

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION
BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. BP592/2018

CATCHWORDS

RETAIL LEASES—applicant landlord failed to prove at the hearing that the third respondent signed a guarantee in respect of the tenant’s obligations to the landlord—claim against the third respondent dismissed, but upheld against the tenant and the co-guarantor.

COSTS—Section 92 *Retail Leases Act 2003*—whether the proceeding was conducted by the applicant in a vexatious way that unnecessarily disadvantaged the third respondent—such a conclusion not open on the facts—claim for costs by the third respondent against the applicant dismissed—*quare* whether it remained open for the third respondent to seek its costs against the second respondent under a *Sanderson* order.

APPLICANT	DJM Group Pty Ltd
FIRST RESPONDENT	Calypso Sports Pty Ltd
SECOND RESPONDENT	Darren Hall
THIRD RESPONDENT	Sharyn Louise Lloyd
WHERE HELD	Melbourne
BEFORE	A T Kincaid, Member
HEARING TYPE	Costs application on the papers.
THIRD RESPONDENT’S SUBMISSION FILED	5 April 2019
APPLICANT’S SUBMISSION FILED	23 April 2019
DATE OF ORDER	30 May 2019
CITATION	DJM Group Pty Ltd v Calypso Sports Pty Ltd (Building and Property) (Costs) [2019] VCAT 808

INTERIM ORDERS

1. The application by the third respondent that her costs be paid by the applicant on an indemnity basis is dismissed.
2. The third respondent is given leave to make an application that her costs be paid by the second respondent. **If no such application is made by 30 June 2019, these orders will stand as final orders.**

A T Kincaid
Member

REASONS

Introduction

- 1 The third respondent Ms Lloyd (“**Ms Lloyd**”), has filed material to the effect that she spent \$51,630.17¹ in successfully defending a claim brought by the applicant DJM Group Pty Ltd (“**DJM**”) against her in the Tribunal.
- 2 The basis of DJM’s claim was that Ms Lloyd was liable as a co-guarantor with the second respondent Mr Hall (“**Mr Hall**”) in respect of the liabilities of the first respondent Calypso Sports Pty Ltd (“**Calypso**”), arising from the latter’s lease of retail premises in Strong Avenue, Thomastown, Victoria (the “**lease**”).
- 3 DJM’s claim against Ms Lloyd failed, for want of DJM being able to prove that Ms Lloyd signed the guarantee.
- 4 Ms Lloyd applies for her costs on an indemnity basis.

Background

- 5 The Thomastown premises were leased by Calypso from DJM for a period of 6 years and 9 months from 1 April 2016, with an option in respect of one further term of 5 years. Calypso used the premises as an indoor sports centre.
- 6 The lease came to an end in March 2018, by DJM’s re-entry.
- 7 In the proceeding, DJM sought \$190,329.91 from Calypso pursuant to the terms of the lease, and damages. DJM also claimed this sum from Mr Hall and Ms Lloyd as alleged co-guarantors of Calypso’s obligations under the lease.
- 8 By my order made on 8 March 2019 in *DJM Group Pty Ltd v Calypso Sports Pty Ltd*² I found that Calypso and Mr Hall were liable to DJM as tenant of the premises and guarantor of DJM’s obligations respectively.
- 9 I dismissed the claim against Ms Lloyd, finding that she was not liable to DJM as a co-guarantor in respect of the liabilities of Calypso.
- 10 The two documents the subject of the proceeding (the “**disputed documents**”), alleged by DJM to have been signed by Ms Lloyd, were:
 - (a) a deed of surrender which, DJM alleged, was signed on about 20 April 2016 by Mr Hall and Mr Jan as “the old guarantors”, and by Mr Hall and by Ms Lloyd as “the new guarantors”; and
 - (b) the lease which, DJM also alleged, was also signed on about 20 April 2016 by Mr Hall and by Ms Lloyd.

¹ Including expert’s fees and disbursements.

² [2019] VCAT 325.

- 11 At the time of her alleged signing of the disputed documents in April 2016, Ms Lloyd was the domestic partner of Mr Hall. I found that their relationship came to an end in February 2018.
- 12 On 4 April 2018, Calypso made an application for injunctive relief granting it possession. Ms Lloyd maintained throughout her evidence that she first became aware of the disputed documents, and of her signature allegedly being on them, upon her attendance that day at the Tribunal.³
- 13 The injunction application was adjourned to 30 April 2018 for the filing of further material, but it was subsequently not pursued by Calypso.
- 14 An illegible signature appears as that of a purported witness to the signing by Mr Hall and to the signing of Ms Lloyd's purported initials on the disputed documents. The identity of the alleged witness was unknown to DJM and, perhaps naturally, given her case, Ms Lloyd claimed no knowledge of the identity of the witness.
- 15 Mr Hall did not attend the hearing. If the identity of the purported witness was known to him, Ms Lloyd gave evidence that he had not offered any information about that person to Ms Lloyd. He also offered no such information to the Tribunal.
- 16 There was no direct evidence of Ms Lloyd having signed the guarantee. I found that there was nothing in the correspondence between 8 March 2016 and 20 April 2016, when the solicitors for DJM received the disputed documents from Mr Hall, from which the knowledge of Ms Lloyd concerning the guarantee purportedly given by her in the disputed documents could be found as a fact, or otherwise inferred.

DJM's case

- 17 DJM submitted that Ms Lloyd was liable as a co-guarantor of Calypso's obligations under the lease. DJM contended that Ms Lloyd was materially interested in the sports centre business conducted at the premises by Calypso and that, with full knowledge of the requirement that she was to become a co-guarantor and that, in collusion with Mr Hall, she:
 - (a) signed the disputed documents as guarantor; or
 - (b) authorised Mr Hall to sign her initials in the disputed documents.
- 18 The characteristics of her initials on the disputed documents appeared to vary from her usual initials. DJM submitted that this was because of the state of her health at the time of signature or, DJM submitted, because she and Mr Hall, in collusion, thought that such an obvious variation would better enable her later to deny that she had signed them.

Ms Lloyd's case

- 19 Ms Lloyd denied that her initials appear on the disputed documents.

³ VCAT proceeding BP468 of 2019.

20 Ms Lloyd contended that her initials were forged by Mr Hall without her knowledge, and that she was therefore not liable to DJM under the guarantees contained in the disputed documents.

GENERAL PRINCIPLES APPLICABLE TO COSTS APPLICATIONS UNDER SECTION 92

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

22 Section 92 of the *Retail Leases Act 2003* (the “**RLA**”) overrides that provision in the case of a retail lease dispute, such as this. It provides:

- (1) Despite anything to the contrary in Division 8 of Part 4 of [the Act], each party to a proceeding before the Tribunal under [Part 10 of the Retail Leases Act] is to bear its own costs of the proceeding.
- (2) However, at any time the Tribunal may make an order that a party shall pay all or a specified part of the costs of another party in the proceeding but only if the Tribunal is satisfied that it is fair to do so because-
 - (a) the party conducted the proceeding in a vexatious way that unnecessarily disadvantaged the other party to the proceeding; or
 - (b) the party refused to take part in or withdrew from the mediation or other form of alternative dispute resolution **under this Part** (emphasis added).

23 It follows then, that if I am to order costs against the applicant, I must be satisfied that it is fair to do so, because I find that either one of the criteria in sub-paragraphs (a) and (b) applies.

24 Section 92(2)(b) of the RLA has no part to play in the claim by Ms Lloyd for costs against DJM, but may do so in any claim that she may bring for costs against Mr Hall, to which I refer later in these Reasons.

Conducting the Proceeding in a Vexatious Way

Claimant persisted in a case that was bound to fail

25 Whether a party has conducted a proceeding in a vexatious way was considered by Vice President Judge Jenkins (as she then was) in *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd*.⁴ She concluded:

[77] By reason of the factual circumstances described above and the findings made following the damages hearing, I am satisfied that the Applicant:

- (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;

⁴ *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd (Costs)* (Building and Property) 2015 VCAT 596

- (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 (**emphasis added**).

26 In *24 Hour Fitness*, in an unsuccessful application for leave to appeal against the decision of Judge Jenkins, the Court of Appeal referred to these paragraphs with evident approval.⁵

27 On appeal, the applicant submitted that for the purposes of section 92 of the 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:

[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.

28 In deciding whether a proceeding is conducted in a vexatious way within the meaning of section 92(2)(a) of the RLA, a relevant consideration, therefore, is where the proceeding is maintained in circumstances that it is obviously untenable or manifestly groundless as to be utterly hopeless or, in the words of the Court of Appeal, "bound to fail".

Conduct of proceeding unfairly burdensome

29 There is another way in which a party may be found to have conducted a proceeding in a vexatious way.

⁵ *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd* [2015] VSCA 216

30 In *State of Victoria v Bradto Pty Ltd*⁶ his Honour Judge Bowman stated that a proceeding is conducted in a vexatious way:

...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”.

31 The Court of Appeal in *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd*⁷ agreed that his Honour’s description in *Bradto* “encapsulates the circumstances in which conduct [in the sense described by Judge Bowman] may be classified as vexatious”.⁸

Conduct of the case by DJM

32 I turn now to consider DJM’s conduct of the proceeding.

33 Calypso issued the proceeding seeking injunctive relief on 4 April 2019. That was the day, it will be recalled, that Ms Lloyd contended she first became aware of her initials being on the disputed documents. The application was adjourned on that day to 30 April 2019, when the application was not proceeded with.

34 DJM commenced this proceeding on 30 April 2018.

35 On 29 June 2018 a directions hearing took place. Ms Lloyd appeared personally at the directions hearing but, according to DJM, made no objection to her involvement in the proceeding, nor did she express any surprise about her purported initials on the disputed documents.

36 A mediation took place on 5 July 2018.

37 At about that time, the applicant was provided with an “acknowledgment” dated 19 June 2018 signed by Mr Hall, to the effect that he had forged Ms Lloyd’s initials on the disputed documents without her consent.

38 By letter dated 8 August 2018 Ms Lloyd’s solicitors wrote a letter to DJM’s solicitor maintaining that Ms Lloyd did not sign the Lease or the Deed of Surrender, nor was she aware of her alleged signature on the disputed documents until 30 April when the proceeding was commenced. A number of documents were attached to the letter:

- (a) Mr Hall’s written acknowledgment dated 19 June 2018;
- (b) documents showing examples of Ms Lloyd’s signatures and initials from 1997 to 2018, intended to demonstrate dissimilarities between them and the initials on the disputed documents; and
- (c) ASIC records demonstrating that Ms Lloyd had no interest in Calypso, either as a shareholder or director.

⁶ [2006] VCAT 1813.

⁷ *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd* [2015] VSCA 216.

⁸ *Ibid* at [4].

- 39 Ms Lloyd’s solicitor’s letter stated that Ms Lloyd was not in Melbourne on 20 April 2016, being the date that they contended the letter was signed. They stated in the letter, and it became clear from evidence at the hearing, that she was then in Adelaide, and in recovery from a neck injury following a fall from scaffolding and subsequent hospitalisation from 6-10 April 2016. In the event, this aspect did not play a part in my decision. This is because it was not clear, on the evidence, when the disputed documents were signed. Also, although it was open to find on the evidence that Mr Hall visited Ms Lloyd in Adelaide on 13-18 April 2016, and that he could have had Ms Lloyd sign the disputed documents then. However, I declined to draw that inference.
- 40 The letter invited DJM to discontinue the proceeding, failing which Ms Lloyd would seek a costs order against DJM on a full indemnity basis.
- 41 The solicitors for the DJM responded by letter dated 10 August 2018, to the effect that they were unconvinced by the documents supplied with Ms Lloyd’s solicitors’ letter dated 8 August 2018, and requested copies of documents that Ms Lloyd had signed using her initials (as opposed to her signature).⁹
- 42 On 15 August 2018, Ms Lloyd’s solicitors provided further correspondence to DJM’s solicitors purportedly evidencing Ms Lloyd’s initials.¹⁰ Solicitors for DJM now submit that the initials appeared to them to strongly resemble Ms Lloyd’s initials on the disputed documents.
- 43 By letter dated 17 August 2018 DJM’s solicitors wrote to Ms Lloyd’s solicitors:
- In respect of the documentation you have supplied with your client’s initials, it is our contention that these initials match the [initials] contained in [the disputed documents]. In the event that [Ms Lloyd] continues to deny executing [the disputed documents] we expect she will engage a handwriting expert to provide evidence in respect of your client’s [initials] and this evidence will be crucial to any strike out application you may seek to bring to the Tribunal.
- In respect of [Ms Lloyd’s] claim that she is unaware of who witnessed the signatures on [the disputed documents], we note your client appears to retain access to Mr Hall and his documentation...and we expect you would have sought the witness’s details from Mr Hall. In the event that evidence is procured from the witness that he/she did not witness [Ms Lloyd’s signature or only witnessed Mr Hall’s signature this would obviously constitute compelling evidence in your client’s favour...
- 44 DJM’s solicitors state that at no time were any pleadings provided by Calypso or Mr Hall to the solicitors for DJM as may have lent further

⁹ I note that the copy documents provided by Ms Lloyd’s solicitors by letter dated 8 August 2016 contained such documents.

¹⁰ The applicant’s written submissions state “signature”, but it appears from the context to have been intended to refer to ‘initials’.

support to Ms Lloyd's contentions concerning her purported initials. All they were provided with, they say, was the "acknowledgment" of Mr Hall dated 19 June 2018.

- 45 A forensic document examiner Ms Holt was engaged by Ms Lloyd. Ms Holt provided a report dated 19 September 2018. It provided some independent support for Ms Lloyd's contention that she did not sign the disputed documents. Ms Holt concluded that the differences between the initials in the disputed documents and the specimen initials reviewed by Ms Holt "are more suggestive of the writing habits of another person", but that this conclusion was subject to the limitations described in her report.
- 46 On 27 September 2018, a strike out application brought by Ms Lloyd was dismissed. I am informed that Senior Member Farrelly then observed that the critical questions in the proceeding would be contested questions of fact, that would need to be decided almost entirely on issues of credibility.
- 47 By offer of settlement dated 3 October 2018, DJM's solicitors offered to receive \$120,000 from Ms Lloyd, inclusive of interest and costs, in settlement of the proceeding.
- 48 Ms Lloyd's solicitors rejected the offer on 10 October 2018, reiterating Ms Lloyd's position that she did not sign the disputed documents, and that there was overwhelming evidence to support this, including the expert report of Ms Holt.
- 49 DJM engaged its own forensic document examiner, Mr Trevor Joyce. On 18 October 2018, His conclusion, set out in his report dated 18 October 2018 was that support existed for both the hypothesis that Ms Lloyd wrote the initials in the disputed documents but disguised them in a way that would assist her disavowing them at a later time, and the hypothesis that the initials were the product of another writer. In other words, DJM now contends, Mr Joyce did not rule out the possibility that Ms Lloyd's initials were on the disputed documents. I agree.

Findings

- 50 I accept the submissions on behalf of DJM that, based on the conclusion of Mr Joyce, it was reasonable for DJM to determine that the matter should proceed to hearing, since there was no conclusive expert evidence supporting Ms Lloyd's contentions that she did not sign the disputed documents.
- 51 I agree with DJM's solicitors' submission that the evidence in support of Ms Lloyd's contention that she did not sign the disputed documents was not "overwhelming", as suggested by her solicitors. In fact, Ms Holt's opinion was expressed, perhaps understandably given the limitations she described, in a more restrained manner than that.
- 52 Against this background, DJM was entitled, in my view, to seek to test the denials of Ms Lloyd that she signed the disputed documents.

- 53 In particular, DJM was entitled to test the credibility of Ms Lloyd in respect of her contentions that she did not sign them. Mr Hall and Ms Lloyd were for many years until February 2018 domestic partners. The solicitors for DJM were entitled in such circumstances to put to Ms Lloyd's that she and Mr Hall were at all times conspiring to eliminate her personal liability that would otherwise have arisen under the guarantees in the disputed documents.
- 54 It follows from the fact that the credit of Ms Lloyd was at all times a live issue, and that the weight of DJM's expert opinion did not rule out the initials in the disputed documents being Ms Lloyd's by her disguise, that DJM was not continuing with a hopeless case that was bound to fail so as to amount to vexatiously conducting the proceeding within the meaning of *24 Hour Fitness*.
- 55 Further, there is nothing else in DJM's conduct of the proceeding, which I have outlined above, that falls within the meaning of vexatious conduct as expounded in *Bradto*.
- 56 Ms Lloyd's claim for costs against DJM must be dismissed.

Further observations

- 57 Section 92(2)(b) may be relevant to any claim that may be made by Ms Lloyd for costs against Mr Hall. This is because it appears from a Certificate issued by the Victorian Small Business Commissioner under section 87(1) of the *Retail Leases Act 2003* dated 27 April 2018 that it was Calypso, by its director Mr Hall, that could not be contacted for the purpose of a mediation. There is a type of costs order known as a *Sanderson* order whereby, in certain circumstances, a respondent's costs of successfully defending a proceeding are paid by a respondent who has failed to do so.
- 58 I have therefore made these orders interim orders only, in the event that Ms Lloyd wishes to seek an order that her costs be paid by Mr Hall.

A T Kincaid
Member