VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. R110/2013

BUILDING & PROPERTY LIST

CATCHWORDS

LANDLORD AND TENANT – Costs - section 92 of the *Retail Leases Act 2003* – whether vexatiously conducting a proceeding – what conduct constitutes vexatious conduct.

APPLICANT	Geopec Pty Ltd (ACN 112 042 051)
FIRST RESPONDENT	BMS Group Pty Ltd (ACN 108 006 159)
SECOND RESPONDENT	IGA Distribution Pty Ltd (ACN 006 509 280)
BEFORE	Senior Member E. Riegler
HEARING TYPE	Interlocutory Hearing
DATE OF HEARING	22 December 2014
DATE OF ORDER	7 January 2015
CITATION	Geopec Pty Ltd v BMS Group Pty Ltd (costs) (Building and Property) [2015] VCAT 12

ORDERS

1. The costs of the compulsory conference on 24 September 2014, compliance directions hearing on 26 November 2014 and application directions hearing on 22 December 2014 are to be costs in the cause.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant:	Mr R. Moore of Counsel
For the First Respondent:	Ms C. Exell of Counsel
For the Second Respondent:	Mr R.M. Garratt, QC and Mr D.G. Guidolin of Counsel

Introduction

1. On 22 December 2014, I heard and determined the Applicant's application for an order that this proceeding be stayed pending the outcome of a Supreme Court proceeding, which concerns a dispute between the directors of the Applicant company. I refused to grant a stay of this proceeding and ordered that the hearing listed for 9 February 2015 be confirmed, principally on the ground that I was not satisfied that the dispute between the directors prevented the Applicant from being able to prepare for the hearing, albeit that the process may have been made more difficult as a result of the directors' dispute.

2. In addition, I extended the date by which the Applicant was to comply with extant orders relating to the provision of particulars of loss and damage and also discovery. At the conclusion of that application directions hearing, both Respondents sought an order that the Applicant pay their costs of and associated with:

   (a) the compulsory conference on 24 September 2014;

   (b) the compliance directions hearing on 26 November 2014; and

   (c) the application directions hearing on 22 December 2014.

Costs under the *Retail Leases Act*

3. The Respondents submit that they are entitled to the costs of and associated with the above appearances because the conduct of the Applicant enlivened the Tribunal's discretion under s 92(2) of *Retail Leases Act 2003* (**'the RLA'**). That provision states:

> **92. 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 of the proceeding.
>
> (2) However, at any time the Tribunal may make an order that a party pay all or a specified part of the costs of another party in the proceeding but only if the Tribunal is satisfied that it is fair to do so because—
>
> (a) the party conducted the proceeding in a vexatious way that unnecessarily disadvantaged the other party to the proceeding; or
>
> (b) the party refused to take part in or withdrew from mediation or other form of alternative dispute resolution under this Part.

4. The Respondents contend that the Tribunal's discretion is enlivened because of two factors, namely:

(a) the Applicant withdrew or failed to take part in a compulsory conference convened by the Tribunal; or alternatively,

(b) the Applicant has conducted the proceeding in a vexatious way which has unnecessarily disadvantaged the Respondents.

Failure to take part in the compulsory conference

5. By order dated 25 August 2014, the parties were required to attend a compulsory conference on 24 September 2014. Both Respondents attended and were legally represented. Only one of the Applicant's two directors attended, together with the Applicant's legal representatives.

6. According to the Respondents, the Applicant's attendance at the compulsory conference was illusory because both directors of the Applicant were required to be in attendance in order to allow the Applicant to make any binding decision regarding settlement of the proceeding. The fact that only one director attended the compulsory conference meant that the Applicant had no ability to participate in the compulsory conference in any meaningful way, despite the appearance that it was attending the compulsory conference.

7. The Respondents made reference to an affidavit filed by Robert Ugrinovski, one of the Applicant's two directors, filed in the Supreme Court proceeding concerning the directors' dispute, which stated:

> 239. I attended the VCAT compulsory conference on 24 September 2014 because Vlado [the other director of the Applicant] and I were ordered to do so. I understood that Vlado was to attend and that any decision made to resolve the dispute would be agreed to between Vlado and myself.
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> 240. Vlado was not contactable on the day of the VCAT compulsory conference despite attempts made by Rebecca Jaffe of HWL, in my presence, to contact him. I am also informed by Julie Callea-Smith of Thomson Geer, that Nick Theofilakos had also attempted to contact Vlado without any success on the day of the VCAT compulsory conference.
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> 241. In the circumstances, I was forced to proceed with the VCAT compulsory conference in order to do what I could to protect Geopec's position.
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> 242. I refer to paragraph 126(b)(vi) of Vlado's affidavit. I did not say to Rebecca Jaffe (of HWL) at any time that I had unlimited instructions to settle on behalf of Geopec. Nor did I say that to the VCAT…

8. The Respondents submit that the extract of the affidavit referred to above clearly demonstrates that the Applicant did not have unlimited authority to settle the dispute at any time during the compulsory conference.

9. For the reasons which follow, I do not accept that the failure by the Applicant to have both directors attend the compulsory conference enlivens s 92(2)(b) of the RLA.

10. First, I do not consider that a compulsory conference, convened pursuant to s 83 of the *Victorian Civil and Administrative Tribunal Act 1998* constitutes *mediation or other form of alternative dispute resolution* under Part 10 of the RLA. In my view, the reference in s 92(2)(b) of the RLA to *under this Part* confines the subsection to mediations or other forms of alternative dispute resolution contemplated under Part 10 of the RLA and not mediations or compulsory conferences ordered under s 83 of the *Victorian Civil and Administrative Tribunal Act 1998*. The mediation or other form of alternative dispute resolution contemplated under Part 10 of the RLA is specifically dealt with under Division 3 of Part 10 of the RLA and concerns mediation or other forms of alternative dispute resolution initiated through the office of the Small Business Commissioner, prior to the Tribunal being vested with jurisdiction to hear the dispute.

11. Indeed, s 87 of the RLA expressly provides that a retail tenancy dispute may only be the subject of proceedings before the Tribunal if the Small Business Commissioner has certified in writing that mediation or another appropriate form of alternative dispute resolution under Part 10 of the RLA has failed, or is unlikely, to resolve the dispute.

12. In my view, mediation under Part 10 of the RLA relates to pre-litigation alternative dispute resolution. The evident purpose of s 92(2)(b) of the RLA is to provide an incentive to mediate prior to initiating litigation by potentially exposing a party who refuses to participate in or who withdraws from pre-litigation alternative dispute resolution with the risk of an adverse costs order if the other party is forced to litigate. In my view, had parliament intended to give s 92(2)(b) wider application to include conduct after proceedings had been issued, the words *under this Part* would not have been expressly included within the provision.

13. Second, even if s 92(b)(2) was given wider application, I do not consider that the failure of both directors to attend the compulsory conference necessarily equates to the Applicant not actually being in attendance, even if it were proved that the Applicant had no ability to settle by reason of that fact. In my view, a failure by a party to have the ability to settle does not necessarily mean that the party is not physically in attendance, although that party may otherwise be in breach of the Tribunal's orders, which require all parties attending a compulsory conference to have, for all practical purposes, unlimited authority to settle. In the present case, the Applicant was legally represented at the compulsory conference. Therefore, it cannot be said that it did not appear at the compulsory conference; even if it were proved that its legal representatives were unable to accept any settlement offer made by the Respondents.

14. The present situation is akin to one where a party attends a compulsory conference but does not have unlimited authority to settle. Although that may give rise to an adverse costs order under s 109 of the *Victorian Civil and Administrative Tribunal Act 1998*, it does not, in my view, enliven s 92(2)(b) of the RLA.

Vexatiously conducting the proceeding

15. In *State of Victoria v Bradto Pty Ltd* [2006] VCAT 1813, Judge Bowman considered the operation of s 92(2) of RLA. His Honour stated:

> [32] Section 92(2) of the RLA, which is similar in wording in parts of s78 of the VCAT Act, involves consideration of three factors. These elements are whether the party conducted the proceeding in a vexatious way; whether this unnecessarily disadvantaged the other party; and, thirdly, the question of justice or fairness.
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> [33] In relation to what is meant by "vexatious", reference is made to *Oceanic Sunline Special Shipping Company Inc v Fay* (1988) 165 CLR 197. A proceeding is conducted in a vexatious way if it is conducted in a way productive of serious and unjustified trouble or harassment, or conduct which is seriously and unfairly burdensome, prejudicial or damaging. Where there is vexatious conduct which causes loss of time to the decision-making body or to other parties, indemnity costs should be ordered, and they are sought in this case.

16. The Respondents contend that the Applicant's conduct in:

    (a) appearing at a compulsory conference in circumstances where it had no ability to settle the proceeding or engage in any meaningful negotiation;

    (b) failing to comply with orders of the Tribunal relating to the provision of further and better particulars and discovery; and

    (c) applying for a stay of the proceeding based on unmeritorious grounds

    evidences that the Applicant is conducting the proceeding in a vexatious way which has unnecessarily disadvantaged the Respondents.

17. It is uncontested that the compliance directions hearing on 26 November 2014 was listed as a result of the Applicant failing to comply with previous orders made by the Tribunal. It is also uncontested that the application directions hearing on 22 December 2014 resulted in the Applicant's application for a stay of the proceeding being refused and further orders being made giving the Applicant additional time to comply with various interlocutory steps. However, the Applicant joins issue with the suggestion that the compulsory conference served no useful purpose by reason of the Applicant's second director not attending.

Lack of authority to settle at compulsory conference

18. The Respondents submit that the compulsory conference on 24 September 2014 was a complete waste of time, given the non-attendance by one of the two directors of the Applicant. They contend that the dispute between the two directors of the Applicant arose prior to 24 September 2014 and in those circumstances, the Applicant must have known that it would not be able to participate in the compulsory conference in any meaningful way. Nevertheless, it made no attempt to forewarn the Respondents of that impediment to settlement and thereby allowed the Respondents to incur the costs of the compulsory conference in circumstances where there was no prospect of settlement.

19. It is difficult to form a view as to the utility of the compulsory conference attended by only one of the Applicant's directors. Although one may speculate that settlement discussions may have been made more difficult by the failure of both directors to attend the compulsory conference, I cannot conclude by that fact alone that the compulsory conference served no useful purpose.

20. It is possible that if offers were made during the course of the compulsory conference, they could have been subsequently ratified by the absent director if he formed the view that acceptance of the offer was in the best interests of the Applicant. Of course, I have no way of knowing what offers, if any, were made during the course of the compulsory conference or whether any offers were belatedly considered by the absent director. In those circumstances, I am unable to conclude that the failure of both directors to attend the compulsory conference necessarily leads to a situation where the compulsory conference served no utility or resulted in the Respondents' costs being thrown away.

21. That being the case, I am also unable to conclude that the failure of both directors to attend a compulsory conference necessarily means that the Applicant has conducted the proceeding vexatiously, even if it breached the Tribunal's orders requiring persons with unlimited authority to attend the compulsory conference.

Failure to comply with previous orders

22. The affidavits of Natalie Bannister, sworn on 25 November 2014 and Emily Kyriacou, sworn on 18 December 2014, set out various instances where the Applicant has failed to comply with the Tribunal's orders, and in particular, concerning the provision of particulars of loss and damage.

23. Although such conduct is not to be condoned, I do not consider that the failure of the Applicant to comply with previous orders of the Tribunal relating to the provision of further particulars and discovery necessarily means that the Applicant has conducted the proceeding vexatiously.

24. Although I accept that the Applicant has a history of non-compliance with orders, especially concerning the provision particulars of loss and damage,

I do not find that this conduct is completely devoid of any explanation. In the present case, the affidavits of Robert Ugrinovski, sworn on 12 and 16 December 2014 and the affidavit of Vlado Naumovski, sworn on 12 December 2014, state that the Applicant's non-compliance results from difficulties in providing instructions to its legal representatives, caused by the dispute between its two directors. The affidavits suggest that the dispute between the two directors has materially hampered the Applicant's ability to properly function.

25. I accept that the dispute between the Applicant's two directors has, to some extent, adversely impacted on the Applicant's ability to comply with the Tribunal's previous orders. In taking all factors into consideration, I am of the view the historical instances of non-compliance, even if looked at in totality, do not justify a finding that the Applicant has conducted the proceeding vexatiously, although any further non-compliance may lead to a different conclusion if the matter is re-visited.

Unsuccessful stay application

26. I do not consider that the unsuccessful application to stay the proceeding constitutes vexatious conduct on the part of the Applicant. Although the application was unsuccessful, it was not completely without merit. Ultimately, I decided that there was insufficient material before me to satisfy me that the dispute between the directors of the Applicant completely tied the hands of the Applicant, such that it could not prepare for the hearing of the proceeding. Indeed, the mere fact that it brought the application for a stay of the proceeding in its own name, rather than by one or both of the directors as intervenors, indicated to me that it had some ability to function.

27. Nevertheless, although the failure to succeed with the application might have attracted an order for costs under s 109 of the *Victorian Civil and Administrative Tribunal Act 1998*, it does not constitute conduct which could be said to be productive of serious and unjustified trouble or harassment, or conduct which is seriously and unfairly burdensome, prejudicial or damaging. Therefore, I do not find that the Applicant has yet reached a point where it can be said that it has conducted the proceeding vexatiously.

28. Accordingly, there will be no order as to costs at this time. The costs claimed by the Respondents remain costs in the cause.

SENIOR MEMBER E RIEGLER