SAN SEBASTIAN PTY. LIMITED

v.

MINISTER ADMINISTERING THE ENVIRONMENT PLANNING AND ASSESSMENT ACT, 1979 and THE COUNCIL OF THE CITY OF SYDNEY

BROUGHAM INVESTMENTS PTY. LIMITED

v.

MINISTER ADMINISTERING THE ENVIRONMENT PLANNING AND ASSESSMENT ACT, 1979 and THE COUNCIL OF THE CITY OF SYDNEY

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v.

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SEBASTIAN PROPERTIES PTY. LIMITED

v.

MINISTER ADMINISTERING THE ENVIRONMENT PLANNING AND ASSESSMENT ACT, 1979 and THE COUNCIL OF THE CITY OF SYDNEY

ORDER

Order that the appellants give security for the costs of each of the respondents of these appeals in the amount of $18,000 for each respondent. Such security to be given on or before 19th January 1984 either by payment into court or by the lodgment in court of a bond, in a form to be approved by the Registrar or the senior Deputy Registrar, furnished by a bank or by such insurance company as may be approved by the Registrar or the senior Deputy Registrar.

Costs of the applications will be costs in the appeals.

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SEBASTIAN PROPERTIES PTY. LIMITED

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The respondents to these four appeals seek orders for additional security to cover the costs not only of the appeals to this Court but also of the respondents' costs in the courts below which have not yet been taxed and paid. The applications are based on the ground that the appellants are without any substantial assets except the cause of action which they are seeking to enforce in these proceedings. Indeed, it is conceded that the appellants are unable to pay their debts as they fall due and that they suffer from a serious deficiency of assets as against liabilities.

According to the affidavit evidence before me, the trial before Ash J. occupied seventy-one hearing days, resulting in the entry of judgments for the appellants in the four actions for the sums of $745,248, $602,497, $32,628 and $34,550 respectively. The respondents' appeals to the Court of Appeal occupied seventeen hearing days and resulted in the allowance of the appeals, the setting aside of the judgments for the appellants and the substitution of judgments for the respondents. The appellants were ordered to pay the costs of the respondents of the proceedings at first instance and on appeal, the appellants obtaining a certificate under the Suitors' Fund Act. It is estimated that the appeals to this Court, if heard in their entirety, will occupy a five-day hearing. The first respondent estimates its party and party costs as follows:

(a) At first instance $150,382.

(b) In the Court of Appeal $83,827.

(c) In the appeal to this Court $26,553.

The second respondent says that its actual costs and disbursements at first instance and in the Court of Appeal were $263,000 and estimates its costs and disbursements in this Court at $23,154.20.

In the four actions which have given rise to these appeals the appellants claimed that the respondents were liable to them in damages for negligence in connexion with the Woolloomooloo Redevelopment Study. Each of the appellants acquired property in the Woolloomooloo area which it proposed to develop at a profit. Instead each

appellant made a loss and this, it is claimed, was due to the negligent preparation or publication of the Study which ultimately governed the permissible development in the area. The primary judge held that the respondents were liable to the appellants for the negligent preparation of the Study in accordance with the principle of Donoghue v. Stevenson [1932] A.C. 562. He also held that the respondents were liable to the appellants for negligent publication of the Study in accordance with the principle of Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] A.C. 465. The Court of Appeal rejected the primary judge's findings on both counts. The appeals to this Court call in question that rejection and the questions thereby raised are questions of considerable general importance.

The impecuniosity of the appellants is not a newly acquired quality. It was a quality or disability that afflicted them at the commencement of the actions and it led to the making of an order for security in the sum of $3,000 before the actions came on for trial. It leads to the inescapable inference that the appellants' costs at first instance and in the Court of Appeal have been financed either by the appellants' creditors or by other developers in the Woolloomooloo area interested in bringing similar actions against the respondents. Indeed, it is suggested that the pending appeals will determine authoritatively the respondents' liability to developers in the area. In this sense the appeals are a test case.

It is convenient to consider first the claim for security in respect of the costs in the courts below.

There is, at the outset, a question whether Order 70, rule 9 authorizes the making of an order for security in respect of unpaid costs in the courts below. Rule 9(1) speaks of "security in the sum of One hundred dollars unless otherwise ordered for the prosecution of the appeal without delay and for the payment of costs that may be awarded against the appellant". The reference to costs appears to refer to costs that may be awarded by this Court, not to costs that have already been awarded by the Court of Appeal in respect of proceedings in the courts below. If this Court were to dismiss the four appeals with costs, the costs in the courts below would be governed by the order for costs already made in the Court of Appeal, an order that does not seem to answer naturally the description contained in rule 9(1). I am therefore inclined to the view that the rule does not authorize an order for security in respect of the costs at first instance and in the Court of Appeal.

If, contrary to the view which I have expressed, rule 9(1) extends to the making of the order sought, I would not exercise the power in the present case. The inability of the respondents to satisfy the existing orders for costs against the appellants is the natural outcome of the proceedings in the lower courts, the respondents having failed to obtain security for costs in a sufficiently large amount to cover a substantial portion of their costs at first instance. In my opinion it would not be appropriate for this Court to condition the appeals to this Court on the provision of security for costs in the lower courts, more particularly when it appears that the appellants are

impecunious and the imposition of the condition may effectively deprive the appellants of their right of appeal. I am reinforced in this view by the inability of counsel to refer me to any case in which an appellate court has ordered security for unpaid costs in the courts below.

The remaining question is whether additional security, over and above the nominal figure of $100, should be ordered in respect of the costs of the pending appeals in this Court. As rule 9(1), like rule 10, confers a discretion on the Court, the inability of an appellant to meet the costs of an unsuccessful appeal is only a factor to be considered in the exercise of that discretion in the light of all the circumstances (D.J.E. Constructions Pty. Ltd. v. Maddocks (1981) 38 A.L.R. 185; Lucas v. Yorke (unreported - judgment delivered by Brennan J. on 15th November 1983)); it is not a bar to the respondents' application. It is, however, an important consideration that the making of an order for security will effectively exclude an appeal, especially when the appellants' cause of action the subject of the appeal is to recover losses which have caused the appellants' impecuniosity - see Farrer v. Lacy, Hartland & Co. (1885) 28 Ch. D. 482, at p. 485 - and the question of law sought to be resolved is of public importance.

None the less the importance of the question of law is but one factor to be taken into account along with the necessity to do justice as between the parties. It does not conform to acceptable standards of fairness that the appellants should be permitted to litigate a difficult question of law against public authorities at great expense

to them when they have no prospect of recovering costs against the appellants, especially when it appears that the outcome of the case will provide an authoritative guide to other plaintiffs who have been affected in like manner by the alleged acts and omissions of the respondents. Moreover, the evidence before me indicates that the appellants' impecuniosity is by no means solely attributable, if attributable at all, to the respondents. To judge from the history of the appellants, particularly San Sebastian Pty. Ltd., impecuniosity has been a congenital condition. At no time have their finances been sufficient to meet the costs that might be awarded against them, as well as their own costs, in litigation as large and complex as these proceedings have proved to be.

The final matter to be mentioned is that the making of an order for security will not in my opinion shut out those appeals if the appellants decide that their prospects of success are sufficiently good to justify further prosecution of them. As I have said, other interested persons have evidently financed the appellants' conduct of the proceedings to this stage. There is strong ground for thinking that finance for security for costs will be forthcoming from the same or similar sources.

In the course of argument a number of authorities were drawn to my attention, most of them being decisions on provisions authorizing the making of an order for security for costs against plaintiff companies which on the evidence are likely to be unable to pay the costs of defendants. I doubt whether these decisions throw much

light on how the general discretion to order security under rule 9 should be exercised by this Court. Nevertheless the more recent decisions demonstrate that the courts have been insistent on maintaining the breadth of the discretionary power given to them by the statute and at pains to resist suggestions that the discretion should be exercised according to restrictive prima facie rules - see, for example, Buckley v. Bennell Design and Constructions Pty. Ltd. [1974] 1 A.C.L.R. 301; National Bank of New Zealand Ltd. v. Donald Export Trading Ltd. (1980) 1 N.Z.L.R. 97, at pp. 100-102; Parkinson & Co. Ltd. v. Triplan Ltd. [1973] Q.B. 609. I merely make the comment that in the case where security is sought against a plaintiff company of which there is reason to believe that it will be unable to pay the defendant's costs there was stronger ground for thinking that prima facie an order for security should be made. Yet the later decisions appear to deny the existence of any prima facie rule to that effect, though conceding that inability to pay is a substantial factor in the exercise of the discretion.

In the result I have come to the conclusion that an order for security should be made. As the appeals will be heard together I shall make the following order in respect of the four appeals:

> Order that the appellants give security for the costs of each of the respondents of these appeals in the amount of $18,000 for each respondent. Such security to be given on or before 19th January 1984 either by payment into

court or by the lodgment in court of a bond, in a form to be approved by the Registrar or the senior Deputy Registrar, furnished by a bank or by such insurance company as may be approved by the Registrar or the senior Deputy Registrar.

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IN THE HIGH COURT OF AUSTRALIA

SAN SEBASTIAN PTY. LIMITED AND OTHERS

v.

MINISTER ADMINISTERING THE ENVIRONMENT PLANNING AND ASSESSMENT ACT, 1979 and THE COUNCIL OF THE CITY OF SYDNEY

(4 Matters)

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY
on 19th December 1983.

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