VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP1422/2015

CATCHWORDS

COMMERCIAL TENANCY DISPUTE- Costs; Section 109 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic); applicant's claim for costs of proceeding allowed in part; respondents' specific claims for costs allowed in part; Section 115B of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic); applicant's claim for reimbursement of fees allowed;

APPLICANT	Glowell International Pty Ltd
FIRST RESPONDENT	Biggin & Scott Commercial Pty Ltd (ACN 162 490 977)
SECOND RESPONDENT	448 St Kilda Road Pty Ltd (ACN 081 091 965)
WHERE HELD	Melbourne
BEFORE	Member C Edquist
HEARING TYPE	Chambers
DATE OF ORDER	22 November 2017
CITATION	Glowell International Pty Ltd v Biggin & Scott Commercial Pty Ltd (Building and Property) (Costs) [2017] VCAT 1849

ORDERS

1 Pursuant to s 109 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), the respondents must pay to the applicant costs in the sum of $5,830.

2 Pursuant to s115B of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), the respondents must reimburse to the applicant fees in the sum of $916.80.

3 Pursuant to s 109 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), the applicant must pay to the respondents costs in the sum of $2,250.

4 The respondents' entitlement to $2,250 in respect of costs is to be set off against the applicant's entitlement to $6,746.80 in respect of costs and fees, with the result that the net amount of $4,496.80 is to be paid by the respondents to the applicant.

Member C Edquist
Member

REASONS

INTRODUCTION

1 This proceeding was heard on 23 February 2017, 26 May 2017 and 16 August 2017. On 8 September 2017 I published written reasons for decision ("Reasons") and made orders including orders that the respondents ("the managing agent" and "the landlord" respectively) must pay the applicant ("the tenant") damages in the sum of $8,246.31. In addition, I ordered the managing agent and the landlord must pay to the tenant damages in the nature of interest in the sum of $1,505.80. I reserved the question of whether fees should be reimbursed under s 115B of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (*"*the VCAT Act*"*), and costs. I directed the tenant to send any further submissions concerning reimbursement of fees and costs to the Tribunal by 22 September 2017, and gave the managing agent and the landlord until 6 October 2017 to file response submissions. Both sides duly filed submissions.

2 I now set out my decision regarding costs and reimbursement of fees.

GENERAL PRINCIPLES

3 If the leased premises had been *retail premises* for the purposes of the *Retail Leases Act 2003* (Vic) ("the RLA"), then the tenant's entitlement to costs would have been covered by s 92 of that Act. However, on the second day of the hearing, Ms Zhang, a director of the tenant, confirmed that she accepted that the RLA did not apply.

4 The upshot is that costs are to be determined in accordance with s109 the VCAT Act.

SECTION 109 OF THE VCAT ACT

5 Section 109 relevantly provides:

> **109 Power to award costs**
>
> (1) Subject to this Division, each party is to bear their own costs in the proceeding.
>
> (2) At any time, the Tribunal may order that a party pay all or a specified part of the costs of another party in a proceeding.
>
> (3) The Tribunal may make an order under subsection (2) only if satisfied that it is fair to do so, having regard to—
>
> (a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as—
>
> (i) failing to comply with an order or direction of the Tribunal without reasonable excuse;

(ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;

(iii) asking for an adjournment as a result of (i) or (ii);

(iv) causing an adjournment;

(v) attempting to deceive another party or the Tribunal;

(vi) vexatiously conducting the proceeding;

(b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;

(c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;

(d) the nature and complexity of the proceeding;

(e) any other matter the Tribunal considers relevant.

6 It is clear from the wording of s 109 that the Tribunal should make an order awarding costs only if it is satisfied that it is fair to do so. In addressing the question of whether it is fair to award costs, the Tribunal must have regard to the matters set out in s 109 (3).

APPLICANT'S PRINCIPAL SUBMISSIONS

7 Ms Zhang did not address the specific requirements s 109(3). However, several times during the hearing, and also in her written submissions, she stressed that had it not been for the 'misleading' invoice of July 2015, the dispute would not have arisen. In her written submissions, Ms Zhang also contended that the managing agent and the landlord had vexatiously conducted the proceeding in progressively submitting contradictory reconciliations on 2 September 2016, 24 March 2017 and 16 August 2017.

RESPONDENTS' PRINCIPAL SUBMISSIONS

8 The managing agent and the landlord filed lengthy submissions. The principal contention pressed was that they had experienced great difficulty in understanding the tenant's case because of the confusing manner in which it was pleaded, and then presented at the hearing. They contend that they "have only ever sought to charge what they believe they are properly entitled to charge in accordance with the law".[1] They also contend that they have "throughout the proceeding made numerous efforts to narrow the issues in dispute and identify the reasons for the [tenant's] claim."[2] They say it was the tenant who has refused to cooperate, and provide the necessary particulars of its allegations. They set out a brief history of the proceeding in an endeavour to support their contentions.

9 I reject the managing agent and landlord's principal contention that no costs order should be made against them because they could not understand the

[1] Managing agent and landlord's written submissions dated 6 October 2017, paragraph 2.
[2] Managing agent and landlord's written submissions, paragraph 3.

case being made against them, for two reasons. Firstly, even on their own assessment of the facts, the managing agent and the landlord were obliged to disgorge more than $1,000 to the tenant. A liability to repay $1,244.96 was acknowledged by their counsel at the opening of the hearing.[3] In the managing agent and landlord's amended defence dated 28 April 2017, that concession was reduced to $1,027.56. In these circumstances, they cannot contend that they did not understand, at least, this aspect of the claim.

10 The second reason why I reject the managing agent and the landlord's argument is that it was disclosed in their written submissions that an offer to settle the case had been made. The offer was in the sum of $7,880. It was contained in a letter from the managing agent and landlord's solicitors dated 16 February 2017 which was appended to the written submissions. It was expressed to be "Without prejudice save as to costs". From its terms it is clear that that it was intended to provide a measure of costs protection to the managing agent and the landlord in respect of the tenant's claims, including the claim for reimbursement of money that had been deducted in respect of cleaning.

11 In circumstances where the managing agent and landlord appear to have been keenly alive to the two issues in respect of which they were most at risk, namely, their liability to disgorge at least $1,000, and the cleaning claim, I reject the proposition that the managing agent and the landlord could not understand the claim being made against them.

FINDINGS RELEVANT TO THE OPERATION OF S 109(3)

12 As noted above, the managing agent and the landlord acknowledged at the outset of the hearing that they owed $1,244.96 to the tenant. In their amended defence, filed shortly before the second day the hearing, they confirmed they owed the tenant the reduced, but still substantial, sum of $1,027.56. In these circumstances, I consider that they effectively forced the tenant to take the proceeding to a hearing, and then to run the hearing to a conclusion. As the managing agent and the landlord ran a defence to the claim that had no tenable basis, insofar as part of the claim was conceded early in the hearing, s 109 (3)(c) of the Act has been enlivened. Running the case in these circumstances was conduct of the proceeding that unnecessarily disadvantaged the tenant, and I find that it is fair that an appropriate costs order should be made.

13 I now turn to an assessment of the tenant's entitlement to costs.

LEGAL FEES

14 In its pleading, the tenant has made a claim for the recovery of substantial legal fees. However, during the hearing, the claim was withdrawn after Ms Zhang conceded that quotations for legal advice had been obtained, but legal fees had not actually been incurred.

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[3] Reasons, at paragraph 11.

15 The other costs to be considered are its accounting fees incurred in favour of HMG Pacific.

ACCOUNTING FEES

16 The tenant seeks an order for payment of a total sum of $16,610 (inclusive of GST) which was paid to the tenant's accountant's HMG Pacific in respect of five invoices. The relevant invoices are as follows:

(a) $8,100 plus GST, or $8,910, dated 16 May 2015;

(b) $3,000 plus GST, or $3,300, dated 22 March 2017;

(c) $1,200 plus GST, or $1,320, dated 24 March 2017;

(d) $1,800 plus GST, or $1980, dated 30 March 2017; and

(e) $1,000 plus GST, or $1,100, dated 23 May 2017.

The HMG Pacific invoice of 16 May 2016

17 The managing agent and the landlord contended that the claim for costs based on this invoice should be rejected. They base their arguments on the form of the invoice, the evidence given about it by HMG Pacific's principal Mr Lim, and the date of the work to which it relates.

18 As I remarked in my Reasons, the initial HMG Pacific invoice of 16 May 2016 related to professional fees and disbursements in relation to the fiscal years 2013, 2014 and 2015. Mr Lim gave evidence about the invoice of 16 May 2016 by telephone on the last day of the hearing. The highlights of this evidence were that:

(a) he received oral instructions only from Ms Zhang, and there was no written brief;

(b) his role was to look into the dispute which had arisen with the landlord;

(c) he confirmed that he was not a forensic accountant, and had suggested at the outset that Ms Zhang should consult a lawyer;

(d) the work related entirely to the dispute which had arisen with the landlord and the managing agent, and did not relate to standard accounting work such as tax returns, as the tax returns are all done in a timely manner from year to year;

(e) the work carried out included meetings with the tenant, internal meetings, the review of invoices and payments provided by the tenant, and preparation of a reconciliation of liabilities under the lease, and identification of payments made;

(f) the general approach he took was not to look closely at every invoice, but to look at the dispute globally, and assess the tenant's liability for rent and outgoings under the lease, and payments made by the tenant, based on its bank statements, and then work out the difference;

(g) he did not prepare a report which could be used as evidence in the Tribunal, but produced a reconciliation from which Ms Zhang could extract figures for the purposes of the Tribunal proceeding;

(h) the documents Ms Zhang submitted to the Tribunal were not prepared by Mr Lim;

(i) HMG Pacific's invoices were not calculated on the basis of any agreed hourly rate, but on the basis that Mr Lim considered it reasonable to charge, and in respect of each of the relevant financial years 2013, 2014 and 2015, a lump sum of $2,700 per year had been changed, generating a total bill of $8,100; and

(j) a second invoice dated 16 May 2016 had been produced only recently, at the request of Ms Zhang, in order to give further information about the work carried out.

19 When he was cross-examined by Counsel for the managing agent and the landlord about this invoice, Mr Lim conceded that in identifying the obligations of the tenant to make payments under the lease, he had been guided by Ms Zhang. An example given was the issue of whether the tenant was obliged to pay for car parking in the first two months of the lease, during the rent holiday.

Discussion of the managing agent and landlord's contentions

20 The managing agent and the landlord argue that there are three characteristics of the fees charged by HMG Pacific which make the recovery of those fees impermissible as costs of the proceeding. The first is that, as conceded by Mr Lim, he is not a forensic accountant. His work simply enabled the tenant to understand its financial position.

21 Mr Lim conceded when giving evidence that he did not produce an expert's report for the purpose of giving evidence to the Tribunal, and did not give any direct oral evidence to the Tribunal regarding the dispute between the tenant, on the one hand, and the managing agent and the landlord, on the other. All he and his team had done was to create a reconciliation of amounts said to be due by the tenant under the lease, compared to amounts paid. Mr Lim then left it to Ms Zhang to formulate the documents to be submitted to the Tribunal.

22 I accept the managing agent and the landlord's contentions that Mr Lim did not act as a forensic accountant and did not provide the services which might have been expected of an appropriately qualified expert witness. In particular he did not provide an expert's report, nor attend the Tribunal to provide evidence. On this basis alone I would have been prepared to find that the invoice of 16 May 2016 could not be recovered as costs.

23 The second attack made by the managing agent and the landlord on the invoice of May 2016 was that the fees claimed were not recoverable as they were not reasonable. The invoice was one of a number which totalled

$16,610, a figure which was said to be unreasonable, and lacking proportion to the nature and scope of the dispute.

24 Mr Lim's evidence does not assist the tenant in resisting this argument. As noted, he deposed that the invoice was not calculated on the basis of any agreed hourly rate, but on the basis that Mr Lim considered it reasonable to charge a lump sum of $2,700 per year in respect of each of the 3 financial years 2013, 2014 and 2015. Accordingly, no previously agreed hourly rate or daily rate had been applied.

25 In my view, this concession of itself means that whole account could not be recovered, even if it was otherwise recoverable as costs, because its quantum has not been fixed appropriately. In my view, the account should have been generated in accordance with pre agreed terms of engagement. The amount charged should have reflected the nature of the work required, the qualifications and experience of the person doing the work, and the time taken.

26 The lack of itemised invoices was also highlighted by the managing agent and the landlord. The May 2016 invoice, like the other invoices, did not explain what work was done by the accountant.

27 I accept the lack of detail contained on the face of the account of 16 May 2016 is a legitimate criticism of it. The account was for $8,100 plus GST, and yet there was no way of telling what tasks had been undertaken by Mr Lim or his assistants, how long each task took, and what the relevant hourly rate for each operator was. This lack of detail also renders the account open to question.

28 In summary, I reject the account dated 16 May 2016 as not being reasonable because it has not been calculated in accordance with an appropriate fee agreement, and also because of its lack of particularisation.

29 A third criticism made of the HMG Pacific account of 16 May 2016 made by the managing agent and the landlord was that it related to work which had been carried out before the institution of proceedings. As a general principle, I do not think that professional costs incurred before the institution of proceedings by a successful applicant in the Tribunal can *never* be recovered as costs. However, as I am not prepared to allow the invoice of 16 May 2016 to be recovered as costs for the other reasons referred to above, I do not need to address this argument.

30 In summary, I find against the tenant in respect of the claim for reimbursement of the sum of $8,100 plus GST invoiced by HMG Pacific on 16 May 2016.

The HMG Pacific invoices of 22 March, 24 March and 30 March 2017

31 As noted in my Reasons, these invoices related to the meeting of accountants which took place on 24 March 2017.

32 That the parties had agreed, during the course of the first day of the hearing, for their respective accountants to meet with a view to reconciling the accounts in dispute, and identifying and limiting the issues to be determined by the Tribunal at a further hearing, was noted in my orders made on 24 February 2017. I went on to say, at [F];

> In the first instance, each party would have to bear the cost of its accountant attending the meeting. However, the Tribunal was asked to note that the ultimate burden of those costs was to be an issue for determination in the proceeding, although the question of whether those costs were to be characterised as damages or part of the costs of the proceeding was not determined today.

33 In my Reasons, I determined that the fees reflected in the HMG Pacific invoices dated 22 March 2017, 24 March 2017 and 30 March 2017 were to be characterised as costs.[4]

34 In circumstances where the managing agent and landlord agreed to allow their accountant to meet with the tenant's accountant for the purposes of the proceeding, I do not think it is open to the managing agent and the landlord to maintain their objection to paying costs in respect of the work of the tenant's accountant merely on the basis that he is not a forensic accountant. As the meeting of accountants was agreed to, I think it is appropriate that the managing agent and the landlord should pay the reasonable costs of the tenant's accountant of and relating to the meeting held on 24 March 2017.

Invoice of 22 March 2017

35 The invoice of 22 March 2017 was expressed to relate to:

> Meetings with client
>
> Review, reconciliation of Biggin Scott on 22 Feb 2017
>
> Preparation for 24 March 2017 meeting with Biggin Scott (Sic)

36 The account was for $3,000 plus GST. Mr Lim said that the figure was charged on a lump sum basis, at the rate of $1,000 a year for three fiscal years. For the reasons previously explained, this is not a reasonable basis for charging professional costs in circumstances where these costs are sought to be recovered as costs in litigation.[5]

37 Under cross-examination, Mr Lim said that his hourly rate was $250 per hour. I accept that this rate, exclusive of GST, is reasonable for a professional accountant performing work of the type in question.

38 Having regard to the complexity of the case, and the amount of documentation to be reviewed prior to the meeting of 24 March 2017, I consider a reasonable figure for the scope of work set out above to be $1,500, calculated at the rate of $250 per hour for six hours. With GST, total amount allowed is, accordingly, $1,650.

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[4] Reasons, paragraph 119.
[5] See paragraph 25 above.

The invoice of 24 March 2017

39 The invoice for 24 March 2017 referred to professional fees and disbursements in relation to "Attendance to meeting with client at Biggin Scott's office on the 24 March 2017". Mr Lim's gave evidence that he attended at a meeting with the managing agent that started at 10.30am and finished between 1.30 and 2.00pm. As the meeting took place at the managing agent's office, Mr Lim would have had to travel to and from the meeting. In these circumstances, I allow as being reasonable 4 hours at $250 an hour, plus GST, a total of $1,100.

The invoice of 30 March 2017

40 The invoice of 30 March 2017 refers to professional fees and disbursements in relation to meetings with the tenant, and reviewing reconciliation of "Biggin Scott 24 February 2017". I note that in his evidence Mr Lim clarified that he charged $1,800 plus GST for meeting with Ms Zhang and reviewing the new reconciliation provided by the managing agent's accountant at the meeting on 24 March 2017. The reference to 24 February in the account was a mistake.

41 Having regard to the complexity of the issues, I do not think an invoice covering just over seven hours work is unreasonable, and I allow the invoice in full at $1,980.

The HMG Pacific invoice of 23 May 2017

42 This was the last invoice rendered by Mr Lim's firm. It was for preparation, and attendance at a meeting, and a letter for the tenant. The charge was $1,000 plus GST. Mr Lim confirmed that in part it covered preparation of the letter which had been prepared on his firm's letterhead and which was tendered to the Tribunal. I do not think an account representing four hours work plus GST is unreasonable for this, and associated work. I allow the invoice in full.

SUMMARY OF ALLOWANCES IN RESPECT OF HMG PACIFIC INVOICES

43 I have rejected above the invoice of 16 May 2016, but allowed $1,650 in respect of the invoice of 22 March 2017, $1,100 in respect of the invoice of 24 March 2017, $1,980 in respect of the invoice of 30 March 2017, and $1,100 in respect of the invoice dated 23 May 2017. The total amount allowed in respect of the HMG Pacific invoices, accordingly, is $5,830.

CLAIMS FOR COSTS BY THE LANDLORD AND MANAGING AGENT

44 Counsel for the landlord and the managing agent, in his closing submission, argued that three specific issues justified costs orders being made in favour of his clients. Firstly, he contended that the conduct of the tenant in seeking to file amended points of claim on the first day of the hearing justified an award of costs. Secondly, he complained that in breach of the Tribunal's orders regarding discovery, the tenant on the first day of the hearing sought

to tender three new documents. He contended that the first day of the hearing was effectively written off because of these two issues. Finally, he contended that an order should be made that the tenant pay the managing agent and landlord's costs of the third day of the hearing, on the basis that the need for the third day arose because the tenant submitted the second, third, fourth and fifth invoices from HMG Pacific only on the second day of the hearing.

APPLICATION TO FILE AMENDED POINTS OF CLAIM

45 In my view, the submission made on behalf of the managing agent and the landlord that the first day of the hearing was effectively lost, significantly overstates the situation. I say this because both sides were able to open their cases, and I was able to form an understanding of the issues. However, that does not mean that the two claims for costs made in respect of the day ought to be dismissed.

46 The managing agent and the landlord strenuously objected to the tenant's application for leave to amend its points of claim, and some time was spent reviewing the proposed pleading handed to them and the Tribunal at the hearing.

47 Ultimately, I allowed the tenant to file the document on terms, saying:

> The Tribunal, having expressly taken into account the case management principle referred to in *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 47, but also the fact that the Tribunal can be flexible in its procedures, that the applicant is not legally represented, and that any prejudice to the respondents caused by the amendment can be cured by an order for costs, exercised its discretion to allow the amendment of the points of claim.

48 There is no doubt the managing agent and the landlord are justified in at least raising the issue of costs, because when I made orders on 24 February 2017, I expressly reserved the issue of the landlord and managing agent's claim for costs arising from the application made by the tenant for leave to amend its points of claim, including any claim for costs thrown away.

49 I have been presented with no material from the landlord and managing agent regarding any costs thrown away by the need to re-plead their defence, and so I make no finding about that aspect of the claim for costs.

50 However, the conduct of the tenant in seeking to file a further version of its points of claim on the first day of the hearing, in circumstances where a copy of the document had not even been sent to the managing agent and the landlord prior to the hearing, was conduct which I find unnecessarily disadvantaged the managing agent and the landlord, as they were taken by surprise. I find that it is fair to make an order that the tenant pay such sum as is necessary to indemnify the managing agent and the landlord in respect of their Counsel's fees in respect of the lost portion of the hearing that was concerned with the application to file the amended points of claim

FURTHER DOCUMENTS

51 The managing agent and the landlord also opposed the application made by the tenant on the first day of the hearing to file and serve a further three documents, including an email from the managing agent, and an offer to lease, upon which it was intended to rely in respect of the cleaning issue. The complaint made by the managing agent and the landlord was that service of these documents should have been effected by 5 February 2017, as this had been ordered at a compliance hearing on 7 September 2016. After some debate, leave was granted to the tenant to file and serve the three documents.

52 I accept the legitimacy of the complaint made by the managing agent and the landlord, and note that the breach by the tenant of the order regarding discovery made on 7 September 2016 could expose the tenant to an order for costs under s 109(3)(a)(i).

FIRST ORDER AS TO COSTS TO BE AWARDED TO MANAGING AGENT AND LANDLORD

53 I noted during the course of the hearing on 24 February 2017 that approximately an hour was wasted in reviewing the proposed amended points of claim. Taking that hour into account, and the similar delay associated with the debate about the filing of the three documents, I find that it is fair that I order that the managing and the landlord be paid 40% of their Counsel's fees incurred on the first day of the hearing.

54 On the basis that the managing agent and landlord's Counsel indicated his daily fee was $2,500 inclusive of GST, I will order that, in respect of costs incurred in dealing with the tenant's applications on the first day of the hearing, the tenant is to pay to the managing agent and the landlord costs of $1,000.

APPLICATION FOR COSTS OF THE THIRD DAY OF THE HEARING

55 It was contended by the managing agent and the landlord that the actions of the tenant in serving the second, third, fourth and fifth invoices from HMG Pacific during the course of the second day of the hearing put the managing agent and the landlord at a disadvantage because they had had no chance to consider them, nor get expert evidence in respect of them. Unless they were given time to consider them, the managing agent and the landlord argued there would be a denial of natural justice.

56 I accepted that submission at the end of the second day, and accordingly adjourned the hearing part heard.

57 The question I now have to determine is whether, in these circumstances, the managing agent and the landlord should get the whole of their costs of the third day of the hearing.

58 I accept that the tenant must accept some responsibility for the need for a continuation of the hearing simply because the tenant did not serve the

second, third, fourth and fifth invoices from HMG Pacific prior to the second day of the hearing,

59 I also accept that the tenant received a benefit from a continuation of the hearing into the third day, because Ms Zhang was able to call Mr Lim in order to fill a gap in the tenant's evidence which she had not been able to fill on the second day of the hearing.

60 However, in my view, the managing agent and the landlord should not be awarded all their costs of the third day of the hearing, because the day was not solely concerned with consideration of those HMG Pacific invoices. Specifically, both parties benefited from the opportunity to make final submissions orally in the afternoon.

SECOND FINDING AS TO COSTS TO BE AWARDED TO MANAGING AGENT AND LANDLORD

61 In the circumstances, I will order that the tenant pay the managing agent and the landlord 50% of their Counsel's fees of the third day of the hearing. The relevant figure is $1,250.

SUMMARY OF FINDINGS REGARDING COSTS IN FAVOUR OF THE TENANT

62 I confirm that I have found:

(a) My discretion to award costs under s109(2) has been enlivened because, in forcing the tenant to go to a hearing, and run the hearing to a conclusion, in circumstances where they conceded that the tenant was entitled to damages of at least $1,027.56, the managing agent and the landlord were relying on a defence that had no tenable basis in fact. Section 109(3)(c) was accordingly engaged.

(b) This was conduct that unnecessarily disadvantaged the tenant, and is and it is fair to make an appropriate award of costs.

(c) However, the tenant had withdrawn its claim for legal costs during the hearing.

(d) The tenant could only justify its claim for costs in respect of accounting fees of $5,830, out of a total claim of $16,610.

SUMMARY OF FINDINGS REGARDING COST ORDERS IN FAVOUR OF THE MANAGING AGENT AND LANDLORD

(a) The managing agent and the landlord are entitled to an order for costs of $1,000 in respect of 40% of their Counsel's fees for the first day of the hearing.

(b) The managing agent and the landlord are entitled to an order for costs of $1,250 in respect of 50% of their Counsel's fees for the third day of the hearing.

(c) In total, the managing agent and the landlord are entitled to a total award of costs of $2,250.

FEES PAID BY THE TENANT

63 In its submissions, the tenant also seeks reimbursement of the fees it has paid under s 115B of the VCAT Act. The fees claimed are the filing fee of $575.30 and a hearing fee of $341.50.

64 In assessing the issue of reimbursement of fees, I am obliged under s 115B(3) to have regard to:

(a) the nature of, and issues involved in, the proceeding; and

(b) the conduct of the parties (including whether a party has failed to comply with an order or direction of the Tribunal); and

(c) the result of the proceeding.

65 It is not necessary for the tenant to have been 'substantially' successful, as would have been the case if the proceeding fell within s115C of the VCAT Act. This is relevant, as clearly in circumstances where the tenant has recovered only $9,752.11 when its initial case claim was for $35,036.93, there would have been an issue as to whether the tenant had been substantially successful.

66 I consider the following factors are relevant to the exercise of my discretion regarding an order for reimbursement of fees:

(a) the complexity of the issues;

(b) the fact that the managing agent and the landlord conducted the defence of the claim vigorously, and in particular sought to have the tenant's claim struck out under s75 of the VCAT Act;

(c) the managing agent and the landlord continued to defend the claim even when, on their own analysis, they owed the tenant more than $1,000; and

(d) the tenant ultimately recovered almost ten times the amount the managing agent and the landlord conceded was due;

(e) an award of costs is being made to compensate the managing agent and the landlord in respect of the instance where the tenant failed to comply with an order for discovery.

67 Bearing these factors in mind, I find this is an appropriate case to order reimbursement to the tenant of the filing fee of $575.30 and the hearing fee of $341.50 it has paid. The fees to be reimbursed by the managing agent and the landlord accordingly total $916.80.

ORDERS TO BE MADE

68 Orders will be made which reflect that:

(a) the tenant is entitled to an order under s 109 of the VCAT for costs totalling $5,830;

(b) the tenant is entitled to an order under s 115B of the VCAT Act for reimbursement of fees of $916.80;

(c) the managing agent and the landlord are entitled to an order s109 of the VCAT for costs totalling $2,250 and

(d) the liability of the tenant to the managing agent and the landlord for costs of $2,250 ought to be set off against the liability of the managing agent and the landlord to the tenant for costs and fees of $6,746.80, with the net result that the managing agent and the landlord must pay to the tenant the sum of $4,496.80.

Member C. Edquist
Member