VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. BP207/2015

BUILDING AND PROPERTY LIST

CATCHWORDS

Retail Lease; application for costs; s 92 Retail Leases Act 2003 (Vic).

FIRST APPLICANT	Ms Rumana Ali
SECOND APPLICANT	Mr Goitom Abraha
FIRST RESPONDENT	Mr Son Si Phu
SECOND RESPONDENT	Ms Thu Nam Thi Nguyen
WHERE HELD	Melbourne
BEFORE	Member C Edquist
HEARING TYPE	Hearing
DATE OF HEARING	25 February 2015, 30 March 2015, 9 April 2015, and 22 April 2015
DATE OF RESPONDENTS' SUBMISSIONS	11 May 2015
DATE OF APPLICANTS' SUBMISSIONS	21 May 2015
DATE OF ORDER	13 November 2015
DATE OF REASONS	13 November 2015
CITATION	Ali v Phu (Building and Property) [2015] VCAT 1801

ORDERS

1 The application of the Respondents that the Applicants pay the Respondents' costs of the hearing of 9 April 2015 is dismissed.

2 The application of the Respondents that the Applicants reimburse to them the $1,320 they have paid to Mr Gadi Kolsky is dismissed.

MEMBER C EDQUIST

APPEARANCES:

For the Applicants	Mr B Gillies of Counsel
For the Respondents	Mr D Laidlaw of Counsel

REASONS

Nature of application

1 I have to consider two applications for costs arising out of this proceeding, which concern a restaurant known as 'The Brown Camel' located in Gordon Street, West Footscray ('the Premises').

Background

2 The Applicants entered into a lease in respect of the Premises on 18 May 2010. The lease is a retail lease under the *Retail Leases Act 2003* (Vic).

3 The Applicants conducted a restaurant at the Premises for about three years, save for periods when the business was closed.

4 At some point the Second Applicant Mr Goitom Abraha ceased to be involved in running the restaurant, but his name was not taken off the lease.

5 From about October 2013, the First Applicant Ms Rumana Ali resumed trading at the premises on her own, with the assistance of members of her family. She did so until 17 October 2014 when she was locked out by her landlords, who are the Respondents Mr Son Si Phu and Thu Nam Thi Nguyen.

6 On 25 February 2015, the First Applicant came to the Tribunal seeking orders restraining the Respondents from performing any building, renovation or other works at the Premises; removing, damaging or otherwise interfering with the First Applicant's property at the Premises; or providing any party exclusive possession, a lease or a licence of the Premises. During this hearing, it became clear that the First Applicant was seeking a declaration that the Respondents' notice of re-entry was invalid, and an order for repossession or relief against forfeiture.

7 Interim orders were made restraining the Respondents in the terms sought by the Applicants on the basis that the First Applicant gave the usual undertaking as to damages. Orders were also made regarding the filing and serving of pleadings and affidavit material.

8 The proceeding came on for hearing on 30 March 2015. At the conclusion of this hearing the Tribunal made a declaration that the lease had been lawfully forfeited. The proceeding (including the counterclaim), being part heard, was adjourned for further hearing on 9 April 2015. The interim orders previously made restraining the Respondents were continued on the basis that the First Applicant gave the usual undertaking as to damages, and further orders for the filing and serving documents were made.

9 At the opening of the hearing on 9 April 2015, the Respondents indicated that they would be making an application for summary dismissal of the

First Applicant's claim for relief against forfeiture under s 75 of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act'). The basis of the application was that the Second Applicant was not a party to the proceeding, and that he ought to be a party as his rights would be affected should relief be granted.

10 After a short adjournment, an application was made that Mr Goitom Abraha should be added as an Applicant. The application was granted. The hearing was vacated and was converted into a directions hearing. The proceeding, being part heard, was adjourned for further hearing on 22 April 2015 and orders were made including orders for the filing of further material by the Applicants and by the Respondents. The interim orders restraining the Respondents were continued on the basis that both Applicants gave the usual undertaking as to damages, and also gave an undertaking to pay to the Respondents the sum of $6,450.24 by 21 April 2015.

11 The hearing continued on 22 April 2015. The Applicants indicated they were proceeding with their application for relief against forfeiture. The Respondents called a lawyer, Mr Gadi Kolsky, who worked part time in-house for their managing agent, and a former managing agent Mr Max Johnstone. The First Applicant gave evidence also.

12 During the course of the day, agreement was reached between the parties that having regard to sums previously paid by the Applicants, the outstanding sum due for rent and outgoings was limited to $5,000.

13 The parties then agreed by consent that the Applicants be granted relief from forfeiture of the lease of the Premises, and that the Applicants must pay all monies payable under the Lease to the end of the rental period of 17 May 2015, agreed at $,5000.

14 The Tribunal also ordered that the Respondents were to pay the costs of Mr Kolsky's attendance at the Tribunal, fixed of $1,320. The Respondents made an application that those costs be paid to them by the Applicants, and that application was reserved.

15 The Respondents also made an application that the Applicants pay their costs of the hearing on 9 April 2015, and that application was reserved.

16 The Respondents were ordered to file and serve submissions in relation to any application for costs which they wished to make by 11 May 2015, and the Applicants were ordered to file and serve answering submissions by 21 May 2015.

17 The Respondents filed submissions in relation to their costs' applications on 11 May 2015. They confirmed that they were seeking the costs thrown away plus preparation of 9 April 2015 on an indemnity basis, and payment by the Applicants of the costs that they had paid to Mr Kolsky in respect of his attendance on 22 April 2015.

18 The Applicants filed their submissions in response on 21 May 2015.

19 The recovery of costs in a dispute concerning a retail lease is governed by s 92 of the *Retail Leases Act 2003* (Vic) ('RLA'). This section 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.*

The Respondents' application for the costs of 9 April 2015

20 The basis of the Respondents' application for the costs of the day and associated preparation is that the costs were thrown away as a consequence of the Applicants' application for relief against forfeiture being misconceived. The Respondents were not specific regarding which Applicant was to meet any order for costs made, but as it was the First Applicant who made the initial application for relief against forfeiture, it must be that Applicant who is to pay any costs awarded.

21 The Respondents submit that the First Applicant's application for relief against forfeiture could not be maintained because only one of two lessees was seeking the relief. The Respondents say they first raised the issue in their Outline of Submissions dated 25 March 2015 at paragraph 20(f). They say they cited the authority of *Australian Retail Enterprises Pty Ltd v N D Cowan Nominees Pty Ltd* [2000] VSC 358 and that 'no controversy existed as to the correctness of that proposition'. They point out that the First Applicant's response was to immediately find and join the Second Applicant.

22 The Respondents say they are seeking indemnity costs pursuant to s 92 of the RLA. From the way they have framed their submissions, it is clear that the Respondents are aware that in order to obtain any order for costs under s 92 they will have to demonstrate that the First Applicant party

conducted the proceeding in a vexatious way that unnecessarily disadvantaged them.

23 The Respondent refers to the Tribunal's decision in *T.B.T (Victoria) Pty Ltd v Trombone Pty Ltd (Costs)* (Building and Property) [2015] VCAT 136 where Senior Member Riegler, having alluded to *Oceanic Line Special Shipping Company Inc v Fay* [1988] HCA 32; (1988) 165 CLR 197 said:

> *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.*

24 The Respondents conclude their argument by asserting that as the claim for relief against forfeiture was at all times unsustainable, and ought not to have been brought in the manner that it had been, an indemnity costs order should be made. The Respondents reject the argument that they should be blamed for raising their objection late. The amount sought is $7,922.20, as set out in an affidavit sworn by Mr Luke Faba, sworn on 11 May 2015.

The Applicants' response regarding the costs of 9 April 2015

25 The Applicants agree that the issue of costs is governed by s 92(2) of the RLA. They cite the decision of the Tribunal in *State of Victoria v Bradto Pty Ltd* [2006] VCAT 1813, where Judge Bowman referred to the passage in *Oceanic Sunline* referred to by Senior Member Riegler, but emphasise that the conduct complained of must be productive of 'serious and unjustified trouble or harassment' or be 'conduct which is seriously and unfairly burdensome, prejudicial or damaging'.

26 The Applicants also refer to Judge Bowman's decision in *State of Victoria v Bradto Pty Ltd* where he said, at [32] that*:*

> *[S]ection 92(2) of the RLA… "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.*

27 The Applicants then refer to a passage from the decision of Senior Member Riegler in *Burd & Cooper Pty Ltd v C&P Cooper Pty Ltd* [2010] VCAT 2002, where he said at [13]:

> *Section 92 focuses on the manner in which a litigant conducts a proceeding, rather than relating to the bringing of or nature of the proceeding in question. Simply initiating a proceeding that is so obviously untenable or manifestly groundless as to be utterly*

> *hopeless is insufficient to enliven s 92 of the RLA. However, continuing to prosecute a proceeding in circumstances where the litigant is aware or ought reasonably be aware that the claim is so obviously untenable or manifestly groundless as to be utterly hopeless may constitute vexatious conduct falling within the definition of s 92 …*

28 The First Applicant points out that she first raised her application for relief against forfeiture at the hearing on 25 February 2015 in the presence of the Respondents and their lawyer. At this time no objection was raised by the Respondents to the First Applicant pursuing relief against forfeiture without Mr Goitom Abraha being a party named in the application.

29 The First Applicant goes on to submit that, on 27 March 2015, she and the Respondents participated in a mediation with the Victorian Small Business Commissioner in relation to 'these proceedings, which included the application for relief against forfeiture' and that Mr Goitom Abraha was not involved.

30 Therefore, the First Applicant says she:

> *proceeded on the basis that the Respondents did not require Mr Goitom Abraha to be joined to the proceedings for the purpose of the relief against forfeiture application*.[1]

31 The First Applicant says that it was not until 30 March 2015, when she was provided with a copy of the Respondents' Outlines of Submissions dated 25 March 2015, that she received notice in paragraph 20(f) that there was the 'added complexity' of Mr Goitom Abraha not being a party.

32 The First Applicant also says that, at the hearing on 30 March 2015, the Respondents agreed that the application for relief against forfeiture would be heard on 9 April 2015, but did not raise the prospect of an application for summary dismissal of her application because Mr Goitom Abraha was not an applicant.

33 The First Applicant says that the Respondents' intention to make an application for summary dismissal of her application for relief against forfeiture, based on *Australian Retail Enterprises Pty Ltd v N D Cowan Nominees Pty Ltd,* was first brought to her attention at 9.54pm on 8 April 2015, the night before the hearing. She contends that this was:

> *an improper opportunistic attempt to stymie the applicant's application for relief against forfeiture at the hearing the next morning on 9 April 2015, as the Respondents believed that Mr Abraha was in Africa, in circumstances where the Respondents*

[1] Applicants' Submissions dated 21 May 2015, paragraph 8.

knew or ought to have known that at the hearing on 9 April 2015 that relief against forfeiture would be granted.[2]

34 The First Applicant contends that if the Respondents had legitimate concerns about the need for Mr Abraha to be joined, they could simply have put the First Applicant's lawyers on notice, and Mr Abraha would have been joined.

35 In the circumstances, the Applicants submit that their conduct in relation to the relief against forfeiture application, and the manner in which their application was brought, cannot amount to vexatious conduct that unnecessarily disadvantaged the Respondents.

36 The Applicants also say that it would be contrary to the principles of justice or fairness for an order for costs to be made in favour of the Respondents in the light of the Respondents' own conduct in the relief against forfeiture application, in particular:

(a) only bringing the application for summary dismissal to the Applicants' attention on 8 April 2015 when they had had over a week to raise their objection, and their intention to make the application;

(b) erroneously claiming costs as a head of damages as part of the forfeiture application;

(c) erroneously relying on *Market Ring Write Services Pty Ltd v Dudson* [2013] VCAT 546 without disclosing to the Tribunal that the decision had been criticised in subsequent decisions of the Tribunal;

(d) the Respondents' erroneous claims for outgoings;

(e) the Respondents' erroneous claim for $3,000, which was paid to the Applicants to be put towards covering capital costs associated with the Applicants fixing the signage of the premises;

(f) the Respondents' extensive misguided reconciliation statements, which were required to be revised on three separate occasions.

Ruling as to the application for the costs of 9 April 2015

37 In *State of Victoria v Bradto Pty Ltd* [2006] VCAT 1813, Judge Bowman said, at [66 and 67]:

> *66 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*

[2] Applicants' Submissions dated 21 May 2015, paragraph 13.

> *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).*

38 I have quoted this passage because it emphasises that, for the purposes of an application for costs under s 92(2)(a), the party against whom the costs order is sought must have **conducted** the proceeding in a vexatious way. This is extremely pertinent in the present case. The First Applicant may have started the proceeding imprudently, as both Applicants should have initiated the application for relief against forfeiture. However, I respectfully agree with the observation made by Senior Member Riegler in *Burd & Cooper Pty Ltd v C&P Cooper Pty Ltd* [2010] VCAT 2002, referred to above, that simply initiating a proceeding that is obviously untenable or manifestly groundless is not sufficient to enliven s 92 of the RLA.

39 It was the successful application to join the Second Applicant that necessitated the vacation of the hearing on 9 April 2015.

40 However, I do not think it necessarily flows that the First Applicant should be held responsible for the Respondents' costs of that day, and associated preparation time, thrown away.

41 The First Applicant says that she did not become aware of the seriousness of the error she had made in failing to name the Second Applicant as a party to the application for relief against forfeiture until the night before the scheduled hearing on 9 April 2015.

42 The First Applicant says, and I accept, that the Respondents did not confront her with a clear statement of the law as expressed in *Australian Retail Enterprises Pty Ltd v N D Cowan Nominees Pty Ltd* on 30 March 2015, or on any subsequent day, until 8 April 2015. I note that this authority is referred to in the Respondents' Submissions dated 9 April

2015,[3] but **not** in the Respondents' Submissions delivered in March. The First Applicant says she received the Respondents' Submissions in March on 30 March, even though they are dated 25 March 2015 on the front page. I note the date on the final page of those Submissions is 30 March 2015, which is consistent with the First Applicant's statement regarding their date of delivery.

43 Once the First Applicant understood that to proceed without joining the Second Applicant as a party would be hopeless, the First Applicant took steps to ensure that the Second Applicant was joined. In these circumstances, it cannot be said that the First Applicant continued after that point to conduct the proceeding in a vexatious manner. I accordingly find that the Tribunal's discretion to award costs under s 92(2)(a) is not enlivened.

The Respondents' application for reimbursement of the costs of Mr Gadi Kolsky's attendance at the Tribunal on 22 April 2015

44 As noted, the Tribunal, on 22 April 2015, fixed the costs of Mr Kolsky's attendance at $1,320, and ordered that the Respondents pay Mr Kolsky those costs. The Respondents refer to the affidavit sworn on 11 May 2015 by Mr Luke Faba in which he deposes [at paragraph 11] that he has, on behalf of the Respondents, made payment to Mr Kolsky of those costs. I accept Mr Faba's evidence on this point.

45 The Respondents say, in anticipation of an argument on the part of the Applicants, that s 92 of the RLA governs this application for costs, that the Applicants' insistence on calling Mr Kolsky only to cross-examine him for a collateral purpose, and even then to no end, was vexatious. In particular, the Respondents say that Mr Kolsky was called as a witness in relation to a late challenge to the service of the s 146 notices. They say that Mr Kolsky had clear and unambiguous evidence as to service, and that the Applicants were put on notice as to that evidence, and were asked to excuse the witness. The response was an 'emphatic insistence' that he would be challenged.

46 The Respondents say that Mr Kolsky's evidence on this point went entirely unchallenged and that, in reality, the Applicants wished to have him appear to answer a series of questions regarding instructions for, and the quantum of, the Respondents' claims as set out in the various notices. They say the reason for Mr Kolsky's attendance 'was for evidence, which the applicants sought to elicit from him'.[4] They contend his evidence was ultimately irrelevant to the proceeding, and unjustified.

47 The affidavit of Mr Faba contains evidence relevant to these propositions. Specifically, Mr Faba deposes:

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[3] At paragraph 11.
[4] Respondents' Submissions dated 11 May 2015, paragraph 17.

(a) On 15 April 2015, he requested that Mr Kolsky provide an affidavit of service in respect of the proceedings.

(b) Mr Kolsky provided that affidavit on 16 April 2015, and it was filed with the Tribunal, and served on the Applicants on 17 April 2015.

(c) A letter accompanying the affidavit of service addressed to the Applicants' lawyers dated 17 April 2015 said that Mr Kolsky had advised that he would require professional witness fees for his attendance at the hearing on 22 April 2015, and in the light of this it was requested that the Applicants accept the position in Mr Kolsky's affidavit, and consent to his not attending at the hearing. The letter went on to put the Applicants on notice that if they required Mr Kolsky's attendance, and his evidence supported that which is in his affidavit, the Respondents would seek costs on the basis that the requirement for his attendance was vexatious.

48 Mr Faba's affidavit goes on to say that the Applicants' lawyers responded by email on 20 April 2015 stating:

> *We advise that your reference to the fees of Mr Kolsky and the costs referred to in your letter are misconceived and do not warrant a response.*
>
> *In circumstances where the issue of service is in controversy between the parties, the assertions concerning service, without full details, in the affidavit of Mr Kolsky are wholly inadequate.*

49 Mr Faba's affidavit goes on to say that Mr Kolsky, being a deponent in an affidavit filed with the Tribunal, was required to attend the hearing on 22 April 2015. In an attempt to avoid having to pay Mr Kolsky the costs he sought under a costs agreement, Mr Faba served Mr Kolsky with a Summons to Appear.

The Applicants' response to the claim for reimbursement of the costs of Mr Kolsky's attendance

50 The Applicants dispute that they called Mr Kolsky only to cross-examine him for some collateral purpose. Rather, they say, Mr Kolsky was required to attend the hearing on 22 April 2015 because of the orders made by the Tribunal on 30 March 2015.

51 Reference to the relevant order made by the Tribunal on 30 March 2015 indicates that it mandated:

> *All deponents, save for Ms Marina Stanisavljevic, are required to attend for cross-examination unless prior written notice is given by the opposite party that such attendance is not required.*

52 The Applicants clearly take the view that this order required Mr Kolsky to attend. The contrary interpretation, of course, is that the order had the

effect that Mr Kolsky would have to attend if the Applicants did not agree that his attendance was not required.

53 The Applicants confirm that by an email dated 20 April 2015 their lawyers advised that the affidavit of Mr Kolsky was 'wholly inadequate' and that the email requested that the Respondents provide them with a list of contemporaneous evidence including mail logs, memoranda of service, photocopies of envelopes, lawyer billing records and file notes.

54 The Applicants contend that the Respondents' lawyers failed to provide any such contemporaneous evidence prior to the hearing on 22 April 2015 and, in fact, completely ignored the request of 20 April 2015. The Applicants say:

> *If the Respondent's lawyers had produced the information request (sic) or any relevant contemporaneous evidence, there would have been no need to call Mr Kolsky as a witness.*[5]

55 The Applicants point out that contemporaneous evidence in the form of a copy of Mr Kolsky's diary for the days on which service of the s 146 notices was said to have been effected, were produced in evidence by Mr Kolsky.

Ruling on the issue of whether the Applicants are to reimburse the Respondents in respect of Mr Golsky's costs

56 At the hearing on 22 April 2015, Mr Gillies, counsel for the Applicants, in cross-examination of Mr Kolsky asked him questions about the figures in one of the s 146 notices. When Mr Laidlaw, counsel for the Respondents, objected, Mr Gillies responded that the question was relevant to the calculation of rent and outgoings. There is accordingly, I consider, some attraction in the Respondents' argument that the Applicants were seeking to elicit evidence from Mr Kolsky which would assist their case.

57 However, I find the Applicants' conduct in insisting on Mr Kolsky attend the hearing on 22 April 2015, and then cross-examining him on matters other than service of the notices, was not conduct that was vexatious and that unnecessarily disadvantaged the Respondents, for the purposes of s 92(2)(a) of the RLA. I make this finding for these reasons:

(a) Merely by insisting that Mr Kolsky attend the hearing on 22 April 2015, the Applicants were not acting unreasonably. The Applicants are right in saying that Mr Kolsky was obligated by the Tribunal's order of 30 March 2015 to attend at the hearing for cross-examination as he was a deponent. In circumstances where the Respondents were given the opportunity to provide further evidence in support of Mr Kolsky's affidavit, but declined to do so, I consider that the

[5] Applicants' Submissions dated 21 May 2015, paragraph 24.

Applicants acted reasonably in refusing to agree to the request that Mr Kolsky be excused from attending the hearing on 22 April 2015.

(b) Furthermore, I consider that it cannot be said that the Applicants' insistence on Mr Kolsky attending the hearing was a matter that unnecessarily disadvantaged the Respondents, because the Respondents themselves benefited from Mr Kolsky's attendance. He was able to put into evidence relevant extracts from his diary relating to service of the notices.

(c) I do not think it can be said that the Applicants behaved vexatiously in cross-examining Mr Kolsky regarding the contents of the s 146 notices, once he was in the witness box. The Tribunal allowed these questions to be put.

(d) Finally, the Applicants were ultimately successful in their application for relief against forfeiture. Central to this success was the fact that the Applicants managed to persuade the Respondents, after the First Applicant had given evidence, that after allowing for previous payments made, the amount due to the Respondents for rent and outgoings under the lease up to and including 17 May 2015 was limited to $,5000. In these circumstances, it is hard to understand how it can be said that the cross-examination of Mr Kolsky regarding the contents of the s 146 notices, as distinct from the events regarding their service, was a matter that 'necessarily disadvantaged' Respondents, even if the cross-examination was vexatious (and as I say, I do not think it was).

58 For these reasons, I dismiss the Respondents' application that the Applicants should pay or reimburse to the Respondents the costs of $1,320.00 which the Respondents have paid to Mr Kolsky.

MEMBER C EDQUIST