VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. **BP314/2016**

CATCHWORDS

RETAIL LEASES-proceeding seeking to set aside market rent valuation-consent orders made having the effect of remitting the matter to the valuer for error-proceeding dismissed by consent-subsequent cross-applications for costs of the proceeding.

COSTS-section 92 *Retail Leases Act* 2003-Vexatious conduct of a proceeding-whether, after the parties had agreed in principle, on the day of the hearing, to the making of consent orders to be filed, having the effect of giving the applicant substantially the relief sought, and having the effect of vacating the hearing, the applicant's subsequently seeking agreement on a fresh issue was hopeless-found to be vexatious conduct of a proceeding within the meaning of section 92 of the *Retail Leases Act* 2003.

APPLICANT	Belaryn Pty Ltd (ABN 30 578 714 326)
FIRST RESPONDENT	Lloyd Alfred Deane
SECOND RESPONDENT	Marian Martina Deane
WHERE HELD	Melbourne
BEFORE	A T Kincaid, Member
HEARING TYPE	Costs applications by each party against the other
DATE OF HEARING	16 March 2017
DATE OF ORDER AND REASONS	22 June 2017
CITATION	Belaryn Pty Ltd v Deane (Building and Property) (Costs) [2017] VCAT 926

ORDER

1. The applicant must pay the costs of the respondents in the proceeding from 23 September 2016 up to and including the costs hearing on 16 March 2017 and, if not agreed, they are to be assessed by the Victorian Costs Court calculated on the County Court Scale of Costs on the standard basis.

A T Kincaid
Member

APPEARANCES:

For Applicant	Ms H Schofield, director Dr A Schofield, director
For Respondents	Mr A Felkel of Counsel

REASONS

1. Belaryn Pty Ltd ("**Belaryn**") is the tenant of retail premises used as a motel, in Trafalgar Street, Wodonga (the "**premises**"). It is the assignee of a lease dated 19 March 1999 (the "**lease**").
2. The landlords under the lease are Mr and Mrs Deane ("**the Deanes**").
3. Each party seeks costs against the other, arising from a proceeding brought by Belaryn, which the parties subsequently compromised.
4. I have concluded, for the reasons I give, that Belaryn was justified in bringing the proceeding in order to have rental valuation set aside.
5. I have also found, however, that following the date upon which the parties subsequently agreed to the matter being remitted to the valuer for reconsideration, substantial legal costs were subsequently incurred by the Deanes in dealing with Belaryn's later insistence, subsequently abandoned, that, upon it being remitted, the valuer should also adopt a particular valuation method.

THE FIRST PROCEEDING

6. By an Application dated 21 May 2015, Belaryn brought a proceeding in the Tribunal seeking the appointment of a valuer to conduct a valuation in respect of a new 3 year term under the lease from 18 March 2014 (the "**first proceeding**").
7. On 2 September 2015, the parties compromised the first proceeding on terms that, on the joint appointment by the parties, Mr John Castran, specialist retail valuer (the "**valuer**") would provide a market rental valuation for the premises for the first year of the 3 year renewal period from 18 March 2014.
8. Clause 19 of the valuer's letter of engagement dated 28 August 2015 ("**clause 19**") stated:

> 19. Should either the landlord or the tenant obtain an order from the Court or Tribunal that:
>
> 19.1 the determination carried out pursuant to this engagement is not in accordance with the provisions of the lease; or
>
> 19.2 the determination of the rent should be assessed at a different figure or in accordance with a different procedure (whether or not the Court or tribunal provides any specific direction in this regard)
>
> [t]hen the parties agree to appoint us again [to] provide a determination in accordance with any directions provided by the Court or tribunal; and the parties will share equally all our costs and expenses involved in providing the revised determination.

9. The parties therefore expressly contemplated that the valuer would conduct another market rental valuation (a "**further determination**") if, for the reasons described in clause 19, it became necessary.

10. By a determination dated 23 October 2015, the valuer provided his determination (the "**determination**").

11. For the purpose of the determination, the valuer adopted what he described as the "direct comparison" approach for determining the current market rent (the "**direct comparison approach**"). In support of this approach, he referred to section 37(2)(b) of the Act, and the *Guidelines* issued by the Small Business Commissioner[1] which state, in part:

> 6.6 When determining the current market rent, a valuer should first consider whether there are any other premises that are comparable retail premises.

12. Belaryn subsequently sought to challenge the determination by seeking to reinstate the first proceeding. At the hearing on 2 March 2016, I found that the compromised first proceeding, the terms of which had been wholly performed by the Deanes, was no longer the appropriate vehicle by which Belaryn may seek to set aside the determination. I dismissed Belaryn's application, and awarded costs in favour of the Deanes.

THIS PROCEEDING

Relief Sought

13. On 8 March 2016, Belaryn filed this proceeding, in which it sought orders:

    (a) discharging the valuer for "fundamental breach" in failing to conduct the determination in accordance with the terms of engagement, the *Retail Leases Act 2003* (the "**Act**") and the lease;

    (b) declaring that the determination was not a determination within the meaning of the Act;

    (c) setting aside the determination for failing to conduct the determination in accordance with section 37(2) and/or (6) of the Act; and

    (d) requiring the Small Business Commissioner to appoint a different specialist retail valuer to conduct a further determination.

14. Belaryn claimed in the Points of Claim attached to the Application that the valuer:

    (a) used the wrong valuation date (which, in the event, was corrected by the valuer soon after the date of the determination, the valuer recording that the erroneous date was a typographical error);

    (b) failed to take account of Belaryn's submissions;

    (c) failed to have regard to the landlord's outgoings;

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[1] See *Guidelines to the Retail Leases Act 2003: Current Market Rent and Engaging Specialist Retail Valuers* (published by Victorian Small Business Commissioner, dated 11 September 2014).

(d) wrongly took into account Belaryn's fixtures and fittings;

(e) failed to provide detailed reasons; and

(f) failed to specify the matters to which he had regard in making the determination.

Amended Points of Claim Filed

15. Directions were made by the Tribunal on 13 May 2016 requiring, among other things, the filing and service by Belaryn of Amended Points of Claim by 10 June 2016, particularising its claim in greater detail. The proceeding was fixed for hearing on 31 August 2016.

16. Directions were made on 6 July 2016, extending the time by which Belaryn was required to file and serve Amended Points of Claim to 20 July 2016. The Tribunal also vacated the hearing date, and re-fixed the hearing for 22 September 2016.

17. Belaryn subsequently filed Points of Claim dated 27 July 2016, signed by solicitors Cyngler Kaye Levy. It sought orders seeking the setting aside of the determination largely for the reasons previously relied on, and the appointment by the Tribunal of an alternative valuer to conduct a further determination.

Defence Filed

18. By their Defence dated 10 June 2016 (but intended to be dated 10 August 2016) and filed on 12 August 2016, the Deanes conceded that, in breach of the requirements of the Act, the determination did not provide detailed reasons, nor did it specify the matters to which the valuer had regard in making the determination.

19. The Deanes also contended though, that by reason of clause 19, it was not open to either party to seek an alternative valuer, thereby alleging that the parties were contractually bound in the circumstances to engage the valuer to conduct a further determination.

Settlement reached on 22 September 2016

20. The matter did not proceed as a hearing on 22 September 2016, when both parties were represented by Counsel. Rather, I was informed that the parties had reached agreement on the way that the matter should proceed. The following notes preceded the orders made on that day:

A. Both parties agree that:

(i) the determination carried out by [the valuer]…is not in accordance with the provisions of the lease; and/or

(ii) the determination of the rent should be assessed at a different figure or in accordance with a different procedure

within the meaning of [clause19].

B. It would therefore be open to the parties to seek a consent order to this effect, with the result that pursuant to [clause19], [the valuer] would be re-appointed to provide a determination in accordance with any directions by the Tribunal.

21. Having then committed to the Deanes on 22 September 2016 to a course of action by which consent orders were to be jointly submitted as anticipated, Belaryn's counsel, perhaps rather inexplicably, made an application for an interlocutory order, in effect, restraining the Deanes from contending that Belaryn was bound to act in accordance with the re-engagement clause. On Belaryn's argument, there was no serious question to be tried whether in the circumstances the parties were bound by the re-engagement clause, and that damages would, in any event, be an adequate remedy. I dismissed the application.

22. In summary, the hearing on 22 September proceeded as a directions hearing and matters were left on the basis that consent orders would be subsequently filed by the parties.

23. By order dated 30 November 2016, the Tribunal's order dated 22 September 2016 was amended such as to show that in light of the agreement reached between the parties that day, the "hearing type" notation was amended to directions hearing, rather than a hearing.

Events after 22 September 2016-Belaryn requires valuer to apply a certain valuation method.

24. By his affidavit sworn 17 February 2017, Mr Deane deposed that the parties left the Tribunal on 22 September 2016 on the basis that Belaryn would provide the Deanes' solicitors with proposed consent orders, having the effect of remitting the matter to the valuer on terms, agreed in principle, for a re-valuation.

25. The orders made at the 22 September 2016 directions hearing were not engrossed and sent to the parties until mid-October 2016.

26. By letter to the Deanes' solicitors dated 10 October 2016 Belaryn, having apparently discharged its solicitors, sent proposed consent orders to the Deanes' solicitors, as follows:

    1. That the rental determination was not binding on the parties;
    2. a further rental determination should be made by the valuer;
    3. the further determination should be undertaken using the Earnings before Interest, Taxes, Depreciation, Amortisation and Rent method (the "**EBITDAR method**");
    4. the further rental determination should be effective as at 18 March 2014;
    5. the valuer be provided with a copy of these orders;
    6. the valuer must carry out the valuation within 45 days of receiving the Tribunal's orders; and
    7. any other order as the Tribunal sees fit.

27. I find that this was the first occasion on which Belaryn had sought to impose a requirement that the valuer must conduct his valuation using the EBITDAR method (which, for convenience, I will refer to as the "**profits method**") for determining current market rent. The profits method is in contrast to the direct comparison approach used by the valuer.

28. The profits method was the approach adopted by the valuer the subject of the Victorian Court of Appeal decision in *Serene Hotels Pty Ltd v Epping Hotels Pty Ltd.*[2] In summary, that approach involves the assessment by the valuer of the net profit of a tenant's business available for the payment of rent, and an assessment of what proportion of that sum should be taken as that which the willing hypothetical incoming tenant would be willing to pay for rent.

29. Croft J (whose decision below was upheld by the Court of Appeal) having traversed some of the authorities, concluded that the valuer in that matter, having adopted the profits method, had used a methodology and reasoning process that had a firm foundation in the general law as being appropriate[3] and, moreover, that the method did not offend the requirements of section 37(2) of the Act.[4]

30. The orders proposed by Belaryn's letter dated 10 October 2016 were unobjectionable from the Deanes' points of view, save for proposed order 3 which contended for a profits method being adopted by the valuer.

31. By email dated 18 October 2016, the solicitors for the Deanes responded:

> Please confirm whether you are represented by Cyngler Kaye Levy Lawyers, as we will not conduct this matter on the basis that we are dealing with you on some aspects of it and your lawyers on other aspects.
>
> We have now received a copy of the VCAT orders, issued consequent upon the proceedings in the Tribunal held on 22 September 2016. No doubt you have a copy of those Orders.
>
> The Notations to the orders have no legal effect. The Orders themselves specifically dismiss the [Belaryn's] application. The Notations refer to the fact that the Tribunal has received no agreed Consent order since the date of the Hearing.
>
> Your letter to us dated 10 October 2016 invites our client to agree to a valuation adopting the [profits] method. Our [clients] reject this proposal. Our client accepts a consent order that includes [all the 7 items proposed by Belaryn] save for the [profits method proposal].
>
> …
>
> In terms of the Orders, it is presumably not now too late to engage in Consent Orders regarding the valuation. To resolve your issue once and for all, we now propose that [the valuer] be engaged to conduct an updated valuation, on the basis of each party sharing the cost equally-an amount of $2,200 ($1,100 each party), as has been agreed with Mr Castran.

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2 [2015] VSCA 228, upholding the decision of Croft J in *Epping Hotels Pty Ltd v Serene Hotels Pty Ltd* [2015] VSC 104

3 *Epping Hotels Pty Ltd* ibid at [25]-[40].

4 *Epping Hotels Pty Ltd* ibid at [41]-[46].

32. In response, Belaryn emailed the Tribunal on 18 October 2016, in effect requesting the Tribunal to make orders in the form of the 7 items proposed to the Deanes by its earlier correspondence dated 10 October 2016, which included an order requiring the further determination to be conducted using the profits method. Belaryn also informed the Tribunal that it was "not in a position to engage ongoing legal representation…"

33. The Tribunal fixed a further directions hearing for 25 November 2016, in order to consider the proposed orders of Belaryn.

Directions hearing on 25 November 2016

34. On 25 November 2016, orders were made by consent in terms of the 7 orders attached to Belaryn's letter to the Deanes dated 10 October 2016, save that they did not extend to the earlier proposed order directing the valuer to adopt the profits method.

Belaryn's subsequent retraction of consent orders made on 25 November 2016

35. By email dated 28 November 2016 to the Tribunal, and before the orders made on 25 November 2016 had been sealed and sent to the parties, Belaryn informed the Tribunal that:

    (a) Belaryn should not be held to its agreement with the Deanes on 22 September 2016 to provide proposed consent orders (and notwithstanding that Belaryn's counsel agreed that Belaryn would do so[5]) because such a course would not result in "an order from the Court or Tribunal" being a necessary pre-condition imposed by clause 19… to the valuer carrying out a further determination, and Belaryn sought "the Tribunal's advice on the validity of such [proposed] Consent Orders [having regard to the provisions of clause 19]"; and

    (b) the consent orders entered into by the parties on 25 November 2016 resulted from Belaryn being "forced to accept Consent Orders only as agreed to by the [Deanes]" because Belaryn "wished to avoid a further hearing" and that the Deanes had "previously refused mediation".

36. By a second email to the Tribunal dated 28 November 2016, Belaryn withdrew its agreement to consent orders 2, 5, 6 and 7 of [the orders proposed by it by letter dated 10 October 2016], effectively rejecting its consent to the valuer undertaking the further determination (as opposed to another valuer), and keeping alive its previous proposal for the further determination to be undertaken using the profits method.

37. By email to the Tribunal dated 6 December 2016, Belaryn attached a copy of its earlier email to the Tribunal dated 28 November 2016, requesting a response from the Tribunal.

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[5] Belaryn contended in the email that that agreement was reached "without consultation with Belaryn's directors").

38. As appears from the Deanes' solicitor's subsequent email to the Tribunal dated 16 December 2016, Belaryn failed to send to the Deanes' solicitor either of its emails to the Tribunal dated 28 November 2016.

39. Having regard to the contents of Belaryn's email to the Tribunal dated 28 November 2016, by order of the Tribunal dated 13 December 2016, the principal registrar was directed to fix the proceeding for a further directions hearing, and this was fixed for 20 January 2017.

40. By email dated 20 December 2016, the Tribunal forwarded a copy of Belaryn's email dated 28 November 2016 to the Deanes' solicitor.

41. It was necessary for the directions hearing on 20 January 2017 to be adjourned by Senior Member Levine to 23 January 2017, before myself.

Directions hearing on 23 January 2017

42. At the directions hearing on 23 January 2017, the parties informed me that they remained unable to agree on the basis on which the matter should be remitted by consent to the valuer to conduct a further determination, and that the principal issue preventing agreement was Belaryn's contention that the rental determination should be conducted by his adopting the profits method.

43. I subsequently made orders on 23 January 2017 setting the matter down for hearing on 16 March 2017, and requiring Belaryn to provide an amended Points of Claim by 13 February 2017, stating in what respects the failure by the valuer to adopt the profits method was not in accordance with the provisions of the lease (including the provisions of section 37 of the Act taken to be included in the lease).

44. Belaryn filed Points of Claim dated 13 March 2016 (intended to be dated 13 February 2017). They failed to provide any basis for requiring the valuer to adopt the profits method, but simply referred to that method being an "industry standard" sought by them, and rejected by the Deanes.

45. On 28 February, the Deanes filed an application to have the proceeding dismissed pursuant to section 78 of the *Victorian Civil and Administrative Tribunal Act 1998* (the "**VCAT Act**"), on the grounds that they had been unnecessarily disadvantaged by Belaryn's:

    (a) failing to comply with orders of the Tribunal without reasonable excuse (including its most recent alleged failure to provide satisfactory Points of Claim);[6] and

    (b) vexatiously conducting the proceeding.[7]

Directions hearing on 8 March 2017

46. At the directions hearing, I made orders by consent as follows:

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6 Within the meaning of section 78(1)(a) of the Act.
7 Within the meaning of section 78(1)(f) of the Act.

1. The rental determination of [the valuer] in respect of the current market rent of [the premises] to be paid by [Belaryn] commencing 18 March 2014 is of no effect does not bind the parties.

2. The valuation is not in accordance with the provisions of:

   (a) Section 37(6)(b) of the [Act], in that it does not contain detailed reasons for the determination; and

   (b) Section 37(6)(c) of the [Act], in that it does not give details of the comparable premises which he took into account.

3. The parties must appoint [the valuer] pursuant to [clause 19] to provide a further determination in accordance with the above directions.

4. The parties agree that in the event that it is found that the further determination carried out by [the valuer] pursuant to [clause19] has not been carried out in accordance with the provisions of the lease and/or the Act, they will not be bound to seek a further determination from [the valuer].

MATTERS TO BE SATISFIED PRIOR TO MAKING A COSTS ORDER

47. Section 92 of the Act provides as follows:

> (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 of 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** (emphasis added]

48. It follows from the terms of section 92 of the Act that if I am to order costs against either party in the matter, I must be satisfied that it is fair to do so, because I find that either or both of the criteria apply.

BELARYN'S CLAIM FOR COSTS

49. Belaryn seeks indemnity costs against the Deanes.

Costs in the first proceeding.

50. In its written submissions dated 14 March 2017, in support of its application, it also relies on events relating to the first proceeding.[8] Given that I am dealing with costs of this proceeding, I have had no regard to them.

Alleged intimidatory behaviour by the Deanes.

51. Paragraphs [37]-[42] of Belaryn's written submissions contend, by reference to alleged communications between the parties during the period

[8] At [3]-[36].

8 March 2016 and 15 April 2016 that the Deanes "attempted to intimidate [Belaryn] into withdrawing the proceeding" so as to amount, I take it, to their conducting the proceeding in a vexatious way. There is no probative material presented here by Belaryn that leads me to make such a finding, and I find the allegation not to be proven.

Alleged wrongful seeking by the Deanes of dismissal of the proceeding.

52. What led to the directions hearing on 6 July 2016 was the Deanes' seeking a dismissal of the proceeding, on the grounds that Belaryn had failed to file and serve its Points of Claim, as ordered on 13 May 2016.

53. Paragraphs [43]-[54] of Belaryn's written submissions contend that the order made by the Tribunal on 6 July 2016, extending the time by which Belaryn was required to file and serve Points of Claim to 20 July 2016, imposed an obligation on Belaryn that was not, in substance, contemplated by the orders dated 13 May 2016. Belaryn relies on an excerpt from a transcript of the directions hearing at the Tribunal on 13 May 2016. It says, in effect, that the Deanes conducted the proceeding vexatiously in seeking to dismiss Belaryn's claim on the basis of a failure by Belaryn to comply with the orders made on 13 May 2016. Having regard to the express terms of the orders made by the Tribunal on that day, I am unable to find from the sequence of events described here that there is any basis for a finding that the Deanes vexatiously conducted the proceeding in the respect alleged.

Alleged refusal by the Deanes to take part in a mediation.

54. Belaryn contends that the Deanes refused to take part in a mediation. By email to the Deanes dated 15 May 2016, Belaryn wrote:

> As you know, the Tribunal Orders give us an option to write to the Tribunal seeking a mediation to be held in Wodonga.
>
> …We are prepared to negotiate with you to see if we can come to an arrangement between ourselves, so we are suggesting that we both write to the Tribunal to request mediation.
>
> What are your thoughts-are you also prepared to negotiate?

55. Belaryn wrote to the Tribunal by email dated 22 May 2016, requesting a mediation, apparently not having received a response from Belaryn's solicitor.

56. The Deanes' solicitor responded by an email (the date of which is not clear from the documents tendered by Belaryn):

> My client has referred your email to it dated 15 May to me, for reply.
>
> Prior to responding, my client would like to know what exactly you wish to mediate about in Wodonga, as your email simply refers to coming to an "arrangement".
>
> If you will kindly be a bit clearer and more specific, my client will advise whether it is prepared to mediate or not.

57. Belaryn responded to the Deanes' solicitor by email dated 23 May 2016, as follows:

> Thank-you for your reply to our email to [the Deanes] of 15 May 2016 requesting their thoughts on seeking mediation in an attempt to settle our dispute.
>
> The matters we wish to discuss relate to VCAT application BP314/2016.

58. By email to Belaryn dated 24 May 2016, the solicitor for the Deanes responded:

> Thank-you [for your email dated 23 May 2016]. I therefore take it that you want to debate the valuer's methodology in a Mediation, even though, as the VCAT member pointed out in the recent Directions Hearing [on 13 May 2016], your Application consisted of a witness statement rather than a pleading.
>
> My clients are not interested in such a debate, and therefore see no point in a Mediation.
>
> I remind you that you need to file and serve Points of Claim by 10 June 2016, which are fully itemised particulars of your claim, in a succinct form, and including any breaches by the landlord, as stated in the Order.

59. By Notice of Mediation dated 30 May 2016, the Tribunal informed the parties that the matter was listed for mediation at the Wodonga Magistrates' Court on 26 July 2016.

60. By an undated application but filed by email dated 1 June 2016, the Deanes applied for an adjournment of the scheduled mediation on the grounds of pre-arranged travel arrangements of their solicitor spanning that date of the proposed mediation.

61. By Notice of Mediation dated 14 June 2016, the mediation was re-scheduled to take place in Wodonga on 11 August 2016.

62. By orders made on 6 July 2016, at a hearing conducted by telephone, the Tribunal cancelled the mediation that had been re-scheduled to take place on 11 August 2016, extended the time by which Belaryn was required to file and serve its Points of Claim to 20 July 2016, vacated the hearing date and fixed a new hearing date on 22 September 2016.

63. Order 6 of the orders also cancelled the mediation previously re-scheduled to take place on 11 August 2016. Belaryn also relies on the submission made by counsel on behalf of the Deanes on that occasion to the Senior Member, as follows:

> "Well, I don't see that there is any point in mediation".

64. Belaryn contends that the transcript reveals that its representative was, in effect, unable on the occasion to take the matter of a proposed mediation any further.

65. Belaryn is only able to rely on an alleged refusal to take part in a mediation if it is one arranged "under [Part 10 of the Act]". That is, one that is referred to mediation by the Small Business Commissioner under the provisions of sections 85-87 of the Act. No such mediation was required to be held as a pre-condition to Belaryn's issue of this proceeding.

Alleged attempted deceiving by the Deanes of Belaryn or the Tribunal (contrary to section 109(3)(v) of the Act.

66. Assuming that such conduct may give rise to a finding that the Deanes conducted the proceeding in a vexatious way within the meaning of the Act, I find that there is no sustainable basis for such a finding contained in paragraph [63] of Belaryn's written submissions.

Alleged vexatious conduct of the proceeding by the Deanes.

67. Belaryn relies for this ground on:

    (a) the alleged failure by the Deanes to take part in a mediation;[9]

    (b) the alleged conduct of the Deanes prior to the issue of this proceeding (and which cannot therefore be considered by me having regard to the terms of section 92(2)(a) of the Act);[10]

    (c) the alleged denial by the Deanes of a "valid rent review" (by reference to the two applications brought by the Deanes to have the proceeding dismissed);[11]

    (d) the alleged conduct by the Deanes, resulting in Belaryn having "no option but to refer [the] matter to the Tribunal" (and which cannot therefore be considered by me having regard to the terms of section 92(2)(a) of the Act);[12]

    (e) the alleged conduct by the Deanes in "ceasing their opposition and [then] conceding" [Belaryn's claim by consent orders];[13]

    (f) the alleged conduct of the Deanes in making the first dismissal application on 6 July 2016, in reliance on an allegedly inaccurate account of what took place at a previous directions hearing;[14] and

    (g) the alleged conduct of the Deanes on 6 July 2016 in turn "forcing" Belaryn to engage legal representation.[15]

68. I have carefully considered each of the above allegations, and find that in respect of those that relate to the Deanes' conduct of the proceeding, there is no basis for a finding that their conduct was in any way vexatious.

THE DEANES' CLAIM FOR COSTS

69. The Deanes claim costs from Belaryn, essentially on the ground that its claim made in the proceeding was so obviously untenable or manifestly groundless as to be utterly hopeless.

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9 At paragraph [64](a).
10 At paragraph [64](b)(i).
11 At paragraph [64](b)(ii).
12 At paragraph [64](c).
13 At paragraph [64](c).
14 At paragraph [64](d).
15 At paragraph [64](e).

70. In this respect, I have not considered making any order for costs in favour of the Deanes in respect of the period prior to and including the directions hearing on 22 September 2016. This is because on that date, and on their own case, they were content to enter into consent orders having the effect of remitting the matter to the valuer because, as contended by Belaryn, the valuation was not in accordance with the lease.

71. What becomes clear, however, from my account of events above, is that Belaryn, having agreed on 22 September 2016 to its submitting to the Deanes a form of consent orders, the content of which had been agreed in principle, chose instead by its letter dated 10 October 2016 to seek a valuation on the profits method. This was in contrast to the direct comparison approach that had been adopted by the valuer. In light of the Deanes' subsequent objection to this new proposal, Belaryn agreed at the Tribunal on 25 November 2017 not to press its suggestion, and consent orders were again agreed to by the parties. Having agreed not to contend for a valuation based on the profits method, on 28 November 2016 Belaryn withdrew its consent on what I find were spurious grounds.

72. Having then maintained its call for a profits method, and being given an opportunity at the directions hearing on 23 January 2017 to submit by an amended Points of Claim why it was entitled to do so, by amended Points of Claim intended to be dated 13 February 2017, it singularly failed to do so.

73. The Deanes submit that Belaryn conducted the proceeding in a vexatious way, and that it unnecessarily disadvantaged them within the meaning of section 92(2)(a) of the Act, as to give rise to an entitlement to have their costs paid by Belaryn.

74. I have already ruled out any consideration of the period prior to 22 September 2016, for the reasons I have given. Does the conduct of the proceeding by Belaryn after 22 September 2016 demonstrate that it conducted the proceeding in a vexatious way.

Conducting the Proceeding in a Vexatious Way

75. In *Cabot v City of Keilor*[16] Gobbo J dismissed an appeal from a costs order made by the Administrative Appeals Tribunal, in which it found that the proceeding was brought vexatiously or frivolously within the meaning of section 150(4) of the *Planning and Environment Act 1997*. The Tribunal's adoption of the test for whether a proceeding has been brought "vexatiously" was not in dispute. That was the test expressed by Roden J in *Attorney-General (Vic) v Wentworth*[17] which his Honour set out as follows:

> 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:

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16 [1994] 1 VR 220.

17 (1988) 14 NSWLR 481 at 491.

(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.[18]

76. In *State of Victoria v Bradto Pty Ltd*[19] his Honour Judge Bowman found that the test of Roden J, based upon section 150(4) of the *Planning and Environment Act*, was concerned only with whether "...proceedings have been *brought* vexatiously or frivolously..." (my emphasis), and that this is to be contrasted with the wording of section 92 of the Act, which refers to a proceeding being "...*conducted*...in a vexatious way" (again, my emphasis).

77. His Honour also held that a proceeding is conducted in a vexatious matter "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 burdensome, prejudicial or damaging".[20]

78. The meaning of the word "vexatious" in section 92 of the Act extends to a proceeding which is so obviously untenable or manifestly groundless as to be manifestly hopeless. Guided by his Honour's reasoning in *State of Victoria v Bradto Pty Ltd*, it is not sufficient for the proceeding brought by Belaryn to be obviously untenable or manifestly groundless to enliven the operation of section 92 of the Act, irrespective of Belaryn's motives (as suggested by the third limb of the test of Roden J). The Deanes would need to demonstrate that Belaryn *conducted* the proceeding in a vexatious way.

79. I also respectfully adopt the view of Senior Member Riegler in *Burd and Cooper Pty Ltd* v *C and P Cooper Pty Ltd and Ors*[21] that a proceeding may be regarded as being conducted in a vexatious way for the purpose of section 92 of the *Retail Leases Act* if the litigant was aware or ought reasonably to have been aware that the claim was so obviously untenable or manifestly groundless as to be utterly hopeless.

Conduct of Belaryn in the proceeding

80. Can it be said, though, that Belaryn continued with the proceeding after 22 September 2016, when the in principle agreement was reached between the parties, in the knowledge that it was hopeless, so as to amount to its conducting the proceeding in a vexatious way? Or, in circumstances where Belaryn cannot be imputed with express knowledge to this effect, ought it to have been so aware?

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18 ibid at 223.
19 [2006] VCAT 1813.
20 Ibid. at [67].
21 [2010] VCAT 2002, 2 December 2010 at [11]-[13]

81. I have concluded that the inability of Belaryn to serve Amended Points of Claim intended to be dated 13 February 2017 that contained any alleged legal or other basis for its contention that the valuer, on remittal, was required to adopt the profits method of valuation demonstrates that its claim after 22 September 2016 was obviously untenable or manifestly groundless as to be utterly hopeless.

82. I also find that Belaryn should have been aware of this, such that I conclude that the proceeding was conducted in a vexatious way. I have reached this conclusion based upon the legal authorities, referred to in Belaryn's own written submissions, such as *Epping Hotels Pty Ltd v Serene Hotels Pty Ltd*,[22] in which during his analysis of the authorities Croft J, while accepting that the profits method of valuation is an accepted valuation methodology, it is "not always appropriate", particularly where there are plenty of comparable premises from which open market rents can be deduced.[23]

83. I also find that Belaryn's conduct of the proceeding after 22 September 2016, resulting in the need for further directions hearings and their associated costs, caused unjustified trouble to the Deanes and their harassment. This only occurred as a result of Belaryn seeking outcomes for which there was no legal justification.

Section 92-Unnecessarily Disadvantaging the Applicant

84. Before I make any order for costs under section 92 of the Act, I must also be satisfied that the vexatious way in which I have found that Belaryn conducted the proceeding "unnecessarily disadvantaged" the Deanes. I find, from a summary tendered by their counsel at the cost hearing, that the Deanes incurred the following costs in defending the proceeding:

24 March 2016	Counsel's fees	$2,708.34
24 March 2016	Keating Avery	$2,945.91
30 June 2016	Counsel's fees	$825.00
15 July 2016	Massola Creighton, Solicitors	$2,579.50
18 August 2016	Counsel's fees.	$2,200.00
22 September 2016	Counsel's fees, hearing	$2,500.00
3 December 2016	Counsel's fees	$660.00
16 December 2016	Massola Creighton, Solicitors	$2,040.00
23 January 2017	Counsel's fees, directions hearing.	$2,200.00

[22] Ibid. fn 2
[23] Ibid fn 2 at [35]-[37].

17 February 2017	Counsel' fees	$2,200.00
6 March 2017	Massola Creighton, Solicitors	$2,194.00
8 March 2017	Counsel's fees, hearing, consent orders made	$2,200.00
16 March 2017	Counsel's fees, costs hearing	$1,100.00
	TOTAL	**$24,552.75**

85. I calculate that the costs incurred by the Deanes after 22 September 2016 amount to $12,594. This amount is equivalent to over a quarter of the annual rent payable by Belaryn to the Deanes under the lease. The costs are significant in this context.

86. I therefore find that the Deanes, being required to incur legal costs of this order in order to oppose the claim improperly asserted by Belaryn in the proceeding after 22 September 2016, were unnecessarily disadvantaged.

Belaryn Not Represented-Should this make any difference?

87. Belaryn was represented by a legal practitioner for the purpose of the filing of its Points of Claim dated 27 July 2016. After the directions hearing on 22 September 2016, Belaryn was not represented by lawyers. Assuming that it might in this respect be regarded as a "litigant in person". Such parties are often without the legal knowledge that is available to a legally represented party, does this mean that the outcome should be different?

88. There is no rule of principle that prevents my ordering the payment of costs by a litigant in person. In reaching his conclusion that a litigant in person should pay costs following the court's dismissal of an application under the *Corporations Law*, Hodgson CJ in *Bhagat v Royal & Sun Alliance Life Assurance Australia*[24] observed:

> I accept that a court does have to make allowances for the position of litigants in person, and try to ensure that a litigant does not lose out because of lack of expertise; although there is a limit to what the Court can do in that regard, while still remaining an impartial determinant of a dispute. The Court may in those circumstances refrain from making orders against litigants in person for conduct that might be considered as justifying orders for costs against represented litigants. By the same token, litigants in person can cause great hardship and expense to other parties, through making allegations and claims that lawyers would recognise as allegations and claims that could not reasonably or even properly be made, by not focussing accurately on the real issues in the case. Conduct of that nature by legally represented parties would often lead to orders for indemnity costs. Litigants in person may escape the consequence of indemnity costs, but I do not think that the circumstance that a party is a litigant in person is a ground for displacing the ordinary result that costs follows the event.

[24] [2000] NSWSC 159 at [13]. See also *Fitzpatrick v Keelty* (No 2) [208] FCA 742.

89. Similar considerations were emphasised by Heerey J in *Salfinger v Niugini Mining (Australia) Pty Ltd (No 4)*[25]:

> A lack of knowledge of the law, unfamiliarity with court practice and a lack of objectivity are common traits of unrepresented litigants. A person's ability to [gain] redress should not depend on lawyerly skills or an ability to pay for legal representation. However, the court owes a duty to all parties to ensure that the trial is conducted in a fair and timely fashion and without significant difficulties and unnecessary expense for the parties against whom an unrepresented litigant proceeds.

90. Considering the above circumstances I find that Belaryn, notwithstanding that it did not have legal counsel after 22 September 2016, should not be relieved from the consequences of conducting a proceeding that I have found was so obviously untenable or manifestly groundless as to be utterly hopeless. I should add that I found both the Ms Schofields, who represented Belaryn throughout this period, as educated, erudite and articulate. Belaryn's written submissions, particularly early in the proceeding, revealed no small knowledge on their part of the applicable principles of valuation law.

91. I find that Belaryn must pay the costs of the Deanes after 22 September 2016. I do so because I am satisfied that it is fair to do so under section 92(2) of the Act because from that date Belaryn conducted the proceeding in a vexatious way that unnecessarily disadvantaged the Deanes.

92. I make the order attached.

A T Kincaid
Member

[25] [2007] FCA 1594 at [7].