VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1638/2017

CATCHWORDS

Retail Leases Act 2003 - Retail tenancy – s.92 - application by party for costs of proceeding – whether respondents conducted the proceeding vexatiously – "costs" – meaning of – unrepresented party

APPLICANT	Mr Nehad Moussa
FIRST RESPONDENT	Mr Geoffrey Allan Herben
SECOND RESPONDENT	Mr Mark Spillman
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	1 March 2019
DATE OF ORDER	15 April 2019
CITATION	Moussa v Herben (Building and Property) [2019] VCAT 560

ORDERS

1. The time by which the Respondents must replace the roof of the subject premises is extended to 15 June 2019.

2. The orders already made concerning the replacement of the roof will otherwise continue to apply.

3. Order the Respondents to pay the Applicant's costs of the proceeding, fixed at $6,045.30.

4. The Landlords' application for costs is dismissed.

5. Liberty is reserved to the parties to apply for any further orders or directions in regard to the replacement of the roof.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant:	In person
For the Respondent:	Mr A. Scrivia, of counsel

REASONS

Background

1. This proceeding concerned a claim by the Applicant ("the Tenant") for injunctive and other relief concerning his tenancy of restaurant premises ("the Premises") that he leased and still leases from the Respondents ("the Landlords").

2. The matter was heard over four days in September 2018. A decision was handed down on 1 November 2018 (inter alia):

    (a) restraining the Landlords from re-entering the Premises on the basis of any of the notices they had previously served upon the Tenant;
    (b) ordering an abatement of rental, due to the failure of the Landlords to maintain the Premises;
    (c) ordering the Landlords to replace the roof and repair the floor of the Premises;
    (d) ordering the Landlords to produce and execute a lease and disclosure statement in accordance with terms of settlement that had been previously executed by the parties.

3. Apart from a small amount of arrears found to be due to the Landlords, which was ordered to be set off against a credit in favour of the Tenant for an abatement of rental, the Landlords' counterclaim was dismissed.

4. Costs were reserved.

This application

5. The Tenant now seeks an order for his costs of the proceeding. He also complains that the order has not been complied with by the Landlords.

6. The Landlords also seek an order for costs and an order that the Tenant sign a form of lease that has been sent to him by the Landlords, purportedly in accordance with the order.

The hearing

7. Both applications came before me for hearing on 1 March 2009 with two hours allocated. The Tenant represented himself and the Landlords were represented by Mr Scriva of counsel.

8. After hearing submissions, I ordered the respondents to replace the vinyl covering in the repaired areas of the floor and I ordered the Tenant to allow the Landlords access to the Premises for that purpose. I said that the remaining issues would be the subject of a written decision.

9. I now turn to those issues.

The execution of the lease

10. It is unclear whether this is a contentious matter. The lease documents sent to the Tenant pursuant to the order made are exhibited to the affidavit of Rebecca Obersby sworn 18 January 2019. She says that the Tenant has asked for more time to check those documents.

11. The proceeding has been determined and final orders have been made. Apart from correcting any error under the "slip rule" (s.119), all that I can do now is make orders in aid of enforcement. Since I have made no order that the Tenant execute the new lease documents I cannot make such an order now.

12. However, the Tenant should be aware that, unless he is willing to execute lease documents in accordance with the Terms of Settlement, he will have no tenancy. It is not for this Tribunal to settle these documents for the parties. The Tenant should seek advice and, if he is advised that they are in accordance with the Terms of the Settlement he must execute them. If they are not in accordance with the Terms of Settlement, they should be made so. If he delays unreasonably, the Landlords might invite the Tribunal to infer that he does not intend to execute them and seek an order for possession of the Premises, although that would need to be done by a fresh proceeding.

Whether the Landlords have complied with the order

13. The Tenant complains that the Landlords have not complied with the order in that:

    (a) they have not replaced the roof;
    (b) they have not properly replaced the floor;
    (c) an exterior wall needs to be repaired;
    (d) the external fuse box at the front of the building needs to be replaced; and
    (e) the damaged ceiling in the toilets has not been repaired.

The roof

14. The relevant part of the order is paragraph 4, which provides:

> "Order the Respondents to replace the roof and repair the floor of the demised Premises by 18 February 2019 as follows:
>
> (a) the said work will be done in a proper and workmanlike manner using good and sufficient carried out by qualified tradesmen.
>
> *(b)* the Respondents must comply with the requirements of s.53 of the *Retail Leases Act 2003."*

15. From the photographs produced and what I was told, it is clear that a number of sheets of roofing material have been replaced but most of the original roof remains. The Tenant produced a letter from a builder dated 14 December 2018 which states:

> "I was recently requested to undertake a building inspection of the recent roof works completed at Inside Out Restaurant 35 Lyons St. Rosedale.

Please see following report and attached photos:

- Only approximately a third of the roof has actually been replaced thus far.
- The recent roof replacement works completed are very rough and do not meet the current plumbing standards.
- Where the ridge cappings meet, they have not been cut in properly.
- The ridge capping should be screwed down every second rib, currently it is only screwed down every fifth.
- On one side of the roof there is a significant hole where water could get through.
- There are texta marks all over the roof."

The builder goes on to say that, in his opinion, the entire roof needs replacing in order to ensure that no leakage occurs again in the future.

16. The photographs attached to the letter show, amongst other things, the junction of three ridge cappings at one of the hips of the roof where the metal has been bent untidily and there is a substantial gap. Silicon has been smeared in the area but it has not sealed the gap.

17. Although a compliance certificate has been produced with respect to the work done on the roof it is in the statutory form and does not offer any expert opinion as to whether what has been done would be sufficient to stop future leaks. It relates only to the work that the author of the certificate did. The Tenant said that he was told by the Landlords' plumber that he had only done what he was asked to do.

18. Mr Scriva submitted that I should find that the roof has been replaced in the sense that, what was previously a leaking roof is now a roof in which the leaks have been repaired. He also said that I was misled at the hearing in relation to the condition of the roof at the start of the tenancy. He produced a letter from one of the former landlords to the effect that the Premises were in very poor condition at the time they were let to the Tenant. That letter was also produced at the hearing. I made a finding on the evidence before me that the roof was not leaking at the start of tenancy and did not start to leak until after the Tenant had renovated the interior of the building. That issue having been determined, I cannot now revisit it.

19. I do not accept the submission that the roof has been replaced. The order was not confined to part of the roof. The whole of the roof was to be replaced and that clearly has not happened. In order to comply with the order, the Landlords must replace the roof. I will extend the time within which they must do so to 15 June 2019. If that extension appears long, it must be borne in mind that the Landlords must comply with the notice provisions of s.53 of the Act.

20. In case there is any further difficulty in regard to the replacement of the roof, liberty to apply for further orders will be reserved.

The floor

21. The Tenant is dissatisfied with the material that was used by the Landlords to repair the floor. He also complains that the work was carried out by a handyman and not a carpenter. It appears from the photographs produced that particleboard flooring has been used instead of floorboards, but that is the usual material used nowadays for flooring. Another photograph shows what appears to be a new bearer under the floor, indicating that the repairs were more than superficial. I cannot find on this evidence that the Landlords have failed to repair the floor.

22. As to the fact that the repairs were carried out by a person whom the Tenant believes is only a handyman, I have no evidence as to the man's qualifications, training or experience and nothing to indicate that his work was less than satisfactory.

23. The proprietary surfacing material intended to cover the repaired areas of the floor in the kitchen of the restaurant is yet to be installed and I made an order to that effect in the course of the hearing.

The other items

24. As to the Tenant's complaints concerning the external wall, the fuse box and the ceiling in the toilets, these were not the subject of the order that I made. If there is a dispute concerning these, that will need to be the subject of a further proceeding.

Costs

25. Both sides have applied for an order for the costs of the proceeding. Because this is a retail tenancy dispute, the power of the Tribunal to make an order with respect to costs is limited by s.92 of the *Retail Leases Act* 2003 ("the Act"). That 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."

26. Since this was an application for an injunction, by s.87(2) of the Act, the underlying dispute was not required to be referred to the Small Business Commissioner for alternate dispute resolution before proceedings were commenced.

27. Since neither party has refused to take part in, or has withdrawn from, mediation or any other form of alternate dispute resolution, I can only make

an order for costs if I am satisfied that the party against whom the order is sought has conducted the proceeding in a vexatious way that unnecessarily disadvantaged the other party to the proceeding.

28. The application of this section was considered in *State of Victoria v. Bradto* [2006] VCAT 1813, where 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)."

29. 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 in that case (at para 28) that the strength of the unsuccessful party's case is a relevant matter to take into account. They added (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."

30. In that context, they said (at para 12):

> "In *Ugly Tribe Co Pty Ltd v Sikola*, [2001] VSC 189 … Harper J identified the following circumstances as warranting a special costs order, noting that the categories of circumstances are not closed:
>
> (a) the making of an allegation, known to be false, that the opposite party is guilty of fraud;
> (b) the making of an irrelevant allegation of fraud;
> (c) conduct which causes loss of time to the court and to other parties;
> (d) the commencement or continuation of proceedings for an ulterior motive;
> (e) conduct which amounts to a contempt of court;
> (f) the commencement or continuation of proceedings in wilful disregard of known facts or clearly established law; and
> (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."

31. The Tenant relied upon the following factors in support of his application for costs:

    (a) issuing a defective default notice, requiring the Tenant to apply to the tribunal for an interlocutory injunction to restrain the Landlords from taking possession. When he attended the Tribunal on 2 May 2018, he was then told that the Landlords did not propose to rely upon the notice;
    (b) serving an affidavit on the morning of 2 May alleging non-payment of rent without there having been any opportunity for the Tenant to respond to it;
    (c) the unlawful purported re-entry by the Landlords on 2 May 2018 after they had led the Tribunal to believe that same morning that there would be no re-entry. This occurred either during or shortly after the hearing while the Tenant was travelling back to the Premises by train. Although, when he returned to the Premises, the Tenant engaged a locksmith to let him in and change the locks back, he was then threatened by the Landlords, who accused him of trespass and caused the police to visit the Premises. As a result, the Tenant had to make a further application to the Tribunal for interlocutory relief and more appearances were necessary;
    (d) failing to comply with successive orders by the Tribunal for the service of documents, being the orders of 22 March 2018 and 23 August 2018, failing to file and serve points of defence as ordered on 9 July 2018;
    (e) serving an affidavit sworn 10 April 2018 by sending it to the Tenant's phone on the morning of the hearing on 11 May 2018.

32. In addition, on 22 August 2018, the Landlords served upon the Tenant a default notice alleging that he was in breach of the agreement for lease by not permitting the Landlords access to carry out repairs, despite the fact that the requirements of s.53 of the Act had not been complied with and the Tenant was entitled to refuse access. The Tenant was required to return to the Tribunal yet again to obtain a further order restraining re-entry.

33. Following the making of the order of 1 November 2018 the Landlords failed to comply with it, necessitating a further application by the Tenant. Additional costs were avoided by reason of the fact that it was dealt with at the same time as this application for costs.

34. Throughout the period during which all of this conduct occurred, the Landlords were represented by a firm of solicitors and by counsel.

35. In the reasons for decision that have already been provided, I have set out details of the above matters and my findings in regard to them. It is unnecessary to repeat what I said there. The Landlords' conduct has resulted in an excessive number of attendances at the Tribunal by the Tenant causing him needless trouble and expense and also a waste of the Tribunal's resources.

36. There is no justification for what occurred, which appears to have been designed to apply improper pressure on the Tenant. It is accurate to describe it as having been productive of serious and unjustified trouble or harassment and so it is vexatious conduct within the meaning of the section. For those reasons, an order for the Tenant's costs is warranted.

The Landlords' application

37. The Landlords' application for costs is stated to be on the grounds that the Tenant:

    (a) issued proceedings in the Tribunal without having the dispute mediated by the Small Business Commissioner;
    (b) conducted the proceeding in a vexatious way, disadvantaging the Landlords by extending the length of the substantive hearing and causing them to incur excessive costs.

38. As to the first of these grounds, the initial application was for injunctive relief and so mediation by the Small Business Commissioner was not required before proceedings were issued.

39. As to the second ground no details were provided of the conduct complained of. The preparation of the Tenant's case was an arduous task involving the assembly of a great many documents and I thought that he conducted it with reasonable competence for a layperson. He was required to come back to the Tribunal on a number of occasions by reason of the conduct of the Landlords. I do not find his conduct of the proceeding to have been vexatious.

40. The Landlords' application for an order for costs is dismissed.

Assessment of costs

41. The Tenant claims the following amounts as costs:

(a)	Legal fees to prepare Points of Claim	$1,375.00
(b)	Legal advice	$1,885.00
(c)	Injunction application fee 20 December 2017	$ 676.80
(d)	Injunction application fee 27 April 2017	$ 209.00
(e)	Injunction application damaged Premises 25 July 2018	$ 212.50
(f)	Four days hearing fee at $354.10 per day	$1,416.40
(g)	Photocopying Tribunal books	$ 155.00
(h)	Express post for Tribunal book	$ 25.00
(i)	Lost income 11 days for hearings at $250 per day	$2,750.00
(j)	Extra 4 days income to attend Tribunal before hearing	$1,000.00
(k)	Cost of photographs	$ 90.60
(l)	Cost of preparing evidence (500 pages)	$ 50.00
(m)	Cost of travel to Melbourne back (8 hearings @ $22)	$ 352.00
(n)	Cost of stay in Melbourne	$ 276.00
(o)	Cost of a locksmith to change back the locks	$ 165.00
		$10,567.30

"Costs"

42. Guidance as to the nature of the costs that can be awarded by this Tribunal is to be found in a number of decisions usefully set out by Senior Member Kirton in the recent decision of *JCA Builders Pty Ltd v. Hicks General Construction Pty Ltd* [2019] VCAT 476.

43. In *Cachia v Hanes* [1994] HCA 14 the High Court said, in connection with an application for costs under the New South Wales Supreme Court Rules, (at para 6):

> "The "costs" provided for in the Rules do not include time spent by a litigant who is not a lawyer in preparing and conducting his case. They are confined to money paid or liabilities incurred for professional legal services. It is only in that sense that the Rules speak of "costs".

44. In *Aussie Invest Corporation Pty Ltd v Hobsons Bay CC* [2004] VCAT 2188, the then President, Justice Morris, said (at para 18):

> "It remains true that an order as to costs is an order in the nature of an indemnity (or partial indemnity). Hence there is no power for the Tribunal to make an award of costs in favour of an unrepresented person in relation to expenses which would have been incurred if the person engaged professional services, but were not in fact incurred. Further, there is no power for the Tribunal to make an order as to costs in favour of an unrepresented person based upon the time spent by that person in relation to the proceeding. However where an unrepresented person loses wages or incurs travelling expenses in order to attend the hearing of the proceeding, this is an outgoing directly related to the proceeding which can be indemnified."

45. In *Schoonderbeek Pty Ltd v Greater Shepparton C* [2017] VCAT 287 Deputy President Dwyer said (at para 21) :

> "...I do not agree with the Council's contention that the Tenant cannot recover any costs as a self-represented party, on the basis of an argument that costs comprise only legal costs incurred by a lawyer on its behalf. I accept that there is some ambiguity in the authorities on the extent (if any) that a self-represented party can recover costs. *In Cachia v Hanes* [1994] HCA 14; (1994) 179 CLR 403, the High Court had indicated that costs meant 'legal costs', and some VCAT decisions have followed that principle notwithstanding that *Cachia* concerned a matter in the NSW courts, rather than a Tribunal such as VCAT that encourages self-representation and that also has governing legislation explicitly recognising non-lawyer 'professional advocates'. For my part, I agree with the sentiment expressed by the then VCAT President Justice Morris in *Aussie Invest Corporation Pty Ltd v Hobsons Bay CC* [2004] VCAT 2188, to the effect that the constitution, purpose and practices of VCAT militate against the decision in *Cachia* being too strictly applied in a VCAT context.
>
> However, having said that, I consider that the costs that are capable of being awarded in favour of a party who is not represented by a lawyer should still be very broadly in the general nature of legal costs – for example the costs of the professional advocate, or the costs of an expert witness necessarily retained to give relevant evidence in the proceeding. I do not consider that the costs capable of being awarded to a self-represented party should ordinarily extend to costs that are more in the nature of personal costs or administrative expenses..."

What should be allowed

46. As to the cost of the locksmith, that is a claim for damages which should have been sought at the hearing. Of the other amounts claimed, the Tenant has produced receipts to verify the legal costs and photocopying charges he has paid. The amounts claimed for payments to the Tribunal accord with the Tribunal's records. The claim for postage of the Tribunal book and the cost of the photographs are also amounts that the Tenant has paid out to other persons.

47. Applying the principles stated above, the claim for lost income cannot be allowed. Even if wages lost could be claimed, which I do not need to decide, this is not a claim for loss of wages but rather, a loss of profit that might have been earned if the Tenant had not attended the Tribunal. Parties are not entitled to claim for their own time, either for preparation or during the hearing.

48. In regard to the claim for travelling expenses, the above passage from the *Aussie Invest Corporation* decision would suggest that these are recoverable to the extent that they are out of pocket expenses that have been actually paid out and are directly related to the proceeding. In the absence of an explicit payment it is not the practice of the Tribunal to make a general

award to compensate a party for what it might have cost that party to travel to the Tribunal.

49. Adding together the legal fees, Tribunal fees and other out of pocket expenses actually paid by the Tenant, I arrive at a figure of $6,045.30, and that sum will be allowed.

Orders to be made

50. The following orders will be made:

    (a) The time by which the Landlords must replace the roof of the Premises will be extended to 15 June 2019.
    (b) Order the Landlords to pay the Tenant's costs, fixed at $6,045.30.
    (c) The Landlords' application for costs will be dismissed.
    (d) There will be liberty reserved to the parties to apply for any further orders in regard to the replacement of the roof.

51. The orders in regard to the floor and access referred to above were made orally during the hearing.

SENIOR MEMBER R. WALKER