VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP592/2018

CATCHWORDS

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

COSTS–Section 92 *Retail Leases Act 2003*– claim for costs by the third respondent against the applicant previously dismissed–found that the proceeding was not conducted by the applicant in a vexatious way that unnecessarily disadvantaged the third respondent–third respondent subsequently sought an order in the nature of a *Sanderson* order that her costs be paid the second respondent–costs so awarded.

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	21 June 2019
SECOND RESPONDENT'S SUBMISSION FILED	No submission received by 15 August 2019, the date afforded to the second respondent.
DATE OF ORDER	9 September 2019.
CITATION	DJM Group Pty Ltd v Calypso Sports Pty Ltd (Building and Property) (Costs) (No 2) [2019] VCAT 1386.

ORDER

Because it is found to be fair to do so because the second respondent Darren Edward Hall refused to take part in mediation under Part 10 of the *Retail Leases Act 2003*, Darren Edward Hall must pay the third respondent Sharyn Louise Lloyd $51,789.17.

A T Kincaid
Member

REASONS

Introduction

1 The third respondent Ms Lloyd ("**Ms Lloyd**"), has filed material to the effect that she spent $51,789.17[1] 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 Darren Edward Hall ("**Mr Hall**") in respect of the liabilities of the first respondent Calypso Sports Pty Ltd ("**Calypso**"), arising from the latter's lease from DJM of retail premises in Strong Avenue, Thomastown, Victoria (the "**lease**").

3 The lease came to an end in March 2018, by DJM's re-entry.

4 In the proceeding, DJM sought $190,329.91 from Calypso and the guarantors pursuant to the terms of the lease, and damages.

5 The hearing took place for three days from 31 October 2018-2 November 2018, and for a fourth day on 20 November 2018. The parties subsequently filed written submissions.

6 By 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 as guarantor of DJM's obligations respectively.

7 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.

8 DJM's claim against Ms Lloyd failed, for want of DJM being able to prove that Ms Lloyd signed the guarantee.

9 Ms Lloyd failed in her subsequent costs claim against the applicant.[3] She now applies for her costs on an indemnity basis against Mr Hall.

10 Mr Hall was given notice by the Tribunal dated 25 July 2019 that he was entitled to make a submission by 15 August 2019 in opposition to Ms Lloyd's costs claim, but he has not done so.

The disputed documents

11 The two documents the subject of the proceeding (together, 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.

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1 Including expert's fees and disbursements.
2 [2019] VCAT 325.
3 See *DJM Group Pty Ltd v Calypso Sports Pty Ltd* (Building and Property) (Costs) [2019] VCAT 808.

12 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.

13 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 each of them, upon her attendance that day at the Tribunal.[4]

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 each of 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 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.

16 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.

17 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.

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

19 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.

20 I found in favour of Ms Lloyd.

21 Mr Hall took no part in the proceeding beyond 4 April 2018, other than by his filing of a purported defence on 31 October 2018.

22 Mr Hall did not attend the hearing.

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[4] VCAT proceeding BP468 of 2019.

The Tribunal's costs jurisdiction

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

24 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).

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

26 Section 92(2)(a) of the RLA has no part to play in the claim by Ms Lloyd for costs against Mr Hall, as Mr Hall took no part in the litigation.

27 A Certificate was however issued by the Victorian Small Business Commissioner under section 87(1) of the RLA dated 27 April 2018 stating:

> Reasonable attempts have been made to arrange mediation or another form of alternative dispute resolution but have been unsuccessful because the respondent [Calypso] cannot be contacted.

28 I infer from the letter enclosing the Certificate from the Victorian Small Business Commissioner dated 27 April 2018 to Mr Matthews, DJM's director, and copied to Mr Hall, that it was the Victorian Small Business Commissioner's attempts to contact Mr Hall, as sole director and shareholder of Calypso and guarantor under the lease, that had proved fruitless.

29 I find in this circumstance that Mr Hall refused to take part in a mediation under Part 10 of the RLA within the meaning of section 92(2)(b) of the RLA, and that it is therefore open to me to make an order that Mr Hall pay all or a specified part of the costs of Ms Lloyd in the proceeding.

Sanderson costs order-what are the discretionary requirements?

30 The claim for costs made by Ms Lloyd is in the nature of a *Sanderson* costs order.[5] It is one of the types of costs orders that may be made where an applicant succeeds against only one or more respondents (or, as in this case, the applicant succeeded against only two of three respondents).

31 Such orders may take one of two forms. The Tribunal may order the applicant to pay the costs of the successful respondent and then order the unsuccessful respondent to pay the applicant the costs it is required to pay the successful respondent (a *Bullock* order), or by ordering the unsuccessful respondent to pay, additionally to the applicant's costs, the costs of the successful respondent directly to that respondent (a *Sanderson* order).

32 The cases generally involve a plaintiff who has succeeded against only one or more defendants making an application for such a costs order, but I see no reason in principle why a successful respondent in the Tribunal, having failed in the circumstances to obtain a cost order against the "losing applicant", should be prevented from then making a costs application against an unsuccessful respondent of the type now made.

33 I take as a guiding principle the statement of the Court of Appeal in a joint judgment in *State of Victoria v Horvath & Ors* (No 2);[6]

> In general terms, a plaintiff who seeks to have the losing defendant pay the costs of the successful defendant pursuant to a *Bullock* or *Sanderson* order must establish that, in the circumstances of the case, it would be reasonable and just for such an order to be made…
>
> If that requirement is satisfied, a plaintiff who seeks a *Bullock* or a *Sanderson* order must also ordinarily show that it was reasonable for him to have joined the successful defendant *and* that the conduct of the unsuccessful defendant was such as to make it just to require him to indemnify the successful defendant.

34 In *State of Victoria v Horvath & Ors* (No 2), their Honours accepted the "two step" analysis favoured as expounded by Gibbs CJ in *Gould v Vaggelas*[7], where he said:

> It is sometimes said that the court may make an order of that kind-a *Bullock* order-where it was reasonable in all the circumstances for the plaintiff to bring an action against two or more defendant [some authorities are noted by his Honour]. In my respectful opinion, however, the mere fact that the joinder of two defendants was reasonable does not mean that the unsuccessful defendant should be ordered to pay, directly or indirectly, the costs of the successful defendant. Obviously a judge should make a *Bullock* order only if he considers it just that the costs of the successful defendant should be

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5 See *Sanderson v Blyth Theatre Co* [1903] 2 KB 533 at 539; *Bankamerica Finance Ltd v Nock* [1988] AC 1002 at 1007.

6 [2003] VSCA 24 per Winneke, P Chernov and Vincent JJ.A.

7 [1984] HCA 68; (1985) 157 CLR 215 at 229-230. See also *McCracken & McCracken v Pippett* (No 2) [2000] VSCA 20 at [9]-[11] where Callaway JA adopted a similar test.

> borne by the unsuccessful defendant, and, if nothing that the unsuccessful defendant has said or done has led the plaintiff to sue the other defendant, who ultimately was held not to be liable, it is difficult to see any reason why the unsuccessful defendant should be required to pay for the plaintiff's error or overcaution…In my respectful opinion the true position was clearly stated by Blackburn CJ in *Steppke v National Capital Development Commission* when he said 'there is a condition for the making of a Bullock order, in addition to the question whether the suing of the successful defendant was reasonable, namely that the conduct of the successful defendant has been such as to make it fair to impose some liability on it for the costs of the successful defendant' (footnotes omitted)

Conduct of Mr Hall, the unsuccessful respondent

35 Applying the two-step analysis adopted by the authorities, first I find that it was reasonable for DJM to have joined the successful respondent Ms Lloyd. After all, the view that could justifiably have been taken by DJM at the time was that her initials appeared on the disputed documents as co-guarantor.

36 Secondly, was there something about the conduct of the unsuccessful respondent Mr Hall, that makes it appropriate to shift the incidence of Ms Lloyd's costs, bearing in mind that DJM, after all, has been unsuccessful too against Ms Lloyd.

37 At about the time of a mediation between the parties on 5 July 2018, the applicant was provided with an "acknowledgment" dated 19 June 2018 signed by Mr Hall that read:

> I, **DARREN EDWARD HALL** of…acknowledge and confirm that I signed [Ms Lloyd's] name to the personal guarantee relating to the lease UNDATED [in writing] between [the first respondent] and [the applicant] without her consent or knowledge.
>
> [Ms Lloyd] did not sign the personal guarantee and as a result is not liable for any and all default arising out of the lease. I am responsible.

38 The day before the start of the hearing, Mr Hall filed a purported defence on behalf of himself and Calypso, in which he stated:

> [4.3] …I then betrayed myself and [Ms Lloyd] by making a very obvious poor forgery of her signature in order to get the…lease and try and make the business work.
>
> [4.4] I have never regretted anything more in my life than making the decision to sign her name without her knowledge and try and make the business work instead of walking away…

39 Given that Mr Hall did not give evidence, the contents of the statutory declaration stood as hearsay evidence of the matters stated. I held that although the Tribunal is not bound by the rules of evidence,[8] and it was

[8] See section 98(1)(b) of the *Victorian Civil and Administrative Tribunal Act 1998*.

therefore open to the Tribunal to receive the statutory declaration into evidence, but to reduce the weight of its probative value. My Reasons made clear, though, that in a case of this sort, where the matters stated in the statutory declaration went to the very facts in issue, I gave its contents no weight. In consequence, I found that I was required to be satisfied by other facts and matters upon which Ms Lloyd relied for any finding that she did not sign the disputed documents and otherwise had no knowledge of them, before I was able to conclude that she had produced the necessary cogent evidence to find that DJM has not discharged its burden of proof.

40 I rejected DJM's submission that the making of the statutory declaration and its contents stand not as evidence of the truth of its contents, but of an alleged collusive relationship between Ms Lloyd and Mr Hall, intended to avoid Ms Lloyd incurring liability under the disputed documents. In respect only of this submission, I received the statutory declaration, and noted the fact that certain statements have been made by Mr Hall, along with other factors. In the event, I rejected DJM's submission of there being a collusive relationship of the type suggested.

41 I am satisfied, however, that I may receive the contents of the statutory declaration and the defence of Mr Hall in Ms Lloyd's costs claim against Mr Hall, as an exception to the hearsay rule. This is because Mr Hall's comments stand as an admission by him that is adverse to his own interests in the proceeding.

42 I have concluded that the conduct of Mr Hall was such as to make it fair within the meaning of section 92 of the RLA, having regard to all the circumstances, that he should pay Ms Lloyd's costs of her defence of the proceeding including her two costs applications. It was Mr Hall who forged Ms Lloyd's signature on the disputed documents. Had he not done so, DJM would not have brought the proceeding against Ms Lloyd.

43 I also find that circumstances of the admitted forgeries are sufficiently contumelious and grave that they warrant the payment of Ms Lloyd's costs on an indemnity basis.

44 I fix these costs at $51,789.17, calculated as follows:

Legal fees and disbursements	$41,706.81
Expert witness fees	$5,932.30
Feelink credit charges and fees	$3,202.06
Accommodation during hearings, Melbourne CBD	$630.00
VCAT filing fees	$318.00
TOTAL	**$51,789.17**

45 I make the accompanying orders.

A T Kincaid
Member