

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP813/2017

CATCHWORDS

No costs order under *Retail Leases Act 2003* (RL Act) s92(2)(a), exception where vexatious conduct. Found, fair to order costs because of conduct of a specified part of proceeding in a vexatious way. *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act) s74(2)(b), power to order costs on withdrawal of proceeding, not excluded by s92(2) of RL Act. Consideration of operation of s74(2)(b) and s159 of VCAT Act in terms of s92(2)(a) RL Act, *Transport Accident Commission v Coyle*, followed. Vexatious conduct, *Oceanic Sun Line Special Shipping Group Pty Inc v Fay*, applied. Strength of a party's case *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd*, considered. Where a party is compelled to suffer cost of attending a hearing and employ Counsel: *Elijoy Investments Pty Ltd v Hart Brothers Pty Ltd*, followed. When appropriate to, and considerations for, ordering indemnity costs, *Ugly Tribe Co Ltd v Sikola*; *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd* and *109 Fitzroy Street Pty Ltd v Frelane Pty Ltd*, applied. Whether a lease later in time can be novated by a lease made earlier in time, meaning and operation of a novation: *Olssen v Dyson*, followed.

APPLICANT	Mr John Patrick Davey
RESPONDENT	Dessco Pty Ltd (ACN 072 755 590) t/as Alexandria Superannuation
WHERE HELD	Melbourne
BEFORE	MJF Sweeney, Member
HEARING TYPE	Hearing
DATE OF HEARING	28 March 2018 and 6 June 2018
DATE OF ORDER	6 August 2018
CITATION	Davey v Dessco Pty Ltd (Building and Property) [2018] VCAT 1217

ORDER

1. Pursuant to s92(2)(a) of the *Retail Leases Act 2003*, and being satisfied that it is fair to do so, the applicant, John Patrick Davey, must pay the respondent, Dessco Pty Ltd, a specified part of the costs, to be assessed by the Costs Court on an indemnity basis under the County Court scale, as follows:

- (a) costs of the respondent of responding to the applicant's application dated 26 June 2017, to maintain the applicant's caveat, and attending the consequent hearing on 21 July 2017;
- (b) costs of the respondent of responding to the applicant's application dated 23 August 2017, seeking an order in the nature of a subpoena, and attending at the consequent hearing on 25 August 2017;
- (c) costs of the respondent of responding to the applicant's applications dated 15 August 2017, 28 August 2017 and 16 January 2018, seeking an order for security for costs;
- (d) costs of the respondent in respect of preparation for and attendance at this costs hearing;
- (e) in respect of each of the above attendances, the attendance of Counsel is certified as appropriate and necessary.

MJF Sweeney
Member

APPEARANCES:

For Applicant (Respondent in Costs application) Mr J. P. Davey, Solicitor, in person

For Respondent (Applicant in Costs application) Mr L. Virgona of Counsel

REASONS

THE COSTS APPLICATION

- 1 The respondent, Dessco, seeks an order for costs, under the provisions of the *Retail Leases Act 2003 (RL Act)* s92(2)(a), from the applicant, Mr Davey. Dessco also seeks that any order for costs be made on an indemnity basis.
- 2 On 19 January 2018, the Tribunal granted leave to Mr Davey to withdraw his application before determination. His claims in the proceeding were ordered withdrawn and costs were reserved. Dessco sought costs. By order 4 of the above orders, the hearing as to costs was set down and ultimately heard by me on 28 March and 6 June 2018.
- 3 Subject to comments that follow, an application to withdraw proceedings and the grant of leave to do so is governed by s74 of the *Victorian Civil and Administrative Tribunal Act 1998 (VCAT Act)*. The question of costs upon withdrawal is governed by s74(2)(b). Under that sub-section, the Tribunal has a discretion to make an order for costs.
- 4 It is common ground that the substantive issues the subject of the withdrawn application were concerned with matters governed by the RL Act. On the question of costs, s92(1) of RL Act excludes the operation of s109 of the VCAT Act, which is contained within Division 8 of Part 4 of that Act.¹ Section 92 of the RL Act provides as follows:

Each party bears 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 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.
- 5 Section 74(2)(b) is not contained within Division 8 of Part 4 of the VCAT Act and thus is not expressly excluded by s92 of the RL Act. To the extent that it may be argued that s74(2)(b) governs the question of costs, I am

¹ 24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd [2015] VSCA 216, [3].

guided by the observations of Batt JA in *Transport Accident Commission v Coyle*² where His Honour stated that sub-section 74(2)(b) does not deal with the contents of a costs order, rather it is an empowering provision that authorises VCAT to award costs against an applicant after an application has been withdrawn. With that guide, it may be said that s92(2) of the RL Act is not inconsistent with s74(2)(b) of the VCAT Act in terms of the power to order costs, once the power is enlivened under s92(2)(a) of the RL Act, but the RL Act goes further to expressly govern and mandate considerations applicable for making an order for costs where the dispute is subject to the RL Act. However, if there be some inconsistency between the two provisions, which I do not find and which was not submitted for by either party, s159 of the VCAT Act provides that if a provision of the VCAT Act is inconsistent with a provision of an enabling enactment, the enabling enactment prevails to the extent of the inconsistency.

- 6 The costs provision of s92 of the RL Act therefore covers the field and provides the criteria that must be taken into account for any costs order to be made.

BACKGROUND

- 7 Dessco submits that Mr Davey's conduct in this proceeding has been continuously vexatious in that he has caused 'serious and unjustified trouble or harassment, or [sic] if there is conduct which is seriously and unfairly burdensome, prejudicial or damaging.'³ It contends that Mr Davey has repeatedly filed defective and irrelevant applications which have served no purpose and which have caused Dessco to incur considerable legal costs in responding to and appearing at, the several applications.
- 8 The background to the dispute needs to be stated. Mr Davey is a solicitor and in early 2015 acted for a director of Dessco, Mr Patrick Dessman. He also acted for Dessco. Dessco desired to purchase retail office premises from a vendor, Snellgrove Pty Ltd. For reasons alleged to do with securing finance for the purchase of the property and the incidence of GST, it was thought advisable that Dessco be able to demonstrate that the property, sought to be purchased by it, be subject to lease, thus being some evidence that the purchase was of a going concern.
- 9 On 16 February 2015, allegedly to give some effect to the matters referred to above, and prior to any contract of sale between Snellgrove and Dessco, Mr Davey signed an agreement with Dessco purporting to be a lease by him of the property from Dessco for use as his legal offices (**Disputed Lease**).
- 10 According to Mr Meehan, a finance broker and adviser to Mr Dessman, the Disputed Lease did not have the effect of qualifying the property sought to be purchased as a going concern for GST purposes because the property

² Supreme Court of Victoria, Court of Appeal, (2001) 3 VR 589 per Brooking, Phillips and Batt, JJ.A.

³ *State of Victoria v Bradto* [2006] VCAT 1813 [67] and Dessco submission [15].

had not at that time settled.⁴ (In fact, at that time, it is common ground that no contract of sale between Snellgrove and Dessco had yet been executed).

- 11 On 23 March 2015, whether to do with securing a level of finance, GST exemption matters and/or a desire of Mr Davey to move into the property as soon as possible, a lease agreement was signed between Snellgrove, the future vendor, as lessor, and Mr Davey, as lessee (**Snellgrove Lease**). Mr Davey took possession under the Snellgrove Lease.
- 12 The Disputed Lease and the Snellgrove Lease contained respective schedules of terms. The schedule of terms were the same in material and relevant respects, except for the rent review terms. The Disputed Lease reviewed rent annually to market.⁵ The Snellgrove Lease reviewed rent annually based on a CPI index.⁶
- 13 On or about 30 March 2015, Dessco, as purchaser, signed a contract for the purchase of the property from Snellgrove, as vendor. The particulars of the contract state that the sale of the property is ‘subject to lease’.⁷
- 14 On 17 June 2015, the sale of the property was settled.
- 15 On or about the first half of 2017, a time almost 2 years after settlement of the property, Dessco claimed rent due, for the months of April and May 2017, including for an amount reflecting the review terms under the Snellgrove Lease. It issued a s146 notice under the *Property Law Act 1958*, dated 26 May 2017.⁸
- 16 On 9 June 2017, Mr Davey brought these proceedings against Dessco seeking orders setting aside the s146 notice. He also sought an order declaring that the proper lease operating between the parties was the Disputed Lease (not the Snellgrove Lease).
- 17 An earlier s146 notice, dated on or about 17 October 2016, in respect of the Snellgrove Lease, had been served by Dessco against Mr Davey for which, in a separate proceeding, the Tribunal made orders, including for relief against forfeiture, on or about December 2016.
- 18 On 19 June 2017, Dessco issued a notice of re-entry and rescission of the Snellgrove Lease advising that it has thereby re-entered the premises and forfeited the Snellgrove Lease.⁹
- 19 Since the commencement of these proceedings by Mr Davey on 9 June 2017, there have been four hearings plus the final directions hearing where Mr Davey withdrew his claim.
- 20 The first hearing was on 26 June 2017, on an application made by Mr Davey. Following the notice of re-entry and repossession issued by Dessco

⁴ Affidavit of Michael James Meehan, affirmed 3 August 2017, paragraph 14.

⁵ Davey Tribunal Book, tab 3.

⁶ Affidavit of Peter Patrick Dessman, sworn 26 June 2017, exhibit PPD-4.

⁷ Affidavit of Peter Patrick Dessman, sworn 26 June 2017, [7] and exhibit PPD-3.

⁸ Affidavit Peter Patrick Dessman, sworn 26 June 2017, [13, [14].

⁹ Affidavit Peter Patrick Dessman, sworn 26 June 2017, [18] and exhibit PPD-12.

(refer paragraph 18 above), Mr Davey brought an application seeking an interim injunction restraining Dessco.¹⁰ On 26 June 2017, orders were made restraining Dessco from entering into possession until 1 September 2017. Mr Davey was required to make payments of rent and outgoings until the ultimate hearing of Mr Davey's application and costs were reserved.

- 21 The second hearing was on 21 July 2017, about 4 weeks after the first hearing, on an application made by Mr Davey. Mr Davey sought a form of declaration that a caveat lodged by him to protect a lease with Dessco should remain in place. The Tribunal found it did not have jurisdiction and reserved Dessco's costs.¹¹
- 22 The third hearing was on 25 August 2017, about 5 weeks after the second hearing, on an application made by Mr Davey. Mr Davey made an application under s81 of the VCAT Act and sought the production of the estate agent's file in relation to the rented premises. Mr Davey also sought an order for contempt. Dessco says that a hearing was not necessary and the proper procedure is under s104, witness summons, issued by the principal registrar. Cost were reserved and by later order on 29 August 2017, were ordered as costs in the cause.
- 23 The fourth hearing was on 29 August 2017, 4 days after the third hearing. Further orders were made requiring Mr Davey to pay rent and outgoings up to the date of the hearing and costs of the 25 August directions hearing and this directions hearing be treated as costs in the cause.
- 24 On 19 January 2018, Mr Davey was granted leave to withdraw his proceeding on the basis that he was no longer seeking relief against forfeiture given his intention to vacate the rented premises. Costs of the application were reserved.
- 25 Dessco maintains throughout that the only lease is the Snellgrove Lease and that Mr Davey in the present proceeding, now withdrawn, has acted vexatiously in pursuing what it terms the 'wrong lease argument', to insist that the Disputed Lease is the proper lease.
- 26 Mr Davey contends that the Disputed Lease is the operative lease and that he only withdrew his proceeding and claim due to deciding to vacate the rented premises.
- 27 The issues for determination in the present application are:
 - (a) Whether Mr Davey conducted the proceeding in a vexatious way that unnecessarily disadvantaged Dessco, entitling Dessco to all costs of the proceeding;
 - (b) Whether Mr Davey conducted aspects of the proceeding in a vexatious way, entitling Dessco to a specified part of the costs of the proceeding;

¹⁰ Davey submission, filed 26 March 2018, [27].

¹¹ Tribunal Orders, 21 July 2017, order number 2.

- (c) If costs are found to be properly payable under either sub paragraphs (a) or (b) above, whether such costs should be ordered to be paid on an indemnity basis.

OPERATION OF S92(2) OF THE RETAIL LEASES ACT

28 The applicable principles in the interpretation and application of the costs exception under s92(2) of the RL Act have been well considered. The authorities capturing the principles are not controversial and may be stated as follows.

29 If an order for costs under s92(2) of the RL Act is to be made, the Tribunal must be satisfied that it is fair to do so because a party has conducted the proceeding in a vexatious way and that such conduct unnecessarily disadvantaged another party to the proceeding.¹²

30 The appropriate test adopted for what constitutes vexatious conduct is that stated by Deane J in *Oceanic Sun Line Special Shipping Company Inc v Fay*¹³:

If the plaintiff is not acting bona fide or in pursuit of a legitimate advantage in pursuing the proceedings in the legal system of this country, that will, of course, make it much easier for a continuation of the proceedings to be characterised as vexatious or oppressive. On that approach, ‘oppressive’, should, in this context, be understood as meaning seriously and unfairly burdensome, prejudicial or damaging, while ‘vexatious’ should be understood as meaning productive of serious and unjustified trouble and harassment.

31 In determining if a proceeding was conducted vexatiously under s92(2) of the RL Act, it is relevant to take into account that the claim was bound to fail. The Victorian Supreme Court of Appeal in *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd*¹⁴ held:

The strength the applicant’s claim for damages was a relevant factor to take into account ... It would be artificial to attempt to evaluate the manner in which the proceeding was conducted by a party without having any regard to the strength of that party’s case. In the present circumstances, it was relevant that the applicant pursued the damages claim, in circumstances where it was bound to fail.

32 In the context of Dessco seeking indemnity costs, the Court of Appeal in *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd* (above), added that 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 unreasonably disadvantaged the other party.

¹² *State of Victoria v Bradto* [2006] VCAT 1813 at [66].

¹³ (1998) 165 CLR 197 at 247; (1988) 79 ALR 9 at 45, per Deane J.

¹⁴ [2015] VSCA 216 at [28], [29].

- 33 The Tribunal has also decided that conduct may be regarded as causing unnecessary disadvantage by compelling the other party to attend the Tribunal. In *Elijoy Investments Pty Ltd v Hart Brothers Pty Ltd*.¹⁵ Senior Member Davis said:

[The party] was compelled to come to the Tribunal and defend this proceeding and it was also compelled to employ expensive Counsel and solicitors in order to do so. This has cost them a considerable sum of money.

DESSCO'S SUBMISSIONS

- 34 The following is a summary of Dessco's salient submissions. It is not intended to be an exhaustive summary.
- 35 In support of its contention that Mr Davey has been continuously vexatious in his conduct of the proceeding in that he has caused 'serious and unjustified trouble or harassment, or if there is conduct which is seriously and unfairly burdensome, prejudicial or damaging'¹⁶, Dessco submits that Mr Davey has repeatedly filed defective and irrelevant applications serving no purpose (Dessco's submission, filed 28 March 2018 (Dessco submission)). The Dessco submission, supplemented by the oral submissions of Mr Virgona of Counsel, included reference to 12 matters from 9 December 2016 to 16 January 2017.¹⁷ The alleged defective and irrelevant applications in the proceeding are referred to and described by Dessco as:
- (a) 9 December 2016: Application referring to an alleged Family Violence Intervention Order against Mr Patrick Dessman, a director of Dessco;
 - (b) 20 June 2017: Urgent injunction application to seek recognition that the 'wrong lease' is being used by Dessco in its letting of the relevant premises to Mr Davey;
 - (c) 22 June 2017: Improper issue of summons to appear served on Mr Silverstein, the current solicitor acting for Dessco;
 - (d) 26 June 2017: Unnecessary application made to maintain caveat AN116319K because Mr Davey already has proceedings on foot, the Tribunal does not have jurisdiction and Mr Davey as a solicitor ought to know that the Transfer of Land Act deals with the manner in which caveats are managed which does not engage VCAT's jurisdiction. Unnecessary also because the application was filed on the afternoon of the day, after all parties attended at VCAT for the interim relief from forfeiture hearing;

¹⁵ [2014] VCAT 321 [17].

¹⁶ Above, at [7].

¹⁷ Dessco submission, [17].

- (e) 25 July 2017: Directions application seeking a restraining order against Dessco from entering the property when there was no evidence of Dessco seeking to enter the premises;
- (f) 26 July 2017: Mr Davey's submissions containing numerous irrelevant considerations;
- (g) 3 August 2017: Filing of irrelevant affidavit material (Michael Meehan affidavit) having the effect of prolonging the hearing;
- (h) 15 August 2017: Letter seeking security for costs with no affidavit in support;
- (i) 23 August 2017: Unnecessarily making an application for directions, thereby unnecessarily causing unfair and burdensome attendance of Dessco at a directions hearing, concerning the issuing of process in the nature of a subpoena, where the proper procedure for requesting production of documents is pursuant to s104 of the VCAT Act;
- (j) 28 August 2017: Application to amend an application for costs, security for costs, and further directions without any affidavit in support;
- (k) 11 January 2018: Letter seeking security for costs raising irrelevant issues;
- (l) 16 January 2018: Application for security for costs containing other irrelevant considerations including personal attack on Mr Silverstein, current solicitor acting for Dessco. The application for security for costs is flawed given that it is Dessco that is being sued by Mr Davey. The application was made at a time when Mr Davey had already determined to withdraw the proceedings. Dessco submits this conduct is unfairly burdensome, unjustifiable and prejudicial to Dessco.

36 In further support of its contention that Mr Davey has been continuously vexatious, Dessco submits that Mr Davey has instigated and continuously relied upon a hopeless argument (described by Dessco as Mr Davey's 'wrong lease argument'), said to be demonstrated by 9 matters arising between 2 December 2016 to 24 August 2017.¹⁸ These are stated as follows:

- (a) 2 December 2016: First time the issue of the 'wrong lease' raised by Mr Davey in a letter to Dessco's agent;
- (b) 23 February 2017: Letter to Mr Silverstein pursuing the 'wrong lease argument';
- (c) 13 March 2017: Letter to Dessco's agent pursuing the 'wrong lease argument';
- (d) 9 May 2017: Another letter to agent similar to the above;

¹⁸ Dessco submission, [18] and table.

- (e) 20 June 2017: Urgent application for injunction seeking recognition that the wrong lease is being asserted by Dessco;
 - (f) 26 June 2017: Mr Davey's submissions to Tribunal referring to the 'wrong lease' from paragraph 12 onwards;
 - (g) 26 June 2017: Document setting out the history of the lease and conveyances allegedly demonstrating that the correct lease is the Disputed Lease;
 - (h) 12 July 2017: Mr Davey's Points of Claim, paragraphs 7 to 14;
 - (i) 24 August 2017: Affidavit of documents.
- 37 Finally, Dessco also submits, as evidence of Mr Davey's vexatious conduct of the proceeding, that:
- (a) On the first anniversary of the Snellgrove Lease, on 23 March 2016, the rent payable was increased by CPI under the review provisions of that lease. Mr Davey paid 11 payments at this higher rate without complaining that the review mechanism was wrong or the wrong lease was being applied;
 - (b) Dessco was put to costly and unnecessary cost for preparation of the Tribunal Book for the hearing. Mr Davey, only days before the hearing on 24 January 2018, withdrew his proceeding at the directions hearing on 19 January 2018 when he knew that he intended to withdraw but failed to advise Dessco. Dessco says his failure to give such advice is vexatious given the correspondence/emails sent by Dessco concerning the Tribunal Book on 19 December 2017, 15, 18 and 19 January 2018.¹⁹
 - (c) As further evidence of Mr Davey's vexatious conduct and placing an unnecessary burden causing disadvantage to Dessco, Dessco submits that there were 5 breaches of monetary orders made by the Tribunal requiring Mr Davey to make payments and 3 breaches of non monetary orders made by the Tribunal.²⁰
- 38 Mr Virgona acknowledges that a finding by me of the elements required by s92(2) of the RL Act to support an order for costs is more difficult given that the proceeding was withdrawn by Mr Davey with the Tribunal not having made a final determination on the substantive dispute.
- 39 Nevertheless, Mr Virgona submits that at the time that Mr Davey and Dessco signed the Disputed Lease on 16 February 2015, Dessco did not have an estate or right in the property necessary to convey an interest in land by way of lease or otherwise and that it follows that no lease interest could be created. He further submitted that the caveat lodged on 20 September 2016 is some proof of Mr Davey's acknowledgment of the Snellgrove Lease as being the relevant lease.

¹⁹ Dessco Tribunal Book, tab 17.

²⁰ Dessco submission, [34] and table, [35].

- 40 Mr Virgona submits that the argument put by Mr Davey, that the Snellgrove Lease entered into on 23 March 2015 was novated by the Disputed Lease entered into on 16 February 2015²¹, has no legal merit, that this is clear and that Mr Davey as a practising solicitor should know this.²² The inference is that, in pursuing the novation argument as support for his ‘wrong lease’ argument, Mr Davey’s conduct is vexatious.
- 41 Mr Virgona concluded that the arguments in support of the Disputed Lease put by Mr Davey are utterly hopeless.
- 42 Based on these submissions, pursuant to s92(2) of the RL Act, Dessco seeks the whole of its costs incurred or, alternatively, a specified part of its costs incurred for the individual matters so identified. The individual elements are summarised in paragraphs 35 to 37 above. Dessco seeks these costs on the basis that it is fair to do so because Mr Davey has conducted the proceeding in a vexatious way and caused unnecessary disadvantage to Dessco.
- 43 Mr Virgona in his submissions identified the elements going to make up Dessco’s claim for all costs but, that if I found that the case was not proved to support an order for all costs, I may have regard to specified elements as an alternative application for part of the costs under s92(2) of the RL Act.
- 44 Mr Virgona further put the costs claim as being sought on an indemnity basis. He contended that, given the definition of vexatious behaviour in s92(2) and the requirement to prove the same, the test for granting indemnity costs follows with like reasoning.

MR DAVEY’S SUBMISSIONS

- 45 In his defence, Mr Davey made written and oral submissions on the first day of the costs application hearing on 28 March 2018, continuing them on the second day on 6 June 2018. The following is a summary of Mr Davey’s salient submissions. It is not intended to be an exhaustive summary.
- 46 Mr Davey’s written submissions are divided into several sections. The first section is set out in three numbered boxes. The second section is set out in six paragraphs, designated A to F. The third section, divided into six sub sections with headings, is contained in paragraphs numbered 1 to 41.
- 47 Box number 1 of the first section, refers to allegations about Mr Silverstein, the solicitor for Dessco, concerning an application by Dessco to lapse a caveat protecting Mr Davey’s leasehold interest over the property in question.
- 48 Mr Davey’s submission, expanded on in his oral submissions, is put in support that his application for an order against removal of the caveat (in the substantive proceeding)²³, was not a vexatious application. He submits

²¹ Mr Davey submission, paragraphs [4] to [5].

²² Transcript, pages 73 to 74.

²³ Refer paragraph 21 above concerning Tribunal directions hearing on 21 July 2017.

that the Tribunal made no order as to costs in respect of that application. Mr Davey did not address with any clarity the order of the Tribunal, noted above at paragraph 21 and footnote 11, where the Tribunal ordered on 21 July 2017 that ‘the respondent’s costs are reserved.’

- 49 In respect of applications concerning his caveat over the leased premises and the submission of Dessco that his application of 26 June 2017 to maintain the caveat and seek a declaration as being vexatious, Mr Davey submits that he is entitled to protect his interest under the Disputed Lease.²⁴ He says it cannot be vexatious to defend his lease interest as a matter of principle. He did not engage on the submission of Dessco that an application was not necessary where Mr Davey already had the proceeding on foot to resist forfeiture and where the Tribunal noted it did not have jurisdiction concerning caveats in the circumstances and that Mr Davey as a solicitor should have known the same.
- 50 Box number 2 of the first section, refers to Mr Davey’s application for security for costs made on 16 January 2018 (filed 18 January 2018) which alleged insolvency of Dessco and that Dessco ‘continues to litigate from this position of insolvency’. The security for costs application arose out of the substantive relief from forfeiture litigation brought by Mr Davey in which Dessco is the respondent to the litigation brought by Mr Davey.
- 51 In his oral submissions, Mr Davey submits that his applications seeking security for costs do not amount to vexatious conduct. (The applications for security for costs complained of by Dessco include the applications made by Mr Davey on or about 28 August 2017²⁵ and on 16 January 2018.²⁶)
- 52 Box number 3 of the first section, refers to questions of mitigation of damages in other proceedings which have not yet been heard or adjudicated upon by the Tribunal. This submission is not relevant to the conduct of the present proceeding and the issue of costs.
- 53 The second section of Mr Davey’s written submissions consists of paragraphs designated A to F. To the extent these paragraphs, especially C to F, are submitted as a defence against claimed vexatious conduct of the present proceeding, now withdrawn, these paragraphs refer to matters that either relate to other proceedings or have insufficient causal connection to the costs application before me.
- 54 The third section of Mr Davey’s written submission contains six sub sections, from paragraph 1 to paragraph 41. Four of the sub sections are ‘Debt recovery proceedings against the Respondent’, ‘Retaliation of the Respondent for the debt recovery proceedings’, ‘First proceedings at VCAT – relief’ and ‘Appointment or [sic] R D Silverstein as solicitor – February 2017’. The other two sub sections are discussed from paragraph 63 below.

²⁴ Including, transcript, page 60.

²⁵ Dessco submission, tab 13, copy application dated 28 August 2017.

²⁶ Dessco submission, tab 18, copy application dated 16 January 2018.

- 55 In sub section, ‘Debt recovery proceedings’, at paragraphs 8 to 11, Mr Davey submits details of the fraught relationship between him, Dessco and Mr Dessman, a director of Dessco, arising out of debts, including legal fees, said to be owed to Mr Davey. In his oral submissions, Mr Davey described his proceedings brought in the Magistrates Court, an appeal to the Supreme Court of Victoria and another piece of litigation, not between the present parties, in the Supreme Court of the Australian Capital Territory. He submits that all the litigation and time taken was causing financial distress to him and his legal practice.²⁷
- 56 Mr Davey explained the relevance of his submission concerning his debt recovery proceedings to the question of vexatious conduct. He said that it was background to the present dispute and that the s146 notice issued under the *Property Law Act 1958*, was a retaliation for him seeking to recover debts owed to him by Dessco or Mr Dessman.
- 57 Whilst the matter of Mr Davey’s debt recovery proceeding may be indicative of the considerable angst that appears to exist between the parties and may be some explanation for multiple proceedings between them, or other parties somehow connected, alleged retaliatory proceedings by Dessco seeking possession, would not be a justification for the complained of behaviour, being whether Mr Davey conducted his present proceeding in a vexatious way.
- 58 In sub section, ‘Retaliation of the Respondent for the debt recovery proceedings’, at paragraphs 12 to 19, Mr Davey submits that his conduct of the present proceeding seeking relief from forfeiture is not vexatious because of unconscionable conduct of Dessco, where Dessco, he submits, is seeking possession of the property as a retaliation against Mr Davey for having brought debt recovery proceedings against Dessco.
- 59 Similarly, the question of vexatious conduct of the substantive proceeding must be considered, as s92(2) of the RL Act demands, in relation to the proceeding itself and not extraneous matters and allegations. The submission, so far as it relates to alleged retaliation of Dessco, without more, is not a relevant consideration in respect of whether the conduct of the substantive proceeding is vexatious.
- 60 In sub section, ‘First proceeding at VCAT – relief’, at paragraphs 20 to 22, Mr Davey submits that the earlier proceeding, BP1628/2016, in which consent orders of the Tribunal were made, including for relief against forfeiture, recognised the Disputed Lease as being ‘the applicable lease’.
- 61 In sub section, ‘Appointment or [sic] R D Silverstein as solicitor’ at paragraphs 23 to 28, Mr Davey submits various actions taken by Mr Silverstein, as newly appointed solicitor acting for Dessco.
- 62 Mr Davey’s submissions in this regard have insufficient causal connection to my consideration of vexatious conduct in the substantive proceeding. His

²⁷ Transcript, pages 25 to 32.

submissions relate to his debt recovery proceedings, a number of proceedings in other jurisdictions and previously decided VCAT proceedings.

- 63 In sub section, ‘Antecedent Facts’, at paragraphs 1 to 7, and in sub section, ‘The Respondent’s claim for costs’, at paragraphs 29 to 41, Mr Davey makes submissions on his reasons for seeking relief against forfeiture. He repeats some of the arguments concerning recovery of debt as discussed above and claims of set off against rent.
- 64 Mr Davey submitted (‘Antecedent Facts’, paragraph 4), that he entered into the Snellgrove Lease on 23 March 2015 which he says ‘was novated by the lease of the 16th February 2015 [the Disputed Lease]’. At paragraph 5, he expands his contention concerning novation. He contends that Dessco wrongly alleges that the Snellgrove Lease prevails, despite Dessco ‘novating and proceeding under the provisions of the 2nd Lease [the Disputed Lease]’.
- 65 Confusingly, Mr Davey refers to the Disputed Lease, dated 16 February 2015, as the ‘second lease’ and the Snellgrove Lease, dated 23 March 2015, as the ‘first lease’.²⁸ I infer from these expressions that Mr Davey contends that the Disputed Lease, whilst dated earlier in time, became operative later in time, succeeding the Snellgrove Lease, and therefore ‘novated’ the Snellgrove Lease.
- 66 In sub section, ‘The Respondent’s claim for costs’, at paragraphs 29 to 41, Mr Davey submits, at paragraphs 30 to 32:
- (a) That he elected not to continue his application for relief against forfeiture in the present proceeding on a ‘no admissions basis’;
 - (b) That Dessco consented to this course [withdrawal] of action; and
 - (c) That the only application that has been withdrawn or discontinued is that seeking relief against forfeiture, but that he continues to maintain entitlement to compensation based on unconscionable conduct of Dessco.
- 67 Mr Davey submits that his withdrawal of the proceeding was not vexatious conduct. Given the above submissions, I refer to the orders of Tribunal of 19 January 2018. The orders are clear. Order 2 states: ‘Leave is granted to the applicant to withdraw his claims in the proceeding and the applicant’s claims in the proceeding are withdrawn with costs reserved. The respondent seeks costs of the proceeding.’
- 68 The parties agree that the withdrawal of the proceeding was ‘not opposed’.²⁹ Although, Mr Davey having stated it was not opposed, added it was by consent.

²⁸ Mr Davey submission, paragraphs 4 and 5.

²⁹ Transcript page 7, paragraphs 5 and 28.

- 69 In his oral submissions on 28 March 2018 and 6 June 2018, Mr Davey restated the basis of his claim for relief against forfeiture. He detailed other areas of litigation between the parties and/or Mr Dessman for other proceedings in different jurisdictions including a previous matter at VCAT, the Magistrates Court, the County Court, the Supreme Court of Victoria and the Supreme Court of the Australian Capital Territory, the last being litigation between different parties.
- 70 In respect of the correct lease submission, Mr Davey spent considerable time taking the Tribunal through his chronology³⁰ and in particular his main argument as to why the Disputed Lease should be regarded as the applicable lease instead of the Snellgrove Lease. He submits that the simple pursuit by him in the proceeding in seeking to assert the Disputed Lease as the correct lease to protect against forfeiture does not constitute vexatious conduct of the proceeding.
- 71 Mr Davey submits that the substantive issue of what is the correct lease, remains a live issue.³¹ Given it remains live, and notwithstanding he withdrew the proceeding, he questions, how could arguing the substantive issue be vexatious conduct.³² He submits that what I am in effect being asked to do is to make a determination on the substantive issue in order to make a finding of vexatiousness.³³ In support of his contention that the question of the correct lease remains a live issue, Mr Davey said that this was so due to different proceedings presently before the Tribunal in relation to a damages claim by Dessco against Mr Davey in respect of the same tenancy.³⁴
- 72 Mr Davey contends that it was the issuing of s146 notice(s) under the *Property Law Act 1958* by Dessco that agitated his responses(s) seeking relief from forfeiture, including the relief sought in the substantive proceeding, prior to his withdrawal of it. Again, he contends that he was entitled to do so where he considered that the s146 notices had not been issued in respect of the correct lease.³⁵
- 73 As additional support for the reasonableness of his pursuit of the Disputed Lease as being the correct lease, Mr Davey refers to the earlier litigation before the Tribunal in proceeding BP1628/2016, which was settled between the parties.³⁶ In the settlement of that earlier proceeding, he contends that it was acknowledged by Dessco that the Disputed Lease was the correct lease.
- 74 Mr Davey, in a long explanation of the background, including discussions with Dessco's agent and other matters prior to and post the appointment of Mr Silverstein as Dessco's solicitor, clarified what he meant by his

³⁰ Mr Davey submission, tab1.

³¹ Transcript, page 34,

³² Transcript, page 34.

³³ Transcript, page 35 and pages 37 to 38.

³⁴ Transcript, page 35.

³⁵ Transcript pages 38, 39.

³⁶ Transcript, pages 40 to 41.

assertion concerning admissions or acknowledgements of the Disputed Lease as being the correct lease. He said: 'I'm saying that ... I don't think he's [Mr Dessman] has admitted to that. I think what he's saying is that he admitted to signing it'.³⁷

75 But, as a further clarification, that the correct lease was the Disputed Lease, Mr Davey said that that the resolution of the rent increase in relation to an earlier dispute between him and Dessco's agent 'was an admission the correct lease was the lease that was signed by Mr Dessman [the Disputed Lease], and payment was made in consideration of that calculation.' 'I was of the view then this issue of the correct lease based upon the rent increase was admitted in those circumstances.'³⁸

76 In further support of his recollection of events supporting that the matters of the correct lease and rent payable had been resolved, he referred to a letter from Mr Dessman's agent, Oak Park Real Estate, dated 3 April 2017.³⁹ This letter was pleaded as particulars in Mr Davey's point of claim of 12 July 2017.⁴⁰

77 In respect of his application seeking delivery up of documents held by the Council, Mr Davey denies vexatious conduct by making his application which unnecessarily caused the attendance of the parties at a directions hearing. He refutes Dessco's submission that he should have known the proper procedure for requesting production of documents is pursuant to s104 of the VCAT Act.

78 Mr Davey submits that it was clear what he was after and that, as he does not practise in the VCAT jurisdiction, he is not familiar with its procedures.⁴¹

79 In respect of non compliance with the Tribunal's monetary and non monetary orders put against him⁴² as examples of vexatious conduct, Mr Davey admits the non compliance.⁴³ He submits that non compliance was not evidence of his conducting proceedings in a vexatious manner. He submits that his non compliance arose out of financial difficulties he was suffering due to non payment of legal fees by Dessco's director, Mr Dessman. Another reason for non compliance is that the sums ordered by the Tribunal to be paid are based on the wrong lease and that this is now caught up in new proceedings presently between the parties relation to Dessco's claim for compensation. Mr Davey submits that the Tribunal should take all these matters into consideration as part of the broader picture of relations between the parties.⁴⁴

³⁷ Transcript, page 56, lines 19 to 21.

³⁸ Transcript page 57, lines 3 to 5; lines 12 to 14.

³⁹ Transcript, pages 52 and 53; 57 and 58.

⁴⁰ Mr Davey's points of claim, 12 July 2017, paragraph 13.

⁴¹ Transcript, page 61.

⁴² Refer summary of Dessco submissions, paragraph 31(c), above.

⁴³ Transcript, page 68, lines 6 to 17; pages 70 and 71.

⁴⁴ Transcript, page 71, lines 1 to 5.

80 Mr Davey submits that his applications were properly made and not vexatious due to Dessco allegedly owing him substantial fees, said to be in excess of \$84,000, and Dessco being unable or refusing to pay where Dessco, he alleges, doesn't appear to have any assets.⁴⁵

Did Mr Davey conduct the proceeding in a vexatious way that unnecessarily disadvantaged Dessco, entitling Dessco to all costs of the proceeding?

81 Mr Davey's main submission, expressed in a number of different ways, is that his conduct cannot be regarded as vexatious as he is entitled to assert the correctness and validity of the Disputed Lease as the basis on which he sought relief from forfeiture. He submits that he felt that it was extraordinary that his reliance on the Disputed Lease could be regarded as vexatious. He said that with regard to the vexatious conduct issue, it all hangs off what is the correct lease ... which was the applicable lease.⁴⁶

82 The main issue in the substantive proceeding brought by Mr Davey, in effect seeking relief from forfeiture on the basis of a declaration that the Disputed Lease is the correct lease, was whether as a matter of law, the binding operative lease over the property was the Disputed Lease, as contended by Mr Davey, or the Snellgrove Lease, as contended by Dessco.

83 Considering whether an order should be made that Mr Davey pay 'all' costs under s92(2)(a) of the RL Act depends on his conduct in relation to the overall proceeding. As is clear from all the submissions, central to this is the pursuit by Mr Davey of his contention that the Disputed Lease is the valid lease and whether that pursuit is vexatious. Whilst other elements of his alleged conduct going to contribute to overall vexation have been submitted by Dessco, entitlement to 'all' costs, as distinct from a specified part of costs, will initially turn on whether pursuit of the Disputed Lease is considered vexatious.

84 If I was to find that there was a proper basis, inconsistent with a finding of vexatious conduct, for Mr Davey to have pursued his contention that the Disputed Lease is the valid lease, such a finding on this central issue would in my opinion result in Dessco failing to establish entitlement to an order for 'all' costs of the proceeding.

85 Dessco submits, in the alternative, that an order for 'all' costs arises from vexatious conduct of Mr Davey from the course of his conduct across the 12 month or so duration.⁴⁷ However, Mr Davey's contention, that the Disputed Lease is the only valid lease, is inextricably intertwined with his general conduct of the proceeding. In the absence of the matter being finally heard and determined, it is difficult to separate this out from his other applications/conduct, to found an alternative finding of an entitlement to

⁴⁵ Transcript, pages 62 to 65, especially page 65, lines 10 to 25.

⁴⁶ Transcript page 37, lines 12 to 16.

⁴⁷ Transcript, page 79.

‘all’ costs, as arising from the course of conduct across the 12 month or so duration.

- 86 Thus, if I find that Mr Davey’s pursuit of the Disputed Lease was not of itself vexatious, the issue remaining for consideration is the second issue referred to in sub paragraph 27(b) above, namely whether Dessco is entitled to a specified part of the costs of the proceeding for other vexatious conduct.
- 87 An issue pursued by Mr Davey, concerning his conduct of the proceeding that the Disputed Lease was the valid lease, is the Tribunal had not considered or decided the matter, due to his withdrawal of the proceeding. That issue is not a matter for decision before me. What is before me is whether Mr Davey has conducted the proceeding in a vexatious way that unnecessarily disadvantaged the other party to the proceeding.
- 88 In more usual applications for costs under the RL Act, the substantive proceeding would have been finally determined. The issues raised would have been extensively argued, factual findings made, the law applied and a final determination made. That testing and determinative process is important to understanding whether an applicant has acted bona fide or has sought, even if it failed, to pursue a legitimate interest, and therefore whether conduct of the case may be characterised as productive of serious and unjustified trouble and harassment.
- 89 In the usual course, those findings would reflect the relative merits and strengths of the propositions argued. If the determination of the Tribunal reflected findings that the losing party’s case was bound to fail, that may be determinative that the losing party had caused the other party unjustified trouble and harassment; that its conduct was vexatious.
- 90 As stated, I do not have the benefit of considering these matters due to the proceeding having been withdrawn. The challenge that this presents was recognised by Dessco’s counsel in its oral submissions.
- 91 Mr Davey submits his conduct in pursuing the Disputed Lease as the valid lease was not vexatious and justified on a number of grounds. These include:
- (a) The Disputed Lease is the valid lease because it was a novation of the Snellgrove Lease;⁴⁸
 - (b) In early 2017, the previous proceeding BP1628/2016, was settled between the parties, by Dessco consenting to relief against forfeiture and by Mr Davey agreeing to pay certain moneys in respect of rent and outgoings. Mr Davey submits he understood the settlement reflected that the valid lease was the Disputed Lease;⁴⁹

⁴⁸ Above, paragraphs 64 to 65.

⁴⁹ Transcript, for example, pages 41, 49 to 50.

- (c) Settlement, reflecting acknowledgement that the valid lease is the Disputed Lease, was made by the estate agent for Dessco, Brian Boyle, in his reply email letter, dated 3 April 2017 and that this constituted a ‘Final Settlement’;⁵⁰
- (d) Mr Davey submits that Mr Dessman, Director of Dessco, admits signing the Disputed Lease (or at least a Schedule of terms denoted as pages, 16, 17 and 19), but that Mr Dessman says he had no recollection of the circumstances under which he signed the Schedule;⁵¹
- (e) The later issue of a s146 notice under the Property Law Act under the Snellgrove Lease, giving rise to Mr Davey bringing the substantive proceeding, was contrary to the settlement. In these circumstances, he submits he is justified in protecting his occupation of the premises.

92 Against this, Dessco, submits that Mr Davey’s pursuit of the ‘wrong lease’ argument as central to his proceeding is a hopeless argument. Dessco’s submissions on this include those summarised in paragraphs 36 and, in respect of the novation argument, paragraphs 39 to 41, above.

93 In my opinion, as a matter of law, Mr Davey’s submissions in respect of the Disputed Lease being a novation of the Snellgrove Lease must be without foundation for the reasons contended for by Dessco. The legal position in respect of novation is as captured in the decision referred to by Dessco of *Olssen v Dyson*.⁵² Again, the law in the factual context of the substantive proceeding, is not controversial.

94 Mr Davey’s submission on the question of novation is misconceived, including on the ground that the earlier contract, the Disputed Lease, could be a novation of the later contract, the Snellgrove Lease. Novation is the making of a new contract ... in consideration of the extinguishment of the obligations of the old contract.⁵³ My finding on this of course is not a finding on the merits of the substantive proceeding. It is a finding on one aspect concerned with the law of novation, based on facts not disputed concerning the time when each purported lease agreement was entered into. I am entitled to make such a finding in the context of considering vexatious or hopeless arguments. My finding is not that the Disputed Lease is not the operative lease. My finding does not preclude the Disputed Lease being the valid lease based on other grounds.

95 However, Mr Davey’s misconception of the question of novation is not, taken alone, demonstrative of vexatious conduct. Findings against parties on questions of law contended for is part and parcel of the litigation process.

⁵⁰ Transcript, pages 40, 52, 53; Points of Claim paragraphs 14, 15, 16 and referring to Final Settlement, paragraph 19.

⁵¹ Affidavit John Patrick Dessman, sworn 26 June 2017, [5] and [6]; Transcript, page 44.

⁵² (1969) 120 CLR 365; Transcript, page 74.

⁵³ *Olssen v Dyson*, above, per Windeyer J at paragraph 14.

- 96 Mr Davey's further submission is that the Disputed Lease has been acknowledged as the applicable operative lease. This centres around an alleged settlement of this issue in an earlier proceeding between the parties, BP1628/2106. The argument of Mr Davey is summarised from paragraph 73, above. Support for the submission on settlement is made on two bases. First that the consent orders in proceeding BP1628/2016, made 7 February 2017, where relief against forfeiture was agreed, was evidence that the parties agreed that the Disputed Lease was the operative lease. The second basis was that settlement was agreed and is supported by the letter from Oak Park Real Estate, dated 3 April 2017 (refer paragraph 76 above). Mr Davey also referred to Mr Dessman's statement that he had no recollection of signing the Disputed Lease schedule.⁵⁴
- 97 Dessco argues that there can be no basis to contend that agreement on the Disputed Lease as being the operative lease is confirmed by settlement of the earlier proceeding. It argues that the whole basis of the earlier proceeding arose out of the issue of a s146 notice on 8 November 2016 under the Snellgrove Lease to which the notice was referenced. Consent orders were in respect of that lease.⁵⁵ In my opinion, it appears implausible that Mr Davey could sustain his argument that the Disputed Lease was agreed as the operative lease based on the consent orders. The consent orders were solely confined to the proceeding then on foot, which was concerned with the Snellgrove Lease, and nothing in those orders gives rise to recognition of the Disputed Lease as the operative lease.
- 98 However, the second aspect of Mr Davey's assertion of a settlement arises out of the email letter of Oak Park Real Estate referred to above. That is a time well after the earlier proceedings had been concluded by consent orders. The letter is referred to in detail in Mr Davey's points of claim.⁵⁶
- 99 Whether the emailed letter is proof of there being a settlement is not a matter before me. The question for me is whether it could be reasonably open, as a legitimate proposition, for Mr Davey to pursue his litigation for relief against forfeiture based on the wrong lease being asserted by Dessco, because of an asserted settlement. I find that, in the case of reliance on the emailed letter of Oak Park Real Estate, and without the benefit of the matter having been tried and findings made, it is open at least for Mr Davey to have pursued his argument on this ground as a legitimate proposition.
- 100 Dessco submits that a review of the caveat lodged by Mr Davey clearly establishes that he knew or should have known the futility of his 'wrong lease' argument.⁵⁷ This submission, as I understand it, flows from the contention made by Mr Dessman in his affidavit⁵⁸ that Mr Davey knew

⁵⁴ Affidavit of Peter Patrick Dessman, sworn 26 June 2017, [5] and [6].

⁵⁵ Transcript, pages 75 to 77.

⁵⁶ Mr Davey's points of claim, paragraph 13.

⁵⁷ Dessco submission, from paragraph 19.

⁵⁸ Affidavit of Peter Patrick Dessman, sworn 26 June 2017, [10] and [11].

when he lodged his caveat on 20 September 2016 that the operative lease was the Snellgrove Lease.

- 101 Dessco relies on the statement in the caveat under the heading, ‘Lease with the following parties and date’, stating the date as ‘01/04/2015’⁵⁹. The contract of sale for the acquisition of the premises by Dessco was signed on or about 30 March 2015. The contract states on page 3, under the heading, Lease, ‘SUBJECT TO LEASE’.⁶⁰ It does not specify the lease with greater particularity. There is no lease submitted for that has the date 1 April 2015.
- 102 The Snellgrove Lease does state that its term commences on 1 April 2015, but the lease itself is dated 23 March 2015. The Disputed Lease is dated 16 February 2015, but the version tendered⁶¹ has no commencement date stated. Amongst other pages, page 18 of the Disputed Lease is missing. Assuming, as seems reasonable, that the Disputed Lease used the same or similar Law Institute of Victoria copyright version, the missing page 18 would contain items 7 to 11, with item 8 stating the term of the lease and commencement date.
- 103 An inference may be that the reference to the date in the caveat of 1 April 2015 is a reference to the start date of the Snellgrove Lease, but it is not entirely clear. The commencement date is a date which is after the sale of the property of 30 March 2015. This could also support an argument that it was intended that that is when the Disputed Lease was to come into operation, if in fact that is what is being asserted by Mr Davey in his points of claim in using the expression ‘novation’.⁶² But this is also not clear.
- 104 By reason of these uncertainties, Dessco’s submission of demonstrated futility of the ‘wrong lease argument’, as supported by the evidence contained in Mr Dessman’s affidavit, is not sufficiently made out. But, again, these matters would be tested and assessed at trial, and any error or inconsistency in argument exposed. However, for present purposes, I do not have the benefit of those findings of fact.
- 105 In my opinion, given the very limited lens afforded me, due to the issues not having been tried and determined, it is open, at the least to assert there is a basis to support that some settlement or compromise was acknowledged or that there is no compelling argument as to demonstrate futility and hopelessness. Put another way, it is open that Mr Davey’s continued pursuit of the proceeding is not inconsistent with acting bona fide and is not necessarily behaviour or conduct productive of serious and unjustified trouble and harassment. In my opinion, to the extent that Mr Davey’s proposition is at least open, it cannot be convincingly contended that it is hopeless and bound to fail.

⁵⁹ Affidavit of Peter Patrick Dessman, sworn 26 June 2017, exhibit PPD-6.

⁶⁰ Affidavit of Peter Patrick Dessman, sworn 26 June 2017, exhibit PPD-3.

⁶¹ Affidavit of Peter Patrick Dessman, sworn 26 June 2017, paragraph 6 and exhibit PPD-2.

⁶² Mr Davey’s points of claim, paragraph 5.

- 106 I refer to my discussion at paragraphs 84 to 86 above. Dessco alternatively submits other elements of Mr Davey's alleged conduct across a 12 month or so duration as constituting or contributing to overall vexation, entitling it to all costs, as distinct from a specified part of costs. I repeat, for the reasons stated, that it is difficult to separate out these elements, as they are inextricably intertwined with Mr Davey's pursuit of the proposition of the Disputed Lease being the operative lease.
- 107 Having found that that pursuit of the Disputed Lease argument was not of itself vexatious, I am unable to find, in respect of the alternative submission, that other elements constitute overall conduct of the whole proceeding of a vexatious nature entitling Dessco to 'all' costs.

Did Mr Davey conduct aspects of the proceeding in a vexatious way, entitling Dessco to a specified part of the costs of the proceeding?

- 108 The individual elements are summarised in paragraphs 35 to 37 above. I have considered the individual elements, leaving aside those that go to the question of which may be the operative lease or the 'wrong lease' argument, which for the reason given above, I have found as being open for Mr Davey to pursue without necessarily constituting vexatious conduct.
- 109 The family violence issue: Dessco identifies a 9 December 2016 application concerning an alleged family violence intervention order. This is prior to the present proceedings having been issued. Whilst it may serve as some indication of behaviour of Mr Davey, it lacks for relevance when considering conduct of the proceeding not then issued.
- 110 Declaration/injunction application: Dessco complains about Mr Davey's 20 June 2017 application for injunction which it asserts is an application seeking recognition of the 'wrong lease'. That may be so, but the application states that it has been issued in response to a notice of re-entry made by Dessco, the previous day, on 19 June 2017.⁶³ Where proceedings are already on foot and a notice of re-entry is issued, it is understandable that Mr Davey would seek to immediately take all steps to protect against potential loss of his occupation. The application in my opinion was not simply a bald application seeking an unnecessary declaration about the operative lease.
- 111 22 June 2017 summons to appear for Mr Sliverstein, allegedly where no proper grounds evident: I have insufficient material before me to conclude this as an element indicative of vexatious conduct.
- 112 Mr Davey's 26 June 2017 application and hearing of the same on 21 July 2017: The application was concerned with Mr Davey seeking an order maintaining his caveat. This application was made on the afternoon of the directions hearing and not sought to be agitated at that hearing. The substantive proceeding itself is to determine the validity of the asserted

⁶³ Affidavit of Peter Patrick Dessman, sworn 26 June 2017, paragraph 18.

Disputed Lease in order to consider orders with respect to relief against forfeiture.

- 113 Mr Davey seeks to justify the making of the application and necessity for the hearing as part of his entitlement to defend against a purported invalid exercise of entry by Dessco. Such an application is unnecessary and in circumstances where the application is made by Mr Davey, as a practising solicitor, he ought reasonably to have known that such an application served no purpose. Further, the application seeks an order which, as the Tribunal found at the hearing on 21 July 2017, it did not have jurisdiction to deal with. Again, in my opinion, this is something that a solicitor should have been satisfied about before causing the issue of an application, if the issuing of the same was justified in the first place.
- 114 Taken together, I find that conduct of Mr Davey in this element of the proceeding was vexatious in that it caused serious unjustifiable trouble and harassment and was unnecessarily burdensome to Dessco. The costs of the hearing were ordered as reserved. I find that it is fair that the costs of responding to the application and attending the consequent hearing on 21 July 2017 should be paid by Mr Davey under s92(2)(a) of the RL Act.
- 115 25 July 2017, application seeking restraining order against Dessco: I have insufficient material before me to conclude this as an element indicative of vexatious conduct.
- 116 26 July 2017 submissions of Mr Davey allegedly containing numerous irrelevant considerations: I have insufficient material before me to conclude this as an element indicative of vexatious conduct.
- 117 3 August 2017 filing of allegedly irrelevant affidavit material having the effect of prolonging hearing. I have insufficient material before me to conclude this as an element indicative of vexatious conduct.
- 118 15 August 2017, letter seeking security for costs with no affidavit: I refer to my findings on security for costs applications below.
- 119 23 August 2017, alleged unnecessary application for directions and hearing on 25 August 2017 for an order in the nature of a subpoena instead of a registrar's direction for the issue of a summons to appear under s104 of the VCAT Act: In my opinion, Mr Davey, as a practising solicitor, ought reasonably to have known or informed himself of the appropriate procedure. Further, the causing of attendance at an unnecessary hearing, in all the circumstances including the opportunity to have made use of earlier interlocutory hearings, constitutes conduct that was vexatious conduct in the nature contemplated in *Eljioy's*⁶⁴ case. These costs of the 25 August 2017 directions hearing were initially reserved and, by order of 29 August 2017, were ordered as costs in the cause. I find that it is fair that an order for costs of responding to the application and attendance at the consequent hearing on 25 August 2017 is appropriate under s92(2)(a) of the RL Act.

⁶⁴ *Eljioy Investments Pty Ltd v Hart Brothers Pty Ltd*, above.

- 120 Mr Davey's applications for security of costs made by letter dated 15 August 2017, by application dated 28 August 2017⁶⁵ and by application dated 16 January 2018⁶⁶ are misconceived. Security for costs applications are made under s79 of the *Victorian Civil and Administrative Tribunal Act 1998*. Mr Davey seeks an order that Dessco not be allowed to proceed until security for costs is provided. In a directions application he states that he has 'now withdrawn our prayer for relief against forfeiture in these proceedings and will vacate the premises by 31st January 2018.'⁶⁷ On the other hand, his later application of 16 January 2018 presses his application for security for costs.
- 121 To the extent that Mr Davey's submission made in box number 2 is put as some defence against vexatious conduct of the proceeding, on the ground that Mr Davey had some well founded basis for seeking security for costs, it is misconceived. S79 of the VCAT Act only has application in respect of the party bringing the proceeding (in this case the substantive proceeding of Mr Davey for relief against forfeiture), not against the party defending against the proceeding brought against it. *Red Earth Building Maintenance Service Pty Ltd v Dura (Australia) Constructions Pty Ltd*.⁶⁸
- 122 In all the circumstances, I consider that the conduct of Mr Davey in pursuing his applications for security for costs was vexatious in that it was productive of serious and unjustifiable trouble and harassment. There is simply no basis for him to have made such applications. I find that it is fair that an order for costs for responding to the applications for security for costs is appropriate under s92(2)(a) of the RL Act.
- 123 Costs of preparation of Tribunal Book: Dessco submits that withdrawing the proceeding only days before the hearing set for 24 January 2018, when Mr Davey had well before formed an intention to withdraw, but without informing Dessco, was vexatious conduct. It submits that more timely advice by Mr Davey would have obviated most of the preparatory works for the Tribunal Book. It submits that Mr Davey had formed the intention to withdraw from around the period, October to December 2017.⁶⁹ It further submits in support of its contention, the several communications with Mr Davey, referred to in its submissions.⁷⁰
- 124 Mr Davey objected to the recollection of his submission made by Mr Virgona and says he did not decide to withdraw in October to December 2017, following the delivery of a decision of the Supreme Court of Victoria, and he denied that he admitted to this in his earlier oral submissions in this

⁶⁵ Dessco submission, tab 13.

⁶⁶ Dessco submission, tab 18.

⁶⁷ Directions application of Mr Davey, lodged 18 January 2018, in proceeding BP813/2017 with material lodged in support.

⁶⁸ For the scope of the operation of s79 of the VCAT Act, *Red Earth Building Maintenance Service Pty Ltd v Dura (Australia) Constructions Pty Ltd* [1999] VCAT 54.

⁶⁹ Transcript, page 83.

⁷⁰ Dessco submission, tab 17.

hearing.⁷¹ The transcript records Mr Davey as stating: ‘I formed the view, that no further litigation was humanly possible, and I can’t remember exactly the date but it was between October and December. We started contemplating not resisting what had been persisted with for the bulk of 2103 [sic] ...’⁷² The context is that the reference to 2013 is a mis-transcription and should read 2017.

- 125 The statement of Mr Davey at the hearing, in context, is somewhat equivocal. I find that the time by which Mr Davey actually decided to withdraw from the present litigation is not proved, on the balance of probabilities, by Mr Davey’s statement at the hearing or by his failure to respond to the communications of Dessco.
- 126 In all the circumstances, I do not find that any prevarication by Mr Davey in deciding to withdraw his proceeding constituted conduct of a vexatious manner.

Should the costs found to be payable, be ordered on an indemnity basis?

- 127 In *24 Hour Fitness* case,⁷³ in awarding costs under s92(2)(a) of the RL Act, the court observed that 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. In my opinion, the position observed in *24 Hour Fitness* is applicable in the present case.
- 128 Nevertheless, in order to determine the question of the appropriateness of an order for indemnity costs, I must consider the overlap of circumstances and how those circumstances may give rise to such an order.⁷⁴
- 129 The non exclusive criteria considered Harper J in *Ugly Tribe Co Ltd v Sikola*,⁷⁵ for warranting a special costs order, includes conduct which causes loss of time to the other party and where a continuation of the proceedings is in wilful disregard of known facts or clearly established law. In my opinion, the identified elements I have found above as constituting vexatious conduct by Mr Davey concerning a specified part of the proceeding and associated costs, clearly offends, for like reasoning, against that criteria included as being relevant considerations by Harper J, referred to above. It is unnecessary for me to repeat the reasons for concluding the conduct identified above as amounting to vexatious conduct, and which in my opinion likewise, entitles Dessco to indemnity costs in accordance with the criteria considered in *Ugly Tribe*, above.

⁷¹ Transcript, page 84.

⁷² Transcript, pages 71 to 72.

⁷³ *24 Hours Fitness Pty Ltd v W & B Investment Group Pty Ltd* [2015] VSCA 216, [32].

⁷⁴ *109 Fitzroy Street Pty Ltd v Frelane Pty Ltd (Building and Property)* [2017] VCAT 1987 per SM R. Walker.

⁷⁵ [2015] VSCA 216.

CONCLUSION

130 Mr Davey must pay Dessco, a specified part of the costs to be assessed by the Costs Court on an indemnity basis under the County Court scale, in respect of the following:

- (a) costs of responding to the application dated 26 June 2017 and attending the consequent hearing on 21 July 2017, as referred to in paragraph 114 above;
- (b) costs of responding to the application dated 23 August 2017 and attendance at the consequent hearing on 25 August 2017, as referred to in paragraph 119 above;
- (c) costs for responding to the applications for security for costs, as referred to in paragraphs 120 and 122 above;
- (d) costs of the respondent of preparation for and attendance at this costs hearing.

131 In respect of each of the above attendances, I consider and find that the attendance of Counsel for the respondent was appropriate and necessary.

MJF Sweeney
Member