VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. R291/2011

CATCHWORDS

Building and Property - Retail Tenancies – Australian Consumer Law – whether costs awarded pursuant to *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (VCAT Act) or *Retail Leases Act* 2003 (RLA 2003) – Indemnity Costs not applicable – costs awarded – VCAT Act 1998 s.109, RLA 2003, s.92.

APPLICANT	The Big Apple Group Pty Ltd
RESPONDENT	Melbourne City Council
WHERE HELD	Melbourne
BEFORE	Robert Davis, Senior Member
HEARING TYPE	Hearing
DATE OF HEARING	20 November 2018
DATE OF ORDER	20 November 2018
DATE OF WRITTEN REASONS	30 November 2018
CITATION	Big Apple Group Pty Ltd v Melbourne City Council (No 2) (Building and Property) [2018] VCAT 1881

ORDER

The Applicant pay the Respondent's costs of the application for reinstatement dated 16 December 2017, such costs to be taxed in default of agreement on the Standard County Court Scale by the Costs Court.

Robert Davis
Senior Member

APPEARANCES:

For Applicant	Mr B. Mako'ochieng, Director, in person
For Respondent	Ms L. Papaelia of Counsel

Note: These written reasons consist of an edited transcription of reasons given orally at the conclusion of the hearing.

REASONS

Background

1 I gave a decision in this matter on 23 September 2018.

2 The applicant in the proceeding sought that the proceeding be reinstated after orders were made on the 23 January 2013. The proceeding was commenced in 2011.

3 On 23 January 2013, there were consent orders whereby the applicant's claim was dismissed. The respondent's counterclaim was dismissed and there were no orders as to costs.

4 I will not repeat the facts of proceeding that were before me but it was an application for reinstatement of the proceeding.

5 The respondent made an application that the Tribunal had no jurisdiction to reinstate this proceeding. The Tribunal was *functus officio* subsequent to the orders that were made on 23 January 2013.

6 I agreed that the Tribunal was *functus officio* and I dealt with a number of points that the applicant raised as to why the proceeding could not be reinstated. In relation to each of those points, the applicant was unsuccessful.

7 I now have before me an application for costs by the respondent whereby costs are sought pursuant to section 109(2) and (3) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic). Alternatively, pursuant to section 92(2)(a) of the *Retail Leases Act 2003*.

8 It is clear from the authorities that an application in relation to jurisdiction where it has been found that there was no jurisdiction can be the subject of an order for costs. I refer to page 48 of Pizer's *Annotated VCAT Act* (the 6th edition), by Mr Nekvapil. It is stated, at page 48, that it has been held that the word "proceeding" in section 109(2) of the VCAT Act extends to unsuccessful applications to have proceedings reinstated. The authorities there cited *Velickovski and Housing Guarantee Fund* [2003] VCAT 956 and *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd* [2006] VCAT 1813 at [22].

9 Thus, even though I have found that the Tribunal had no jurisdiction to reinstate this proceeding, there is jurisdiction in the Tribunal in relation to awarding costs.

10 The respondent has applied for costs on an indemnity basis, alternatively, on a basis to be tax on a Standard County Court Scale.

11 In the application I heard, the applicant filed an affidavit which was approximately 1500 pages in length which included the exhibits, two submissions, one submission of 27 pages and another submission of 50

pages. It also gave the respondent three letters of 6 pages each. All that material has countless numbers of authorities referred to therein.

12 The hearing lasted for 2 days. It was initially listed for half a day. The first day the hearing continued through lunch and I attempted to finish the matter, but it could not be finished within the day. It came back for a second day of hearing.

13 The length of the matter, in my view, was largely due to the way that the applicant conducted his case with the large amount of materials that was put before me, namely, many cases - many of which were not very relevant or stated precisely the same things. An enormous amount of time was wasted because of the conduct of the applicant in relation to the way the case was conducted on its behalf by its director, Mr Mako'ochieng.

14 As a result, I find that the respondent was caused to spend a great deal of time which had otherwise would not have been obliged to spend in the preparation of this case and in making submissions. That extra time was spent as a result of the way that the applicant conducted the proceeding. If the proceeding had been conducted in a normal way in my view, it would have been concluded in the morning it was set down to conclude.

15 The applicant raised many issues in the proceeding which needed to be answered and which ultimately, all proved fruitless on its behalf.

16 There was an issue in relation to the applicant's Counsel that it implied in January 2013, Mr Sterling had some disciplinary proceeding against him and he was suspended. However, that suspension was stayed at the time that Mr Sterling was employed the applicant.

17 A considerable amount of time on the first day was spent as to whether the fact that Mr Sterling had been suspended meant that the applicant did not have any representation and did not appear.

18 The applicant could and should have made proper enquiries and found that Mr Sterling's suspension was stayed at the relevant time and therefore he clearly had the right to appear. It conceded as much on the second day. However, even on the second day, it said that Mr Sterling had a duty pursuant to section 62(8) of the *Victorian Civil and Administrative Tribunal Act 1998* to disclose to the applicant that he was a person disqualified.

19 I find that Mr Sterling that had no such duty as his disqualification or suspension had been stayed. It was partly on that basis that the applicant raised an allegation of fraud. I will come back to the issue of fraud in due course.

20 The applicant also raised many other issues which involved careful consideration of the cases and which really had no basis at all. He distinguished between an implied and inherent power of the Tribunal and he said the Tribunal had an implied power to set aside the consent orders which had been made. He also spent a considerable amount of time on fraud and misleading and deceptive conduct. I have already mentioned the

allegation of fraud against Mr Sterling. He also alleged that the respondent committed fraud because it did not inform him of a moratorium, which I have referred to in my decision, in relation to nightclubs shutting at 1.00 am in the morning.

21 In spite of the lengthy material, there was no other reference as to how the allegation of fraud was to be made out. Further, there was no real allegation of any misleading and deceptive conduct which was bought pursuant to the *Australian Consumer Law and Fair Trading Act*.

22 There were no real facts or circumstances to substantiate that. There was also an issue in relation to the conflict of interest in relation to the respondent's Counsel, but then again there was no basis for that submission. There were also matters in section 119 and 120 of the VCAT Act which I dealt with and dismissed.

23 There was also a question of whether the consent orders were made pursuant to a jurisdictional error which also had no basis.

24 All these matters took considerable time of the Tribunal and cost the respondent a considerable amount of money.

25 The question has been raised before me as to whether this cost application should be made pursuant to section 92 of the *Retail Leases Act* or section 109 of the *Victorian Civil and Administrative Tribunal Act.*

26 Miss Papaelia has submitted that section 109 of *Victorian Civil and Administrative Tribunal Act* is the section that should apply because she has said that, even though the relationship between the applicant and the respondent was one of landlord and tenant and was covered by the *Retail Leases Act 2003* that was before, this was in fact an application for reinstatement of which there was no jurisdiction and therefore the *Retail Leases Act* did not apply.

27 Mr Mako'ochieng, on behalf of the applicant, said that the *Retail Leases Act* did apply because the applicant was the respondent's tenant and therefore section 92 should be the section that governs the costs in this matter.

28 I also note, that considerable arguments in the hearing were put before me in relation to the *Australian Consumer Law and Fair Trading Act*. That Act has no provisions such as section 92 and clearly, any cost matters under that Act are dealt with pursuant to section 109 of the *Victorian Civil and Administrative Tribunal Act.*

29 I have considered the submissions that were put before me and I conclude that, because this was an application for reinstatement because the proceeding involved in the *Retail Leases Act* was complete and because part of the matter that was put before me in any event, was related to the *Australian Consumer Law and Fair Trading Act*, that this is not a matter as to which section 92 of the *Retail Leases Act* would apply. However,

because of the conclusion that I am going to come to, in my view, it does not really matter in this situation.

30 I will, first of all, deal with matters pursuant to section 109 of the *Victorian Civil and Administrative Tribunal Act* and then, in case I am wrong in the finding that I have just made, I will deal with the matter on the basis that section 92 applies.

Section 109 of the VCAT Act

31 Section 109 of the *Victorian Civil and Administrative Tribunal Act* provides in subsection (1) that each party should bear their own costs. However, subsection (2) provides that the Tribunal has power to award costs and subsection (3) provides that power to award costs shall be where it is fair to do so.

32 I will go through each of this matters that Miss Papaelia referred to into saying why section 109 (3) should apply.

33 The first matter she referred to was section 109(3)(a), subsection (vi), vexatiously conducting the proceeding. I note that when I am dealing with the question of vexatiously conducting the proceeding that will also be relevant to my consideration of section 92.

34 I refer to the *Attorney General for the state of Victoria v Weston* [2004], VSC 314, at [22] where it was found that if a proceeding had no prospect of success and could have been, in fact, struck out as disclosing no reasonable cause of action, it is likely that they will be held to have commenced vexatiously.

35 In my view, the application I heard, the way it was conducted and the length of time that it was conducted and had no reasonable chance of success, is sufficient to find it was vexatious. It would have been quite clear if the applicant had sought legal advice that this matter was *functus officio* and did not fall in any exceptions that could be claimed to have the consent orders set aside.

36 I also note that by alleging fraud in this matter which I have already referred to in relation to Mr Sterling and in relation to the respondent the applicant put upon itself a very high onus indeed and none of those matters came anywhere near to being able to show that there was fraud to have this matter set aside.

37 Given those circumstances, I find that the applicant conducted the proceeding vexatiously within the meaning of section 109(3)(a)(vi). There also being pursuant to section 109(3)(b), the applicant was responsible for prolonging unreasonably the time taken to complete the proceeding.

38 As I have stated, I found that this proceeding could well have been completed within half a day. That is the morning which was set aside, instead it went into the second day. I have already mentioned the huge

amount of material that was supplied by the applicant in this proceeding and which it became necessary for the respondent to answer.

39 Put differently, this proceeding took many times longer than it needed to take in order for the application to be dealt with. Subsection (c) of section 109, subsection (3) deals with the relative strengths of claims of each party, including whether the parties made a claim that is no tenable basis in fact or law.

40 I have found that there was no tenable basis in either fact or law in the decision that I have given and even though the applicant submitted to me this morning that it was an arguable case in relation to Mr Sterling and other matters, I do not agree with that submission.

41 Further, I note that the applicant made complaint that the respondent employed a member of Counsel, it said that there were officers of the respondent that could have appeared. However, I note that if this proceeding had been reinstated, the applicant intended to claim $8.6 million which is a very substantial claim indeed which would make it highly desirable for the respondent to employ Counsel. Criticism could have been made of the respondent if he had not employed competent Counsel.

42 I also note, the way the applicant made its submissions to which I have referred and the lengthy affidavit made it all the more important that Counsel be employed.

43 Section 109(3)(d) refers to the nature and complexity of the proceeding. I have already dealt with that and dealing with the strength of the claim and the way the proceeding was brought. In my view, the way the proceeding was brought meant that it had the nature of being very complex by all the material and the number of cases that were relied on that often needed to be read by Counsel for the respondent in order to say that they had no application to this proceeding, or that they were easily distinguishable.

44 Miss Papaelia has also referred to section 109(3)(e), which is the other matter that the Tribunal considers relevant. In relation to that matter, Miss Papaelia referred to the question of fraud and that is something that is a very serious matter for any party to allege against another party and it is something that should be taken into account in awarding costs.

45 Thus, in my view, that section 109 of the VCAT Act has been made out and this should be an award of costs in relation to that section.

46 Before coming to whether the costs should be a standard scale or on indemnity basis, I will deal with section 92.

Section 92 of the Retail Leases Act 2003

47 Section 92 of the *Retail Leases Act 2003* provides that in subsection (1) in relation to proceedings under that Act each party is to bear their own costs in the proceeding. However, subsection (2) provides that in certain

circumstances the Tribunal can make an order for costs. The relevant part of subsection (2) reads as follows:

> 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.

48 In relation to section 109(3)(a)(iv), I have already found that the applicant did conduct the proceeding vexatiously and that same finding must apply here. The way the proceeding was conducted did unnecessarily disadvantage the other party because of the huge amount of material and the many cases that were referred to that needed to be, as I have said, either read in order to disregard, or read in order to distinguish.

49 In the end, those cases did not take the matter very much further. However, it would have taken an enormous amount of time to have those cases digested by the respondent's lawyers. Therefore, I find that the proceeding was conducted in a way that disadvantaged the respondent. Thus, the two elements of section 92 are made out.

Indemnity Costs

50 I now turn to whether there should be indemnity costs or costs on a standard scale.

51 It is often said that in a court, indemnity costs are rarely awarded and, in the Tribunal, where costs do not follow the event, they should be even more rarely awarded.

52 There have been a number of cases put to me in relation to whether indemnity costs should be awarded, and I have given those matters serious consideration. In particular, the applicant put before me the case of *Anita Loughran and Miles Loughran v Hasham* [2018] VCAT 586.

53 In that matter, Senior Member Walker distinguished most of the relevant cases that were important in deciding whether there should be indemnity costs in the proceedings or otherwise.

54 He referred to the *Colgate-Palmolive Pty Ltd & Anor v Cussons Pty Ltd* [1993] FCA 536 a decision of Justice Sheppard and there he said:

> The circumstances of cases must be such to warrant the court in departing from the usual course.

55 He also referred to a case that is much cited before this Tribunal and indeed was cited by Miss Papaelia for the respondent, viz. *Ugly Tribe Co Pty Ltd v Sikola* [2001] VSC 189 (Harper J). His Honour said at [12]:

> The position changes where a litigant acts dishonestly in the litigation, or where the rights and privileges of litigation are flouted or abused.

> Then, the rationale for refusing to order that the losing party indemnify an opposite party against that party's costs is less compelling. Indeed, costs are more frequently if not invariably awarded on an indemnity or like basis (such as solicitor/client) where findings of dishonesty or serious misconduct have been made against the party ordered to pay.

56 I hasten to say that there is no allegation of dishonesty against the applicant and I make no findings of dishonesty whatsoever, even though the applicant certainly took a lot longer and time was wasted in the way the proceeding was conducted. Bearing in mind that the applicant is a law student and not a qualified lawyer, I cannot say that there was serious misconduct on his behalf - it does not come within that category.

57 In the case of *24 Hour Fitness Pty Ltd v W & B investment Group* [2015] VSCA 206, the Court of Appeal referred to the *Ugly Tribe* case which I already referred to, one of the matters that should be taken into account is an allegation of fraud. In particular, the one that has been made against the opposite party.

58 In this particular instance, that allegation was made. Also, there was an irrelevant allegation of fraud. There was conduct causing loss of time to the Tribunal and other parties. I do not find there were ulterior motives in bringing this proceeding and I do not find that the proceedings were conducted in disregard of fact or clearly established law.

59 I do this on the basis that I have taken into account that there were two offers made to the applicant. One in March 2018 and the other in July 2018 between the first and second days of the hearing. Both those offers set out matters of law which the applicant could have read and disregarded. Also, they offered that the applicant discontinue the proceeding. He did not do so. However, bearing that in mind, in my view it would be taking it too far to say that the applicant acted in disregard of law and facts. I cannot say that was so in this matter.

60 Taking all those matters into account and taking into account the nature of this Tribunal, I have come to the view that indemnity costs are not warranted. However, I do come to the view that costs should be awarded on a standard scale of the County Court to be assessed, in default of agreement, by the Costs Court and I will make that order accordingly.

61 In regard to the application for reinstatement dated 16 December 2017, such cost will be taxed in default of agreement on the standard basis of the County Court by the Costs Court.

Robert Davis
Senior Member