

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO.BP1301/2015

CATCHWORDS

RETAIL LEASE: application of *Retail Leases Act 2003* (RLA); termination of lease; attempt at re-entry by landlord unsuccessful; tenant ultimately vacated after landlord issued this proceeding to obtain an order for vacant possession together with indemnity costs; application for indemnity costs.

APPLICANT	Staples Super Pty Ltd as trustee for Staples Investments Superannuation (ACN 089 717 046)
RESPONDENT	Australian Asset Consulting Pty Ltd (ACN 600 957659)
WHERE HELD	Melbourne
BEFORE	Member C Edquist
HEARING TYPE	Hearing
DATES OF HEARING	22 February 2016, 23 February 2016, 3 June 2016 and 7 June 2016
DATE FOR FILING OF FINAL SUBMISSIONS	20 October 2016
DATE OF REASONS	7 November 2016
CITATION	Staples Super Pty Ltd v Australian Asset Consulting Pty Ltd (Costs) (Building and Property) [2016] 1788

ORDER

The Respondent must pay the costs of the Applicant on an indemnity basis, such costs, if not agreed, are to be taxed on the Scale of Costs in Appendix A of Chapter 1 of the Rules of the County Court.

MEMBER C EDQUIST

APPEARANCES:

For the Applicant:

Mr J Foster of Counsel on 22 February 2016,
23 February 2016, 3 June 2016

Mr Cloak, solicitor, on 7 June 2016

For the Respondent:

Mr W Short, director

REASONS

Introduction

- 1 Staples Super Pty Ltd (Staples) owns a property in Somerton, in Victoria ('the property'). On about 28 August 2014, Staples entered into a lease ('the lease') over the property with Australian Asset Consulting Pty Ltd (AAC).
- 2 Disputes developed between the parties and AAC issued proceeding BP779/2015 on 17 June 2015. AAC sought orders including an injunction restraining Staples from re-entering the property or otherwise forfeiting the lease pursuant to a s 146 notice issued on 5 June 2015 of the *Property Law Act 1958* ('PLA'). AAC also sought a declaration the lease was a lease of retail premises for the purposes of the *Retail Leases Act 2003* ('RLA'), a declaration that AAC was not liable to contribute to any outgoings under the lease, and a permanent order restraining Staples from manufacturing and storing pesticide or animal control products where such manufacture or storage constituted a nuisance or breach of AAC's quiet enjoyment. An interim injunction restraining Staples from entering into possession of the premises was granted by consent until the determination of the application, and orders were made in respect of several pre-hearing steps. The injunction application was initially listed for 4 August 2015 but was adjourned and ultimately was superseded. By the time of the hearing there had been a number of developments in the dispute between the parties.

BP1254/2015

- 3 On 24 September 2015, AAC sought a permanent injunction in a separate proceeding (BP1254/2015) restraining Staples from re-entering the property or otherwise forfeiting the lease pursuant to a notice issued under a PLA s 146 notice dated 10 September 2015. Unlike the s 146 notice issued on 5 June 2015, which asserted that rent, interest and outgoings were outstanding, the September s 146 notice issued by Staples alleged that AAC was in breach of the covenant contained in clause 1 (s) of the lease to observe and comply with all provisions and requirements of all Acts, rules, regulations, and by-laws so far as they relate to the building and the premises or their use. AAC also sought a declaration that the lease was a retail lease for the purposes of the RLA. The application for an injunction was dismissed by Member Kincaid on 24 September 2015, but the application for a declaration that the lease came under the RLA was not determined.

Re-entry

- 4 On 28 September 2015, Staples' lawyers, by letter, advised that Staples had exercised its rights of re-entry and taken possession of the premises and that the lease had been 'absolutely determined'.

Commencement of this proceeding

- 5 Because AAC remained in possession of the premises, Staples issued its own proceeding on 30 September 2015 seeking an order that AAC provide vacant possession of the property, and pay Staples' costs on an indemnity basis. This proceeding came on for hearing on 9 October 2015. The Tribunal declared that AAC had vacated the premises and that Staples had exclusive possession. The Tribunal did not determine whether the re-entry was lawful, but ordered that Staples' application for costs in this proceeding was to be heard and determined together with proceeding BP779/2015.

The hearing of proceeding BP779/2015

- 6 This proceeding came on for hearing before me on 22 February 2016. AAC was represented by Mr Wade Short, its director. He gave evidence on behalf of AAC but also called a number of other witnesses. Staples was represented by Mr Justin Forster of Counsel. Mr Staples gave evidence on behalf of his company.
- 7 The hearing proceeded over four days: 22 and 23 February, 3 and 7 June 2016. Orders were then made for the filing of written submissions which were received on 15 June 2016. Those submissions were to cover the issue of costs in this proceeding as well as the issues in BP779/2015.

Application of the RLA

- 8 One of the issues to be determined in BP779/2015 was whether the lease was a lease of retail premises for the purposes of the RLA.
- 9 I delivered my decision in BP779/2015 on 3 November 2016. Amongst other things, I declared that the lease was a lease of retail premises of the RLA.
- 10 The upshot of this decision is that the issue of costs in this proceeding is governed by s 92 of the RLA. Relevantly, this provides that the default position is that each party to a proceeding before the Tribunal in respect of a retail tenancy dispute is to bear its own costs of the proceeding. Only two exceptions to this rule are created. The first is where a party has conducted the proceeding in a vexatious way that unnecessarily disadvantaged the other party to the proceeding. The second is where a party has refused to take part in or withdrawn from mediation or other form of alternative dispute resolution. It is common ground between the parties that the second exception is not relevant. Accordingly, the first issue to be determined, so

that costs can be resolved in this proceeding, is whether AAC conducted this proceeding in a vexatious way.

Staples' contentions regarding costs

11 Staples combined its final submissions in proceeding BP779/2015 within submissions regarding costs in this proceeding. Accordingly, it is necessary in this proceeding to have regard to what Staples had to say about the power of the Tribunal to award costs on an indemnity basis in proceeding BP779/2015.

12 Staples relies on the decision of the Victorian Court of Appeal in *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd*,¹ ('*24 Hour Fitness*'). In that case the Court, comprising Hansen, Ferguson and McLeish JJA, commented upon the Tribunal's power to award costs under the RLA in these terms:

3 Section 109 of the VCAT Act empowers the Tribunal to make costs orders in certain circumstances. The Retail Leases Act 2003 overrides that provision so that, with one exception, each party in a retail tenancy dispute before the Tribunal is to bear its own costs in the proceeding. The exception is specified in s 92(2) of the Retail Leases Act which, so far as relevant to the current case, reads:

... 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.

4 Section 92(2)(a) was considered by Deputy President Bowman in *State of Victoria v Bradto Pty Ltd and Timbrook Pty Ltd* ('*Bradto*'). He observed that the provision requires the Tribunal to be satisfied that it is fair to order costs because a party conducted the proceeding in a vexatious way and that such conduct unnecessarily disadvantaged another party to the proceeding. Deputy President Bowman referred to the distinction between a proceeding which is conducted in a vexatious manner and the bringing or nature of the proceeding being vexatious. He held that 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

¹ [2015] BSCA 216.

conduct which is seriously and unfairly burdensome, prejudicial or damaging. This encapsulates the circumstances in which conduct may be classified as vexatious. (Citations omitted).

- 13 In the original decision in *24 Hour Fitness* the Tribunal had analysed in detail the matters upon which the respondent relied as constituting vexatious conduct. The Court of Appeal commented:

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.

It would be artificial to attempt to evaluate the manner in which the proceeding was conducted by a party without having any regard to the strength of that party's case. In the present circumstances, it was relevant that the applicant pursued the damages claim, in circumstances where it was bound to fail.²

- 14 On the basis of the Court of Appeal's decision in *24 Hour Fitness*, I consider that, in the present proceeding, the hopelessness of AAC's position is a relevant factor to be considered in assessing whether its conduct of the proceeding was vexatious.

- 15 I consider that the following factors are relevant to an assessment of the hopelessness of AAC's position:

- (a) in proceeding BP1254/2015, AAC had sought an injunction restraining Staples from re-entering the property or otherwise forfeiting the lease pursuant to a notice issued by Staples under s 146 of the *Property Law Act 1958* dated 10 September 2015.
- (b) That application for an injunction was refused by Member Kincaid on 24 September 2015.
- (c) AAC had, for a period after 24 September 2015, attempted to carry on its business, albeit with the doors locked to the public.
- (d) AAC's tenancy was determined by Staples on 28 September 2015, although Staples attempt to re-enter the building was frustrated on that that evening.
- (e) It was in these circumstances that Staples initiated this proceeding seeking an order for immediate possession of the property.

- 16 When these factors are reviewed, it can be seen that in the present proceeding Staples had, in effect, to re-litigate an issue which had already been determined in in proceeding BP1254/2015. In these circumstances, AAC had no prospect of successfully resisting Staples' application for an order for immediate possession. AAC effectively acknowledged this when it vacated the property before the hearing before Senior Member Walker on 9 October 2015.

² Ibid, at [28] and [29].

- 17 I accordingly find that AAC conducted this proceeding in a vexatious manner, and the discretion of the Tribunal to award costs under s 92 of the RLA has been enlivened.
- 18 The discretion of the Tribunal to award costs under s 92 is not unfettered. The Tribunal may only make an order that a party pay all, or a specified part of, the costs of another party in the proceeding if the Tribunal is satisfied that it is fair to do so because the party conducted the proceeding in a vexatious way that unnecessarily disadvantaged the other party.
- 19 In its submissions in proceeding BP779/2015, AAC acknowledged that it did not vacate the premises until 9 October 2015. However, as was pointed out by Staples in its submissions regarding costs in this proceeding, AAC signed an offer and acceptance to lease alternative premises on 6 October 2015.³
- 20 AAC gave notice of its intention to vacate the property in an email to Staples' lawyers sent only at 10.51am on 9 October 2015.⁴ Relevantly, this email read:
- We refer to your client's application returnable today in VCAT at 3.15. Vacant possession of the property will be delivered up before that time, but without any admission that the owner's re-entry was lawful.
- In the circumstances your client's application should be dismissed with no other orders.
- If the owner intends to pursue this application plainly the only question for the Tribunal will be in relation to costs. In that respect, the Tribunal will need to consider whether the owner's re-entry was lawful. This is not a matter which the Tribunal will determine at an interlocutory hearing.
- Please confirm by return of the matter may be dismissed with no other orders. Failing which we intend to appear to be heard both in relation to your client's application and the question of costs. (Sic)
- 21 I note the following points are made the email:
- (a) It is confirmed that vacant possession will be delivered up before the hearing.
 - (b) It is acknowledged that if the matter proceeds, costs will be an issue.
 - (c) That there was no prospect of an order for costs being made, because the Tribunal would not determine the legality of the re-entry at an interlocutory hearing. AAC did not foresee that costs might be reserved for determination at a later time when the issues of whether the lease was a lease of retail

³ Tribunal Book, tab 58.

⁴ Tribunal Book, tab 61.

premises under the RLA and the legality of the termination has been resolved.

- (d) Finally, AAC threw down the gauntlet, and advised that if it did not get the concession it required, i.e. that Staples agreed to the matter being dismissed with no other orders, it would contest *both* the application and costs.

- 22 As AAC indicated that vacant possession of the property would be granted less than five hours before the hearing itself, AAC must have expected that Staples would have made final arrangements for representation at the hearing, as was the case.
- 23 As AAC had been aware since 6 October 2015 that vacant possession was to be volunteered, I consider that it was both unnecessary and unreasonable for notice of this to have been given only on the morning of the hearing. I find that Staples was unnecessarily disadvantaged by AAC's vexatious conduct forcing Staples to go to a hearing, and then putting in contest both the substantive issue and costs. I find further that it is fair that an order for costs should be made.
- 24 It remains to deal with Staples' contention that costs should be awarded on an indemnity basis.

Submissions regarding an award of costs on an indemnity basis

- 25 Staples contends is entitled to award costs in the present proceeding against AAC on an indemnity basis for reasons which can be summarised as follows:
 - (a) On 28 to 2015, its representatives threatened and harassed locksmiths and security guards engaged by Staples when it attempted to re-enter the property;
 - (b) Staples filed the application in this proceeding because AAC had prevented Staples and taking possession;
 - (c) On 6 October 2015, AAC signed an offer and acceptance to lease alternative premises;
 - (d) Mr Short sent an email to Staples' lawyers at 10.51am on October 2015 advising that vacant possession would be delivered up that day without admission of liability;
 - (e) No prior notice had been given to Staples that AAC was vacating the premises;
 - (f) An appearance by the parties could have been avoided if AAC had ceased carrying out its business activities at the property, and given prior notice it was vacating.
- 26 It is to be noted that these matters are in many respects identical to those relied on by Staples in connection with its contention that the conduct of the proceeding has been vexatious. This is not a novel situation. In *24 Hour Fitness* the applicant contended that the Tribunal applied reasoning relevant to the exercise of a court's discretion to order costs on an indemnity basis

rather than the relevant principles under s 92 of the RLA for determining whether it was fair to award costs. The Court of Appeal commented:

Again, this criticism lacks foundation. 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. The Tribunal was not in error to consider such factors in respect of both issues.

- 27 Clearly it is not impermissible for Staples to invite the Tribunal to take into account, in connection with its application for a special costs order, the same factors which it should take into account in assessing whether AAC's conduct of the proceeding has been vexatious.

Relevant legal principles

- 28 The Court of Appeal in *24 Hour Fitness* said this:

Ordinarily, where costs are awarded they are awarded on a standard basis. However, in some circumstances, it is appropriate to make a special costs order. In *Ugly Tribe Co Pty Ltd v Sikola* ('Ugly Tribe') 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.⁵

- 29 Clearly, not all of the features identified by Harper J in *Ugly Tribe* are present. However, these are the circumstances in which the matter came on before Senior Member Walker:

- (a) The Tribunal had on 24 September 2015 refused AAC's application for an injunction to restrain Staples from re-entering on the basis of the s 146 notice dated 10 September 2016;

⁵ [2015] VSCA 216 [9].

- (b) The institution of this proceeding by Staples was necessitated because AAC had refused to vacate the premises in the face of a termination of the lease by Staples.
- (c) AAC had no basis to defend Staples' application for an order for possession.
- (d) Notwithstanding the fact that AAC made a decision to vacate the premises and had arranged alternative accommodation by 6 October 2015, AAC elected not to communicate to Staples that vacant possession would be delivered up until the morning of the hearing.
- (e) Even then, AAC made a demand that unless the proceeding was dismissed without an order for costs, it would contest both the application for possession and the issue of costs.
- (f) By the time the matter came on for hearing on the afternoon of 9 October 2015, Staples had not agreed to an order dismissing the proceeding without costs. On the contrary, by an email sent at 12.11pm on that day, Staples' lawyer had advised Mr Short that Staples would be proceeding with the application of 3.15pm, and that Counsel would be appearing.⁶

30 I find that AAC conducted this proceeding in a manner which caused loss of time to Staples because it did not advise Staples that vacant possession would be delivered up until the morning of the hearing. I also find that AAC conducted this proceeding in a manner which caused loss of time to the Tribunal because it did not advise the Tribunal that vacant possession would be conceded until the hearing itself.

31 Furthermore, I note that when AAC, by its email sent on the morning of the hearing, advised Staples that it would be contesting *both* the application and the issue of costs if it did not get agreement to an order for dismissal without costs, this was an unreasonable action that wilfully disregarded both the weakness of AAC's position regarding the application for repossession, as well as Staples' legitimate expectations regarding costs having regard to the very late point at which vacant possession was offered.

32 For these reasons I find that this is a suitable case for an award costs on an indemnity basis. I will order that the Respondent must pay the costs of the Applicant on an indemnity basis, such costs, if not agreed, to be taxed on the Scale Costs in Appendix A of Chapter 1 of the Rules of the County Court.

MEMBER C EDQUIST

⁶ Tribunal Book, tab 61.