

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### CIVIL CLAIMS LIST

VCAT REFERENCE NO. BP1496/2015

### CATCHWORDS

LEASE: proceeding withdrawn; lease not a lease of retail premises within the meaning of the *Retail Leases Act 2003*; application by Respondent for costs of the proceeding made under s 74(2)(b) of the *Victorian Civil and Administrative Tribunal Act 1998*; principles for assessment of costs under s 74(2)(b).

**APPLICANT:** Luchio Nominees Pty Ltd (ACN 005 495 992)

**RESPONDENT:** Epping Fresh Food Market Pty Ltd (ACN 127 544 049)

**WHERE HELD:** Melbourne

**BEFORE:** Member C. Edquist

**HEARING TYPE:** Directions Hearing

**DATE OF HEARING:** 7 March 2016

**DATE OF ORDER:** 14 June 2016

**DATE OF REASONS:** 14 June 2016

**CITATION:** Luchio Nominees Pty Ltd v Epping Fresh Food Market Pty Ltd (Building and Property) [2016] VCAT 969

### ORDERS

- 1 The Applicant is granted leave under s 74(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (the VCAT Act) to withdraw the proceeding, and the proceeding is withdrawn.
- 2 Pursuant to s 74(2)(b) of the VCAT Act, the Applicant must pay the Respondent's costs of the proceeding on the standard basis, which in the absence of agreement, are to be assessed by the Costs Court on the Scale of Costs in Appendix A of Chapter 1 of the Rules of the County Court.

**MEMBER C EDQUIST**

**APPEARANCES:**

For Applicant

Mr R Peters of Counsel

For Respondent

Mr R Hay QC with Mr L Hawas of Counsel

## REASONS

1. The Tribunal declared, on 7 June 2016 in the related proceeding BP366/2014, that the lease is not a lease of *retail premises* within the meaning of the *Retail Leases Act 2003*.
2. The upshot is that the entitlement of the Respondent (Epping), turns on the provisions of the *Victorian Civil and Administrative Tribunal Act 1998*, (VCAT Act).
3. Section 74 of the VCAT Act relevantly provides:  
**74 Withdrawal of proceedings**
  - (1) If the Tribunal gives leave, an applicant may withdraw an application or referral before it is determined by the Tribunal.
  - (2) If an applicant withdraws an application or referral—  
...
    - (b) the Tribunal may make an order that the applicant pay all, or any part of, the costs of the other parties to the proceeding; ...
4. The Applicant (Luchio), has been granted leave to withdraw its application before its determination by the Tribunal, and the proceeding is withdrawn. Section 74(2)(b) is thus enlivened.
5. Epping has made an application for its costs of the proceeding.
6. Luchio's primary contention regarding costs, as articulated in its Contentions dated 30 March 2016, filed in proceeding BP366/2014, implies that costs are to be determined applying the principles set out in s 109 of the VCAT Act. This implication arises from the statement: 'There is no suggestion that the proceeding was vexatious'. This is an apparent reference to the discretion of the Tribunal to make an order for costs under s 109(3)(a)(vi), if the Tribunal is satisfied that it is fair to do so to do so, where a party has conducted the proceeding in a way that unnecessarily disadvantages the other party by conduct such as vexatiously conducting the proceeding.
7. Epping, on the other hand, argues in its Contentions dated 8 April 2016, that:

Although some doubt exists about the matter, the Tribunal's power to award costs under s 74(2)(b) of the VCAT Act is probably unfettered and not restrained by the matters in s 109(2).
8. I find that s 74(2)(b) of the VCAT Act provides the Tribunal with the power to make an order for costs which is not constrained by the matters referred to in s 109(3) of the Act. I reach this conclusion by reference to the plain words of the section. If Parliament had intended the power to award costs

under s 74(2)(b) to be fettered by the matters set out in s 109 of the Act, it would have been a simple matter to have stated this. It is relevant to note, by way of comparison, that the power to award costs under s 78(2) - where a party to a proceeding has conducted the proceeding in a way that has necessarily disadvantaged another party to the proceeding - is expressed to be a power to 'make an order for costs under section 109'.

9. I note that Deputy President McKenzie took the view that s 74(2)(b) created a separate power to award costs in *Asgari v SBS Radio* [2001] VCAT 1755. Other authorities are referred to by Pizer's *Annotated VCAT Act*, 4th Edition p 262.

10. Epping argues in its Contentions dated 8 April 2016, is that there is a general principle that:

In a leasing dispute, the Tribunal will usually order the withdrawing party to pay the other party's costs of the proceeding.

11. In support of this general proposition, Epping relies on *Taylor Made Sports Pty Ltd v Australian Prime Property Fund Custodian Pty Ltd*, an unreported decision of Deputy President Macnamara made on 26 November 1998. I have had the benefit of reading the decision. The relevant passage appears to be:

In the circumstances I think that the indication in Section 74(2) that it is proper to consider ordering costs against a discontinuing applicant and the matters flowing as from the general nature of proceedings in this list, render it appropriate that there should be a costs order in favour of the respondent.

12. I am not sure that Deputy President Macnamara was pronouncing that a special rule as to costs should apply to leasing disputes. If he was, I do not agree that there should be such a rule. It may be that many leasing disputes have features which would justify an order for costs being made under s 74(2)(b). But that is not to say that all leasing disputes will have such features. I think each case must be considered on its own merits.

13. I consider that before an order for costs can be made under s 74(2)(b) of the Act, the relevant factors have to be present.

14. In *Asgari v SBS Radio*, Deputy President McKenzie relevantly said:

Section 74(2)(b) is a separate power to order costs on the withdrawal of a proceeding. There is no rule here that costs lie where they fall, unless the Tribunal considers it fair to order otherwise. Here the Tribunal has an unfettered and broad discretion as to costs, similar to the discretion which the Anti-discrimination Tribunal had under the now repealed s.138 of *Equal Opportunity Act 1995*. However, the fact that there is a broad and unfettered discretion under s 74(2)(b) of the VCAT Act also means that there can be no automatic rule that costs will always be awarded against the withdrawing party. The decision as to costs must be based on the particular circumstances of each case. There is no reason why similar factors to those which have been taken

into account in decisions under s.138 of the *Equal Opportunity Act*, could not also be taken into account in determining whether or not to award costs under s74(2)(b) of the VCAT Act. (As to this, see *Kallinikos v. Hellinger*, a decision of VCAT dated 15 March 2000). These factors include whether a complaint has been instituted vexatiously, that is, predominantly to embarrass the Respondent, or place an unreasonable burden on a Respondent, or for some purpose other than the adjudication of rights under the *Equal Opportunity Act*; whether the applicant has conducted the proceeding unreasonably; whether the applicant has made or persisted in a claim in which he or she had no genuine belief, or in circumstances where, although he or she may have genuinely believe the complaint to be well founded, the claim had no foundation and no reasonable person would have believed that it had. (As to this, see for example, *Blaney v. National Bank of Australia Limited*, a decision of VCAT dated 17 September 1999).

15. I respectfully agree with Deputy President McKenzie that there is no automatic rule that costs will always be awarded against the withdrawing party. I consider that the power to award costs under s 74(2)(b) is governed by the overarching obligation on the Tribunal to act fairly and according to the substantial merits of the case, imposed by s 97 of the Act. It is for this reason that I consider the issue of costs under s 74(2)(b) must be considered on a case-by-case basis.
16. Luchio's second contention regarding costs is that:

Luchio is not to be punished for deciding not to proceed and to withdraw. If the Tribunal orders costs, it will only encourage litigation rather than encouraging parties not to continue with litigation which they are no longer keen to pursue.
17. There is some merit in Luchio's argument that if the Tribunal orders costs, it will only encourage other litigants to continue with litigation which they are no longer keen to pursue. On the other hand, there is also merit in the view that any applicant in the Tribunal should carefully consider the prospects of success because to initiate litigation is not something to be undertaken lightly. Not only is conducting litigation a burden on the applicant, it is likely to be at least as burdensome to the respondent. Accordingly, as a general principle, the Tribunal should not encourage applicants to initiate proceedings in the expectation that those proceedings can be in every case be withdrawn without there being some consequence in terms of costs.
18. Epping says that there are particular features of this case which would justify the Tribunal ordering Luchio to pay its costs. The central point is that Luchio did not give Epping reasonable notice of its intention to withdraw the proceeding, and did so only on Friday, 4 March 2016. By that time, Epping had prepared a draft defence to Luchio's points of claim dated 9 November 2015. I comment that these are features which, if my decision regarding costs were governed by s 109 of the VCAT Act, would in my

view have justified in order that Luchio should pay at least some of Epping's costs pursuant to s 109(3)(b), because Luchio has been responsible for prolonging unnecessarily the time taken to complete the proceeding.

19. However, as I consider the power to award costs is fettered only by the obligation to act fairly, and according to the substantial merits of the case, pursuant to s 97 of the Act, I approach the issue with those tests in mind.
20. This proceeding was initiated by Luchio in an attempt to obtain an order for possession of the Premises, based on a notice issued under s 146 of the *Property Law Act 1958* ('PLA') that had been issued on 19 June 2015. The proceeding was initiated because Luchio had had to abandon its attempt to obtain an order for possession in the related proceeding BP366/2014.
21. Special features are present in this case which I find justify an order being made that Luchio should pay Epping's costs on the basis that this would be fair, and in accordance with the substantial merits of the case. These features are:
  - (a) Luchio at all times was legally represented.
  - (b) The proceeding was deliberately initiated in the context of a long-running commercial dispute between the parties.
  - (c) The proceeding was withdrawn, according to Luchio's Counsel, not because Luchio was abandoning its attempt to obtain possession of Premises or because the wider dispute has been settled, but because the issuing of the proceeding was an 'error'.
  - (d) The withdrawal occurred at a point at which Epping must have incurred significant costs.
22. I will make an order that Luchio must pay Epping's costs of the proceeding on the standard basis, which in the absence of agreement, are to be assessed by the Costs Court on the Scale of Costs in Appendix A of Chapter 1 of the Rules of the County Court.

**MEMBER C EDQUIST**