

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1640/2016

CATCHWORDS

Retail Leases Act 2003; costs; section 92; whether vexatiously conducting a proceeding; conduct constituting vexatious conduct

APPLICANT	AJ Moussi Pty Ltd (ACN 151 243 613)
RESPONDENT	Luxor Corporation Pty Ltd (ACN 098 235 566)
WHERE HELD	Melbourne
BEFORE	BW Thomas, Member
HEARING TYPE	In chambers
DATE OF ORDER	18 July 2017
CITATION	AJ Moussi Pty Ltd v Luxor Corporation Pty Ltd (No 2) (Costs) (Building and Property) [2017] VCAT 1069

ORDER

1 The Respondent's application for costs is dismissed.

BW Thomas
Member

REASONS

BACKGROUND

- 1 The Applicant applied to reinstate this proceeding on the grounds that the Respondent had failed to comply with a Deed of Settlement between the parties dated 31 August 2016. By Orders dated 22 June 2017, I dismissed the application and ordered that any application for costs be filed by 30 June 2017. On that day, the Respondent filed a Submission for Costs. The Applicant did not file any Reply.
- 2 Relying on section 92(2)(a) of the *Retail Leases Act (2003)* (the Act), the Respondent seeks an order for costs in the sum of \$6,702.00, calculated on the Magistrates' Court Scale F. For the reasons set out below, I dismiss the Respondent's application.

THE LAW

- 3 Section 92 of the Act provides –

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 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.

SUBMISSIONS

- 4 The Respondent submits that the Applicant conducted the proceeding in a vexatious way that unnecessarily disadvantaged the Respondent. Relying on *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd* [2015] VSCA 216 (24 Hour Fitness), the Respondent says that in determining whether the proceeding was conducted in a vexatious way, it is relevant to take into account that the claim was bound to fail. At paragraph 28, the Court of Appeal said –

True it is that the Tribunal also considered the hopelessness of the applicant's claim, but there was no error in that. The strength of the applicant's claim for damages was a relevant factor to take into account.

- 5 The Applicant's sought reinstatement of the proceeding on three grounds –
- (a) a breach of clause 3 of the Deed of Settlement requiring the Respondent to pay \$60,000 for carpet at the premises had been ordered, supplied and installed;
 - (b) a breach of clause 8 requiring the Respondent to repair the external canopies at the premises; and
 - (c) the Respondent had failed to pay the Applicant the sum of \$8,593.00 for the repair of an air conditioner at the premises.
- 6 The Respondent submits that the Applicant's application for reinstatement was misconceived, untenable in law and fact and bound to fail, because I found that –
- (a) carpet had not been ordered, supplied installed;
 - (b) there was no evidence that the canopy was continuing to leak after 1 February 2017; and
 - (c) the Deed of Settlement did not impose any obligation on the Respondent in respect of the air conditioning unit.
- 7 I do not accept the Respondent's submission. At paragraph 27 of its judgment in 24 Hour Fitness, the Court of Appeal said –
- 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.** ... It submitted that the Tribunal focused 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 proceeding that is material not consideration of the strength of its claims.**
- 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. ... the Tribunal carefully considered each of those matters and made findings in respect of them. It is true 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 applicants 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 (emphasis added).
- 8 Section 92(2)(a) speaks only of conducting a proceeding in a vexatious way; there is no reference to the strength of the party's claim.

- 9 With regards to conduct, the Respondent submits that the following factors are relevant –
- (a) persisting in what should, on proper consideration, be seen to have been a hopeless case;
 - (b) engaging in conduct which caused a loss of time to the Tribunal and the Respondent;
 - (c) commencing a proceeding in wilful disregard of known facts or clearly established law; and
 - (d) making allegations as to losses claimed to have been incurred, which should not have been made.
- 10 In simply listing these factors, I take it that the Respondent is submitting that they support that the Applicant conducted the proceeding in a vexatious way. However, no particulars of these factors are provided; they are simply unsubstantiated assertions. Therefore, I do not accept that they are evidence of the Applicant having conducted the proceeding in a vexatious manner.
- 11 In any event the application before me involved the interpretation of a Deed of Settlement. I did not find the application was without merit.
- 12 I will therefore order that the Respondent's application for costs be dismissed.

BW Thomas
Member