VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. R112/2013

BUILDING & PROPERTY LIST

CATCHWORDS

LANDLORD AND TENANT – Costs - section 92 of the *Retail Leases Act 2003* – whether vexatiously conducting a proceeding – what conduct constitutes vexatious conduct. Costs of a special referee appointed under s 95 of the *Victorian Civil and Administrative Tribunal Act 1998*.

APPLICANT	T.B.T (Victoria) Pty Ltd (ACN 006 325 873)
FIRST RESPONDENT	Trombone Investments Pty Ltd (ACN 124 192 845)
SECOND RESPONDENT	Jermone Borazio
BEFORE	Senior Member E. Riegler
HEARING TYPE	Interlocutory Hearing
DATE OF HEARING	11 December 2014
DATE OF ORDER	5 February 2015
CITATION	T.B.T (Victoria) Pty Ltd v Trombone Pty Ltd (Costs) (Building and Property) [2015] VCAT 136

ORDERS

1. The Respondents must reimburse the Applicant for the payment of the Special Referee's costs associated with the inspection of the demised premises and the preparation of the Special Referee's report dated 22 July 2014, such costs to be fixed in the sum of $1,926.38 (inclusive of GST).
2. The Respondents must pay the Applicant's costs of and incidental to the application directions hearing on 6 June 2014, calculated on a solicitor and client basis in accordance with the *County Court Scale of Costs*, such sum to be agreed between the parties, failing which to be assessed by the Victorian Costs Court.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant:	Mr P Best of Counsel
For the Respondents:	Mr J Searle of Counsel

REASONS

Introduction

1. This proceeding involves a dispute between the Applicant, being the registered owner of premises located at 12-18 Meyers Place, Melbourne (**'the Landlord'**) and the First Respondent (**'the Tenant'**), who leases the upper floor of those premises (**'the Premises'**). The second Respondent is a director of the Tenant. The dispute concerns works undertaken by the Tenant to the Premises, which the Landlord contended affected the structural integrity of the Premises. In particular, the Premises are used by the Tenant for the purpose of a Japanese bathhouse. In order to give effect to that use, a number of large spa baths were installed into the Premises, together with other associated facilities.

2. The Landlord believed that the weight of the spa baths exceeded the structural capacity of the concrete beams and slab spans within the Premises. In addition, it was of the view that water was escaping from the Premises and entering other tenancies located below the Premises. As a result, this proceeding was commenced by the Landlord in order to determine whether the installation of the spa baths constituted a breach of the relevant provisions of the lease between the parties (**'the Lease'**).

3. Obviously, the central question underlying the dispute between the parties was whether the aggregate weight of the spa baths undermined the structural integrity of the Premises and whether water was escaping from the Premises.

4. By orders dated 20 September 2013, Mr Tony Croucher, building consultant, was appointed as a special referee under s 95 of the *Victorian Civil and Administrative Tribunal Act 1998* to determine a number of questions, concerning the structural integrity of the Premises and water escaping from the Premises. On 7 November 2013, Mr Croucher released a report setting out his opinions in answer to the questions raised in the 20 September 2013 orders. Ultimately, he opined that the structural integrity of the Premises was not undermined by the installation of the spa baths. However, he was of the view that the installation of the spa baths had led to a situation where water escaped from the Premises. He made a number of recommendations concerning what remedial work was required in order to remedy potential water egress.

5. On 28 February 2014, the proceeding was listed for a directions hearing before me. After hearing oral submissions and reviewing written submissions subsequently filed by the parties, orders were made on 21 March 2014 that Mr Croucher's report dated 7 November 2013 be adopted by the Tribunal. Further orders were made which provided that within 45 days, remedial works would be carried out in accordance with the works identified in Mr Croucher's 7 November 2013 report and that such works were to be undertaken by appropriately qualified or certified contractors.

6. The orders also provided that:

> 3. The Respondents must permit Mr Tony Croucher (the Special Referee) to inspect the Works at such stages as the Special Referee considers reasonably necessary in order to be satisfied that the Works have been carried out in a professional and workmanlike manner in accordance with these orders and the *Building Act 1993* (where applicable).
>
> 4. In order to give effect to Order 3 of these orders:
>
> (a) Prior to the commencement of the Works, the Special Referee must advise the parties in writing of the stages of work that he proposes to inspect (**'the Inspection Stages'**);
>
> (b) The Respondents must notify the Special Referee and the Applicant at least two business days prior to the Works reaching the Inspection Stages;
>
> (c) The Special Referee must notify the Respondents and the Applicant of the time and date that he intends to inspect the Works at each of the Inspection Stages; and
>
> (d) The Respondents must give the Special Referee reasonable access to the Premises to allow him to conduct his inspection of the Works.
>
> …
>
> 9. Subject to the parties agreeing on the amount of the Special Referee's costs and fees to be paid by the Respondent, the Respondents:
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> (a) within 14 days from the date of these orders must pay to the Applicant the cost of the Special Referee's report; and
>
> (b) must pay to the Special Refereed the Special Referees costs of the inspection and certification of the works within 14 days of the date any such invoice is delivered to the respondents.
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> 10. In the event that the parties cannot agree as to the amount to be paid by the Respondent pursuant to Order 9(a) and 9(b) of these orders, then the Special Referee's costs and fees are to be paid in the first instance by the Applicant and then to be determined by the Tribunal pursuant to section 95(2) of the *Victorian Civil and Administrative Tribunal Act 1998*.

7. At the request of the parties, a further directions hearing was convened on 10 April 2014 in order to consider a number of issues raised by the parties. Those issues included a complaint by the Tenant concerning the suitability of Mr Croucher as special referee and the payment of his fees. In addition, the Landlord alleged that the Tenant had breached Order 4(b) of the 21 March 2014 orders by failing to give prior notice to Mr Croucher and the Landlord of the remedial works having reached the nominated *Inspection*

Stages. In that respect, the Tribunal found the Tenant had completed the remedial works without any inspection by Mr Croucher.

8. Orders were made on 10 April 2014 amending the 21 March 2014 orders by providing that Mr Croucher carry out only one inspection - to determine, insofar as he was able to, if the remedial work had been carried out in a professional and workmanlike manner. A further order was made to re-list the proceeding for another directions hearing to determine the further conduct of the proceeding and to determine the dispute over Mr Croucher's fees.

9. The proceeding was returned on 9 May 2014, in order to deal with the outstanding issues. However, due to the business of the Tribunal, insufficient time had been allocated, with the result that the directions hearing was adjourned to 6 June 2014.

10. On 6 June 2014, an application was made by the Tenant that Mr Croucher be disqualified as the special referee. The application was made on the ground that Mr Croucher had unilaterally communicated with the Landlord's legal represenatives without providing the Respondents with a copy of that communication. Accordingly, it was argued that his conduct had impugned his independent status. That application was dismissed. Further orders were then made which included an order that the Tenant pay the Landlord $4,642, being the cost of Mr Croucher's report and other orders allowing for Mr Croucher to re-inspect the Premises and carry out such tests as may be appropriate for the purpose of establishing whether the remedial works undertaken by the Tenant was carried out in accordance with the Tribunal's orders dated 21 March 2014.

11. Mr Croucher re-inspected the Premises on 11 July 2014. A comprehensive building inspection report dated 22 July 2014 was prepared and issued by Mr Croucher following that inspection. As detailed in that building inspection report, extensive water testing was carried out by Mr Croucher in order to determine whether the remedial works had been effective. Ultimately, Mr Croucher stated:

> Based on my inspection and testing, I do not consider works had been carried out to a satisfactory standard or a professional and workmanlike manner.

12. Mr Croucher's report prompted further remedial work, which the Tenant now contends has arrested any further water egress from the Premises.

The costs of Mr Croucher's inspection and report

13. Mr Croucher rendered an invoice in the amount of $1,926.38 being his costs and disbursements associated with his re-inspection on 11 July 2014 and preparation of the building inspection report dated 22 July 2014. The Landlord has paid that account and now seeks to be reimbursed for that amount. The Tenant contends that the amount charged is excessive.

14. In particular, Mr Searle of counsel, who appeared on behalf of the Tenant and the Second Respondent, submitted that when the Tribunal ordered that the Tenant and the Second Respondent to pay for the costs of the re-inspection by Mr Croucher, the Landlord's legal representatives said that those costs were likely to be in the vicinity of $800. He submitted that, as a consequence, the Tenant did not oppose the Tribunal making the 10 June 2014 orders, requiring it to pay for that re-inspection. Therefore, Mr Searle submitted that the Mr Croucher's costs should be capped at that amount.

15. Mr Best of counsel, who appeared on behalf of the Landlord, submitted that the 11 July 2014 report indicated that Mr Croucher:

    (a) inspected the Tenant's remedial works;

    (b) carried out three water tests within the Premises;

    (c) inspected for water egress from the Premises into the tenancies located below the Premises after each test;

    (d) perused photographs provided by the Tenant's legal representative, which were taken when the remedial work was performed; and

    (e) took his own photographs of both the testing and water ingress to tenancies below.

16. Mr Croucher's invoice shows that he spent 6.75 hours at $255 per hour:

    (a) travelling to and from the Premises;

    (b) carrying out the inspection and testing;

    (c) preparing and writing the report; and

    (d) paying $30 for car parking.

17. The rate charged by Mr Croucher is identical to the rate charged for the preparation of his earlier report. In my view, the amount of time spent to inspect, test and prepare the written report dated 22 July 2014 is reasonable. Moreover, given that no issue is taken in respect of the rate charged by Mr Croucher I also considered this rate to be reasonable. The fact that Mr Croucher had to undertake further testing which, in all likelihood, took considerably more time than what would have occurred had he been able to conduct staged inspections, results from the Tenant's failure to comply with the orders dated 21 March 2014. In my view, it ill behoves the Tenant from now complaining that the cost of the single inspection and testing is more than what was anticipated.

18. Accordingly, I find that the costs of Mr Croucher in the amount of $1,926.38 are reasonable and that those costs should be borne by the Tenant and Second Respondent. I will order that the Tenant and Second Respondent reimburse the Landlord for that amount.

Costs

19. The Landlord seeks an order that its costs of the directions hearing on 9 May 2014; and the directions hearings conducted on 6 and 10 June 2014 be paid by the Tenant and Second Respondent.

20. The Landlord submits that it is entitled to the costs of and associated with the above appearances because the conduct of the Tenant and Second Respondent enlivened the Tribunal's discretion under s 92(2) of *Retail Leases Act 2003* (**'the RLA'**). That provision states:

> **92. 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 of 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.

21. The Landlord submits that the Tribunal's discretion is enlivened because the Tenant and Second Respondent have conducted the proceeding in a vexatious way which has unnecessarily disadvantaged the Landlord.

22. In *State of Victoria v Bradto Pty Ltd*,[1] Judge Bowman considered the operation of s 92(2) of RLA. His Honour stated:

> [32] Section 92(2) of the RLA, which is similar in wording in parts of s78 of the VCAT Act, involves consideration of three factors. These elements are whether the party conducted the proceeding in a vexatious way; whether this unnecessarily disadvantaged the other party; and, thirdly, the question of justice or fairness.
>
> [33] In relation to what is meant by "vexatious", reference is made to *Oceanic Sunline Special Shipping Company Inc v Fay* (1988) 165 CLR 197. A proceeding is conducted in a vexatious way if it is conducted in a way productive of serious and unjustified trouble or harassment, or conduct which is seriously and unfairly burdensome, prejudicial or damaging. Where there is vexatious conduct which causes loss of time to the decision-making body or to other parties, indemnity costs should be ordered, and they are sought in this case.

[1] [2006] VCAT 1813.

9 May 2014 directions hearing

23. The directions hearing listed for 9 May 2014 was listed pursuant to orders made by the Tribunal on 10 April 2014. The orders expressly stated that the purpose of the directions hearing was to make orders for the further conduct of the proceeding and also determine who was to pay for the costs of the special referee. The orders dated 10 April 2014 specifically directed the principal registrar to list that directions hearing for 90 minutes. Regrettably, only 30 minutes was allocated for the directions hearing on 9 May 2014, despite what was stated in the 10 April 2014 orders.

24. Not surprisingly, there was insufficient time to consider the question of who was to pay for Mr Croucher's costs. Nevertheless, some interlocutory orders were made on that day to progress the proceeding, such that the parties' costs of that appearance were not totally thrown away.

25. In my view, the adjournment of the directions hearing on 9 May 2014 resulted from an error in the listing of the directions hearing. It cannot be said that the parties' attendance on that day and the subsequent adjournment of that directions hearing is attributed to vexatious conduct on the part of the Tenant and Second Respondent.

26. Even if s 92 of the Act were enlivened, I do not consider that it would be fair to order costs under s 109 of the *Victorian Civil and Administrative Tribunal Act 1998* as the matters considered on that day benefited both parties. Therefore, there will be no order as to the costs of the directions hearing on 9 May 2014, insofar as that directions hearing relates to this proceeding.[2]

6 and 10 June directions hearings

27. The directions hearings conducted on 6 and 10 June 2014 comprised a number of issues which related to both this proceeding R112/2014 and also the related proceeding R33/2014 (which remains listed for hearing). It would appear, however, that the majority of matters relating to proceeding R112/2014 were heard and considered on 6 June 2014, with 10 June 2014 primarily focusing on issues concerning R33/2014.[3]

28. The directions hearing on 6 June 2014 primarily related to matters concerning proceeding R112/2014, such as:

    (a) an application by the Tenant for an order disqualifying Mr Croucher as special referee;

[2] Insofar as the directions hearing on 9 May 2014 concerned the related proceeding 33/2014, the costs remain in the cause in that proceeding.

[3] Those issues comprised an application by the Landlord to strike out a part of the Tenant's *Points of Defence and Counterclaim* and issues concerning discovery.

(b) determining whether the Tenant should pay for Mr Croucher's fees, which had at that stage already been paid by the Landlord; and

(c) determining what steps should be undertaken by Mr Croucher to inspect the remedial work completed by the Tenant.

29. As indicated above, orders were subsequently made dismissing the Tenant's application to disqualify Mr Croucher as special referee and requiring the Tenant and Second Respondent to reimburse the Landlord $4,642, being the cost of Mr Croucher's report. In addition, procedural steps were ordered to provide for the inspection of the remedial work completed by the Tenant. In particular, an order was made allowing Mr Croucher to undertake further testing to ascertain whether the remedial works were effective. As I have already indicated, Mr Croucher formed the view that the remedial works were not effective, which prompted his subsequent report dated 22 July 2014.

30. In my view, the need for the directions hearing on 6 June 2014 largely arose as a consequence of the Tenant failing to comply with the Tribunal's previous orders dated 21 March 2014 and to a lesser extent, to provide a forum to consider the Tenant's application to recuse Mr Croucher.

31. Notwithstanding my finding that Mr Croucher had unilaterally communicated with the Landlord's solicitors, which I considered inappropriate, I did not find that there were sufficient grounds to order that he be disqualified as the appointed special referee.

32. Irrespective of the fact that the directions hearing partly comprised the Tenant's application for an order to disqualify Mr Croucher as special referee, the directions hearing was unavoidable because of the actions of the Tenant and or the Second Respondent. In my view, the failure to adhere to the orders requiring notification of the nominated *inspection stages* is reprehensible and constitutes vexatious conduct on the part of the Tenant and or Second Respondent. It is conduct which I consider is *productive of serious and unjustified trouble or harassment, or conduct which is seriously and unfairly burdensome, prejudicial or damaging*.

33. Accordingly, I find that, in the circumstances, it would be fair to order that the Landlord's costs of and associated with the directions hearing on 6 June 2014 be paid by the Tenant and the Second Respondent. In that regard, I accept the submissions made on behalf the Landlord that the circumstances justify a special costs order being made. Accordingly, I will order that the Landlord's costs of and associated with the directions hearing on 6 June 2014 be paid by the Tenant and Second Respondent on a solicitor and client basis in accordance with the *County Court Scale of Costs*.

34. The costs of and associated with the directions hearing on 10 June 2014 are to remain costs in the cause in proceeding R33/2014, given that the

time occupied was largely taken up with matters comprising that proceeding.

SENIOR MEMBER E RIEGLER