VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP846/2018

CATCHWORDS

RETAIL LEASE: application by respondent for costs under s92 of the *Retail Leases Act 2003* (Vic) after applicant withdrew its claim; application successful.

FIRST APPLICANT	Parrion Holdings Pty Ltd (ACN: 606 254 013)
SECOND APPLICANT	Kinglake Supermarket Pty Ltd (ACN: 615 794 995)
RESPONDENT	Dora Kordas (personal representative of the late Peter Maroukas)
WHERE HELD	Melbourne
BEFORE	Senior Member L. Forde
HEARING TYPE	Hearing
DATE OF HEARING	4 October 2018
DATE OF ORDER	4 October 2018
DATE OF REASONS	30 October 2018
CITATION	Parrion Holdings Pty Ltd v Kordas (Building and Property) [2018] VCAT 1659

ORDER

Parrion Holdings Pty Ltd is to pay Dora Kordas' (personal representative of the late Peter Maroukas) costs of the proceedings from 14 June 2018, such costs, if not agreed, to be assessed by the Victorian Costs Court on the scale of costs in Appendix A of Chapter 1 of the rules of the County Court.

L. Forde
Senior Member

APPEARANCES:

For the First Applicant	Mr A Schlicht of counsel
For the Second Applicant	No appearance
For Respondent	Mr S Kyriacou, solicitor

REASONS

INTRODUCTION

1 Parrion Holdings Pty Ltd (**the tenant)** is the lessee of the IGA supermarket at 12 Whittlesea-Kinglake Road, Kinglake Vic 3763 (**the premises**). The respondent is the landlord (**the landlord**). Following service of a notice of default, the tenant filed an application in the Tribunal seeking an injunction restraining the landlord from re-entering the premises. An interlocutory injunction was granted on 25 June 2018, and the matter was listed for hearing on 17 August 2018. The hearing was adjourned to 4 October 2018 due to the late delivery of material by the tenant.

2 At the commencement of the hearing on 4 October 2018, the tenant withdrew its application. Numerous affidavits had been filed by the tenant and the landlord prior to the hearing. The landlord has made an application for its costs of the proceedings.

3 The second applicant is Kinglake Supermarket Pty Ltd. It took no part in the proceedings.

4 The following matters are not in dispute: –

a Peter Maroukas and Adon Holdings Pty Ltd entered into a 10 year lease of the premises commencing 1 May 2003 with a number of options;

b The lease is a retail lease;

c On 25 May 2017, Adon Holdings Pty Ltd assigned the lease to the tenant;

d On 25 November 2017, the landlord's agent issued a notice setting out defaults by the tenant under the lease;

e On 27 March 2018, after Mr Maroukas passed away, his daughter Ms Dora Kordas was appointed as legal personal representative;

f On 19 January 2018, the landlord's agent issued a notice pursuant to section 146 of *Property Law Act 1958* (Vic) setting out defaults by the tenant of payments of rental, outgoings and fees in an amount of $13,326.28 (**Default Notice**);

g At the time the Default Notice was issued the tenant had not paid the January rent of $8,296.48 plus GST in breach of the lease;

h By email of 30 January 2018, the tenant purported to exercise its option under the lease for a further term, the last date for exercising the option being 31 January 2018;

i The option has not been accepted by the Landlord on the basis that the tenant was in default;

j The landlord says the lease expired on 30 April 2018;

k The tenant vacated the premises prior to the hearing on 4 October 2018;

l The tenant had not regularly paid its rent and outgoings when due.

GENERAL PRINCIPLES APPLICABLE TO COSTS APPLICATIONS UNDER SECTION 92

5 Section 109 of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* **(the Act)** empowers the Tribunal to make costs orders in certain circumstances.

6 Section 92 of the *Retail Leases Act 2003* (Vic) (**RLA**) overrides that provision. It provides:

> (1) Despite anything to the contrary in Division 8 of Part 4 of [the Act], each party to a proceeding before the Tribunal under [Part 10 of the *Retail Leases Act*] is to bear its own costs in the proceeding.
>
> (2) However, at any time the Tribunal may make an order that a party shall 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
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> (b) the party refused to take part in or withdrew from the mediation or other form of alternative dispute resolution under this Part.

7 The parties agree that section 92(2)(b) of the RLA is not relevant.

8 It follows, that if I am to order costs against the tenant, I must be satisfied that it is fair to do so, because I find that the tenant conducted the proceedings in a vexatious way that unnecessarily disadvantaged the landlord.

Conducting the Proceeding in a Vexatious Way

9 In a much-quoted decision *Attorney-General (Vic) v Wentworth*,[1] Roden J stated:

> It seems to me that litigation may properly be regarded as vexatious for present purposes on either subjective or objective grounds. I believe that the test may be expressed in the following terms: -
>
> (a) proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought;

[1] (1988) 14 NSWLR 481 at 491

(b) 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;

(c) 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 The relevant test was carefully considered by Vice President Judge Jenkins, in *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd*[2] where her honour concluded:

> By reason of the factual circumstances described above and the findings made following the damages hearing, I am satisfied that the Applicant:
>
> (a) commenced an action for damages, following the finding that the Respondent was in breach of the lease, in circumstances where the Applicant, properly advised, should have known it had no chance of success;
>
> (b) persisted in what should, on proper consideration, be seen to have been a hopeless case;
>
> (c) engaged in conduct which caused a loss of time to the Tribunal and the Respondent;
>
> (d) commenced a proceeding in wilful disregard of known facts or clearly established law; and
>
> (e) made allegations as to losses which it claimed to have incurred, which ought never to have been made.
>
> [78] In consequence, I am satisfied that the Applicant has conducted the proceeding in a vexatious way that has unnecessarily disadvantaged the Respondent. Accordingly, I am satisfied that the Respondent is entitled to an award of costs subsequent to the liability hearing, to the extent that such costs relate to the preparation for and hearing of the application for damages.

11 In *24 Hour Fitness*, on an unsuccessful application for leave to appeal against the decision of Judge Jenkins, the Court of Appeal referred to these paragraphs with evident approval. On appeal[3] the applicant submitted that for the purposes of section 92 of RLA, it is the conduct of the party in the proceeding that is material, not a consideration of the strength of its claims as had been taken into account at first instance. The Court of Appeal rejected the submission stating:

> [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

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2 [2015] VCAT 596
3 [2015] VSCA 216

> 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.
>
> [29] It would be artificial to attempt to evaluate the manner in which the proceeding was conducted by a party without having regard to the strength of that party's case. In the present circumstances, it was relevant [for the purpose of determining whether the applicant conducted the proceeding in a vexatious way] that the applicant pursued the damages claim, in circumstances that it was bound to fail.

ANALYSIS

12 This is not a case where costs are sought after a finding on the substantive issues. The proceeding was withdrawn before the hearing commenced. Six affidavits were filed by the parties which set out the parties' respective positions.

13 The tenant's position is that it validly exercised the option to renew and the landlord had no right to re-enter the premises. It maintained that it was not in breach of the lease.

Default Notice

14 The Default Notice required the tenant to rectify defaults under the lease and provided that failure to do so may result in the landlord re-entering the premises. It then read: -

> The said covenants have been broken insofar as the Lessee has failed to pay: -
>
Rent due 1/1/2018 – 31/1/2018	$8,296.48 plus GST
Council rates 1/7/2017 – 31/12/2017	$3,218.32 plus GST
Default notice fee from past notice	$300.00 plus GST
Notice	$300.00 plus GST
Total	$12,114.80 plus GST

15 The tenant challenged the Default Notice saying it was "not sufficient" for the purposes of s27(2) of the RLA. This is discussed below. The tenant also argued that the amounts required to be paid were incorrect, included GST which was not payable and included council rates and default fees which were not due and payable. The amount required for rectification was incorrect and therefore it is submitted that the notice was invalid.

16 To comply with s27(2) of the RLA, it is not necessary to set out the consequence of breach, but the notice must make it *"expressly clear that a breach by the tenant is alleged and should be clear and consistent in its description of the nature of the breach, all of which is alleged to constitute*

the default".[4] The notice clearly does this. The fact that some items might be disputed does not render the entire notice invalid.

Tenant's claim for offsets

17 The tenant claims that it was entitled to offset some amounts against the amounts claimed in the Default Notice. It claims to have paid GST to the landlord in an amount of $7,858.77 which it alleges it should not have paid. It claims that the landlord must reimburse it $1,071.40 for tiling works undertaken to the premises and this amount should be credited to its account. It further claims that the two notice fees totalling $600 should be deducted. These disputed amounts total $9,530.17 plus GST.

18 While it was not raised by the parties, the lease provides in clause 1(A) that the tenant will punctually pay to the landlord or its agent the rent set out in the schedule of payments at the due times "without any deductions whatsoever". There is, accordingly, a strong argument that the tenant's claim that offsets ought to be taken into account before they are established at a hearing, is just misconceived.

19 The claim in relation to GST is that the landlord was allegedly not registered for GST and this lack of registration cannot be cured by the landlord's agent being registered for GST. No evidence was provided as to whether the tenant had claimed GST credits for GST paid to the landlord. The GST issue was not part of the original application and was introduced for the first time in an affidavit filed by the tenant on 13 August 2018. The landlord contends that the tenant misunderstood the law regarding GST and the invoices issued by the landlord's agent satisfy the legal requirements. As the hearing did not proceed, the issue was not fully agitated before me and I am unable to reach a conclusion on the GST issue.

20 I accept the evidence of the landlord that the GST paid by the tenant since its occupation is $6,629.20 as set out in the affidavit of Dora Kordos sworn 21 September 2018. I accept this evidence because it is based upon detailed particulars of invoices and amounts paid. I do not accept the tenant's position that it paid an amount of $7,858.77 in GST for this period as it is not supported by any documentation.

21 The issue of mistaken payment of GST was raised for the first time almost 7 months after the Default Notice was issued. Given that the issue had not been raised before August 2018, the fact that the lease provides that deductions cannot be applied to the rent and the acknowledgement by the tenant that it had not paid the overdue January rent when the Default Notice was issued, I do not accept that a subsequent claim in relation to alleged mistaken payment of GST invalidates the Default Notice.

22 The tenant claims that it purchased ceiling tiles for the premises and produced an invoice from AJ Construction dated 13 September 2017 for ceiling tiles for $1,071.40. No further evidence was given about these tiles

[4] Leonard Joel Pty Ltd v Australian technical Approvals Pty Ltd [2017] VCAT 1781 at [138]

and it appears the first time the issue of the tiles was raised was in the affidavit of Dusan Niceski sworn 16 August 2018 filed on behalf of the tenant. It is unclear on the affidavit material why the tiles were purchased and who should bear the liability for the cost of the tiles. There is nothing in the affidavit material to suggest the tiles were required for urgent repairs. The landlord submits that the invoice was made out to the second applicant, not the tenant and was not provided to the landlord at any stage before it was exhibited in these proceedings. According to ASIC records, Mr Niceski's son is a director and 50% shareholder of AJ Constructions. There is no evidence that the invoice was paid or by whom.

23 I accept that the invoice for the tiles was directed to the second applicant. It cannot be offset against the amounts claimed in the Default Notice. It has not been established as a liability of the landlord to the tenant, it was not raised by the tenant until August 2018 and the tenant would appear to be barred by reason of clause 1(A) of the lease to offset the amount against rent.

24 The tenant claims that reference to legal costs in one part of the Default Notice and then charging of the default notice fee in another part is inconsistent as the landlord did not engage lawyers to prepare the notice. The landlord's agent prepared the notice and the agent is not a lawyer. This "inconsistency" does not invalidate the Default Notice for the purposes of s27(2) of the RLA. The landlord is entitled to charge under the lease for issuing default notices and I do not accept that the tenant was confused by how the fees were described. If these charges were improper, they do not invalidate the Default Notice.

25 The tenant challenged the amount in the Default Notice claimed for rates. The amount claimed relates to two rate periods being 1/7/17 – 31/12/17 ($1,606 plus GST) and 1/1/18 – 31/3/18 ($1,606 plus GST). The tenant claims that the 2018 rates were not yet due and payable. If I accept this argument and deduct the 2018 rate amount from the amount due, it leaves a balance due and outstanding for a rates period which had passed of $1,606 plus GST.

Conclusion

26 If I were to accept that the tenant is entitled to deduct the disputed amounts (with GST payments fixed at $6,629.20) from the amounts claimed in the Default Notice, a balance due of $2,208.20 plus GST would still have been owing.

27 It follows that, on the tenant's best case scenario, at the time it exercised the option to renew, it was in default of the lease in an amount of $2,208.20 plus GST in respect of amounts claimed in the Default Notice.

28 For the reasons stated, I do not however accept that the tenant is entitled to claim all the disputed amounts as offsets to the amount claimed in the Default Notice. At the time the Default Notice issued, the alleged offsets

had not been raised by the tenant. At the time the period for exercising the option expired, the alleged offsets had not been raised by the tenant. The amounts set out in the Default Notice with the possible exception of one period of rates and default fees were due and owing.

29 I find for the reasons set out above that the Default Notice is a valid written notice for the purpose of s27(2) of the RLA notwithstanding any issues with the amounts claimed in the notice.

The Option

30 Section 27(2) of the RLA provides: -

> (2) If a retail premises lease contains an option exercisable by the tenant to renew the lease for a further term, the only circumstances in which the option is not exercisable is if—
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> (a) the tenant has not remedied any default under the lease about which the landlord has given the tenant written notice; or
>
> (b) the tenant has persistently defaulted under the lease throughout its term and the landlord has given the tenant written notice of the defaults.

31 The affidavit of Dora Kordas sworn 3 October 2018 exhibits the landlord's agent's trust records which record a payment by the tenant on 5 February 2018 of $9,115.13 via Bpay. This is the January rent. It also deposes to Bpay's terms of use which states that payments will be recorded on the day it is paid if it is a banking business day. On this basis payment by the tenant of the January rent had to have occurred between 5.01pm on Friday 2 February 2018 and 5pm on Monday 5 February 2018. This evidence was not challenged, and I accept it. Accordingly, the January rent was not paid when the option period expired.

32 The tenant had to know when it paid the January rent, yet it maintained before the Tribunal that it paid the rent before the option period expired. This was simply not true. I find that the tenant knew it did not pay the January rent before midnight on 31 January 2018. The tenant produced no evidence to show when it paid the rent.

33 The last day to exercise the option was 31 January 2018. On the tenant's best case, it was in default of the lease on the last day for exercising the option. The tenant could not therefore exercise the option under s 27 of the RLA.

34 The exercise I carried out to determine the liability of the tenant on its best case scenario was not a difficult exercise. It was something that the tenant ought to have done and was possible for the tenant to do on its own affidavit material.

Vexatious Conduct

35 The tenant filed affidavit material which referred to largely irrelevant material about the former tenant. The landlord claims this material was designed to embarrass the Estate. There is insufficient evidence for me to draw that conclusion. I do however find that the production of irrelevant material at the eleventh hour by the tenant caused a loss of time to the Tribunal and expense to the landlord.

36 The landlord contends that the tenant brought the proceedings for collateral purposes namely to sell the business of the supermarket. The intention to sell is not disputed. The tenant sought the consent of the landlord to an assignment of the lease by letter dated 21 September 2018 which is exhibited to the affidavit of Ms Dora Kordas sworn 21 September 2018.

37 There is insufficient evidence before me, to determine on a costs application, whether there was a collateral purpose and no legitimate purpose to the proceedings.

38 When deciding whether a party conducted the proceeding in a vexatious way that unnecessarily disadvantaged the other party within the meaning of section 92(2)(a) of the RLA, another relevant consideration is whether the proceeding is maintained in circumstances where it is obviously untenable or manifestly groundless as to be utterly hopeless or, in the words of the Court of Appeal, "bound to fail".

39 I find that the tenant's case was bound to fail as on its best case scenario it was in default of the lease at the time it purported to exercise the option and remained in default until after the time for exercising the option expired. The tenant sought to cloud the issue by maintaining that it was not in default of the lease, implying that it paid the January rent before the option period expired. This was simply untrue.

40 The tenant raised issues around when it was served with the Notice of Default and when it paid the January rent. These issues were addressed in the affidavit of Bill Di Donna, the landlord's agent, sworn 13 June 2018. If the tenant was uncertain of these issues at the commencement of the proceedings, the material in the affidavit should have finally resolved the issues for the tenant. I find, based on Mr Di Donna's affidavit, that the Default Notice was served at the latest on 22 January 2018 and the January rent not received until after 31 January 2018.

41 Orders were made on 25 June 2018 by the Tribunal requiring the applicants to file a reconciliation of invoices and payments and any further affidavit material by 3 August 2018.

42 The tenant failed to deliver a reconciliation of invoices and served an affidavit of Dusan Niceski sworn 16 August 2018 the evening before the hearing. This late service necessitated an adjournment of the hearing.

43 Orders were made by the Tribunal on 17 August 2018 requiring the tenant to advise the landlord by 7 September 2018 which entries in the landlord's

account reconciliation were challenged by the tenant. The tenant did not comply with the order. Accordingly, the landlord's reconciliation remained unchallenged with the exception of the GST claim.

44 I am satisfied however that from 14 June 2018, being the day after the affidavit of Bill Di Donna was sworn, the tenant persisted with its case when it should have been clear to the tenant that it could not succeed.

45 The tenant avoided undertaking the reconciliation process ordered by the Tribunal. This conduct and the late delivery of material caused delay to the proceedings. I find that the second affidavit filed by the tenant on 14 August 2018 raised issues concerning the previous tenant which are irrelevant to its liability.

46 For the reasons stated I find that the tenant's case was bound to fail at the outset, yet the tenant persisted with its case and thereby unnecessarily disadvantaged the landlord. If the tenant was in any doubt about the strength of its case, that doubt should have been put to rest when it received the affidavit of Bill Di Donna sworn 13 June 2018. The tenant engaged in conduct (not complying with the Tribunal's orders) which caused a loss of time to the Tribunal and to the landlord and it made an allegation in relation to payment of the January rental which should not have been made. In consequence, I am satisfied that the tenant's conduct falls within the ambit of s92(2)(a) of the RLA.

47 The tenant is to pay the landlord's costs of the proceedings from 14 June 2018 such costs to be assessed by the Victorian Costs Court, in default of agreement, on the Standard Basis in accordance with the relevant County Court Scale.

L. Forde
Senior Member