VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. BP126/2016

BUILDING AND PROPERTY LIST

CATCHWORDS

Retail Lease Act 2003 – s. 92(2)(a) - order for payment of costs - circumstances in which order can be made - vexatious conduct of proceeding causing disadvantage - whether fair to order costs - refusal by landlord to comply with terms of settlement - whether conduct of landlord in refusing performance vexatious - whether conduct of proceeding by landlord vexatious - whether there rental valuation

APPLICANT	109 Fitzroy Street Pty Ltd (ACN 100 653 683)
RESPONDENT	Frelane Pty Ltd (ACN 104 410 120)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Application for Costs
DATE OF HEARING	20 October 2017
DATE OF ORDER	29 November 2017
CITATION	109 Fitzroy Street Pty Ltd v Frelane Pty Ltd (Building and Property) [2017] VCAT 1987

ORDER

Order the Respondent to pay the Applicant's costs of this proceeding including any reserved costs and the costs of this application for costs, such costs if not agreed, to be assessed by the Victorian Costs Court on an indemnity basis in accordance with the County Court Scale.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr L.P. Magowan of counsel
For the Respondent	Mr P.R. Best of counsel

REASONS

Background

1. The principal proceeding in this matter concerned a dispute between the applicant ("the Tenant") and the respondent ("the Landlord") concerning an adjustment to be made to rental that had already been paid by the Tenant following a rental valuation that fixed a lower rental than that which the Tenant had paid pending the assessment. It had been agreed between the parties that, when the assessment was made, any underpayment or rental paid in the meantime would be made up by the Tenant and correspondingly, any overpayment would be refunded by the Landlord.

2. The hearing occupied three days in September last year followed by submissions that were heard on 12 December 2016.

3. A decision was handed down on 31 January 2017 ordering the Landlord to pay to the Tenant $134,875.21 and making a declaration concerning responsibility for payment of insurance premiums.

4. No order was made concerning an additional claim made by the Tenant in regard to a veranda at the front of the demised premises, because some work had been belatedly done to it by the Landlord just before final submissions and it was not apparent that any further work was required. Costs of the proceeding were reserved.

5. In July this year the applicant's solicitors informed the registry that it wished to apply for costs. The application for costs was fixed for hearing on 20 October 2017. Mr L.P. Magowan of Counsel appeared on behalf of the Tenant and Mr P. Best of counsel appeared on behalf of the Landlord.

6. Submissions occupied all of the time allocated and I informed the parties that I would provide a written decision.

Power to award costs

7. The general power of the tribunal to award costs is found in s.109 of the *Victorian Civil and Administrative Tribunal Act* 1998 ("the Act"). In essence, by sub section (1) of that section, each party must bear its own costs in the proceeding. By sub section (2), the tribunal may order a party to pay all or a specified part of the costs of another party to the proceeding if it is satisfied that it is fair to do so having regard to certain matters that are set out in subsection (3).

8. Further provision as to orders for costs is found in sections 112 to 114 of the Act in cases where a party has made an offer to settle the proceeding that was not accepted.

9. In the case of retail tenancy disputes within the meaning of the *Retail Leases Act* 2003 however, orders can only be made in special circumstances which are set out in s.92 of that act. That section provides as follows:

> "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 in 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.

(3) In this section, "costs" includes fees, charges and disbursements."

The Tenant's submission

10. As to how this section should be applied, Mr Magowan referred me to the following passages in the authorities.

11. In *State of Victoria v. Bradto* [2006] VCAT 1813, Judge Bowman said (at paragraph 66 and 67):

"66 In essence, there was not a great deal of conflict between the parties as to the principles to be applied in relation to the operation of s.92 of the *RLA*. Clearly that section is designed to restrict the number of situations in which costs can be ordered. I agree that, whilst assistance can be gained from looking at various sections of the *VCAT Act* and the manner in which they have been interpreted, s.92 should essentially be viewed in isolation. Whilst it might be that, under both the *RLA* and the *VCAT Act*. the starting point is that no order should be made as to costs and that each party should bear its own costs, the exceptions contained in s.109(3) of the *VCAT Act*, with the exception of (3)(a)(vi), do not operate. If I am to order costs in a matter brought pursuant to the *RLA*, I must be satisfied that it is fair so to do because a party conducted the proceeding in a vexatious way, and that such conduct unnecessarily disadvantaged another party to the proceeding.

67 I am also of the view that, pursuant to the frequently cited test in *Oceanic Sun Line*, 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 conduct which is seriously and unfairly burdensome, prejudicial or damaging. A similar approach was adopted by Gobbo J in *J&C Cabot*, although it could be said that the tests there set out relate more to the bringing of or nature of the proceeding in question, rather than the manner in which it was conducted. Indeed, if

one looks at the factual and statutory context in which the decision in *J&C Cabot* was taken, that distinction is underlined. Section 150(4) of the *Administrative Appeals Tribunal Act* 1984 refers to "... proceedings (that) have been *brought* vexatiously or frivolously ..." (My emphasis). Furthermore, the tests adopted by Gobbo J are those previously expressed by Roden J in *Attorney-General (Vic) v Wentworth* (1988) 14 NSW LR 481, and are worded as "... Proceedings are vexatious if they are *instituted*... if they are *brought*... if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless". (Again my emphasis). This is to be contrasted with the wording of s.92 which specifically refers to a proceeding being "*conducted* ... in a vexatious way". (Again my emphasis)."

12. This passage was relied upon in the case of *Elijoy Investments Pty Ltd v Hart Brothers Pty Ltd* (Retail Tenancies) [2014] VCAT 321, where Senior Member Davis held that the actions of a Tenant, in bringing an application to the Tribunal to re-agitate a dispute that had already been settled pursuant to written terms of settlement, was acting vexatiously. He said (at paras.12 to 17):

> "Was this proceeding vexatious or not?
>
> 12. After having reached a settlement, a party should not have to argue its case over and over again to defend its position.
>
> 16. In this particular instance, in my view conducting this proceeding in such a way as the Tenant did is quite unjustified and has caused the Landlord a considerable amount of trouble. It should have been obvious to the Tenant that the subject of this proceeding was something that was clearly already agreed between the parties pursuant to the Deed of Settlement and the Deed of Lease.
>
> 17. Given those circumstances, I find that the proceedings were conducted vexatiously. I also find that the proceedings were conducted causing the Landlords disadvantage. It was compelled to come to the Tribunal and defend this proceeding and it was also compelled to employ expensive Counsel and solicitors in order to do so. This has cost them a considerable sum of money."

13. In *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd* [2015] VSCA 216 the Court of Appeal held that, when determining whether a proceeding was conducted vexatiously for the purpose of s.92, it was relevant to take into account that the claim was bound to fail. The court said (at paragraphs 27 and 28):

> "27 Essentially, the applicant contends that there is a difference between instituting a proceeding that is vexatious, or making a claim that fails, and the conduct of a proceeding which is vexatious. The applicant argued that there is no basis to suggest that the commencement of the proceeding was

vexatious, and that its entitlement to damages flowed from the finding that the respondent had breached the lease. It submitted that the Tribunal focussed more on what were perceived to be the prospects of success than on the actual conduct of the proceeding, yet it is the conduct of the party in the proceeding that is material, not consideration of the strength of its claims.

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 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."

and at paragraph 32, where the court said:

"32 The applicant also 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 Retail Leases Act for determining whether it was fair to award costs. 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."

14. Mr Magowan said that the Landlord in the present case consistently obfuscated and delayed the implementation of the terms of settlement the parties had signed in regard to the review of the rent and the adjustment of any under or over payment. He said that this was part of a deliberate strategy by the Landlord to place financial pressure upon the economically weaker Tenant with a view to financially starving it so as to prevent it from agitating its lawful rights. He said the Landlord had been effectively playing games with the Tenant.

15. He said that the question of the adjustment of rental and the obligation to repair the awning in front of the demised premises were clearly dealt with in the terms of settlement and it should not have been necessary for the Tenant to commence these proceedings to recover the overpayment and to have the awning repaired. He said that as a consequence of the Landlord's conduct, the Tenant has had to argue its case over again at considerable cost.

16. He referred to the evidence of the Landlord's director, Mr Paraskevas, to the effect that the delay in performing the works and implementing the terms of settlement was because a new lease had not been signed. He said this was not an adequate explanation, given that the Landlord was represented by experienced lawyers.

17. Mr Magowan said that the Landlord:

    (a) continued to defend the claim when it had no defence. He said that the calculation of the overpayment to be refunded was a simple matter and notwithstanding the Landlord acknowledged on some occasions that it owed the Tenant money it failed to pay any of the varying amounts admitted;

    (b) provided multiple inconsistent calculations concerning the rent received. He said that much of the hearing was taken up with this;

    (c) throughout the tenancy, had not provided the Tenant with receipts for the rental the Tenant had paid;

    (d) insisted on making deductions for insurance notwithstanding that the claim for the adjustment was inconsistent with the terms of settlement that were entered into after the period to which the insurance claim related and was therefore caught by the terms of settlement and manifestly hopeless. He pointed out that the Landlord had not made any claim for repayment of any money with respect to insurance until after the rental determination and that a claim for insurance did not appear in the Landlord's Points of Defence or Counterclaim. He said that the Landlord had not complied with the requirements of sections 46 and 47 of the *Retail Leases Act* 2003 by providing a statement of outgoings which would have shown clearly any obligation to pay insurance.

18. He said the obligation to repair the awning and replace it with an awning of similar size and quality was spelled out clearly in the terms of settlement and yet the Landlord took no steps to repair it until after the hearing and just before the date fixed for the hearing of oral submissions. He complained that the Landlord had made a claim on its insurance company for the repair of the awning, using evidentiary material provided by the Tenant. The Tenant's solicitors asked the Landlord's solicitors to provide copies of the plans for the repairs but they were not forthcoming. He said that the awning has not been inspected by an engineer or any appropriate person and that the extent of the repairs carried out was unknown. He said that the Tenant was entitled to have it in a condition whereby it would support a reasonable amount of signage, pulldown screens, out-door heaters and lighting but he nonetheless suggested that the Tenant was content with the works that had been done.

19. The final issue was the failure of the Landlord to accept reasonable offers to resolve the dispute. In that regard, Mr Magowan relied upon an affidavit sworn by his instructing solicitor Mr Brierley. In exhibit "TV1" to that affidavit, Mr Brierley requested the Landlord to make an upfront payment towards the

refund that was due for overpaid rent. That was not done. Exhibit "TV2" contains a letter to Mr Brierley from the Landlord's solicitors, dated 15 October 2015, referring to a spreadsheet which also forms part of the exhibit. This exhibit, which is said to be the Landlord's own calculations, shows an amount of $106,827.17 payable to the Tenant by the Landlord. By a reply email dated 16 October 2015 to the Landlord's solicitors, Mr Brierley invited the Landlord to pay that sum of $106,827.17 into Mr Brierley's trust account pending a proper accounting, since, he said, the Landlord acknowledged that amount as being payable after deducting the amount of the bond,. The Landlord did not do so.

20. In exhibit "TV3" Mr Brierley sets out the figures relating to the monetary dispute between the parties in great detail, making a number of concessions for the purpose of settlement, and offering on the Tenant's behalf to accept the amount of $120,837.15 inclusive of GST. That was less than the sum of $134,875.21 that I ultimately ordered the Landlord to pay to the Tenant. Mr Brierley's letter stated that, should this offered not be accepted, the Tenant would continue to incur significant legal costs and would produce the letter to the Tribunal on the question of costs following the hearing.

21. Mr Magowan submitted that I should find that the Landlord conducted the proceeding in such a way as to cause serious disadvantage to the Tenant, in terms of the delay in receiving payment and the very substantial legal costs that it has incurred. According to the affidavit of Mr Brierley, there will be very little of the sum awarded to the Tenant left to it if an order for costs in its favour is not made.

The Landlord's submission

22. Mr Best referred to some of the same authorities as Mr Magowan. He also referred me to the following passage from *Victorian Education Foundation Ltd v Brislugan Pty Ltd* (Retail Tenancies) [2009] VCAT 317 where Deputy President Macnamara, as his Honour then was, said(at para 21):

> "The question is however whether what has occurred amounts to vexatious conduct. Certainly it is clear that merely bringing a proceeding which is unsuccessful is not in itself vexatious. Section 92 was intended to operate as a very stern restriction on the Tribunal's discretion to award costs. Its effect and intent is to make the award of costs as between party and party the exception rather than the rule."

23. He also referred me to *Risi Pty Ltd V Pin Oak Holdings Pty Ltd* [2017] VCAT 95 when Senior Member Riegler said (at para 32):

> "Section 92(2) of the RLA, which is similar in wording in parts to 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."

24. Mr Best said that a proceeding would be conducted in a vexatious way if it were conducted in a way productive of serious and unjustified trouble or

harassment or conduct which is seriously and unfairly burdensome, prejudicial or damaging (*State of Victoria v. Bradto* [2006] VCAT 1813 at para.33 per Judge Bowman). He said that the proceeding may be conducted vexatiously if brought for a collateral purpose and not for the purpose of having a court adjudicate on the issues to which they give rise (*Cooper Pty Ltd v. C & P Cooper Pty Ltd* [2010] VCAT 2002 at para 8 per Senior Member Riegler) and that although the conduct of a hopeless case or a case that is bound to fail may found an award of costs, a case which is arguable and merely unsuccessful is not a hopeless case in this sense (*24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd* [2015] VSCA 216 para. 31). Merely putting the other party to its proof is not vexatious (*De Simone Nominees Pty Ltd v Szabo* [2005] VCAT 2919 para 29)

25. Mr Best submitted that in order to recover costs under section 92(2)(a) it is necessary for the applicant for costs to satisfy the Tribunal that:

    (a) the other party conducted the proceeding in a vexatious way:

    (b) the vexatious conduct unnecessarily disadvantage the other party to the proceedings; and

    (c) it is just and fair to make an award of costs.

    I accept the correctness of these statements of principle.

26. Mr Best set out a long list of the issues that he said were raised in the proceeding which he said were complex factual and legal issues. He said the terms of settlement raised substantial issues of construction and required issues of fact to be determined. He said:

    (a) the amount of the rent to be refunded was not determined by the terms of settlement;

    (b) what was to be considered to be rent needed to be determined;

    (c) the issue of set-off against the rent needed to be determined, both in law and in fact.

27. Mr Best said that the calculation of the amount due to be paid to the Tenant could have been arrived at much earlier if the Tenant had provided a clear statement of what it was claiming and if it had not cancelled a particular meeting which was scheduled to take place.

28. He said that the question of insurance was addressed in the evidence as a live issue during the hearing and that there was some evidence to suggest that there was an insurance component in the rental that had been paid. He referred to a number of emails sent by the Tenant to the Landlord's solicitor in this regard.

29. He also referred to a number of other issues that were raised by the Tenant that were resolved prior to the trial.

30. He said that the Tenant's construction of the terms of settlement in regard to the awning were unsuccessful at trial.

31. In these circumstances he said that it could not be argued that the Landlord's defences were unmeritorious or bound to fail and there was no ground for alleging that the Landlord failed to conduct the proceeding otherwise than in a proper and professional manner. He said that the defence was not maintained for a collateral purpose, there was no question of unconscionable conduct and the legal and factual issues had to be determined.

32. Mr Best said that the Landlord did not engage in vexatious conduct and in any case, had not disadvantaged the Tenant.

33. As to the letter which is exhibit "TV3 "to the affidavit from Mr Brierley, Mr Best said that the offer was not relevant for the purpose of section 92, that it was a composite offer with many parts and that it cannot be said that it was unreasonable of the Landlord to reject the offer, particularly having regard to time the Landlord had to consider it, which was only three days. The offer was also made before the Tenant's material had been filed and the information contained in that material was available to the Landlord.

Consideration of these submissions

34. The list of factual and legal issues said by Mr Best to have been complex do not directly relate to the claim for the refund or an order that the agreed work to the veranda be carried out, which were the issues that proceeded to the hearing. They were brought into the claim by the Landlord in order to defend its refusal to pay anything to the Tenant. In the end, its attempt to avoid payment was unsuccessful.

35. Although the terms of settlement did not fix the amount of the refund, the provision was to adjust the rental already paid to reflect the outcome of the rental determination. The calculation of the refund was clearly to be the amount the Tenant had paid for the relevant period less the amount fixed by the valuation. The amount of the valuation could not be the subject of dispute and it was not disputed.

36. The factual enquiry as to what been paid should also not have presented any difficulty. Mr Best referred to the time and expense the Landlord was alleged to have taken in producing all bank payments and statements to finally agree with the Tenant's figures. It is not credible that the records of what the Landlord had received from the Tenant were not readily available. The Tenant had complained that the Landlord had failed to provide receipts for the amounts that it paid but the Landlord acknowledged that it had financial records from which its own figures were eventually produced. Indeed, it had included the amounts perceived in its tax returns. Both sides had records of what had been paid and they were essentially the same, subject to some very minor qualifications referred to in the reasons for decision.

37. The refund of the overpayment was not dependent on the Tenant providing a clear statement of what it was claiming or attending a particular meeting. It was for the Landlord to pay what was due and it made no attempt at all to do so,

despite acknowledging that various sums were due. The Tenant's solicitor asked that the undisputed portion be paid but nothing was paid.

38. The question of what the word 'rent' meant for the purposes of the terms of settlement was not raised by the document itself. It was an argument that was raised unsuccessfully by the Landlord at the hearing. In the points of defence the Landlord acknowledged that the rental had been determined by the valuer in the amount pleaded by the Tenant, denied that the Tenant had paid rental in the amount claimed for the relevant period and denied that the Tenant was entitled to any refund, stating that any credit due to the Tenant from the rent determination had been given by the Landlord. That was patently untrue. It was not pleaded by the Landlord in its Points of Defence that any part of the amounts the Tenant had paid were in fact insurance premiums. That argument was raised at the hearing.

39. Mr Best said that the terms of settlement raised substantial issues of construction and required issues of fact to be determined. It seems clear to me that these issues were raised by the Landlord in order to resist what ought to have been obvious namely, that it was required to make a substantial refund to the Tenant. If an issue is raised in a proceeding it must necessarily be argued on both sides but that does not mean that the issue should have been raised in the first place. The points relied upon by the Landlord were very skilfully argued by Mr Best on its behalf and equally skilfully argued against by Mr Magowan and this took up considerable time. However in the end I found that the arguments were not maintainable.

40. The insurance argument was not maintainable, given the provisions about insurance in the terms of settlement and the overwhelming weight of the evidence as a whole. Similarly, arrears of rental sought to be offset by the Landlord had been waived by specific clauses of the terms of settlement and so were not available to be set off.

41. The fact that a number of issues were resolved before hearing, including the whole of the Landlord's counterclaim, meant that the length and cost of the hearing was reduced. However it is not otherwise relevant to what I have to consider in this application for costs.

42. The failure of the Landlord to repair the awning was still continuing at the time of the hearing. No adequate excuse was provided by the Landlord in regard to that. The reason pleaded, that it had not been painted, was untrue. In the reasons for decision I was not able to determine that there was anything further to be done at that time, having been informed during submissions that the awning had been repaired by the Landlord's insurer. In should not have been necessary for the Tenant to bring proceedings to enforce compliance by the Landlord with such a clear obligation that it undertook under the terms of settlement.

43. As to the question of disadvantage, the Landlord kept the Tenant out of a very substantial sum of money for a long period and forced the Tenant to incur a very substantial sum in legal costs in order to enforce its rights.

44. These proceedings should have been unnecessary. The parties had already resolved their differences in accordance with the terms of settlement and for the Landlord to require the Tenant to bring these proceedings in order to enforce the rights that the Landlord had agreed it would have under those terms of settlement was quite improper and vexatious.

Indemnity costs

45. Mr Magowan seeks costs on an indemnity basis or, in the alternative, on the standard basis. In general, where an order for costs is made, it is on the standard basis (see for example *Pacific indemnity Underwriting Agency v. Maclaw No. 651* [2005] VSCA 165 at [92]) and special circumstances are generally required before they are awarded on an indemnity basis.

46. Orders for indemnity costs are only made in exceptional circumstances (see Pizer: *Annotated VCAT Act* Sixth edition para. 111.80 and the cases there cited).

47. In *Colgate-Palmolive Pty Ltd v Cussens* [1993] FCA 536 Sheppard J. reviewed the relevant common law principles and said:

> "In consequence of the settled practice which exists, the Court ought not usually make an order for the payment of costs on some basis other than the party and party basis. The circumstances of the case must be such as to warrant the court in departing from the usual course. That has been the view of all judges dealing with applications for payment of costs on the indemnity or some other basis, whether here or in England."

48. However, in *Ugly Tribe Co Pty Ltd v Sikola* [2001] VSC 189 Harper J said (at Para.12):

> "The position changes where a litigant acts dishonestly in the litigation, or where the rights and privileges of a litigant are flouted or abused. Then, the rationale for refusing to order that the losing party indemnify an opposite party against that party's costs is less compelling. Indeed, costs are more frequently if not invariably awarded on an indemnity or like basis (such as that of solicitor/client) where findings of dishonesty or serious misconduct have been made against the party ordered to pay."

49. In *Fountain Selected Meats (Pty Ltd) - v.- International Produce Merchants Pty Ltd* [1988] FCA 202; Woodward J said (at p.401):

> "I believe that it is appropriate to consider awarding "solicitor and client" or "indemnity" costs, whenever it appears that an action had been commenced or continued in circumstances where the Applicant, properly advised, should have known that he had no chance of success. In such cases the action must be presumed to have been commenced or continued for some ulterior motive, or because of some wilful disregard of the known facts or the clearly established law. Such cases are, fortunately, rare. When they occur, the court will need to consider how it should exercise its unfettered discretion."

50. In *Rouse v. Sheppard* and Ors (1994) 35 NSW LR 277 an order for indemnity costs was made in favour of plaintiffs who had been put to expense in proving their case by the unreasonable conduct of the defendants. In discussing the principles behind such an order, Badgery-Parker J. said (at p.279):

> "The tendency of the Court has been to avoid unduly widening the cases in which indemnity costs would be awarded.

51. In *Taylor Street v. Trentwood Homes Pty Ltd anor* [2012] VCAT 520, Senior Member Farrelly said (at para 34):

> "In my view an order for indemnity costs should only be made in exceptional or extreme cases such as where the conduct of a party is vexatious or particularly obstructive or where a party's case is hopeless or fanciful and with no real prospect of success or where a claim is brought for an ulterior purpose."

52. In *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd* [2015] VSCA 216 the Court of Appeal said (at para. 9):

> "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, 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;
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> (b) the making of an irrelevant allegation of fraud;
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> (c) conduct which causes loss of time to the court and to other parties;
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> (d) the commencement or continuation of proceedings for an ulterior motive;
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> (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
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> (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."

53. That (*24 Hour Fitness*) was a case in which costs were awarded under section 92 (2)(a) and the court observed (at para.32):

> "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."

54. In determining whether or not to order costs on an indemnity basis I should take into account the matters referred to above concerning s.92 but I must bear in mind that it is not the same question and it must be approached and answered separately.

55. I think that of particular importance in the present case is the fact that there were was very little in the way of disputed facts to determine. As I pointed out in the reasons for decision:

    (a) when one compared the two sets of statements that were produced during the hearing there was a very little dispute as to what had been paid by the Tenant;

    (b) the Landlord's argument that some of those payment should be considered to be insurance was simply not maintainable. Although a higher rental had been fixed earlier on the basis that the Landlord was to pay for the insurance, the word "rental" in the deed of extension could not mean anything other than rental. Moreover the Landlord's agent acknowledged in writing that past insurance premiums were "past history" and "closed and buried forever";

    (c) there could be no deduction for alleged arrears of rental because, by the terms of settlement, the Landlord had waived any such arrears;

    (d) there was never any adequate excuse provided for the failure to repair the veranda. It was pleaded that the obligation only arose when the awning had been painted but, according to the Tenant's evidence, it was painted "around March 2015".

56. Although some time was taken with a few minor secondary issues, the foregoing was really what the case was about and where the overwhelming bulk of the time was taken. The amount of the bond was to be deducted from the refund but that was always acknowledged.

57. I do not believe that, properly advised as it was, the Landlord could have had any bona fide belief that it was entitled to withhold such a very substantial sum from the Tenant for the reasons advanced on its behalf. If the Landlord genuinely believed that these defences were available, one would expect them to have been pleaded but they were not. They were raised at the hearing.

58. Consequently, I do not believe that payment was refused and the proceeding was defended in order to pursue a genuine defence or have determined a genuine dispute. Rather, payment was withheld and the proceedings were defended for an ulterior motive namely, to simply avoid payment of a known debt.

59. Consequently, the Tenant ought not to have been put to the expense of taking these proceedings and this is an appropriate case in which to order indemnity costs.

Conclusion

60. I am satisfied that the Landlord could not have any genuine belief that it was entitled to retain such a substantial overpayment from the Tenant, nor could there have been any doubt that it was obliged to repair the awning.

61. I am satisfied that the Landlord's conduct in refusing to abide by the obligations it had agreed upon in the terms of settlement was vexatious. I am also satisfied that the Landlord's conduct in defending this proceeding on grounds that had no reasonable prospect of success and raising arguments that were unsustainable was also vexatious.

62. This conduct has caused substantial disadvantage to the Tenant in terms of the very substantial costs of this proceeding. Consequently, this is one of those special cases in which an order for costs should be made and they should be costs on an indemnity basis.

SENIOR MEMBER R. WALKER