

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1562/2018

CATCHWORDS

Retail tenancy, Section 109 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 92 *Retail Leases Act 1958* (Vic) – Application for costs by landlord following dissolution of injunction and relief against forfeiture claim by tenant.

FIRST APPLICANT	Blackwood Pub Pty Ltd
SECOND APPLICANT	Michael Boyd
FIRST RESPONDENT	Ken Cooke
SECOND RESPONDENT	Anne Cooke
WHERE HELD	Melbourne
BEFORE	Senior Member L. Forde
HEARING TYPE	In Chambers
DATE OF ORDER AND REASONS	24 September 2019
CITATION	Blackwood Pub Pty Ltd v Cooke (Building and Property) (Costs) [2019] VCAT 1516

ORDER

1. The applicants must pay the respondents' costs of and incidental to: -
 - a. the respondents' application to dissolve the interlocutory injunction dated 23 November 2018, heard on 28 March 2019; and
 - b. the respondents' costs of defending the applicants' claim from 28 March 2019as agreed or as assessed by the Costs Court on the County Court scale on the standard basis.

L. Forde
Senior Member

REASONS

BACKGROUND

- 1 By orders made 21 August 2019, the applicants' claim including the claim for relief against forfeiture was dismissed. The respondents asked for their costs of the applicants' proceedings. The respondents still have a counterclaim on foot.
- 2 The parties were provided an opportunity to file written submissions in relation to the respondents' application for costs.
- 3 The respondents filed written submissions on 3 September 2019.
- 4 The applicants' submissions were due by 11 September 2019. No submissions have been filed by the applicants.
- 5 On 10 September 2019, the Tribunal received notice that the second applicant was bankrupt.

COSTS

- 6 Because this is a retail tenancy dispute, the power of the Tribunal to make an order with respect to costs is limited by s.92 of the *Retail Leases Act 2003* (Vic) (the Act). That provides as follows:
 - (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 withdrew from mediation or other form of alternative dispute resolution under this Part.
 - (3) In this section, "costs" includes fees, charges and disbursements.
- 7 Since this proceeding was originally an application for an injunction, by s.87(2) of the Act, the underlying dispute was not required to be referred to the Small Business Commissioner for alternate dispute resolution before proceedings were commenced.
- 8 Since neither party has refused to take part in, or has withdrawn from, mediation or any other form of alternate dispute resolution, I can only make an order for costs if I am satisfied that the party against whom the order is

sought has conducted the proceeding in a vexatious way that unnecessarily disadvantaged the other party to the proceeding.

9 The application of this section was considered in *State of Victoria v. Bradto*¹, where Judge Bowman said (at paragraphs 66 and 67):

66. In essence, there was not a great deal of conflict between the parties as to the principles to be applied in relation to the operation of s.92 of the RLA. Clearly that section is designed to restrict the number of situations in which costs can be ordered. I agree that, whilst assistance can be gained from looking at various sections of the VCAT Act and the manner in which they have been interpreted, s.92 should essentially be viewed in isolation. Whilst it might be that, under both the RLA and the VCAT Act the starting point is that no order should be made as to costs and that each party should bear its own costs, the exceptions contained in s.109(3) of the VCAT Act, with the exception of (3)(a)(vi), do not operate. If I am to order costs in a matter brought pursuant to the RLA, I must be satisfied that it is fair so to do because a party conducted the proceeding in a vexatious way, and that such conduct unnecessarily disadvantaged another party to the proceeding.

67. I am also of the view that, pursuant to the frequently cited test in *Oceanic Sun Line*, 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 burdensome, 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. Indeed, if one looks at the factual and statutory context in which the decision in *J&C Cabot* was taken, that distinction is underlined. Section 150(4) of the *Administrative Appeals Tribunal Act 1984* refers to "... proceedings (that) have been brought vexatiously or frivolously ...". (My emphasis). Furthermore, the tests adopted by Gobbo J are those previously expressed by Roden J in *Attorney-General (Vic) v Wentworth* (1988) 14 NSW LR 481, and are worded as "... Proceedings are vexatious if they are instituted... if they are brought... if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless". (Again, my emphasis). This is to be contrasted with the wording of s.92 which specifically refers to a proceeding being "conducted ... in a vexatious way". (Again, my emphasis).

10 This approach to the section was approved by the Court of Appeal in *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd*². The court said in

¹ [2006] VCAT 1813

² [2015] VSCA 216

that case (at para 28) that the strength of the unsuccessful party's case is a relevant matter to consider. They added (at para 32):

Some of the circumstances relevant to whether costs should be awarded other than on a standard basis will overlap with the circumstances relevant to determining whether a proceeding has been conducted vexatiously and has unnecessarily disadvantaged the other party.

11 In that context, they said (at para 12):

In *Ugly Tribe Co Pty Ltd v Sikola*, [2001] VSC 189 Harper J identified the following circumstances as warranting a special costs order, noting that the categories of circumstances are not closed: (a) the making of an allegation, known to be false, that the opposite party is guilty of fraud; (b) the making of an irrelevant allegation of fraud; (c) conduct which causes loss of time to the court and to other parties; (d) the commencement or continuation of proceedings for an ulterior motive; (e) conduct which amounts to a contempt of court; (f) the commencement or continuation of proceedings in wilful disregard of known facts or clearly established law; and (g) the failure until after the commencement of the trial, and without explanation, to discover documents, the timely discovery of which would have considerably shortened, and very possibly avoided, the trial.

ANALYSIS

12 The respondents' submission can be summarised as relying upon the following factors in support of its application: -

- a the claim was always weak as noted by SM Lothian in the order of 23 November 2019 that the Tribunal is only just satisfied that there is a serious question to be tried;
- b other than filing pleadings, the applicants have done little to progress their case;
- c the applicants' failure to comply with orders including orders dated 23 November 2018, 28 February 2019 and 15 July 2019; and
- d the applicants' withdrawal of the relief against forfeiture application.

13 The respondents submit that because the conduct was vexatious the threshold for indemnity costs is satisfied. No elaboration on this point was made in the submission.

14 As mentioned, no submission was made by the applicants opposing the costs order.

15 I am not satisfied that the applicants' conduct at the commencement of the proceedings was vexatious. The claim was not so obviously untenable or manifestly groundless as to be utterly hopeless. There was enough to secure an interlocutory injunction.

- 16 However, as the proceedings progressed, and the facts became clearer the applicants' case became more obviously hopeless.
- 17 At the directions hearing on 28 February 2019 the Tribunal refused an order dissolving the interlocutory injunction granted on 23 November 2018. Orders were made for payment of an insurance premium and for the timely payment of rent. An invitation was extended to the respondent in the order to apply again to dissolve the injunction if the payments of the premium and timely rent were not made. A further application was made on 28 March 2019 and the interlocutory injunction dissolved.
- 18 The first applicant fell behind in its rent payments in June and July 2019 despite Tribunal orders requiring rent to be paid.
- 19 Furthermore, the first respondent brought an eleventh-hour application for relief against forfeiture and then subsequently, before the hearing, abandoned the premises. This conduct was clearly to the detriment of the respondents.
- 20 By the end of March 2019, the applicants should have known their case was hopeless and that there was continuing default under the lease.
- 21 In the circumstances a costs order is justified. I am not satisfied that circumstances exist to warrant an order for costs on an indemnity basis.
- 22 The applicants must pay the respondents' costs of and incidental to: -
- a. the respondents' application to dissolve the interlocutory injunction dated 23 November 2018 heard on 28 March 2019; and
 - b. the respondents' costs of defending the applicants' claim from 28 March 2019,
- as agreed, or as assessed by the Costs Court on the County Court scale on the standard basis.

L. Forde
Senior Member