

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. BP421/2018

**CATCHWORDS**

Unpaid licence fees – Costs – s 109 *Victorian Civil and Administrative Tribunal Act 1998* (Vic)

<b>APPLICANT</b>	Melbourne Anglican Trust Corporation (ABN 82 862 724 352)
<b>RESPONDENT</b>	Brunswick Town Hall Kebab Pty Ltd (ABN 71 621 011 667)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	H Nash, Member
<b>HEARING TYPE</b>	In Chambers
<b>DATE OF SUBMISSIONS</b>	25 October 2018
<b>DATE OF ORDER AND REASONS</b>	18 December 2018
<b>CITATION</b>	Melbourne Anglican Trust Corporation v Brunswick Town Hall Kebab Pty Ltd (Costs) (Building and Property) [2018] VCAT 2036

**ORDER**

The Tribunal orders that:

- 1 The Respondent pay the Applicant licence fee arrears in the sum of \$14,038.86 (inclusive of GST).
- 2 No order as to costs.

H Nash  
**Member**

## REASONS

- 1 The hearing in the proceeding was held on 24 July 2018 and Orders were made on 12 September 2018 ordering the Respondent to vacate the Property and to provide written submissions to the Tribunal addressing the outstanding issues of the licence fees owing to the Applicant by the Respondent and the costs of the proceeding.
- 2 Pursuant to those Orders made on 12 September 2018, the Applicant has filed written submissions with the Tribunal regarding the Applicant's claim to arrears of licence fees payable by the Respondent and for payment of its costs by the Respondent.
- 3 The Respondent has not filed any written submissions on these issues.
- 4 The Applicant submits that the Respondent vacated the premises on 12 September 2018.

### Licence Fee Arrears

- 5 The licence fee payable under the licence agreement dated 11 August 2017 between the parties for the premises located at 260 Sydney Road, Brunswick (the **Property**) is \$4000.00 plus GST per calendar month payable in advance (the **Licence Agreement**).
- 6 The Respondent has failed to make any payment of the licence fee for the period 11 May 2018 to 12 September 2018 and the arrears of licence fees owing at 12 September 2018 is \$14,038.86 (inclusive of GST).
- 7 In the absence of any evidence to the contrary from the Respondent, I find that the Respondent owes the Applicant the sum of \$14,038.86 being arrears of licence fees payable pursuant to the Licence Agreement.

### Costs

- 8 The Applicant has sought an order that the Respondent pay its costs of the proceeding pursuant to section 109(2) of the *Victorian Civil and Administrative Tribunal Act 1998* (the **VCAT Act**). The Applicant's submissions in this regard are directed to the adjournment of the hearing on 21 May 2018.
- 9 The Respondent was unable to attend the hearing listed for 21 May 2018 on medical grounds and provided to the Tribunal a medical certificate from his General Practitioner which noted his medical complaints and that he had been referred to St Vincent's hospital. The Tribunal adjourned the hearing listed for that day to commence on 4 June 2018 and reserved the Applicant's costs of 21 May 2018 thrown away by reason of the adjournment (the **First Adjournment**).
- 10 The Tribunal also directed the Respondent to file and serve an affidavit deposing to the circumstances of his unavailability on 21 May 2018 and whether he was able to attend the hearing listed for 4 and 5 June 2018.

- 11 The Respondent filed and served an affidavit sworn 29 May 2018 deposing to the medical ailments he was suffering on 21 May 2018 and his ongoing medical ailments which would prevent him from attending the hearing listed for 4 and 5 June 2018.
- 12 The Tribunal made a further order adjourning the hearing listed for 4 and 5 June 2018 to 24 July 2018 and reserved the costs of the Applicant thrown away by reason of the adjournment of the hearing listed for 4 and 5 June 2018 (the **Second Adjournment**).
- 13 The Applicant submitted that each of these adjournments are sufficient to fall within the scope of Subsections 109(3)(a)(iv) and 109(3)(b) and therefore constitute a basis for the Tribunal to order costs against the Respondent.
- 14 Section 109 of the *Victorian Civil and Administrative Tribunal Act 1998* says in part:
- s.109:**
- (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 –
      - ...
      - (iv) causing an adjournment;
      - ...
    - (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;
- 15 It is unclear whether the Applicant seeks the costs of the entire proceeding or the costs of the two adjourned hearings.
- 16 I do not consider the Respondent's conduct of the proceeding falls within the Subsections 109(3)(a)(iv) and 109(3)(b).
- 17 As to whether each of these adjournments fall within the scope of Subsections 109(3)(a)(iv) and 109(3)(b), I find that they do not for the following reasons.
- 18 As emphasised by the Supreme Court in the matter of *Vero Insurance Limited v Gombac Group* [2007] VSC 117 at [20], the Tribunal should approach the question of entitlement to costs on a step-by-step basis:
- (i) The prima facie rule is that each party should bear their own costs of the proceeding.

- (ii) The Tribunal should make an order awarding costs being all or a specified part of costs, only if it is satisfied that it is fair to do so; that is a finding essential to making an order.

In determining whether it is fair to do so, that is, to award costs, the Tribunal must have regard to the matters stated in s.109(3). The Tribunal must have regard to the specified matters in determining the question, and by reason of (e) the Tribunal may also take into account any other matter that it considers relevant to the question.

- 19 The First Adjournment arose due to the ill health of the Respondent. While it is inconvenient for the Applicant to have the hearing adjourned, it is not unreasonable for the Respondent to ask for such an adjournment in circumstances where he attended his GP who referred him to the emergency department of St Vincent's hospital. The Respondent, as is appropriate, followed his doctor's instructions.
- 20 The Second Adjournment was directed by the Tribunal in response to the Respondent's affidavit sworn 29 May 2018 outlining his medical condition and why he was unavailable to attend the hearing ordered to commence on 4 and 5 June 2018. The Second Adjournment was ordered with sufficient notice to the Applicant for it not to incur further costs and the Applicant has not indicated that any such costs were incurred.
- 21 Rather, the Applicant's complaint about the Second Adjournment appears to be that the hearing of the proceeding was again delayed by reason of the Respondent's ill health.
- 22 There is no evidence on which I can find that the Respondent has conducted himself in a manner which invites me to deviate from the prima facie rule of each party bearing their own costs of the proceeding. Nor do I find that it would be fair to do so.
- 23 Accordingly, the Applicant's claim that the Respondent pay the Applicant's costs is dismissed.

H Nash  
**Member**