SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2015 0026

FAÇADE TREATMENT ENGINEERING PTY LTD (IN LIQUIDATION) (ACN 147 328 443)	Applicant/Respondent
v	
BROOKFIELD MULTIPLEX CONSTRUCTIONS PTY LTD (ACN 107 007 527)	Respondent/Applicant

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JUDGES:	TATE and McLEISH JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	19 June 2015
DATE OF JUDGMENT:	19 June 2015
MEDIUM NEUTRAL CITATION:	[2015] VSCA 169

PRACTICE AND PROCEDURE – Application for security for costs – Weight to be given to impecuniosity of respondent – Genuinely arguable question of law of considerable public importance – Application refused.

APPEARANCES:	Counsel	Solicitors
For the Respondent/Applicant	Mr M G Roberts QC with Mr L J Connolly	Norton Rose Fulbright
For the Appellant/Respondent	Mr I W Upjohn QC with Mr B G Mason	Aitken Partners

TATE JA:

1 I invite McLeish JA to deliver the first judgment in this matter.

McLEISH JA:

2 The respondent to this application for leave to appeal, Brookfield Multiplex Constructions Pty Ltd ('Multiplex'), seeks orders for security for its costs of the application and any appeal.

3 The appeal that is sought to be brought is from a judgment of a judge in the Trial Division[1] dismissing the claim of the applicant Façade Treatment Engineering Pty Ltd (in liquidation) ('Façade') for judgment under s 16 of the *Building and Construction Industry Security of Payment Act 2002* ('the Act') in respect of two payment claims Façade made between August and September 2012, Payment Claims 18 and 19.[2] Multiplex made a part payment in response to Payment Claim 18 but did not pay the balance and served no payment schedule under s 15 of the Act. No part of Payment Claim No 19 was paid.

4 There was a dispute as to whether an email sent by Multiplex on 5 October 2012 satisfied the requirements of a payment schedule pursuant to s 15 in respect of Payment Claim No 19. The judge held that it did[3] and therefore that Façade was not entitled to judgment in respect of Payment Claim No 19.[4] With respect to Payment Claim No 18, Multiplex failed to provide the relevant payment schedule within the prescribed time,[5] and thus *prima facie* became liable, under s 16 of the Act, to pay the balance of the amount claimed. Multiplex argued that, to the extent that Façade had any entitlement to a judgment under s 16 of the Act, it (Multiplex) was entitled to set

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1 *Façade Treatment Engineering v Brookfield Multiplex Constructions* [2015] VSC 41 ('Reasons').

2 Payment Claim 18 dated 23 August 2012 for the sum of $1,089,403 (plus GST) and Payment Claim 19 dated 27 September 2012 in the sum of $539,347 (plus GST). Multiplex made a part payment of $598,155.80 towards Payment Claim No 18 leaving a balance of $600,187.50 (inclusive of GST).

3 Reasons [35].

4 Ibid [39].

5 Ibid [23].

off its claims under the underlying building contract under s 553C of the *Corporations Act 2001* (Cth).[6] The judge held that, although Façade satisfied the requirements of s 16 of the Act to establish its entitlement to payment, and although s 16(4) precludes cross-claims, s 16 was inconsistent with s 553C of the *Corporations Act* and therefore was invalid to that extent by virtue of s 109 of the *Constitution*.[7] Façade seeks to appeal against the trial judge's finding that s 553C applied in the circumstances of the present case, and the conclusion that, to the extent that it did, it operated to exclude the operation of s 16 of the Act.

5 The trial judge's judgment was given on 24 February 2015. Façade filed the documents necessary to institute its application for leave to appeal, including its written case and list of authorities, on 26 March 2015. Thereafter, Multiplex filed its materials, including a notice of contention, on 24 April 2015. The notice of contention asserts that the Act is properly construed as operating only when a claimant is a going concern. Also, starting on 8 April 2015, the solicitors for Multiplex sent correspondence to Façade's solicitors seeking information as to how Façade proposed to pay Multiplex's costs of the trial and any costs orders made against Façade on the appeal. Multiplex indicated that it would seek security for its costs of the appeal in a letter dated 13 May 2015, and made an application the following day.

6 Multiplex relies on an affidavit sworn 13 May 2015 by Grant James Ahearn. Mr Ahearn deposes to the fact that Façade was wound up by the Supreme Court of Victoria on 6 February 2013 and that, as appears from Australian Securities and Investments Commission Form 524 lodged by the liquidator on 9 February 2015, only $12,320.90 is held in the liquidation and the liquidator expects no dividend to be paid to any class of creditors. Security is sought in the amount of $83,742.86, being an estimate of the costs of the appeal on scale, based on Mr Ahearn's experience as a solicitor and estimates obtained from counsel.

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6 Ibid [55].

7 Ibid [83].

7 Façade resists the application and relies for that purpose on two affidavits. By affidavit sworn 22 May 2015, John Stuart Potts, liquidator of Façade, deposes that Façade does not have the benefit of any litigation funding from a commercial litigation provider but has received $50,000 towards the costs of prosecuting the appeal from one of its creditors. Those funds have largely been spent pursuing the application for leave to appeal and will not be sufficient to enable Façade to provide for the security that is sought. Mr Potts states that the liquidation of Façade occurred as a direct result of the failure of Multiplex to pay the amounts claimed under the Act which were the subject of the proceeding below.

8 Philip Eric Fox, by affidavit sworn 25 May 2015, gives evidence of an opinion by Ariel Weingart, a costs consultant, as to the amount of security estimated by Mr Ahearn and claimed by way of security in the application.

9 The application for security is based on the inability of Façade to meet a costs order against it if it is unsuccessful in the proceeding. Multiplex relies on r 64.38 of the *Supreme Court (General Civil Procedure) Rules 2005* ('the Rules'), s 1335 of the *Corporations Act 2001*, and the inherent powers of the Court. Multiplex submits that the application for leave to appeal has no prospect of success, on the basis that the trial judge correctly determined the legal issues, or alternatively that the contention in its notice of contention should be upheld. Multiplex says that the impecuniosity of Façade is established and that the application for security for costs has been brought promptly, Façade having been put on notice of such an application on 8 April 2015. Multiplex says further that the proceeding only concerns interim rights under the Act and that, if the appeal is stayed, there is no substantial prejudice to Façade as it is still free to pursue its claims in proceedings brought outside the Act. Multiplex denies that its conduct has caused Façade's impecuniosity and invites the Court not to accept the liquidator's opinion that non-payment of Payment Claims 18 and 19 caused Façade's liquidation.

10 Façade submits that Multiplex's application is very belated and should be dismissed for that reason alone. Façade submits that the appeal has real prospects of

success and that to order security for costs would be oppressive because it would stifle Façade's reasonably arguable claim. Façade relies on the evidence of Mr Potts (already referred to) and contends the Court is not in a position to reach any different conclusions as to the cause of Façade's liquidation.

11 The power of the Court to order security for costs, whether under s 1335 of the *Corporations Act* or r 64.38 of the Rules, involves an exercise of discretion. Although the discretion is unconfined, factors which have been identified as relevant to its exercise include the prospects of success of the appeal, the extent of the risk that a costs order would not be satisfied, whether the making of the order would be oppressive in that it would stifle a reasonably arguable claim, whether any impecuniosity of the appellant arises out of the conduct complained of and whether there are aspects of the public interest which ought to be weighed in the balance.[8]

12 It is not in issue that Façade is impecunious and, on the available evidence, would not be in a position to meet a costs order if it was unsuccessful in its application for leave to appeal, and any appeal. There is also no reason to expect that Façade would be in a position to provide any meaningful security that might be ordered. The admitted impecuniosity of Façade is clearly a matter that weighs heavily in favour of granting the application for security.

13 At the same time, however, the liquidator of Façade has deposed that the liquidation itself and therefore, to a significant extent at least, the impecuniosity of Façade upon which any successful application for security would depend, was caused by the refusal of the claims which are the subject of the proceeding below. Although Mr Roberts QC, who appeared for Multiplex, urged the Court not to accept this opinion, on the basis that Façade has creditors in the total amount of some $4.2 million, the Court is not in a position to make its own finding on this point. I would therefore rely on the evidence of the liquidator for the purposes of this application. In those circumstances, the impecuniosity of Façade is of less

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8 *Maher v Commonwealth Bank of Australia* [2008] VSCA 122, [80] (Dodds-Streeton JA, with whom Redlich JA agreed).

weight than might otherwise have been the case.

14 Further, I am not convinced that the prospects of success of the appeal are as low as Multiplex submits. The trial judge indicated, in refusing to make a special costs order after handing down judgment, that the questions posed had been 'quite difficult' and that the answers to them were 'not self-evident'. In the circumstances, it can be concluded that Façade seeks to bring before the Court on appeal a genuinely arguable question of law. Further, it is a question of considerable public importance and Mr Roberts properly conceded that this was so. If, as Multiplex submits, the operation of the Act is excluded in circumstances where a claimant is in liquidation (or is not a going concern), this is a significant matter for the operation of the Act and for the building industry in Victoria more generally, as Mr Upjohn QC, who appeared for Façade, emphasised.

15 Multiplex points out, correctly, that the failure of Façade's claims under the Act will not preclude Façade pursuing those claims in other civil proceedings. However, this is a matter to which little weight can be attached. If Façade has a valid claim under the Act, there is no reason why it should be put to the trouble and expense of litigating that claim afresh. Nor would such a result be consistent with the policy of the Act.

16 Another element in the exercise of the Court's discretion concerns the timing of Multiplex's application. No application for security was made when the matter was at trial, nor was such an application made, or foreshadowed, at any time before the filing of the application for leave to appeal. Of course, no application could have been made before the time of the application for leave to appeal. However, Façade was in liquidation before the proceeding commenced.

17 On 6 February 2013 Efthim AsJ ordered Façade to be wound up in insolvency under the provisions of the *Corporations Act* and Façade was placed in liquidation.[9]

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[9] Reasons [13].

The proceeding in the Trial Division was commenced on 26 September 2014.[10] Multiplex was therefore on notice of Façade's potential impecuniosity well before it foreshadowed making an application for security. The circumstances in which the parties now find themselves is that an application has been brought only after all the documents necessary for the conduct of the appeal have been prepared and filed. No criticism is to be made of the parties' conduct of the matter in this respect. However, ordering security at this stage would mean that preparation of the matter for hearing by the Court had been futile. In *Smail v Burton*,[11] Gillard J (with whom Newton and Norris JJ agreed) said:

> If an appellant has expended sums of money preparing the appeal for hearing and all the matters necessary to be performed have already been performed and the appeal is ready for hearing, it would be patently unjust to permit a respondent who stood by and allowed the work to be done to come to court and to ask for security after such expenses have been incurred. Accordingly, it is well established by authority that applications for security for costs should be made promptly and before considerable expense is incurred by the appellant.[12]

18 These observations must now be read in light of two changes in procedure. First, an applicant for security for costs on appeal is no longer required to establish 'special circumstances', as r 64.24(2) formerly required. Secondly, since an applicant for leave to appeal is now required to file a written case at the time of applying for leave, a successful party at trial first learns of the making of an application for leave to appeal only after all the written materials required for the appeal have already been prepared. Nonetheless, the risk of wasted expenditure on an appeal, of which Gillard J spoke in *Smail v Burton*, still exists. In cases where the impecuniosity of a prospective applicant for leave to appeal is known to the successful party at trial, it will often be unjust to allow that party to stand by and take steps towards seeking security only after the unsuccessful party has performed the work necessary to

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10 Ibid [14].

11 [1975] VR 776.

12 Ibid 777.

prepare the appeal for hearing. In this regard, Gillard J made it clear that he was relying, not on delay on the part of the applicant for security, but on the fact that preparation for the appeal was complete.[13]

19 By virtue of the importance of the issues sought to be raised on appeal, the evidence as to the role played by the conduct of Multiplex in bringing about the liquidation of Façade on which it seeks to rely, and the expense to which both parties have already gone in preparing the appeal (in Façade's case without notice of any potential application for security), I would refuse the application.

TATE JA:

20 I agree with McLeish JA, for the reasons he gives, that the application for security for costs should be dismissed.

21 (Discussion re costs.)

22 (Discussion re orders.)

23 With respect to the application made by Multiplex for security for costs, the Court orders that:

(1) The application for security for costs is dismissed.

(2) The applicant (Multiplex) pay the respondent (Façade) the costs of the application save for the costs of the appearance today.

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[13] Ibid 779.