

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING & PROPERTY LIST

VCAT REFERENCE NO. BP913/2018

CATCHWORDS

Costs following withdrawal of application – sections 74(2)(b) and 109 *Victorian Civil and Administrative Tribunal Act 1998*.

APPLICANTS	Rodgers Munene, Abigail Munene
RESPONDENT	Down Town Entertainment Pty Ltd
WHERE HELD	Melbourne
BEFORE	Senior Member S. Kirton
HEARING TYPE	Costs Hearing
DATE OF HEARING	29 July 2019
DATE OF ORDER	30 September 2019
CITATION	Munene v Down Town Entertainment Pty Ltd (Building and Property) [2019] VCAT 1510

ORDER

1. The respondent's application for costs is dismissed. Each party is to bear its own costs of the proceeding, including reserved costs.

SENIOR MEMBER S. KIRTON

APPEARANCES:

For the Applicants

Mr V. Ryan, solicitor

For the Respondent

Mr C. Moloney, solicitor

REASONS

BACKGROUND

1. In June 2018 the applicants commenced this proceeding, seeking orders to prevent the removal of a caveat which they had lodged over the respondent's land. The respondent had applied to the Registrar of Titles under section 89A of the *Transfer of Land Act 1958 (Vic)* to have the caveat removed.
2. At a directions hearing in August 2018 the respondent foreshadowed bringing an application to strike out the proceeding, on jurisdictional grounds. The Tribunal noted that the applicants would need to clarify their cause of action, as it was questionable whether the Tribunal has jurisdiction to order the retention of a caveat. The applicants were advised to seek legal advice and ordered to file and serve Points of Claim by a certain date. Costs were reserved.
3. Points of Claim were not filed by the due date and the respondent applied to have the proceeding struck out on the grounds of lack of jurisdiction. This application was refused on 16 October 2018; however orders were made striking out the proceeding due to the non-compliance, with a conditional right to apply for reinstatement upon the filing of Points of Claim. The respondent's costs of that day were reserved, to be considered if the applicants made a successful application for reinstatement.
4. On 1 February 2019 the applicants filed and served Points of Claim and the proceeding was reinstated. On 13 February 2019 the applicants filed and served Amended Points of Claim. Causes of action under the *Australian Consumer Law* were identified.
5. At a directions hearing on 29 March 2019, the respondent was ordered to file and serve Points of Defence and the proceeding was listed for a preliminary hearing on 24 May 2019 to determine the issue of jurisdiction. Costs were reserved.
6. In April 2019 the respondent filed Points of Defence which pleaded lack of jurisdiction, as it was not in the business of trading in land.
7. On 7 May 2019 the respondent advised the applicants that it would accept the jurisdiction of the Tribunal rather than proceed with the preliminary hearing. However the applicants formed their own view that the Tribunal lacks jurisdiction and so at the preliminary hearing on 24 May 2019 they sought leave to withdraw the application, which was granted. The respondent applied for its costs of the proceeding pursuant to sections 74(2)(b) or 109 of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic)*.

THE LAW

8. Section 74(2)(b) provides as follows:

- (2) If an applicant withdraws an application or referral –
 - (a) ...
 - (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...

9. Section 109 says in part:

- (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 –
 - (i) failing to comply with an order or direction of the Tribunal without reasonable excuse;
 - (ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;
 - (iii) asking for an adjournment as a result of (i) or (ii);
 - (iv) causing an adjournment;
 - (v) attempting to deceive another party or the Tribunal;
 - (vi) vexatiously conducting the proceeding;
 - (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;
 - (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;
 - (d) the nature and complexity of the proceeding;
 - (e) any other matter the Tribunal considers relevant.

10. The parties agreed that the Tribunal should approach the question of costs following the withdrawal of an application in the following manner:

... the better approach is that section 109 does not directly apply but that the principles in section 109 are relevant to any decision under section 74(2)(b)¹

11. The Supreme Court has held that the Tribunal should approach the question of entitlement to costs under s109 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.
 - (iii) 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.²

THE RESPONDENT'S SUBMISSION

12. In making its application for costs, the respondent relies on the following factors:
 - a. The caveat in question had been lodged by the applicants to secure the deposit they had paid for the purchase of the respondent's property. When they failed to settle the purchase, the respondent served them with a Notice of Rescission and the contract of sale was ended. The respondent filed a notice with the Registrar of Titles pursuant to section 89A(1) of the *Transfer of Land Act* so as to remove the caveat.
 - b. The applicants commenced this proceeding to prevent the removal of the caveat and effectively did so for a lengthy period of time.
 - c. Each of the orders made in the proceeding to date contemplate that costs would flow with the proceeding, especially the order made on 16 October 2018 which reserved the respondent's costs.
 - d. The respondent has been put to the expense of defending the proceeding at VCAT, not to have the proceeding determined but to have it simply withdrawn.
 - e. The applicants have issued proceedings in the County Court of Victoria seeking a refund of the deposit which had been protected by the purchasers' caveat. The respondent has to bear the financial

¹ Per DP Steele in *Juresko v Watts* [2007] VCAT 2462 at [9] adopted by DP Macnamara in *Nguyen v Nguyen* [2010] VCAT 2129 at [13]-[14]

² *Vero Insurance Limited v Gombac Group* [2007] VSC 117 at [20]

burden of two proceedings, with the costs of the VCAT proceeding being wasted.

- f. It would be unfair to the respondent to deny it the costs of this proceeding.

THE APPLICANTS' SUBMISSION

13. In response, the applicants submitted:

- a. From June 2018 to January 2019 the applicants were not legally represented. English is not their first language. Unrepresented parties should not be discouraged from litigating.
- b. The applicants commenced the proceeding at VCAT on the basis of advice they received from the Land Titles Office which apparently told them they could commence an action in a court or the Tribunal to justify their caveat.
- c. By January 2019 the respondent had made (or foreshadowed) three unsuccessful applications to strike out the applicants' claim. It would be unfair to inflict a costs order on the applicants where the respondent has been unsuccessful.
- d. Once the applicants obtained legal advice, Points of Claim were filed which raised a cause of action under the *Australian Consumer Law*. The applicants believed that the respondent was in the business of trading in land.
- e. The applicants then made an offer to the respondent on 28 March 2019 that the applicants would withdraw the VCAT proceeding if the respondent bore its own costs, and would commence an action in the County Court.
- f. The respondent could have agreed to the withdrawal of the application at any time after 28 March. The continuation of the claim before the Tribunal was the responsibility of the respondent. The applicants should not have a costs order imposed when they had not only wanted to withdraw, even before the respondent's defence was known, but had prepared consent orders to that effect.
- g. On 7 May 2019 the applicants repeated the offer to withdraw the claim, notwithstanding the respondent's advice that it would accept the Tribunal's jurisdiction. That the proceeding continued beyond that date is the responsibility of the respondent alone.
- h. The costs foreshadowed in the Tribunal's orders of 16 October 2018 were due to the applicants' failure to provide Points of Claim, not as a result of any hearing on jurisdiction.

- i. The Tribunal should commence with the principle that VCAT is a no costs jurisdiction which should not discourage unrepresented parties. The applicants have a genuine cause of action for the recovery of a substantial deposit and are pursuing that action in a forum that has jurisdiction. They were entitled to commence their action at VCAT based on the advice from the Land Titles Office. Even before they had been told by the respondent that it was not in the business of trading in land, they had offered to withdraw the proceeding.

FINDINGS

14. I am not satisfied that it would be fair to make an order for the respondent's costs in this proceeding. I must take as the starting point that each party should bear their own costs. I am not satisfied that the actions of the parties or the facts of this dispute, as set out above, would make it fair to move away from this starting point.
15. In particular, in determining the question of fairness, the matters set out in s109(3) are relevant circumstances. The applicants have not conducted the proceeding in a way that unnecessarily disadvantaged the respondent (within the meaning of ss(a)), apart from failing to provide Points of Claim as first ordered. They have not been responsible for prolonging unreasonably the time taken to complete the proceeding (within the meaning of ss(b)). The proceeding is not complex (within the meaning of ss(d)).
16. While there is an argument that the applicants' claim had no tenable basis in fact or law (which is a factor under ss (c)), I must weigh this against the other relevant factors, including "any other matter [I] consider relevant" under ss(e). I consider that the offers made by the applicants to withdraw the proceeding at an earlier stage are relevant matters. In circumstances where the respondent rejected the offers by holding out for its costs, and yet because of the presumption in s109(1) it was not assured of receiving a costs order, I do not think it is fair to require the applicants to pay the respondent's costs.
17. Further, I also consider it relevant that the applicants commenced the proceeding based on advice they received from the Land Titles Office. I have not seen a copy of the letter so I make no finding as to whether wrong advice was actually given or whether the wording of the letter was such as to confuse self-represented litigants for whom English is their second language. However one of the reasons behind the presumption in s109(1) is to allow people without legal training to bring claims they honestly believe have a basis³. I accept that the applicants had such a belief based on the correspondence sent to them by the Land Titles Office.

³ If they do not have such an honest belief, then a remedy is found in s.109(3)

18. Lastly, if the proceedings in the Tribunal and the County Court were identical, I would have some sympathy for the respondent having to incur two sets of legal costs. However, I was advised that the proceeding in the County Court is for the recovery of the deposit. This proceeding concerned the removal of the caveat and a claim under the *Australian Consumer Law*. Accordingly the overlap of legal costs appears to be minimal.
19. Accordingly, I will order that each party is to bear its own costs of the proceeding. The respondent's application for costs is dismissed.

SENIOR MEMBER S. KIRTON