VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. BP946/2016

BUILDING AND PROPERTY LIST

CATCHWORDS

Costs - *Retail Leases Act 2003* – s.92(2) - circumstances in which order for costs can be made – vexatious conduct of proceeding – what is — reliance by unsuccessful party on manufactured document – failure to call evidence in support of case – whether indemnity costs should be awarded – relevant considerations – non-acceptance of more favourable offer

APPLICANTS	Anita Loughran, Myles Loughran
RESPONDENT	Sharon Hasham
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Application for Costs and Interest
DATE OF HEARING	26 March 2018
DATE OF ORDER	17 April 2018
CITATION	Loughran v Hasham (Building and Property) [2018] VCAT 586

ORDERS

1. Order the Respondent to pay the Applicants' costs of this proceeding including reserved costs, such costs if not agreed to be assessed by the Victorian Costs Court in accordance with the County Court Scale, on the standard basis up to 9 October 2017 and thereafter on an indemnity basis.
2. Further order the Respondent to pay to the Applicants interest assessed at $2,511.30.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants	Mr K. Hickie of Counsel
For the Respondent	Mr M. Black of Counsel

REASONS

Background

1. This is an application for the costs of this proceeding that was determined by an order made on 11 October 2017 and also interest on a security deposit not placed by the Respondent in an interest bearing account.

2. The dispute arose from the tenancy of a dilapidated building owned by the Respondent in the central business district of Melbourne. The Applicants moved out of the building following the repudiation of the lease by the Respondent and re-established their business elsewhere.

3. The Applicants claimed the return of their security deposit and damages arising from the repudiation, altogether totalling $77,596.94. The Respondent counterclaimed, seeking damages under various heads, totalling over $200,000.00.

4. After a four-day hearing, an order was made on 11 December 2017. The Applicants were awarded the sum of $63,993.51 and the Respondent's counterclaim was dismissed.

The application for costs and interest

5. This application for costs came before me for hearing on 26 March 2018. Mr K Hickey of Counsel appeared for the Applicants and Mr M Black of Counsel appeared for the Respondent.

6. After hearing submissions from counsel I informed the parties that I would order the Respondent to pay the Applicants' costs of this proceeding, on the standard basis up to 9 October 2017 and thereafter on an indemnity basis.

7. I also said that I would order the Respondent to pay interest on the amount of the security deposit as claimed by the Applicants and the amount, which I would need to calculate, would be specified in the written order that would be sent to the parties.

8. Before the written order was sent, a request was received from the Respondent's solicitors for written reasons for the orders to be made and these are now supplied.

9. The findings of fact upon which the conclusions expressed below are based are set out in detail in the reasons for decision that accompanied the order that I made determining the proceeding and I do not intend to repeat them in detail in these reasons.

Retail Leases Act 2003 – Section 92

10. The power of the tribunal to order costs in a retail tenancy dispute such as this is limited by s.92 of the *Retail Leases Act 2003* which provides as follows:

> "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 in 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.

(3) In this section, "costs" includes fees, charges and disbursements."

11. Counsel have referred me to a number of decisions as to how this section should be applied.

12. In *State of Victoria v. Bradto* [2006] VCAT 1813, Judge Bowman said (at paragraph 66 and 67):

"66 In essence, there was not a great deal of conflict between the parties as to the principles to be applied in relation to the operation of s.92 of the *RLA*. Clearly that section is designed to restrict the number of situations in which costs can be ordered. I agree that, whilst assistance can be gained from looking at various sections of the *VCAT Act* and the manner in which they have been interpreted, s.92 should essentially be viewed in isolation. Whilst it might be that, under both the *RLA* and the *VCAT Act*. the starting point is that no order should be made as to costs and that each party should bear its own costs, the exceptions contained in s.109(3) of the *VCAT Act*, with the exception of (3)(a)(vi), do not operate. If I am to order costs in a matter brought pursuant to the *RLA*, I must be satisfied that it is fair so to do because a party conducted the proceeding in a vexatious way, and that such conduct unnecessarily disadvantaged another party to the proceeding.

67 I am also of the view that, pursuant to the frequently cited test in *Oceanic Sun Line*, a proceeding is conducted in a vexatious manner 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. A similar approach was adopted by Gobbo J in *J&C Cabot*, although it could be said that the tests there set out relate more to the bringing of or nature of the proceeding in question, rather than the manner in which it was conducted. Indeed, if one looks at the factual and statutory context in which the

decision in *J&C Cabot* was taken, that distinction is underlined. Section 150(4) of the *Administrative Appeals Tribunal Act* 1984 refers to "... proceedings (that) have been *brought* vexatiously or frivolously ...". (My emphasis). Furthermore, the tests adopted by Gobbo J are those previously expressed by Roden J in *Attorney-General (Vic) v Wentworth* (1988) 14 NSW LR 481, and are worded as "... Proceedings are vexatious if they are *instituted*... if they are *brought*... if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless". (Again my emphasis). This is to be contrasted with the wording of s.92 which specifically refers to a proceeding being "*conducted* ... in a vexatious way". (Again my emphasis)."

13. The learned Judge's approach to the section was approved by the Court of Appeal in *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd* [2015] VSCA 216. The court said (at paragraphs 27 and 28):

> "27 Essentially, the applicant contends that there is a difference between instituting a proceeding that is vexatious, or making a claim that fails, and the conduct of a proceeding which is vexatious. The applicant argued that there is no basis to suggest that the commencement of the proceeding was vexatious, and that its entitlement to damages flowed from the finding that the Respondent had breached the lease. It submitted that the Tribunal focussed more on what were perceived to be the prospects of success than on the actual conduct of the proceeding, yet it is the conduct of the party in the proceeding that is material, not consideration of the strength of its claims.
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> 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."

and at paragraph 32, where the court said:

> "32 The applicant also contended that the Tribunal applied reasoning relevant to the exercise of a court's discretion to order costs on an indemnity basis rather than the relevant principles under s 92 of the Retail Leases Act for determining whether it was fair to award costs. Again, this criticism lacks foundation. Some of the circumstances relevant to whether costs should be awarded other than on a standard basis will

> overlap with the circumstances relevant to determining whether a proceeding has been conducted vexatiously and has unnecessarily disadvantaged the other party. The Tribunal was not in error to consider such factors in respect of both issues."

14. Mr Black also referred me to *Oceanic Sun Line Special Shipping Company Inc v. Fay* (1988) 165 CLR 197 as authority for the proposition that conduct is vexatious that is:

> "… productive of serious and unjustified trouble or harassment or …conduct which is seriously and unfairly burdensome, prejudicial or damaging."

I accept the correctness of that proposition.

Vexatious conduct

15. The section is directed at vexatious conduct of the proceeding that unnecessarily disadvantages the party seeking an order for costs. A proceeding is conducted in a vexatious manner 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.

16. The section is not specifically directed to the bringing of a vexatious claim. However to persist in the conduct of a proceeding in pursuit of a vexatious claim when one knows or ought to know that it is vexatious is, in my opinion, conducting the proceeding vexatiously. Legal proceedings are intended to be used for the pursuit of legitimate claims and bona fides disputes, not vexatious claims or groundless disputes. A party should not have to incur substantial legal costs in contested proceedings in order to prosecute a claim to which there is no arguable answer or defend a claim that is simply unsustainable.

17. The defence to the claim failed and the counterclaim was dismissed largely for two reasons.

18. In the first place, they were largely based on alleged lease documents that could not have been genuine or thought by the Respondent to have been genuine.

19. The lease upon which the Applicants' claim was based was prepared by the Respondent's solicitor and signed by the Applicants in the Respondent's solicitor's office. It was witnessed by the Respondent's solicitor.

20. On that day the Applicants paid the security deposit and handed over a certificate of currency for their insurance. In exchange they received the key to the premises, entered into possession and incurred expense fitting out the premises for the intended use. They then commenced conducting their business.

21. At no time were they contacted by the Respondent or anyone on her behalf to say that the document that they had signed was not the lease, or that there had been a mistake in it or indeed, that there was another version of the

lease in existence. Despite requests by the Applicants, the Respondent refused to provide them with a copy of the lease bearing her signature.

22. Instead at one time she suggested that they did not have a lease at all and at a later time, she asserted that different terms applied and produced a document which in my opinion, from the manner in which it was drafted, is most unlikely to have been prepared by a solicitor. No credible explanation was provided by the Respondent as to how this document came into existence. Her solicitor was not called, the agent that carried out the negotiations on behalf of Respondent was not called. I was not satisfied that the document was genuine.

23. I found the Respondent to be a most unsatisfactory witness. During the hearing she produced a further version of the lease purporting to have been signed by all parties. The evidence concerning this was conflicting. There had been an email from her solicitor some months earlier stating that such a document existed although it was not discovered. In the evidence that she gave at the hearing, she first said that she was not aware whether or not there was a lease document signed by all parties. Later in her evidence when the document was produced, she suggested that she had signed it on the first day of the hearing. I concluded that this also was not a genuine document but something the Respondent had constructed for her own purposes.

24. The Respondent knew that she had prepared these documents herself. She could not have been of the opinion that either of them was the lease document that regulated the rights of the parties in regard to the tenancy of the subject premises.

25. The second reason the Respondent's case failed was that many of the claims that she made in her counterclaim, which were based on her own version of the lease that she had prepared herself, were not supported by any substantial evidence, apart from some quotations that she had received which she did not accept. She never had any of the work described in these quotations carried out. Many of the claims made in the counterclaim were quite inflated on their face. There was no expert evidence led on behalf the Respondent to prove any of the claims. In contrast, there was detailed evidence given on behalf of the Applicants to dispute each of the claims that the Respondent made. That evidence was not answered. In the end, the whole of the counterclaim was dismissed because, apart from having been based upon a bogus document, the amounts sought were not proven.

26. As stated above, proceedings are vexatious if they are so obviously untenable or manifestly groundless as to be utterly hopeless. In the brief summary above and in the reasons accompanying the decision that determined this proceeding, I set out why I found both the Respondent's defence to the claim and her counterclaim to be manifestly groundless and utterly hopeless. Moreover, I am satisfied that she would have been aware of that fact.

27. Consequently, I am satisfied that this is an appropriate case in which to order the Respondent to pay the Applicants' costs. The issue then becomes, on what basis should those costs be assessed?

The offer of compromise

28. Mr Hickie seeks an order for payment of indemnity costs. He referred me to an offer of compromise that his clients had made.

29. By a letter dated 2 March 2017 the Applicants' made an offer of settlement, expressed to have been made under s.112 of the *Victorian Civil and Administrative Tribunal Act 1998*. It was also said to be a Calderbank offer.

30. In that letter, following a highly detailed analysis of the case, the Applicants offered to pay the Respondent the sum of $15,000 and release her from their claim for the security deposit of $35,200.00. They also offered to pay their own costs. In return, the Respondent was to provide tax receipts for the rental they had paid to her.

31. This offer was not accepted. The outcome of the case was considerably less favourable to the Respondent than the offer that was made.

Should indemnity costs be awarded?

32. Orders for indemnity costs are only made in exceptional circumstances. In *Colgate-Palmolive Pty Ltd v Cussens* [1993] FCA 536 Sheppard J said:

> "In consequence of the settled practice which exists, the Court ought not usually make an order for the payment of costs on some basis other than the party and party basis. The circumstances of the case must be such as to warrant the court in departing from the usual course. That has been the view of all judges dealing with applications for payment of costs on the indemnity or some other basis, whether here or in England."

33. However, in *Ugly Tribe Co Pty Ltd v Sikola* [2001] VSC 189 Harper J said (at Para.12):

> "The position changes where a litigant acts dishonestly in the litigation, or where the rights and privileges of a litigant are flouted or abused. Then, the rationale for refusing to order that the losing party indemnify an opposite party against that party's costs is less compelling. Indeed, costs are more frequently if not invariably awarded on an indemnity or like basis (such as that of solicitor/client) where findings of dishonesty or serious misconduct have been made against the party ordered to pay."

34. In *Fountain Selected Meats (Pty Ltd) - v.- International Produce Merchants Pty Ltd* [1988] FCA 202; Woodward J said (at p.401):

> "I believe that it is appropriate to consider awarding "solicitor and client" or "indemnity" costs, whenever it appears that an action had been commenced or continued in circumstances where the Applicant, properly advised, should have known that he had no chance of success. In such cases the action must be presumed to have been

commenced or continued for some ulterior motive, or because of some wilful disregard of the known facts or the clearly established law. Such cases are, fortunately, rare. When they occur, the court will need to consider how it should exercise its unfettered discretion."

35. I was referred by counsel to *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd* [2015] VSCA 216. In that case, the Court of Appeal said (at para. 9):

> "Ordinarily, where costs are awarded they are awarded on a standard basis. However, in some circumstances, it is appropriate to make a special costs order. In *Ugly Tribe Co Pty Ltd v Sikola*, Harper J identified the following circumstances as warranting a special costs order, noting that the categories of circumstances are not closed:
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> (a) the making of an allegation, known to be false, that the opposite party is guilty of fraud;
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> (b) the making of an irrelevant allegation of fraud;
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> (c) conduct which causes loss of time to the court and to other parties;
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> (d) the commencement or continuation of proceedings for an ulterior motive;
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> (e) conduct which amounts to a contempt of court;
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> (f) the commencement or continuation of proceedings in wilful disregard of known facts or clearly established law; and
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> (g) the failure until after the commencement of the trial, and without explanation, to discover documents, the timely discovery of which would have considerably shortened, and very possibly avoided, the trial."

36. It is apparent from the foregoing that, in determining whether to order costs on an indemnity basis, I should take into account similar matters to those referred to above concerning s.92. However it is not the same question and it must be approached and answered separately.

37. In the *24 Hour Fitness* case, costs were awarded under section 92(2)(a) and the court observed (at para.32):

> "Some of the circumstances relevant to whether costs should be awarded other than on a standard basis will overlap with the circumstances relevant to determining whether a proceeding has been conducted vexatiously and has unnecessarily disadvantaged the other party. The Tribunal was not in error to consider such factors in respect of both issues."

38. The consideration from *Ugly Tribe* most relevant to the present case is (f), that is, whether the continuation by the Respondent of the proceeding was in wilful disregard of known fact or clearly established law.

39. There was no dispute as to the applicable legal principles. The dispute turned almost entirely on questions of fact.

40. To justify the defence of the claim and the prosecution of a large part of the counterclaim, the Respondent relied upon what I referred to in my reasons for decision as "the Respondent's version of the lease". Mr Black said that the question, which version of the lease applied, was an issue that needed to be determined in the case. That is so, but the question is whether the Respondent proceeded in wilful disregard of the facts as those facts were known to her.

41. She knew the provenance of the purported lease documents that she produced and she knew that she had built her case in regard to both the defence of the claim and the major part of her own counterclaim, on them. She knew also that they were documents of her own creation. Although there was a controversy at the trial as to which version of the document applied, it was a controversy of the Respondent's own creation.

42. At the time the hearing commenced she also knew that she was calling no evidence to support the quantum of the counterclaim or any witness to prove any of the documents that she was relying upon.

43. It is not necessary to look at these matters with the benefit of hindsight. The Respondent knew at the time she commenced to defend the claim and also when she brought the counterclaim what the situation was. She had solicitors, and counsel to advise her and yet she nonetheless proceeded.

44. It is quite artificial to speculate that if the Respondent's version of the lease had been accepted the result of the case would have been quite different because that ignores the fact that it could never have been accepted because it was not a genuine document and the Respondent knew that.

45. To conduct proceedings in those circumstances, thereby causing the other party to incur substantial legal costs and take up this tribunal's time is, on any view, vexatious. That vexatious conduct unnecessarily disadvantaged the Applicants because of the substantial costs they had to incur as a result. Evidence as to the substantial amount of those costs was given in an affidavit sworn by the Applicants' solicitor.

Non-acceptance of the offer

46. In addition, the Respondent proceeded notwithstanding having received an extraordinarily generous offer from the Applicants.

47. The offer was substantially more favourable to the Respondent than the outcome of the proceeding. The Applicants had offered, in effect, to pay to the Respondent $50,200.00 by allowing her to retain the security deposit, abandoning their own claim and paying her $15,000.00.

48. Instead, the counterclaim was dismissed and the Applicants have received an order of almost $64,000.00.

Conclusion

49. On the eve of the hearing, with the benefit of the availability of advice of counsel and her solicitors, the Respondent must have known that she should not proceed, either with the defence of the claim or the prosecution of the counterclaim but she proceeded nonetheless. In prosecuting the case, the evidence to support it was not produced.

50. No expert or other evidence was called to prove the quantum of the counterclaim. The solicitor was not called nor was the agent. That there was to be no such evidence must have been apparent to the Respondent from the commencement of the hearing and yet she proceeded and thereby caused the Applicants to needlessly incur the cost of a four-day hearing.

51. Costs will therefore be awarded on an indemnity basis from the date of the hearing. Before that, they will be on the standard basis.

Interest

52. Interest will be allowed on the amount of the security deposit that the Respondent should have placed in an interest-bearing account. Had she done so, it would have earned interest at the quite modest rates fixed from time to time by the Reserve Bank of Australia. She did not, and so the Applicants are entitled to be compensated for the interest they have lost, which I have calculated from the date upon which the security deposit was handed to the Respondent's agent, which was 15 May 2014, up to 26 February 2018. I calculate the amount at $2,511.30.

SENIOR MEMBER R. WALKER