an identified factor is the plaintiff's prospect of success, in my view other authorities, for example *Bryan E Fencott Pty Ltd v Eretta Pty Ltd* [1987] 16 FCR 497 at 513 and the authorities there referred to by French J suggest that the examination is of the bona fides of the claim and its merits rather than any attempt to assess on a factual basis the plaintiffs' prospect of success. I adopt His Honour's view in that case that:

> "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" (at 514).

The content of the first defendant's claim against the applicants has been referred to above. There is nothing on the face of that claim to suggest that it discloses no reasonable cause of action against the applicants. Indeed, in relation to the contribution notice to the second and third defendants for the plaintiff's claim against the first defendant, it is clear on the pleadings that a

very real issue arises as to which of these parties bears contractual responsibility with respect to obtaining the services of the hydraulics consultant. The issue of the retention monies and variation to the head contract are in my view live issues as between the defendants.

The quantum of the risk

23. In view of my observations as to assets, the risk must be viewed as significant.

The cause of the first defendant's impecuniosity

24. The first defendant derived its income from its construction business. It is a common ground that it no longer continues that trade. Any ongoing income is dependent on the receipt of monies owed to the company under contracts performed by it, including retention monies commonly held under construction contracts. These are two central issues of the counter-claim by the applicants. The first defendant's impecuniosity is substantially linked to the very acts for which it seeks payment from the applicants (the retention and variation monies).

25. There is also in my view, a live issue as to the second defendant's involvement in the management of the first defendant following the passing of Mr Theodore, the former Director of the first defendant and as to whether or how that may have affected the first defendant's interests. I am not able to resolve that on the material before me.

26. A company, GRD Building Pty Ltd, in which the second defendant is actively involved, purchased plant and equipment from the first defendant in August 2005. The actual date is not specified in the copy annexed to Ms Theodore's affidavit. The contract purports to transfer or assign contractual interests of the first defendant to GRD Building Pty Ltd. The contract arises at around the time of commencement of this litigation, subsequent to a time at which, as will become apparent further in these reasons, that the second

defendant already had concerns about the financial situation of the first defendant.

Would an order for security of costs be oppressive or stultify prosecution of a genuine claim?

27. A relevant factor is whether there is a natural person standing behind the company who stands to benefit from the litigation. It is obvious that Mrs Elizabeth Theodore is in that position. No evidence has been put forward as to Mrs Theodore's ability to assist the company with the funding of the litigation, although such evidence would be relevant. It has not however been suggested that the making of a costs order of an appropriate quantum based on a consideration of the relevant factors would stultify the proceedings.

As his Honour Justice French observed in *Bryan E Fencott Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497 at 514:

> "The further a plaintiff has proceeded in an action and the greater the costs it has been allowed to incur without steps being taken to apply for an order for security for costs, the more difficult it will be to persuade the court that such an order is not, in the circumstances, unfair or oppressive".

I therefore turn to a consideration as to whether there has been delay in the bringing of the application for security for costs so as to make such an order oppressive.

Timing of the application for security of costs

28. An application for security of costs is required to be made without undue delay. The relevance of delay is explained in *Ravi Nominees Pty Ltd v Phillips Fox* (1992) 10 ACLC 1313 at 1315:-.

> "… an application for security of costs should be brought promptly and prosecuted promptly so that if it is going to delay the plaintiff's claim, while it is finding the security, or if it is going to frustrate the

> plaintiff's claim completely and stop the action, it does so early on before the plaintiffs have incurred too many costs. An early hearing of such an application also benefits the defendant because it stops the plaintiff's claim before the defendant has incurred too many costs".

29. A short history of this matter is that the plaintiff in this matter issued proceedings against both the first defendant and the applicants in August 2005. The first defendant filed a defence and counter-claim on 23 September 2005 and then issued a notice of contribution against the applicants on 1 December 2005. It also provided at that time a list of documents. An amended notice of contribution was filed on 17 February 2006. The applicants did not respond within the statutory time frame but on 3 March 2006, were given leave to file and serve a defence to the first defendant's notice of contribution within 21 days. The defence and counter-claim were filed on 4 April 2006 under which they claimed $266,166.42 together with an unspecified amount of damages from the first defendant. That claim was clearly in excess of this Court's jurisdiction. The first defendant responded promptly to this defence and counter-claim on 8 May 2006 and sought further and better particulars from the applicants. Particulars were not provided until the day after the first defendant filed a strike out application for part of the counter-claim – an application which was subsequently upheld, the Judicial Registrar finding that the applicants had not pleaded all material particulars to enable the first defendant to answer the counter-claim. The first defendant was then put to the cost of replying to the applicant's amended counter-claim which they did on 26 October 2006. A consent judgement as between the plaintiff and the first defendant was filed on 21 December 2006.

30. It was not until 6 March 2007, that is, around 15 months from the issue of the first notice of contribution that an application for security of costs was filed. In the supporting affidavit to that application, the second defendant deposes as follows:

> "[6] Since early to mid 2005 I am aware that the first defendant has not traded for at least 12 months or more"

The fact that the first defendant no longer actively engages in construction work following the passing of one of the directors and therefore has little or no ongoing income is put forward as one of the reasons why an order for security of costs should be made. It is therefore significant in my view that concern as to the financial status of the first defendant is conceded by the second defendant to be a matter of which he was aware prior to commencement of any proceedings in this matter. It is also alleged that the second defendant acted as manager for the first defendant following the passing of Mr Rex Theodore (see affidavit of Elizabeth Theodore dated 24 May 2007). It is notable that in his affidavit of 8 June 2007, the second defendant deposes at [9] that he "did not get involved in the financial position of the first defendant when [he] was managing the first defendant" however further in that paragraph he deposes that "The only financial interest that I undertook was in June 2005 when I was approached by a director of the first defendant, Richard Lee, when he asked me to have a look at the financial documents relating to the first defendant. After reviewing those documents, I talked to both Richard Lee and the deponent [Elizabeth Theodore] and advised them to take the documents to their accountant as the financial position of the first defendant seemed to me to be precarious".

Further, at [10] of his affidavit of 8 June 2007 the second defendant deposed that "…I have made decisions on behalf of the second and third defendants based on my view of the financial position of the first defendant. I always considered that the second and third defendants had a claim for monies owed to them by the first defendant. **Knowing of the first defendant's difficult financial position, I made the decision not to pursue the first defendant for those monies. However because of the Notice of Contribution served by the first defendant I have caused this claim to be made in a counter-**

claim". (emphasis added). It is apparent to me from this statement that the second defendant, prior to the commencement of proceedings, appreciated the financial position of the first defendant to the extent that he was not prepared to risk costs in undertaking litigation against an impecunious defendant. This raises a question as to why he would be prepared to incur the costs to which Mr Briggs has deposed, a considerable proportion of which must relate to the applicants' counter-claim.

31. The affidavit of Peggy Cheong of the solicitors for the applicants dated 7 March 2007 and filed in support of the application for security of costs deposes to the fact that the second defendant advised her in July 2006 that the first defendant [was] in a difficult financial position and that he was concerned that it might not be able to meet a costs order. No explanation has been offered as to why, in view of what the second defendant said at [10] of his affidavit of 8 June 2007, that he waited until 1 July 2006 to instruct his solicitors that he was 'concerned' that the first defendant might not be able to meet a costs order. Ms Cheong was instructed to seek financial details from the first defendant which she set about doing. It would appear that although correspondence was exchanged between the respective solicitors with respect to the delay in responding to the request, that the attempt to extract that information was abandoned in early September 2006 and no further correspondence or action occurred with regard to the alleged concern until the application for security of costs was filed in March 2007.

32. The affidavit of Elizabeth Theodore also deposes to the fact that the first defendant sold to GRD Building Pty Ltd assets including plant and equipment and transferred certain interests in building contracts (although not specified in the contract of sale, this is referred to by the second defendant in his affidavit of 8 June 2007 as "one current construction contract and some potential contracts") to GRD Building Pty Ltd which is a company in which the applicants or at least the second defendant are actively involved. The contract is dated August 2005. As at that date the

applicants would have been aware that not only had particular assets been liquidated, but that further interests in building contracts no longer existed because each had been transferred to a company under their control. Indeed at [9] of his affidavit of 8 June 2007, the second defendant deposes that "The purchase of the assets of the first defendant is one of the bases of my knowledge of the financial position of the first defendant".

33. Taking each of these matters into account, there would be no reason for the second defendant (who conducts this litigation on behalf of himself and the third defendant) to have had any different view of the financial situation of the first defendant as from the issue of the first proceedings in this matter. Notwithstanding that knowledge, the applicants elected not only to defend the notice of contribution in respect of the plaintiff's claim, but to issue a counter-claim in excess of the Court's jurisdiction and as I have noted, incurred considerable costs to date both in defence of the first defendant's claim against them and in pursuit of their own claim and for which they have sought security for costs against the first defendant.

34. Delay of itself will not bar an order for security of costs if a good reason can be put forward to explain the delay. No reason or cause has been proffered as to why more immediate action was not undertaken other than the tardiness of the first defendant in responding to the request for financial statements.

Conclusion

35. Based on the foregoing, the applicants (represented by the second defendant) were not simply in a position where they did not know or suspect that the first defendant might have some difficulty in meeting a costs order, absent their sighting of financial statements. The second defendant, according to his own evidence, had insight all along into the trading activities and financial affairs of the first defendant, including viewing the first defendant's financial position as so impecunious that he chose not to pursue

a claim against it for the same matters that are now the subject of the counter-claim. This is not a case where knowledge of the financial position of the first defendant only developed late in the proceedings, such knowledge was present at the outset and prior to the commencement of proceedings by the plaintiff. No explanation has been put forward to explain the delay and the allowance of costs by both parties to run particularly in relation to interlocutory applications over the time period in question.

36. The applicants' conduct in the proceedings (the failure to properly particularise their counter-claim, to comply with the time frame of interlocutory orders or at all in the case of the order to abandon the excess of the claim or transfer the proceedings to the Supreme Court), whilst allowing the first defendant to continue to accrue costs, also go to the question of oppression in the making of a security for costs order.

In the circumstances that I have mentioned, I am satisfied that it would be oppressive for an order for security for costs to be made. I decline to do so and the appeal is dismissed.

The first defendant is to have the costs of and incidental to this appeal and of the application to the Judicial Registrar.

Dated this 11th day of March 2008.

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Sue Oliver
STIPENDIARY MAGISTRATE