

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. BP955/2018

**CATCHWORDS**

*Retail Leases Act 2003*; claim for rent and promotion fees; claim for costs; section 92 of *Retail Leases Act 2003*; whether tenant conducted proceeding vexatiously so as to unnecessarily disadvantage the landlord.

<b>APPLICANT</b>	Resdal Corp (Vic) Pty Ltd (ACN 120 121 708)
<b>RESPONDENT</b>	Daiso Industries (Australia) Pty Ltd (ACN 160 576 134)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	R. Buchanan, Member
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	15 October 2019
<b>DATE OF ORDER AND REASONS</b>	19 December 2019
<b>CITATION</b>	Resdal Corp (Vic) Pty Ltd v Daiso Industries (Australia) Pty Ltd (Building and Property) [2019] VCAT 2035

**ORDER**

Daiso Industries (Australia) Pty Ltd must pay \$1,412,129.57 to Resdal Corp (Vic) Pty Ltd, together with costs on the County Court scale on the standard basis, to be assessed, in default of agreement, by the Victorian Costs Court.

R. Buchanan  
**Member**

**APPEARANCES:**

For Applicant

Mr S. Hopper of counsel

For Respondent

Mr J. Levine of counsel (withdrew with leave)

## REASONS

### Introduction

- 1 This is a claim by a landlord, arising from a tenant's abandonment of leased premises. The manner in which the tenant conducted its part in the proceeding was somewhat unusual.

### Background

#### The shopping centre

- 2 The leased premises are part of a shopping centre in Caroline Springs. The centre is owned by Resdal Corp Pty Ltd ("the "Owner").
- 3 In 2003, the Owner leased the centre by a lease with a term of 50 years to Geopac Pty Ltd (the "Head Lease").
- 4 On 2 August 2017, Geopac Pty Ltd assigned the Head Lease to Resdal Corp (Vic) Pty Ltd (the "Landlord").

#### The leased premises

- 5 In 2013, Geopac Pty Ltd sub-let the leased premises to Daiso Industries (Australia) Pty Ltd (the "Tenant") by a sub-lease with a 10-year term, commencing on 1 March 2013 (the "Lease").
- 6 On 11 October 2017, after Geopac Pty Ltd assigned the Head Lease to the Landlord, the Landlord gave notice of attornment to the Tenant.
- 7 By reason of section 141 of the *Property Law Act 1958*, all rent, arrears of rent and other monies payable under the Lease are payable to the Landlord.
- 8 The Tenant vacated the leased premises on 27 April 2018 and thereafter failed to pay rent and promotion fees under the Lease.
- 9 On 27 June 2018, the Landlord began the present proceeding, which the Tenant has defended.
- 10 On the day of the hearing, in circumstances to which I will refer below, the Tenant took no part in the hearing proper.

### The Tenant's defences

- 11 The Tenant denied that it was indebted to the Landlord and rested its defence on two grounds. The first was that the Lease had been terminated. The Lease had been terminated, the Tenant said, because:
  - a The Tenant had vacated the leased premises.
  - b The Tenant had handed the keys to the leased premises to the Landlord, which the Landlord had accepted.
  - c The Landlord had advertised the leased premises for lease with vacant possession.

- d The Landlord had entered the leased premises without regard to the covenant of quiet enjoyment contained in the Lease.
  - e The Landlord had entered the leased premises with prospective Tenants in order to lease the premises.
- 12 The second ground of defence relied on by the Tenant was that the Landlord had acted unconscionably by failing to take any reasonable step to mitigate any loss or damage suffered by the Landlord upon the Tenant's vacating the premises. That alleged failure, the Tenant claimed, arose from the following facts:
- a The Landlord was in control of the premises.
  - b The Landlord had accepted the keys to the premises.
  - c The Landlord had breached the covenant of quiet enjoyment in the lease by entering into the premises.
- 13 As I have said, the Tenant played no part in the hearing proper and there was no evidence before the Tribunal in relation to the factual matters on which the Tenant's grounds for defence were based. In the absence of such evidence, the Tenant's defence must fail.

### Findings

- 14 Evidence for the Landlord was given by its managing agent David Frankel, who adopted a witness statement he had made and also gave oral evidence. I was satisfied on the Landlord's evidence that the Landlord's claim was made out as follows:

Rent and promotion fees	\$1,047,404.05
Interest	\$267,659.44
<b>Total</b>	<b>\$1,412,129.57</b>

- 15 In making that finding, I relied on the evidence of Mr Frankel, the annexures to Mr Frankel's witness statement and the Landlord's Further and Better Particulars – Interest Calculations, which latter contained detailed calculations of the interest claimed.
- 16 I will order accordingly.

### Costs

- 17 The Landlord applied for its costs of the proceeding.
- 18 The leased premises which are the subject of this proceeding are retail premises within the meaning of the *Retail Leases Act 2003*. Section 92 of that Act provides that parties to proceedings such as the present must bear their own costs. Subsection (2) of the section does, however, modify that rule, as follows:
- (2) ... 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.

- 19 In *State of Victoria v Bradto* [2006] VCAT 1813, Judge Bowman, considering section 92, observed (paragraphs 66 and 67):

If I am to order costs in the matter brought pursuant to the *RLA*, I must be satisfied that it is fair to do so because a party conducted the proceeding in a vexatious way, and that such conduct unnecessarily disadvantaged another party to the proceeding.

I am also of the view that, pursuant to the frequently cited test in *Oceanic Sun Line*, a proceeding is conducted in a vexatious matter 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.

- 20 In *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd* [2015] VSCA 216, the Court of Appeal, approving the approach to section 92 taken by Bowman J, said as follows:

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 the proceeding has been conducted vexatiously and has unnecessarily disadvantage the other party (paragraph 32).

- 21 In the course of that decision, the Court of Appeal also cited with approval the observations of Harper J in *Ugly Tribe Co Pty Ltd v Sikola*: [2001] VSC 189, in the following terms (paragraph 12):

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.

- 22 I consider that a number of the indicia set out by Harper J are found in the Tenant's conduct of the present case.
- 23 In this case, I am satisfied and find that it is fair to order that the Tenant pay the costs of the Landlord, because the Tenant conducted the proceeding in a vexatious way that unnecessarily disadvantaged the Landlord. The conduct of the Tenant upon which I base that finding is as follows.

#### Failure to comply with orders

- 24 The Tenant failed to comply with orders of the Tribunal. On 17 August 2018, 15 November 2018, 2 January 2019 and 16 April 2019 the Tenant was ordered to file and serve a list of documents. It did not trouble itself to do so.

#### Failure to appear at directions hearings

- 25 Although legally represented, at the last two directions hearings, on 16 April 2019 and 19 July 2019, there was no appearance by or for the Tenant.

#### Behaviour on the day of hearing

- 26 The Tenant's behaviour on the day the hearing was particularly troubling. Counsel for the Tenant did not appear until some 90 minutes after the proceeding was listed to begin. Counsel's instructor, who was present at the starting time, informed me that counsel was engaged in a hearing in another jurisdiction. I found counsel's behaviour astonishing.
- 27 When the Tenant's counsel did arrive, the Tenant applied for an adjournment on the basis that a witness, summonsed by the Tenant, had failed to appear. Without the witness, the Tenant claimed, it was not ready to proceed. The witness was important, the Tenant said, because the Landlord had failed to make full discovery.
- 28 I refused the Tenant's application. The Landlord said (and the Tenant did not dispute) that the Tenant had never questioned the fullness of the Landlord's discovery.
- 29 Further, the proposed witness was an estate agent who had acted, not for the Landlord, but for the Landlord's predecessor, Geopac Pty Ltd. (As I said above, Geopac Pty Ltd had assigned its interest in the lease of the shopping centre – in which the leased premises were located – in August 2017, some eight months before April 2018, when the Tenant vacated the leased premises.) The Tenant was unable to explain how the witness might be in possession of information which would shed light on the matters pleaded in the Tenant's defence.
- 30 Finally, the Tribunal had previously ordered the parties to serve witness statements and had also ordered that, "A party will not be allowed to

present any evidence at the hearing which is not contained in a Witness Statement without justifying the need to do so to the Tribunal". Yet the Tenant had not served any witness statement.

- 31 Upon my refusal of the Tenant's application, its counsel and its solicitor applied for leave to withdraw, which leave I granted.
- 32 Other than counsel and his instructor, at no point was any representative of the Tenant present.
- 33 The Tenant's behaviour on the day of the hearing shed a harsh light on the Tenant's defence and its previous behaviour, set out above.
- 34 These matters lead me to the conclusion that the Tenant had vexatiously conducted the proceeding without any real intention of defending it, but probably, with the intention of delay.
- 35 Accordingly, I will order that the Tenant pay the Landlord's costs of the proceeding.

R. Buchanan  
**Member**