VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP542/2017

CATCHWORDS

RETAIL LEASE: application by landlord for costs under s92 of the *Retail Leases Act 2003* (Vic); tenant's claim dismissed; Landlord's counterclaim succeeded.

APPLICANT	AZW International Pty Ltd ACN: 147 143 851
RESPONDENT/APPLICANT BY COUNTERCLAIM	N J Agius Pty Ltd ACN:006 686 443
SECOND RESPONDENT BY COUNTERCLAIM	Mr Jihong Zhong
THIRD RESPONDENT BY COUNTERCLAIM	Ms Minyuan Wang
FOURTH RESPONDENT BY COUNTERCLAIM	Mr Weijiang Wang
WHERE HELD	Melbourne
BEFORE	Senior Member L. Forde
HEARING TYPE	Costs Hearing
DATE OF HEARING	26 October 2018
DATE OF ORDER AND REASONS	31 October 2018
CITATION	AZW International Pty Ltd v N J Agius Pty Ltd (Costs) (Building and Property) [2018] VCAT 1716

ORDER

AZW International Pty Ltd's application for costs is dismissed.

L. Forde
Senior Member

APPEARANCES:

For Applicant and Second, Third and Fourth Respondents by counterclaim	Mr Virgonia of counsel
For Respondent	Mr Ridgeway of counsel

REASONS

BACKGROUND

1 On 31 August 2018, I made orders dismissing the applicant's claim and finding in favour of the respondent on its counterclaim in the sum of $60,248.72. Costs were reserved.

2 The respondent/applicant by counterclaim (**landlord**) has made an application for costs against the applicant (**tenant**) and the second to fourth respondents by counterclaim (**guarantors**).

3 The background facts are set out in my reasons dated 21 September 2018. The tenant issued the proceedings claiming the return of its bank guarantee. The landlord counterclaimed for damages for breach of lease. The main issue was whether the tenant had exercised an option to renew. The tenant said it had not exercised the option whereas the landlord maintained that it had. I found in favour of the landlord. As the option was exercised, the tenant was found to have repudiated the lease by vacating the premises. The landlord accepted the repudiation, terminated the lease and was awarded damages against the tenant and the guarantors under the lease.

GENERAL PRINCIPLES APPLICABLE TO COSTS APPLICATIONS UNDER SECTION 92

4 Section 109 of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* **(the Act)** empowers the Tribunal to make costs orders in certain circumstances.

5 Section 92 of the *Retail Leases Act 2003* (Vic) (**RLA**) overrides s109 of the Act. It provides:

> (1) Despite anything to the contrary in Division 8 of Part 4 of [the Act], each party to a proceeding before the Tribunal under [Part 10 of the *Retail Leases Act*] is to bear its own costs in the proceeding.
>
> (2) However, at any time the Tribunal may make an order that a party shall 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 withdrew from the mediation or other form of alternative dispute resolution under this Part.

6 The parties agree that section 92(2)(b) of the RLA is not relevant.

7 It follows, that if I am to order costs against the tenant, I must be satisfied that it is fair to do so, because I find that the tenant conducted the

proceeding in a vexatious way that unnecessarily disadvantaged the landlord.

Conducting the Proceeding in a Vexatious Way

8 In a much-quoted decision *Attorney-General (Vic) v Wentworth*,[1] Roden J stated:

> It seems to me that litigation may properly be regarded as vexatious for present purposes on either subjective or objective grounds. I believe that the test may be expressed in the following terms: -
>
> (a) proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought;
>
> (b) they are vexatious if they are brought for collateral purposes, and not for the purpose of having the Court adjudicate on the issues to which they give rise;
>
> (c) they are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless.

9 The relevant test was carefully considered by Vice President Judge Jenkins, in *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd*[2] where her honour concluded:

> 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 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

---

1 (1988) 14 NSWLR 481 at 491
2 [2015] VCAT 596

> hearing, to the extent that such costs relate to the preparation for and hearing of the application for damages.

10 In *24 Hour Fitness*, on an unsuccessful application for leave to appeal against the decision of Judge Jenkins, the Court of Appeal referred to these paragraphs with evident approval. On appeal[3] the applicant submitted that for the purposes of section 92 of RLA, it is the conduct of the party in the proceeding that is material, not a consideration of the strength of its claims as had been taken into account at first instance. The Court of Appeal rejected the submission stating:

> [28] The applicant's criticism does not take into account the Tribunal's detailed analysis of the 14 matters upon which the respondent relied as constituting vexatious conduct. As can be seen from what we have set out above, the Tribunal carefully considered each of those matters and made findings in respect of them. It is obvious that the Tribunal relied upon those findings in reaching the conclusion that the case was an appropriate one in which to order costs. True it is that the Tribunal also considered the hopelessness of the applicant's claim, but there is no error in that. The strength of the applicant's claim for damages was a relevant factor to take into account.
>
> [29] It would be artificial to attempt to evaluate the manner in which the proceeding was conducted by a party without having regard to the strength of that party's case. In the present circumstances, it was relevant [for the purpose of determining whether the applicant conducted the proceeding in a vexatious way] that the applicant pursued the damages claim, in circumstances that it was bound to fail.

Tenant's vexatious conduct

11 Counsel for the landlord submitted that the tenant had clearly and unconditionally exercised the option and identified eight factors to support. the submission. Counsel relied upon acts of the tenant after the option had been exercised including the act of the tenant seeking the landlord's consent to assign the renewed lease to a prospective purchaser. Counsel submitted that the tenant vexatiously commenced proceedings.

12 The conduct of the parties after the exercise of option was conduct I determined could not be considered when considering whether the option had been exercised.

13 I accept that the tenant's conduct after the purported exercise of option was consistent with the tenant acting as if it had exercised the option. An example of this conduct is the tenant entering into a sale agreement of its business which included the renewed lease.

14 It does not, however, follow that the tenant's conduct post option prevents it from later alleging that the option was not exercised.

---

[3] [2015] VSCA 216

15 The test in relation to exercising an option is set out in my earlier decision. The exercise needs to be clear and unequivocal. There was an arguable case to be run by the tenant that the wording used by it to exercise the option was open to interpretation. This argument, as I found, is to be run without reference to the post option conduct. The post option conduct cannot be considered in determining whether the option was, in fact exercised. On this basis, I do not accept that the tenant's case was bound to fail or that it had no chance of success.

16 I find the tenant's conduct in issuing the proceedings was not vexatious for the reason set out above.

Conduct prior to the hearing

17 Counsel for the landlord submitted that the tenant's conduct after issuing the claim and prior to the hearing was vexatious. In this regard I note that the Tribunal made costs orders pursuant to s78 of the Act in favour of the landlord on 24 November 2017 and 7 March 2018.

18 I am satisfied that the Tribunal has made orders in relation to conduct prior to the hearing and there are no further orders to be made in this regard.

Conduct during the hearing

19 Counsel for the landlord submitted that the tenant engaged in vexatious conduct during the hearing which ran for five days. Ten grounds were relied upon to support the claim. Five grounds relate to the tenant failing to call evidence of conduct occurring after the option was exercised. For reasons stated in my earlier decision, there was no reason for the post option period conduct to be considered when determining whether the option had been exercised. Accordingly, failure to call evidence on these matters cannot be vexatious conduct.

20 It was argued that one of the witnesses appeared to "feign a far greater lack of understanding of English than they actually had." There was insufficient evidence before me to be able to make finding on this issue. It did however appear to me that the director of the tenant was not fluent in English, it being clearly a second language to her. This was supported by the fact that her daughter usually communicated on her behalf with the landlord.

21 It was submitted that the tenant "dragged the landlord through a five day hearing". The hearing was extended by the landlord leading evidence and cross-examining on events occurring after the option had been exercised. The events were irrelevant to the determination of whether the option had been exercised. For this reason, I do not accept that the tenant's conduct extended the trial.

22 The landlord has submitted that the tenant's resistance to settlement is an example of vexatious conduct under s92 of the RLA.

23 As set out above, s92 of the RLA excludes anything to the contrary contained in Division 8 of Part 4 of the Act. Section 112 "presumption of

order for costs if settlement offer is rejected" of the Act does not therefore apply.

24 The landlord made two written offers of settlement. One offer demanded payment of the amount claimed as a debt "within 14 days of the date of this letter" and the other "within 7 days".

25 The offers purport to be Calderbank letters of offer.[4] The offers do not in my opinion contain a reasonable offer of compromise. They are a demand for the amounts then due and owing as a debt and for $8,800 in relation to expenses associated with the landlord locating another tenant. The offer was that the $8,800 would be waived.

26 As set out in paragraph 44 (vii) of my reasons dated 31 August 2018, the landlord failed in its claim for $8,800 in relation to finding another tenant. Accordingly, I find that the two letters of offer did not meet the requirements of a Calderbank offer in that they did not offer a genuine compromise of the amount due.

27 Failure by the tenant to accept either of the offers is not vexatious conduct under s92 of the RLA warranting an award of costs.

28 For the reasons stated, no order as to costs is made in the proceeding.

L. Forde
Senior Member

[4] *Calderbank v Calderbank* [1975] 3 All ER 333