



CONSTRUCTION | DECEMBER 2023

## VICTORIAN COURT OF APPEAL – SECURITY FOR COSTS DECISION

The HFW Construction team was successful before the Victorian Court of Appeal representing the Second Respondent in *VM Romano v BCG* [2023] VSCA 312 (8 December 2023).

On 1 December 2023, the Victorian Court of Appeal refused to grant leave to a prospective Appellant seeking to set aside an order for security for costs granted by the County Court of Victoria.

The decision reaffirms the general applicability of the principle in *Bell Wholesale Co Pty Ltd v Gates Export Corp (No 2)* (1984) 2 FCR 1 ('*Bell Wholesale*')— those who seek to benefit from litigation should bear the risk where the plaintiff cannot provide security for costs. In this instance, the Applicant – head contractor – sought to persuade the Court to distinguish *Bell Wholesale* on the basis that it was acting altruistically by bringing a pass-through claim for the ultimate benefit of the Owners Corporation, as opposed to for its members and officeholders. It argued that this altruism, along with the current cladding crisis faced by the construction industry, rendered the proceedings an exceptional case of an impecunious plaintiff.

In rejecting the Applicant's submissions, the Court held that:

1. The abovementioned principle in *Bell Wholesale* is not confined to officers and shareholders. It may even extend so far as to capture any person for whose benefit litigation is being conducted.
2. It cannot be contended that, in applying *Bell Wholesale*, the primary judge neglected to consider factors other than the Applicant's failure to establish that those standing behind it are without means. The lower court appropriately treated this as but one factor.
3. The lower court made no error in describing the Applicant's prospects as 'neutral'. It aptly referred to the Applicant's success as 'not an inevitably' in circumstances where:
  - a. the potential outcomes in terms of apportionment were unclear; and
  - b. the case upon which the Applicant sought to rely to establish its prospects by analogy, *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436T* [2021] VSCA 72, did not involve a glazing subcontractor (as in the instant case).
4. The Applicant had not satisfied the requirements to challenge the exercise of judicial discretion namely:
  - a. establishing any error of the kind in *House v The King* (1936) 55 CLR 499; and
  - b. showing that substantial injustice will be done if the ruling remains uncorrected.

HFW Australia represented the Second Respondent in this case. A link the judgment can be located [here](#).

For more information, please contact the authors of this alert



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