VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1066/2018

CATCHWORDS

Retail Lease, application for costs, Section 92 of the *Retail Leases Act 2003* (Vic).

APPLICANT	Chantelle Enterprises Aust Pty Ltd (ACN: 612 587 210)
FIRST RESPONDENT	Denise Julie Sangster-Greenwood
SECOND RESPONDENT	Rory Sangster
SECOND RESPONDENT TO COUNTERCLAIM	Chantelle Kostovski
WHERE HELD	In Chambers
BEFORE	Senior Member L Forde
DATE OF WRITTEN SUBMISSIONS	7 June 2019
DATE OF ORDER AND REASONS	2 July 2019
CITATION	Chantelle Enterprises Aust Pty Ltd v Sangster-Greenwood (Building and Property) (Costs) [2019] VCAT 972

ORDER

1. The respondents' application for costs is dismissed.

L. Forde
Senior Member

REASONS

BACKGROUND

1 On 30 May 2019 the respondents (landlords) made an application for costs in relation to the preliminary questions.

2 Orders were made on 30 May 2019 for the parties to file submissions in relation to the cost application.

3 The landlords filed their submissions by 7 June 2019 in accordance with the order.

4 The tenant (applicant in the proceedings) did not file any submissions. Its submissions were due by 4 pm on 14 June 2019.

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

6 Section 92 of the *Retail Leases Act 2003* (Vic) (RLA) overrides s109 of the Act. It provides that Tribunal may make an order that a party pay all or part of the costs of another party if the Tribunal is satisfied that it is fair to do so because the party conducted the proceeding in a vexatious way that unnecessarily disadvantaged the other party to the proceeding.

7 Had the landlords' costs application been made under s109, I would have no hesitation in making a costs order against the tenant. The test however under s92 of the RLA is much more restrictive.

Vexatious conduct

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

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

9 The relevant test for vexatious conduct was carefully considered by Vice President Judge Jenkins, in *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd* where Her Honour concluded:

> By reason of the factual circumstances described above and the findings made following the damages hearing, I am satisfied that the Applicant:
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> (a) commenced an action for damages, following the finding that the Respondent was in breach of the lease, in circumstances where the Applicant, properly advised, should have known it had no chance of success;
>
> (b) persisted in what should, on proper consideration, be seen to have been a hopeless case;
>
> (c) engaged in conduct which caused a loss of time to the Tribunal and the Respondent;
>
> (d) commenced a proceeding in wilful disregard of known facts or clearly established law; and
>
> (e) made allegations as to losses which it claimed to have incurred, which ought never to have been made.
>
> [78] In consequence, I am satisfied that the Applicant has conducted the proceeding in a vexatious way that has unnecessarily disadvantaged the Respondent. Accordingly, I am satisfied that the Respondent is entitled to an award of costs subsequent to the liability hearing, to the extent that such costs relate to the preparation for and hearing of the application for damages.

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

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

Landlords' costs application

11 The landlords rely upon the following matters in support of their cost application:

a The tenant should have known that its claim of a valid lease had no prospect of success. On 12 October 2018, at the directions hearing, the director of the tenant informed the Tribunal that she wished to retake possession of the premises. Counsel acting for the landlords stated that the lease had been terminated. On 22 February 2019, the director and her sister, Ms Jones, appeared at the Tribunal. Ms Jones informed the Tribunal that the tenant wished to retake possession. Counsel for the landlords informed the Tribunal that the lease had been terminated and the property since sold with vacant possession;

b In Supreme Court proceedings relating to the removal of a caveat lodged on the title to the premises by the tenant, Garde J said on 7 February 2018 "in my view the claim by the first defendant (Tenant) that the lease is still on foot is not a strong one. It vacated the premises and did not return after the repair works were completed despite the request by the plaintiffs that it do so. The locks were then changed, and possession resumed by the plaintiffs (Landlords). The first defendant has not sought relief against forfeiture of the lease or sought injunctions to protect any rights to possession. However even if I found that there is a serious issue to be tried, the balance of convenience in all the circumstances markedly favours the removal of the caveat;"

c It would have been perfectly clear to the tenant on 7 February 2018 at the latest that it should not persist with its argument for a valid lease;

d The tenant failed to comply with paragraph 2 of the orders of the Tribunal made 5 April 2019 which required it to file and serve affidavit material in opposition to the respondent's application for declaratory relief by 26 April 2019. The tenant attended the Tribunal with no documentary evidence and attempted to give extensive evidence from the bar table. The tenant's lack of preparation caused a substantial waste of Tribunal time and resources;

e To stymie the Tribunal proceedings, the tenant lodged a further caveat over the premises to prevent the landlords from selling the property. An identical caveat had previously been lodged. The caveat was ultimately removed by the Supreme Court;

f The tenant deliberately deceived a third party in that on 27 February 2019 the purchaser's solicitor stated that its client received a call from the previous tenant at which time the tenant stated that she had a VCAT order in her favour to remove various items from the building. This was untrue; and

g The tenant's conduct in failing to comply with the orders of 5 April 2019 put the landlords at a significant disadvantage at the hearing.

12 Given that the tenant was self-represented at the hearing on 30 May 2019 and had failed to file affidavit material as ordered, the Tribunal recommended in the interest of justice, that Ms Kostovski, the director of the tenant give oral evidence which she did.

13 The Tribunal found in determining the first preliminary question that the tenant had surrendered its lease and the landlords were entitled to re-enter the premises on 5 February 2018. The landlords argued their case on two grounds. The Tribunal found in favour of the landlords on one of the two grounds being the surrender of lease ground and against them on the second ground being re-entry based upon non-payment of rent.

14 I do not accept that the tenant's case on the preliminary questions was vexatious or so hopeless that it was bound to fail or that it had no prospects of success. The issues around the safety of the premises were very real.

15 The tenant was legally represented at various times since 2017. No submissions were made by the Tenant about the advice given on the merits of the tenant's case.

16 I accept the submission that the tenant should have had real concerns about the strength of its case by 7 February 2019 based on the assertions made by the landlord up to that date and the comments of Garde J in the Supreme Court caveat proceedings. That said, Garde J made comments. He did not and was not required to, make a finding on the legal position. He did not go so far as to say the tenant's claim appeared hopeless.

17 The tenant's conduct of not complying with orders of the Tribunal directing the filing of affidavit material, filing of submissions and not attending the direction hearings on 14 June 2019 is conduct which put the Tribunal and the landlords to some inconvenience. This is not a case where the tenant is a reluctant party to the proceedings. The tenant elected to issue the proceedings against the landlords and substantially amend the grounds of its claim along the way. That said the behaviour is not significant enough to warrant a costs order being made against the tenant.

18 The application for costs is refused for the following reasons:

a There was an argument open to the tenant based on the physical condition of the premises and the safety of the premises to dispute the landlords' entitlement to re-enter based on non-payment of rent. There was also an argument open to the tenant that all of the safety concerns identified by the tenant's "expert" had not been addressed. It was by no means an open and shut case by the landlords. The tenant's case was not so hopeless that it was bound to fail;

b The Tenant was legally represented at various times and likely received advice;

c The tenant's failure to comply with certain directions of the Tribunal did not cause any significant disadvantage to the landlords. The hearing on the preliminary questions went ahead as scheduled and no time was lost other than about 30 minutes hearing the oral evidence of the Tenant's director. The same amount of time would have been spent by the Tribunal and the landlords reading any affidavit material of the Tenant if some had been filed; and

d Because of the matters stated above, the tenant's conduct, so far, in the litigation falls short of vexatious conduct.

L Forde
Senior Member