VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. R119/2014

CATCHWORDS

Retail Leases Act 2003 - s.92 – application for costs – claim by applicants unsuccessful – whether claim was vexatiously conducted – claim found to have been manifestly hopeless – order for costs made

APPLICANTS:	Meadsview PTY LTD (ACN 007 136 503) and Natsue PTY LTD (ACN 072 414 478)
FIRST RESPONDENTS:	Robert Fenton and Glenda Fenton
SECOND RESPONDENT:	Owners Corporation No. 2 336467A
THIRD RESPONDENT:	Ashley Fenton
FOURTH RESPONDENT:	Alison Fenton
FIFTH RESPONDENT:	Owners Corporation No. 1 336467A
WHERE HELD:	Melbourne
BEFORE:	Senior Member R. Walker
HEARING TYPE:	Costs application
DATE OF HEARING:	29 May 2019
DATE OF ORDER:	21 June 2019
CITATION:	Meadsview Pty Ltd v Fenton (Building and Property) [2019] VCAT 934

ORDER

Order that the Applicants pay the First, Third and Fourth Respondents' costs, including any reserved costs, of this proceeding as between the Applicants and the First, Second and Third Respondents, including this application for costs but not including the proceeding as between the First, Third and Fourth Respondents and the Second and Fifth Respondents, such costs if not agreed to be assessed by the Victorian Costs Court on the standard basis in accordance with the County Court scale.

SENIOR MEMBER R. WALKER

APPEARANCES:

For Applicants:	Mr C.P. Wirth, of Counsel
For First, Third and Fourth Respondents:	Mr A. Donald, of Counsel
For the Second and Fifth Respondents:	No appearance

REASONS FOR DECISION

Background

1 In this proceeding the Applicants ("**the Tenants**") sought damages against the First, Third and Fourth Respondents ("**the Landlords**") in regard to losses said to have been suffered by the Tenants because certain premises ("**the Premises**") that they had leased from the Landlords were without air-conditioning for an extended period.

2 The Tenants claimed that, because the Premises were without air-conditioning, they were unable to establish a medical practice there and that they lost the profits that they would have derived from such a practice.

3 There was an associated claim by the Landlords against the Second and Fifth Respondents for not permitting the Landlords to install an external compressor to the air-conditioning system that serves the Premises. That claim was settled and the Points of Claim against Second and Fifth Respondents was struck out on 11 May 2018 with no order as to costs.

4 The Tenants' claim against the Landlords came before me for hearing on 19 June 2018 and, on 10 August 2018, I gave a reserved decision dismissing the application.

Hearing

5 The Landlords have now sought an order for their costs of this proceeding.

6 The application for costs came before me for hearing on 29 May 2019. Mr L.P. Wirth of counsel appeared on behalf of the Tenants and Mr A. Donald of counsel appeared on behalf of the Landlords. The time allocated for the hearing did not allow proper consideration of the matters raised and so, after hearing submissions, I informed the parties that I would provide a written decision.

Power to award costs

7 The Tribunal only has power to award costs in a retail tenancy dispute in the limited circumstances set out in s.92 of the *Retail Leases Act 2003* ("the Act"), 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."

8 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)."

9 As to when a claim can be said to be vexatious, Mr Donald referred me to the following passage from the judgement of Roden J in the case of *Attorney General (Vic) v. Wentworth* (1988) NSWLR 481 (at p. 491):

> "It seems then that litigation may properly be regarded as vexatious for present purposes on either of objective or subjective grounds. I believe that the test may be expressed in the following terms:
>
> > 1. Proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought stop
> >
> > 2. They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise stop
> >
> > 3. They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless."

10 Section 92 does not refer to vexatious proceedings but rather, to conducting the proceeding in a vexatious way. However, it is clear from the cases that conducting a case that is so obviously untenable or manifestly groundless as to be utterly hopeless amounts to vexatious conduct within the meaning of the section.

11 Mr Donald referred me to the decision of Vice President Judge Jenkins in *24 Hour Fitness Pty Ltd v. W & B Investment Group Pty Ltd* [2015] VCAT 596, where her Honour said (at para. 57a):

> "My reasons for dismissing the Applicant's claim for damages have been previously set out in written reasons delivered on 6 March 2015, which I will not repeat again here; suffice to say that I found no merit in any of the submissions made on behalf of the Applicant. Furthermore, the Applicant could not refer the Tribunal to any authority which supported its position in the circumstances of this case. The Applicant's claim for damages, where no loss could be demonstrated as having been incurred by the Applicant, can properly be described as 'obviously untenable or manifestly groundless as to be utterly hopeless'."

12 The learned Judge's decision was upheld by the Court of Appeal in *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd* [2015] VSCA 216. In affirming that the strength of a party's case was a relevant consideration, 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.

> 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."

13 Mr Donald invited me to find that similarly, in the present case, I found no merit in any of the submissions made on behalf of the Tenants. He said that the Tenants did not refer me to any authority which supported their case, he said that no loss could be demonstrated as having been suffered by them and in those circumstances, their case was so obviously untenable or manifestly groundless as to be utterly hopeless.

14 Mr Wirth said that the proceeding was commenced for legitimate reasons and the claim for losses flowing from the absence of air conditioning was sound. He said that the construction of the relevant email correspondence urged on behalf of the Tenants was arguable and that, although I was not satisfied with the Tenants' proofs, the claims were not manifestly groundless.

Was the Tenants' case groundless?

15 Mr Donald submitted that the Tenants commenced the proceeding for damages in circumstances where, properly advised, they should have known that it had no chance of success. He said that they persisted with the claim when, on a proper consideration, it should have been seen to be hopeless. He said that they did this in wilful disregard of known facts, including the known fact that the Tenants had compromised their rights in respect of the air-conditioning by accepting a reduction of rent in an amount fixed by them, and also contrary to clear law namely, the legal effect of compromising a legal right.

Liability

16 It is common ground that the Landlords were liable under the terms of the lease to provide air-conditioning to the Premises. The defence taken was that the Tenants had agreed to accept a rental reduction of $40 per week plus GST for the period during which the Premises would be without air conditioning and that they had received that reduction. That agreement was clearly spelt out in the exchange of emails between the Landlords' agent and the Tenants.

17 The Tenants argued that the reduction in rental was not the price paid for the absence of air-conditioning but rather, that it was a commercial accommodation for a temporary nuisance and that the Landlords could set off the reduction against their liability for damages for failing to provide

air-conditioning. There was nothing to that effect in the email correspondence. The agent's email offered the reduction for the lack of air conditioning, not as compensation for a temporary nuisance.

18 I did not accept the Tenants' argument because it was quite clear from the correspondence between the parties that the reduction was to be compensation for the absence of air conditioning. It was also clear that Dr Pinskier, who negotiated the reduction on behalf of the Tenants was an astute businessman who was aware of the consequences of there being no air-conditioning.

19 In the circumstances, the argument had no substance at all. I do not accept Mr Wirth's submission that there was room for debate in this regard. In light of the clear words of the emails, the submission was utterly baseless and should have been seen to be without any sensible foundation.

20 The alternate argument put on behalf of the Tenants was that it was an implied term of the agreement for a reduction in rental that it would only be for a short period. For the detailed reasons I set out in the decision which I will not repeat here, I found that there was no basis for implying such a term. Again, I thought that the proposition was not arguable.

21 I accepted the Landlords' case because it was quite plain that the Tenants had already been compensated for the lack of air conditioning by a reduction of rental in an amount that they themselves had suggested and that they had received. Consequently, there had been an accord and satisfaction and the Tenants' claim was not maintainable.

Damages

22 Quite apart from the question of liability, it was not proven that the Tenants had suffered any of the loss or damage that they claimed.

23 The losses claimed on a contractual basis were said to be the loss of income that the Tenants would have derived from sub-letting the Premises. However, the Tenants had no right under the terms of the lease to sublet the Premises. By s.63 of the Act, a landlord is entitled to include a provision in the lease forbidding subletting and, by Clause 1(t) of the lease in this case, the Tenants could not sublet the Premises without the prior written consent of the Landlords. No such consent was obtained.

24 Even if they could have sublet, the figures produced by their expert witnesses in support of their quantification of damages were calculated on the basis of the Premises being sublet to doctors. Yet the evidence led on behalf of the Tenants suggested that their intention was to license the rooms to various quasi health professionals.

25 With one exception, the proposed sublessees were not identified and no subleases were produced. The exception was a "sublease" to a potential subtenant called Melbourne Pathology, but the landlord described in that document was neither of the Tenants, but an associated entity called "Medi-

Admin", which is a company of which Dr Pinskier and his brother are the directors. I did not accept Dr Pinskier's evidence that this was a mistake because:

(a) it was not explained how such a mistake came to be made;

(b) the licensor named in each of the licensing agreements to the two licensees who occupied the Premises was also Medi-Admin.

(c) Dr Pinskier said that he and his brother have an established business model that they use, and that what they proposed to do with the Premises was consistent with that business model and with what they do at other sites. The documents produced in regard to these other sites identified in each case that the sublessor was Medi-Admin, not the Tenants.

26 Consequently, any loss of revenue from potential subleases of the Premises would have been suffered by Medi-Admin, not by the Tenants. There was no evidence which led as to the financial connection between the Tenants and Medi-Admin.

27 Further, the claimed intention to sublet the Premises in the manner described was not supported by any evidence of a business plan, licensing or subletting agreements to any doctors or quasi health professionals or even an application for planning permission to allow such a use.

28 Finally, there is the question of remoteness of damages and the foreseeability of the losses claimed. In negotiating for the Premises, Dr Pinskier informed the agent that it was the intention of the Tenants to use the Premises for offices and that they intended to conduct a medical practice in the adjoining premises, which they had leased from a different landlord. He said in cross-examination that he told the agent that the Premises were going to be used as offices so as to obtain a lower rent. It seems to me that the damages that would have been within the reasonable contemplation of the parties at the time the lease was entered into would have been damages arising from the inability of the Tenants to use the Premises for offices, not for the medical practice that they represented would be conducted next door.

29 I found that the alternative claims for unconscionable conduct and for misleading and deceptive conduct had no basis on the evidence presented. In any case, the measure of damages pursuant to s.236 of the *Australian Consumer Law* would have been the difference between the Tenants' position now compared with what their position would have been if they had not entered into the lease. Since the rental derived from subletting the Premises exceeded the amounts that they paid to the Landlords, they were better off.

Conclusion

30 It is uncommon that one finds a case that is so obviously untenable or manifestly groundless as to be utterly hopeless, but I am satisfied that this is such a case. The Tenants' claim was so lacking in any substance that it should not have been brought and consequently, it was vexatious within the meaning of s.92 of the Act.

31 There will be an order that the Applicants pay the First, Third and Fourth Respondents' costs, including any reserved costs, of the proceeding as between the Applicants and those respondents, but not including the proceeding as between the First, Second and Third Respondents and the Fourth and Fifth Respondents, such costs if not agreed to be assessed by the Victorian Costs Court on the standard basis in accordance with the County Court scale.

SENIOR MEMBER R. WALKER