VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. R200/2012

CATCHWORDS

Retail lease of premises for gymnasium and fitness academy; Business operated by a related company which was not the leasee and not the Applicant; Applicant's claim for damages for breach of lease based upon losses incurred by a related party dismissed; Respondent's application for costs under s 92 *Retail Leases Act 2003*; Whether proceeding conducted vexatiously and caused unnecessary disadvantage; Whether Respondent entitled to indemnity costs; Applicant to pay Respondent's costs on a solicitor and client basis assessed according to County Court Scale applicable at relevant time.

APPLICANT	24 Hour Fitness Pty Ltd (ACN 080 352 334)
RESPONDENT	W & B Investment Group Pty Ltd (ACN 127 810 691)
WHERE HELD	Melbourne
BEFORE	Judge Jenkins, Vice President
HEARING TYPE	Hearing
DATE OF HEARING	6 March 2015
DATE OF ORDER	17 April 2015
CITATION	24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd (Costs) (Building and Property) [2015] VCAT 596

ORDER

The Applicant pay the Respondent's costs of the proceeding subsequent to 22 August 2013, to the extent that such costs relate to the preparation for and the hearing of the Applicant's application for damages, such costs to be assessed by the Costs Court, in default of agreement, on the relevant County Court Scale applicable at the time when the costs were incurred and in each case on a solicitor and client basis.

Judge Jenkins
Vice President

APPEARANCES:

For Applicant	Mr C. Northrop of Counsel, instructed by Goldsmiths Lawyers
For Respondent	Mr J. Searle of Counsel, instructed by M + K Lawyers

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REASONS

NATURE OF APPLICATION

1 The Applicant is the tenant and the Respondent is the landlord of premises situated at 276 Russell Street, Melbourne (the 'Premises').

2 This proceeding was listed before the Tribunal on 2 March 2015 for an anticipated 5 day hearing to assess the Applicant's claim for damages by way of loss incurred consequent upon the Respondent's prior failure to comply with Clause 22.1 of the Lease.

3 On the first day of the hearing Robert Hornsey, a director of the Applicant, gave sworn evidence that the business is conducted from the Premises by Australian Institute of Fitness (Vic & Tas) Pty Ltd ('AIF') and the Applicant does not in fact conduct any business at the Premises or anywhere else.

4 In consequence, upon application by the Respondent, I agreed that there was a threshold issue to be determined, namely, whether the Applicant had standing to claim by way of damages, the loss that AIF alleges it has suffered.

5 Upon hearing oral and written submissions of the parties, I gave oral reasons why the Applicant's claim for damages, as pleaded, must be dismissed, with written reasons delivered on 6 March 2015.

6 The Respondent now applies for costs of the proceeding to date, to the extent that such costs related to the hearing on 12 August 2013, to determine whether the Respondent had breached Special Condition 22.1 of the lease, and the hearing on 2 and 3 March 2015, concerning the Applicant's consequential claim for damages.

RELEVANT LEGISLATION CONCERNING COSTS

7 Section 109 of the *Victorian Civil and Administrative Tribunal Act 1998*, (the 'VCAT Act') clearly prescribes the general rule in proceedings before the Tribunal that each party bears their own costs. Nevertheless, the Tribunal may order a party to pay all or a specified part of the costs of another party, but only if the Tribunal is satisfied that it is fair to do so having regard to the matters set out in subsection (3).

8 In the case of proceedings concerning a retail lease dispute, the question of costs is determined by s 92 of the *Retail Leases Act 2003*, which provides as follows:

> 92. **Each party bear its own costs**
>
> (1) Despite anything to the contrary in Division 8 of Part 4 of the *Victorian Civil and Administrative Tribunal Act* 1998, each party to a proceeding before the Tribunal under this part is to bear its own costs in the proceeding.

(2) However, at any time the Tribunal may make an order that a party pay all or a specified part of the costs of another party in the proceeding, but only if the Tribunal is satisfied that it is fair to do so because –

(a) the party conducted the proceeding in a vexatious way that unnecessarily disadvantaged the other party to the proceeding; or

(b) the party refused to take part in or withdraw from mediation or other form of alternative dispute resolution under this part.

(3) In this section, **costs** includes fees, charges and disbursements.

9 Accordingly, before the Tribunal can award costs in a retail tenancy dispute it must be satisfied that the Applicant 'conducted the proceeding in a vexatious way that unnecessarily disadvantaged the other party to the proceeding'.

RELEVANT CASE LAW

10 The Tribunal was referred to the following cases:

a. In *Attorney-General (Vic) v Wentworth*,[1] Roden J said:

> Proceedings are vexatious if they are instituted… If they are brought… if, irrespective of the motive of the litigant, they are obviously untenable or manifestly groundless as to be utterly hopeless.

b. The above case was also referred to in *Bradto's*[2] case, where His Honour Judge Bowman considered the operation of s 92(2):

> I am also of the view that, pursuant to the frequently cited test in Oceanic Sunline, a proceeding is conducted in a vexatious manner if it is conducted in a way productive of serious and unjustified trouble or harassment, or if there is conduct which is seriously and unfairly, prejudicial or damaging. A similar approach was adopted by Gobbo J in J & C Cabot, although it could be said that the tests there set out relate more to the bringing of or nature of the proceeding in question, rather than the manner in which it was conducted… This is to be contrasted with the wording of s 92 which specifically refers to a proceeding being 'conducted… in a vexatious way.'

11 In its discretion, the Tribunal may order that costs be paid on a standard or indemnity basis. However, it is well settled that an order for indemnity costs will only be made by the Tribunal in the most exceptional circumstances.

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1 (1988) 14 NSWLR 481.

2 *State of Victoria v Bradto Pty Ltd (Palace Entertainment Complex) and Tymbook Pty Ltd (Palais Theatre)* (Retail Tenancies Costs Ruling) [2006] VCAT 1813 (1 September 2006) at [67].

12 In *Colgate-Palmolive Company and Colgate-Palmolive Company Pty Ltd v Cussons Pty Ltd*,[3] Sheppard J, after agreeing that the categories in which the discretion may be exercised are not closed, then enunciated some of the circumstances where orders could be made, including:[4]

> Evidence of particular misconduct that causes loss of time to the Court and to the parties…The fact that proceedings were commenced or continued for some ulterior motive or in wilful disregard of known facts or clearly established law…The making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions…
>
> The question must always be whether the particular facts and circumstances of the case in question warrant the making of an order for payment of costs other than on a party and party basis.

13 In *Connor v Western*,[5] Ashley J had to consider whether costs should be awarded on a solicitor and client basis. His Honour noted that:

> … Various circumstances which have characterised occasions upon which the "special" or "exceptional" order for solicitor and client costs has been made are present in this proceeding. Thus, conduct by a party which is unmeritorious, deliberate, high-handed or otherwise improper. So also, commencement or pursuit of allegations which are without a chance of success - this implying an ulterior motive, or otherwise wilful disregard of the facts or clearly established law.[6]

14 In *Ugly Tribe Co Pty Ltd v Sikola & Ors*,[7] Harper J, in considering whether to award indemnity costs, said:

> In seeking costs on an indemnity basis, the first defendant is asking the court to depart from its usual course: Spencer v Dowling. Special circumstances must be present to justify such departure: Australian Electoral Commission v Towney (No 2). These include:
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> …
>
> (iii) Conduct which causes loss of time to the court and to other parties…;
>
> (iv) The commencement or continuation of proceedings for an ulterior motive…;
>
> (vi) The commencement or continuation of proceedings in wilful disregard of known facts or clearly established law…;
>
> (vii) The failure until after the commencement of the trial and without explanation to discover documents, the timely discovery of which would have considerably shortened or very possibly avoided the trial…

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3 [1993] FCA 536.
4 At [24] on p 11.
5 Unreported VSC No 1300 of 1995, 14 November 1996.
6 At p 10, lines 14-21 Transcript 14/11/96.
7 (2001) VSC 189 at [7].

15 I have selected the special circumstances above as most worthy of analysis in the current case.

16 Harper J did not find a sufficient basis for awarding indemnity costs, noting that:

> It seems to me that I could only accede to the first defendant's application for costs on an indemnity basis were I satisfied that the plaintiff in fact appreciated the hopelessness of its position. There is no direct evidence that it did. The first defendant asked me to draw the necessary inference. I do not think that I can do so, although I have some sympathy with the first defendant's position. The courts are daily faced with examples of surprising ignorance. It seems to me at least as likely that this was the reason for the launching of this proceeding as the hypothesis that the plaintiff sought to gain an illegitimate advantage from doing so.[8]

17 In my view, the observations made by Harper J may justify a different result in the current case. I will return to this matter shortly.

18 In *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw No 651 Pty Ltd*,[9] Nettle JA observed:

> I also agree ... that where an order for costs is made in favour of the successful party in a domestic building list proceeding, the costs should ordinarily be assessed on a party/party basis ... Of course there may be occasions when it is appropriate to award costs in favour of the successful client in domestic building proceedings on an indemnity basis. Those occasions would be exceptional and, broadly speaking, circumscribed by the same criteria as govern the award of indemnity costs pursuant to Rule 63.28(c) of the *Supreme Court (General Civil Procedure) Rules* 1996.

19 The circumstances in which an order for indemnity costs might be made were considered by the Tribunal in *Milankovic v Binyun Pty Ltd and Ors.*[10] In refusing an application for indemnity costs, Lothian SM referred to *Sholl Nicholson Pty Ltd v Chapman (No 2)*[11] and summarised the matters Balmford J set out to be taken into account when considering whether to order indemnity costs:

> i. Whether a party has been forced to take legal proceedings entirely through the wrongful or inappropriate conduct of the other party;
>
> ii Whether an action has been commenced or continued in circumstances where the applicant, properly advised, should have known he had no chance of success;
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> iii Where a party persists in what should, on proper consideration, be seen to be a hopeless case;

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8 At [18].
9 [2005] VSCA 165 at [91-92].
10 [2010] VCAT 538 at [26].
11 2001 VSC 462.

iv Whether the party against whom indemnity costs are sought has made a false allegation of fraud;

v Particular misconduct that causes a loss of time to the Court and the parties;

vi Commencing or continuing proceedings for an ulterior motive or in wilful disregard of known facts or clearly established law;

vii Making allegations which ought never to have been made or undue prolongation of a case by groundless contentions, and

viii An imprudent refusal of an offer of compromise.

20 For the reasons set out below, I am satisfied that the matters outlined above at sub-paragraphs ii, iii, v, vi, and vii are present in this case.

RESPONDENT'S CASE AND APPLICANT'S RESPONSE

21 The Respondent submitted that the Applicant has conducted this claim in a vexatious manner in the following ways.

22 First, the Applicant issued its initial Points of Claim ('POC') nearly 4 years after the breach by which the Applicant subsequently claimed to have suffered loss, but did not make reference to such alleged losses in the initial Points of Claim.

23 In response, the Applicant sought to give some context to the Applicant's actions:

a. The issuing of the initial POC followed an unsuccessful attempt at mediation before the Small Business Commissioner in 2011;

b. The proceeding was initially commenced on the basis that the Respondent wrongfully refused to renew the lease; and

c. Only when this threshold issue had been determined in the Applicant's favour by His Honour Judge Macnamara, could the claim for damages proceed.

24 In my view, it was not unreasonable for the Applicant to defer pursuing its claim for damages until the question of whether the lease had been renewed had been determined.

25 Secondly, the Applicant issued the Amended POC more than four years after the breach which gave rise to the alleged losses and claimed that the Applicant had incurred losses with respect to operating expenses.

26 In my view, there can be no criticism made of the Applicant to issue a claim within the limitation period. I will come back to the Applicant's claim of operating losses.

27 Thirdly, the Applicant issued the Second Amended POC again stating that the Applicant had suffered losses with respect to increased operating expenses and the Table within the POC refers to the 'Applicant's costs'.

28 The Applicant conceded that the Amended POC and Second Amended POC should have referred to the Applicant's associated company AIF.

29 Fourthly, the Applicant failed to provide up-to-date particulars, as stated would be done, following service of the Second Amended POC and prior to the hearing.

30 However, the Applicant contends that the expert report of Mr McCann of 1 November 2013, provides such particulars and makes clear that the additional costs and loss of revenue was incurred by AIF.

31 In my view, the Applicant's reliance upon Mr McCann's report for this purpose is both unreasonable and inadequate. I will return to this matter shortly.

32 Fifthly, the Applicant failed to disclose to the Tribunal and the Respondent the fact that the Applicant conducted no business at the Premises and indeed no business otherwise.

33 In response the Applicant contends that Mr McCann's report clearly and unequivocally states that the business was operated by AIF and this was further confirmed in Mr Munday's report.

34 In my view, the position stated by the Applicant is untenable. I will return to this matter shortly.

35 Sixthly, the Applicant conducted the liability trial on the basis that the Applicant conducted the business at the Premises.

36 The Applicant rejected this assertion, contending that the trial was conducted on the basis that the Applicant had certain rights under the lease which had been breached.

37 In my view, the Applicant is correct to the extent that it was entitled to ascertain its rights under the Lease with regard to the operation of clause 22.1. However, there is no doubt that the Applicant did not, at any stage, disclose to the Tribunal during the liability hearing that a related company in fact conducted the business at the Premises.

38 Seventhly, the Applicant failed to provide any explanation of the claim following service of Mr McCann's report.

39 In response, the Applicant contends that the McCann report was quite specific in identifying that the business was conducted by AIF; the Applicant produced further documents in support of such business; and the Respondent's expert did not request any further explanation.

40 I will return to the expert reports shortly.

41 Eighthly, the Applicant failed to disclose to the Tribunal that it did not conduct any business or have any interest in the business conducted at the Premises when this issue was raised by the Respondent before the Tribunal.

42 In response, the Applicant merely stated that the Respondent was already aware of the status quo.

43 In my view, it is unreasonable to impute constructive knowledge to the Respondent merely on the basis that it has raised a concern or queried the business operation of the Applicant at the Premises. The Respondent has, at all times, dealt with the Applicant as the tenant under the Lease. There has been no formal request of the Respondent to consent to a sub-tenancy arrangement which identified AIF; and there has been no formal advice from the Applicant to the Respondent that the Applicant did not in fact conduct business at the Premises or that a business was conducted by a related company on its behalf.

44 Ninthly, the Applicant protracted the final hearing and exposure of this part of the Applicant's claim by multiple intervening adjournments and hearings in relation to other matters.

45 In response, the Applicant acknowledged that there was one adjournment in relation to quantum from February to March 2015. Delays were otherwise attributable to other causes. I concur with the Applicant on this point.

46 Tenthly, the Applicant caused affidavits sworn by Robert Hornsey to be filed and served in which he made no disclosure that the Applicant did not conduct the business and in fact expressly or impliedly stated that it did conduct the business.[12]

47 In response, the Applicant contends that Mr Hornsey is not a lawyer and has not had an opportunity to respond.

48 In my view, the response by the Applicant is unsatisfactory. In particular, the Applicant has failed to explain how Mr Hornsey, properly advised, when swearing an affidavit in his capacity as Director of the Applicant, could have failed to disclose that the business was in fact not being conducted by the Applicant.

49 Eleventhly, the Applicant alleged that the business and by inference the Applicant, required the Wheelers Hill premises by reason only that it lost the opportunity to lease additional space at Russell Street. In this regard the Respondent pointed out that the relevant lease for Wheelers Hill was entered into between parties other than the Applicant or AIF and while it was dated 24 March 2009, being after the date of the Respondent's breach, the relevant lease provides for a commencement date of 1 July 2007.

50 In response, the Applicant through its Counsel, merely refers to the date upon which the Wheelers Hill lease was signed as determinative of the Applicant's decision to lease Wheelers Hill following the lost opportunity to lease additional space at Russell Street.

51 In my view, the Applicant's evidence in this regard is unsatisfactory and tenuous at best. There has also been no effort to explain how the Applicant purports to rely upon a lease to which it is not a party.

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[12] Affidavit sworn 8/8/2012 at paras 47, 48 and 49, TB 15; Affidavit sworn 20/8/2012 at paras 35, 36 and 37, TB 28-9; Affidavit sworn 17/12/2012 at para 5, TB 34.

52 Twelthly, the Applicant, in its outline of the evidence for Mr Hornsey and Mr Corley, was, at best, vague and impliedly dishonest. I agree that the outline of evidence was, at best, vague.

53 Thirteenthly, the Applicant, through its Counsel, in the opening to the quantum trial failed to disclose the true position of the Applicant. I agree.

54 Finally, the Respondent contends that the overall manner in which the Applicant has conducted this proceeding may be described as a campaign of concealment constituting commercial fraud. In particular, the Respondent alleges that the Applicant has consistently filed documents, affidavits and given evidence by which the Applicant expressly or impliedly has been presented as the party operating the business at the Premises. In so doing, the Applicant's conduct was clearly unfairly burdensome, prejudicial and dishonest. It has brought and protracted the proceeding when its claim was obviously untenable or manifestly groundless as to be utterly hopeless. Accordingly it has conducted the proceeding in a vexatious way such as to warrant an award of costs in favour of the Respondent.

55 I will address this allegation below.

56 In relation to the Respondent's claim for indemnity costs, Applicant's Counsel vigourously denied any dishonesty by or on behalf of the Applicant and further stated that:

a. the Tribunal should not accept that the Applicant's claim had no prospect of success; and

b. the Respondent made no attempt to formally challenge the Applicant's claim prior to the hearing; and

c. the Respondent is now 'the unmeritorious beneficiary of the way in which the AIF business was conducted.'

57 In my view:

a. My reasons for dismissing the Applicant's claim for damages have been previously set out in written reasons delivered on 6 March 2015, which I will not repeat again here; suffice to say that I found no merit in any of the submissions made on behalf of the Applicant. Furthermore, the Applicant could not refer the Tribunal to any authority which supported its position in the circumstances of this case. The Applicant's claim for damages, where no loss could be demonstrated as having been incurred by the Applicant, can properly be described as 'obviously untenable or manifestly groundless as to be utterly hopeless'.

b. Respondent's Counsel submitted to the effect that a concern about the Applicant's standing and/or relationship with AIF had been previously raised at a Directions hearing when the Applicant's Counsel had responded to the effect that… 'we will deal with it'. There was no

basis for the Respondent, without further information, to formally challenge the Applicant's claim for damages prior to the hearing; and

c. The Applicant's claim for damages having been dismissed, the position in which the Respondent now finds itself, is entirely of the Applicant's own making. There can be no suggestion that the Respondent bears any responsibility for the following circumstances, namely:

   i. the Applicant leased the Premises, but did not have any role in the conduct of the business conducted at the Premises;

   ii. any losses allegedly incurred by AIF as a result of the Respondent's breach of the Lease cannot be attributable to the Applicant; and

   iii. prior to the recent hearing, the relationship between the Applicant and AIF, in regard to the business conducted at the Premises, has never been the subject of any affidavit from the Applicant or oral evidence before the Tribunal.

58 The Respondent seeks indemnity costs for the following reasons.

59 First, the Applicant's related company AIF has been operating a significant number of fitness training institutes[13] for many years. Accordingly, it may be inferred that when the Lease was first negotiated by the Applicant for the Russell Street premises it was always intended that the business would be conducted by AIF. The Applicant has been in breach of clauses 2.1.11, 4.7 and 7.1.7(a) of the Lease since its commencement by not operating the business itself but allowing another party to be in possession to operate its own business. This arrangement has never been formally disclosed to the Respondent and no approval for a sublease has been sought.

60 Secondly, the Applicant has brought and maintained its claim for damages in circumstances where it knew or ought to have known that such claim was unfounded in law or fact.[14]

61 In the *Fountain Selected Meats* case, Woodward J elaborated upon this ground as follows:[15]

> I believe that it is appropriate to consider awarding "solicitor and client" or "indemnity" costs, whenever it appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known that he had no chance of success. In such cases the action must be presumed to have been commenced or continued for some ulterior motive, or because of some wilful disregard of the known facts or the clearly established law.

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13 TB 285 and 289.

14 *Sunshine Retail Investments Pty Ltd v Wulff* [1999] VSC 454 at 17; *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397 at 401; *Hurstville Municipal Council v Connor* (1991) 24 NSWLR 724 at 735.

15 At 401.

> Such cases are, fortunately, rare. But when they occur, the court will need to consider how it should exercise its discretion.

62 The Respondent submits that the Applicant chose to conceal and or misrepresent the true state of affairs and the only explanation for doing so was an ulterior motive on its part in bringing the claim. Such motive is apparent in the context of serious allegations of breaches of the Lease by the Applicant and in pursuing its untenable claim for damages it was seeking to create a stronger negotiating position. Such improper motive was all the more aggravating by reason that the claim as, at 30 June 2012, was estimated in excess of $3 million and continuing.

63 The instructions to the Applicant's expert, Mr Michael McCann of Bedfords, included the following:[16]

> You are requested to undertake an assessment of the loss and damage suffered by the tenant and its associated companies as a consequence of the landlord failing to provide to the tenant the premises known as Shop 1 and Level 1, 27 Russell Street Melbourne… You are requested to prior your opinion as to the following:
>
> 1. Whether our client has suffered loss and damage … and if so how that loss and damage is to be quantified;
>
> 2. What are the losses sustained by our client to date as a result of not having been leased shop 1?
>
> 3. For each year that our client has been denied occupation of shop 1, what are our client's likely loss and damage moving forward?
>
> 4. What are the losses sustained by our client to date as a result of not having been leased the first floor?
>
> 5. For each year that our client has been denied occupation of the first floor, what are our client's likely loss and damage moving forward?

64 Other than the reference to 'and its associated companies' there is no indication in the letter of instructions as to what role, if any, an associated company performed in relation to the business and no indication as to the nature of any business relationship between the Applicant and any associated company.

65 The Applicant subsequently filed and served the expert report prepared by Mr McCann dated 1 November 2013, in which overall damages were assessed at $3,025,793. In his report, Mr McCann indicates that he has not audited or tested any of the documents provided to him. Accordingly, he does not express any opinion as to their accuracy or reliability. Mr McCann also notes:[17]

> 1.7 I have been engaged to provide an opinion as to whether the Applicant has suffered loss and damage as a consequence of the respondent failing to offer the premises, Shop 1 and First Floor

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16 TB 266, letter dated 10 September 2013 from Goldsmiths Lawyers to Mr Michael McCann.

17 TB 260 at para 1.7.

> of 276 Russell Street Melbourne. In particular I also note that while the tenant was 24 Hour Fitness Pty Ltd, the business operated from the premises was that of a related entity, Australian Institute of Fitness (Vic and Tas) Pty Ltd. Furthermore, I have been asked to express an opinion on losses individually for Shop 1 and the First Floor, as well as loss and damage carried forward.

66 Apart from the reference in the above paragraph 1.7 of his report, Mr McCann does not otherwise deal with the relationship between the Applicant and AIF.

67 Mr McCann assessed lost revenue of $2,816,404 up until 30 June 2012.[18] No loss of revenue claim has otherwise been made in any documents before the Tribunal and no updated particulars of loss and damage have ever been filed or served.

68 In the Appendices to Mr McCann's report, the following references are made:

a. Appendix C is headed with the names '24 Hour Fitness Pty Ltd & W&B Investment Group Pty Ltd' and includes under the heading 'Other documents viewed or supplied' a reference to AIF Rolling Sales Statistics. There is otherwise no identification as to whether financial records relate to the Applicant or relate entirely to its related company, AIF;

b. Appendix D comprises a letter from the Applicant's external accountant Alistair Hamblin in which he states that he 'acts as the external accountants for 24 Hour Fitness Pty Ltd and Australian Institute of Fitness (Vic and Tas) Pty Ltd.' Thereafter, reference to the two related companies appears to be used interchangeably, for instance:

> As a result of the landlord's failure to provide the Australian Institute of Fitness first option on the lease…

There is otherwise no clarification as to the business relationship between the two companies; and

c. Appendix E is headed 'Australian Institute of Fitness', while Appendices G and H are headed '24 Hour Fitness Pty Ltd & W&B Investment Group Pty Ltd'.

69 The McCann report is the first occasion when any reference to AIF was brought to the attention of the Tribunal. However, it otherwise, on its face, provides no information about any business relationship between the Applicant and AIF.

70 The Respondent instructed Russell Munday of Munday Wilkinson Pty Ltd to assess the McCann report and what loss if any had been suffered by the

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[18] TB 265 Table 3.1.

Applicant. In his report dated 12 March 2014, Mr Munday notes the following:

> The Applicants associated entity, Australian Institute of Fitness (Vic and Tas) Pty Ltd operates personal training and fitness courses. 276 Russell Street is one of six campuses operated in Victoria by the company.

FURTHER FINDINGS

71 The Applicant's claim for damages, based upon alleged losses incurred by AIF, was dismissed on the basis of the following findings.

72 I am satisfied that:

a. Up until the damages hearing and apart from the indications made in the McCann report, the claim for damages foreshadowed by the Applicant was on the basis that the Applicant conducted business at the Premises; and

b. There has been no documentation produced to the Tribunal which indicates any basis for a business relationship or common business enterprise or partnership between the Applicant and AIF or between the Applicant and any other related party.

73 I am not satisfied that the Applicant has proven:

a. any indicia of operating a business in partnership with AIF; or

b. any entitlement to claim the losses incurred by AIF as an associated company.

74 These findings are equally relevant to this costs application.

75 The Applicant has relied upon the McCann report as clearly disclosing the position of AIF. In my view, this contention is untenable for the following reasons:

a. Mr McCann was not giving a legal opinion as to the business structure of the Applicant and its associated companies or as to any business relationship between the Applicant and AIF or any other associated company;

b. The letter of instruction to Mr McCann, while asking him 'to undertake an assessment of the loss and damage suffered by the tenant and its associated companies…' goes on to refer, in a number of paragraphs, to losses sustained by 'our client';

c. The letter of instruction implicitly treats the Applicant and any associated company which may be involved in a business at the Premises, as one business operation; again, Mr McCann was not asked to opine upon this structure or such relationship;

d. Mr McCann was not instructed as to what, if any, contractual relationship of agency or sub-tenancy existed between the Applicant and AIF;

e. Mr McCann appears to have relied upon the instructions of the Applicant as to its involvement in the lease of Wheelers Hill, without having regard to the legal entities which in fact were the parties to the lease; and

f. Mr McCann purports to assess losses of AIF on the basis that, according to its accounts, it was operating the business at the Premises; the report does not and could not make any finding as to whether those losses could be legally imputed to the Applicant.

76 Equally, the Applicant cannot rely upon any statements made in the Munday report, which merely reflect the findings made by Mr McCann.

77 By reason of the factual circumstances described above and the findings made following the damages hearing, I am satisfied that the Applicant:

a. Commenced an action for damages, following the finding that the Respondent was in breach of the Lease, in circumstances where the Applicant, properly advised, should have known it had no chance of success;

b. Persisted in what should, on proper consideration, be seen to have been a hopeless case;

c. Engaged in conduct which caused a loss of time to the Tribunal and the Respondent;

d. Commenced a proceeding for damages in wilful disregard of known facts or clearly established law; and

e. Made allegations as to losses which it claimed to have incurred, which ought never to have been made.

78 In consequence, I am satisfied that the Applicant has conducted the proceeding in a vexatious way that has unnecessarily disadvantaged the Respondent. Accordingly, I am satisfied that the Respondent is entitled to an award of costs subsequent to the liability hearing, to the extent that such costs relate to the preparation for and hearing of the application for damages.

BASIS FOR AWARDING COSTS

79 The only question which remains is the basis for awarding such costs. The Applicant has conducted its application for damages in a manner which can be properly described, in the words of Ashley J, as 'unmeritorious, deliberate, high-handed or otherwise improper'. It failed to disclose material information about the basis upon which it sought to claim the losses of an associated company. At the same time, in its Amended Points of Claim and supporting affidavits, it claimed the alleged losses as its own.

In my view, this is an appropriate case in which to award damages on a solicitor and client basis, applying the County Court Scale.

80 I am reluctant to award damages on an indemnity basis, which are reserved for the most exceptional circumstances. The evidence given by Mr Hornsey at the damages hearing definitively confirmed that the Applicant did not conduct any business. However, there is insufficient evidence to justify an inference that the Applicant was motivated by an ulterior motive, namely, to use the threat of a very large damages claim to gain a better bargaining position in the disputes between the parties generally. The most that can be said is that the Applicant has failed to give any proper or reasonable explanation for its conduct.

81 The period during which relevant costs have been incurred by the Respondent traverse a change to the County Court Rules relating to costs.

82 The power to award costs in VCAT effectively incorporates the rules applying in the County Court. Amendments to the *County Court Civil Procedure Rules 2008* ('the Rules'), which became effective on 6 October 2014, repealed previous rules regarding orders to pay party and party costs, solicitor and client costs or costs on an indemnity basis, and replaced them with power to make an order for costs on a 'standard basis' or on an 'indemnity basis'.

83 The Rules still allow an order for costs to be taxed on a solicitor and client basis, although the 'standard basis' appears similar to the traditional 'solicitor and client' basis in any event. In this regard, I note as follows.

84 Part 3 of the County Court Rules is titled 'Costs of Party in a Proceeding'. Rule 63A.27 provides that Part 3 (comprising rules 63A.27 to 63A.31):

> applies to costs in a proceeding which by or under any Act or these Rules or any order of the Court are to be paid to a party to the proceeding either by another party or out of a fund.

85 Significantly, r 63A.28 provides that:

> Subject to this Part, costs in a proceeding which are to be taxed shall be taxed on—
>
> (a) a standard basis;
>
> (b) an indemnity basis; or
>
> (c) such other basis as the Court may direct. [emphasis added]

86 Accordingly, despite the introduction of the rules regarding 'standard basis' and 'indemnity basis', the Court retains discretion to make an order for costs to be taxed on 'such other basis as the Court may direct'. The same discretion extends to the Tribunal.

87 In *Bob Jane Corporation Pty Ltd (No 2)*,[19] Sifris J considered the equivalent provisions in r 63.28 of the Supreme Court Rules (on which r 63A.28 of the

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[19] [2013] VSCA 467, [9].

County Court Rules are based). His Honour observed that he could still make an order for 'party and party costs' under the new rules, by reliance on the 'such other basis' power in r 63A.28(c) of the Supreme Court Rules (equivalent to r 63.28(c) of the County Court Rules).

88 In any event, r 63A(30) provides that:

> On a taxation on a standard basis, all costs reasonably incurred and of reasonable amount shall be allowed.

89 This appears very similar, if not equivalent, to the traditional measure of 'solicitor and client' costs. Whereas 'solicitor and client' costs included all reasonable costs reasonably incurred, party and party costs were only necessary and proper costs. Furthermore, in *Gruma Oceania Pty Ltd v Bakar (No 2)*,[20] the Court observed:

> It can be seen from the above amendments to the Rules that from 1 April 2013: the usual basis of taxation became the standard basis; party and party costs and solicitor and client costs were deleted from r 63.28; and the former definition of solicitor and client basis was adopted for the definition of the standard basis. [footnote omitted]

90 Nevertheless, there appears no impediment to the Court [and in this case the Tribunal] making an order consistent with r 63A.38(c) for costs to be paid on a 'solicitor and client' basis.

91 The equivalent costs rules, and transitional arrangements, in the Supreme Court (General Civil Procedure) Rules 2008, have been held not to operate retrospectively.[21]

92 The transitional provision for the 2015 amendments is set out in r 63A.28. The regulation provides:

> For the avoidance of doubt, these Rules, as amended by the County Court (Chapter I Costs Amendment) Rules 2014, apply to all things done or required to be done or omitted to be done on or after 6 October 2014 in, or in relation to, any proceeding in the Court, including the Costs court (including all work and all amendments, applications and orders) regardless of the date of commencement of the proceeding.

93 In the *Bob Jane case,* Sifris J considered that the equivalent provision for the changes to the Supreme Court Rules meant that the changes had a prospective operation only.[22]

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20 [2014] VSCA 259, Neave, Santamaria and Kyrou JJA, [5].

21 See r 63A.28 of the County Court Rules; and *Bob Jane Corporation Pty Ltd (No 2)* [2013] VSCA 467, [6]-[8] interpreting equivalent provisions in the Supreme Court).

22 At [6] to [8]): "Everything done after 1 April 2013 is to be dealt with on the new scale. The fact that an order for costs is being made after 1 April 2013 is not sufficient to include or capture costs prior to 1 April 2013."

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94 Accordingly, I propose to order costs to be assessed under the County Court Scale applicable at the time when the costs were incurred, in each case on a solicitor and client basis.

Judge Jenkins
Vice President