

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP751/2015

CATCHWORDS

Retail lease; application for costs; s 92 *Retail Leases Act 2003*.

APPLICANT	Level 353 Pty Ltd (ACN 601 443 685) (Trading as Imagine Lounge Bar and Dining)
FIRST RESPONDENT	Granopa Holdings Pty Ltd (ACN 111 476 638)
SECOND RESPONDENT:	Causeway Hotels Pty Ltd (ACN 124 538 772)
WHERE HELD	Melbourne
BEFORE	Member C Edquist
HEARING TYPE	Hearing 8 July and 10 July 2015
DATE OF FILING OF APPLICANT'S SUBMISSIONS	23 July 2015
DATE OF FILING OF RESPONDENTS' SUBMISSIONS	Not filed
DATE OF ORDER	25 November 2015
DATE OF REASONS	25 November 2015
CITATION	Level 353 Pty Ltd v Granopa Holdings Pty Ltd & Anor (Building and Property) [2015] VCAT 1874

ORDERS

- 1 The application of the Respondents that the Applicant pay to them the costs of the hearing on 1 July 2015 is dismissed.
- 2 The application of the Respondents that the Applicant pay to them costs of the hearing on 8 July 2015 is dismissed.
- 3 The Applicant is to pay to the Respondents its costs of appearing at the hearing on 10 July 2015, fixed at \$3,908.

MEMBER C EDQUIST

APPEARANCES:

For Applicant

On 8 July 2015, Mr N Singh, director

On 10 July 2015, no appearance

For Respondents

On 8 July and 10 July 2015, Mr L Truong of
Counsel

REASONS

Nature of application

- 1 In this proceeding, the Applicant (a tenant of premises in a hotel situated in Little Collins Street, Melbourne) sought an injunction to restrain the Respondents (the landlord and the hotel operator respectively) from re-entering the leased premises.
- 2 On 9 June 2015, the Tribunal granted an interim injunction and listed the matter for further hearing on 8 July 2015. The interim injunction was granted on the condition that the Applicant provide to the First Respondent a bank guarantee in the sum of \$33,000 ('the Bank Guarantee') by 30 June 2015.
- 3 By an order made at a Directions Hearing on 1 July 2015, the date for provision of the Bank Guarantee was extended to 9 July 2015.
- 4 The proceeding came before me for hearing on 8 July 2015. On that day I made orders requiring the Applicant to file and serve a statement of its claims and supporting affidavit material by 9 July 2015. The hearing was otherwise adjourned, part heard before me, for further hearing on 10 July 2015.
- 5 At the further hearing on 10 July 2015, the Applicant failed to appear, and I ordered that the interim injunction be discharged and the proceeding otherwise be dismissed, and declared the First Respondent had re-entered the premises. The Respondents applied for costs and I made further orders for the filing and service of written submissions in respect of costs. Written submissions were subsequently filed by the Respondents, but no submissions were received from the Applicant.
- 6 The Respondents seek their legal costs of, and incidental to, the hearings in the proceeding on 1, 8 and 10 July 2015.
- 7 The Respondents filed an affidavit in support of their submissions sworn by one of their solicitors, Meagan Louise Grose. Reference to exhibit MLG-1, which sets out in tabular form the Respondents' solicitors' costs of the proceeding from 30 June 2015, and also to Exhibit MLG-2 which sets out the fees of Mr Truong of Counsel incurred in the proceeding from 30 June 2015, makes it clear that the Respondents are effectively seeking the costs of the whole proceeding, save for the costs of the initial hearing day on 9 June 2015. The Respondents seek costs on an indemnity basis in respect of the three hearings totalling \$35,374.50, alternatively, costs on the County Court scale fixed in the amount of \$27,739.20, or alternatively, such other sums the Tribunal sees fit.

Relevant legislation

8 As the proceeding involved a retail lease within the meaning of the *Retail Leases Act 2003* ('the RLA'), the issue of costs is governed by s 92 of that Act. This reads:

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.

Relevant legal principles

- 9 The Respondents accept that the issue is whether, for the purposes of s 92(2)(a), the Applicant conducted the proceeding in a vexatious way that unnecessarily disadvantaged them. They cite the decision of the Tribunal in *State of Victoria v Bradto Pty Ltd* [2006] VCAT 1813, where Judge Bowman at [67] emphasised 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'.
- 10 The Applicant also refers to Judge Bowman's comments in *Bradto* where he said at [78] that the Respondent's conduct, which involved disregarding prior orders of the Tribunal and advancing irrelevant and nonsensical arguments, was vexatious on the basis that it:
- involved considerable wastage of time
- and caused disadvantage to the Applicant:
- in terms of the incurring of what one would expect to be quite substantial legal costs.
- 11 The Respondents contend that the Applicant vexatiously conducted the proceeding because:
- (a) it completely disregarded and breached the Tribunal's orders on numerous occasions, without explanation;

- (b) it at no time provided any affidavit or other cogent material supporting the continuation of the interim injunction granted on 19 (sic) June 2015;
 - (c) it failed to provide a bank guarantee at any time, despite this being a condition of the interim injunction granted on 19 (sic) June 2015;
 - (d) Mr Singh was one hour late to the hearing on 8 July 2015, and there was no time for evidence to be adduced, and no affidavit material or other legal or factual basis was put forward to justify revisiting the orders previously made;
 - (e) after the Respondents foreshadowed, on 8 July 2015, that they would re-enter the Premises if a bank guarantee was not provided by 9 July 2015, the Applicant requested that the Tribunal list the matter for hearing on 10 July 2015. The Applicant failed to appear. The hearing was pointless.
- 12 The Respondents contend that the Applicant's vexatious conduct unnecessarily disadvantaged them because it caused them to incur substantial legal expenses in preparing for and defending the proceeding, and attending the Tribunal.
- 13 In my view, it is appropriate to address separately the claims for costs in respect of 1 July, 8 July and 10 July 2015.

The directions hearing on 1 July 2015

- 14 This hearing came about because Mr Singh wrote to the Tribunal on 26 June 2015 seeking more time in which to provide the Bank Guarantee. The justification was that he had been in hospital for three days.
- 15 The proceeding was listed for directions before Senior Member Walker. The Applicant was represented by Mr Singh, and the Respondents were represented by their principal solicitor, Mr Mengolian.
- 16 According to the affidavit of Ms Grose, the hearing on 1 July 2015 was a half day hearing. Ms Grose deposed that:
- the Applicant raised allegations for the first time that variously included that the Applicant was not obliged to provide the Bank Guarantee, that the Respondents had somehow waived the obligation to provide the Bank Guarantee, and that the reason why the Applicant could not provide the Bank Guarantee was due to the Respondent's conduct. (sic)
- 17 It was deposed by Ms Grose that the Applicant did not file any affidavit material in support of these allegations, nor in relation to its application for an extension of time in which to provide the Bank Guarantee, nor in relation to its attempts to procure the Bank Guarantee by 30 June 2015.

Ruling as to the application for costs of the directions hearing on 1 July 2015

18 I consider that the fact the Applicant's representative Mr Singh had been in hospital for three days constitutes a reasonable justification for seeking an extension of time from the Tribunal in which to provide the Bank Guarantee. Senior Member Walker evidently thought so too, as the extension of time was granted. There was nothing vexatious about the making of this application for an extension of time in which to supply the Bank Guarantee in the circumstances in which it was made, and I accordingly find that the Respondents are not entitled to any costs in relation to the directions hearing on 1 July 2015.

The hearing on 8 July 2015

19 Ms Grose deposes that prior to the hearing Mr Singh emailed her and Mr Mengolian advising that the Applicant would oppose the Respondents being legally represented at the hearing on 8 July 2015. Ms Grose also deposes that the Respondents were ready to proceed at 2.15pm, but the hearing was delayed by approximately an hour because the Applicant had not paid the daily hearing fee, and did so only at about 3.00pm that day. The Applicant had not provided to the Tribunal, nor to the Respondents, a statement of orders sought and the Applicant's affidavit material, despite having been ordered to do so by the Tribunal.

20 Ms Grose says:

The hearing did not conclude by the end of the setting (sic) day on 8 July 2015, due to the hearing not commencing until after 3 pm.

21 Reference to my notes of the hearing on 8 July 2015 confirms that the hearing fee was not paid at the outset by the Applicant, and it was only after a fee waiver application had been made and rejected, that the hearing fee was paid by or on behalf of the Applicant. The hearing got underway at 2.55pm.

22 I do not agree that the only reason the matter was not concluded on 8 July 2015 was because of the late commencement due to the Applicant having failed to pay the hearing fees until nearly 3.00pm. Another relevant factor was that the Applicant had not filed a document setting out the orders it wanted and supporting affidavit material. A third factor was that time was taken up because Mr Singh made submissions about the Respondents' unreasonable conduct regarding the charging of outgoings.

23 I consider that the Applicant is not to be criticised because Mr Singh made submissions about the conduct of the Respondents regarding the charging of outgoings, but the Applicant is certainly to be criticised because:

- (a) it had not, by 26 June 2015, or at all prior to 8 July 2015, filed a statement setting out briefly its claims including the relief sought and supporting affidavit material; and

- (b) it did not pay the hearing fee it was required to pay by the start of the hearing, with the consequence that about one third of the time allocated for the hearing on that day was lost.
- 24 I find that these two matters in combination contributed to the proceeding not being finalised on 8 July 2015. However, this finding does not necessarily mean that the Applicant should pay all the Respondents' costs of, or incidental to, the hearing on that day. The two factors need to be considered separately.
- 25 The Applicant's failure to abide by the order made by the Tribunal that it should file, by 26 June 2015 a statement setting out briefly in numbered paragraphs its claims including the relief or orders sought, and also file affidavit material setting out the relevant factual matters upon which the claims were based, was, in my view, vexatious conduct. However, it was conduct which did not unnecessarily disadvantage the Respondents, and this is necessary if s 92(2)(a) of the RLA is to be engaged. The relevant point is that the Applicant was entitled to have a hearing regarding the issue of whether the injunction granted on 9 June 2015 should be extended. The Respondents inevitably had to be at that hearing. They are not entitled to their costs of the day just because the Applicant was not prepared for the hearing.
- 26 It remains to consider the relevance of the Applicant's failure to pay the hearing fee by the scheduled starting time. This failure was arguably conduct which constituted a failure to comply with the Tribunal's fee regulations which unnecessarily disadvantaged the Respondents by causing them expense, and therefore disadvantaged them. The relevant expense arose from the delay caused directly as a result of the Applicant's failure to pay the hearing fee by the scheduled starting time. This was conduct that, might, accordingly, in a case not involving a retail lease, have enlivened the Tribunal's discretion to award costs pursuant to s 109(3)(a)(ii) of the *Victorian Civil and Administrative Tribunal Act 1998* ('the VCAT Act').
- 27 However, as this proceeding concerned a retail lease, s 109 of the VCAT Act (which is to be found in Part 4 of that Act) is expressly excluded from consideration by the language of s 92(1) of the RLA.
- 28 I consider that the Applicant's conduct in paying the hearing fee late on 8 July 2015, after making an unsuccessful application for a fee waiver, may have been unsatisfactory, but it was not vexatious. I accordingly find that the Tribunal's discretion to award costs pursuant to s 92(2)(a) is not enlivened.
- 29 The Respondents' application for the costs of and incidental to the hearing on 8 July 2015 is accordingly dismissed.

The hearing on 10 July 2015

- 30 The contention of the Respondents regarding the hearing on 10 July 2015 is that it was unnecessary from their point of view because they had

foreshadowed on 8 July 2015 that if the Bank Guarantee was not provided by 9 July 2015 they would re-enter the Premises, and that any further hearing would accordingly be an application for relief against forfeiture of the Premises. The Respondents say it was the Applicant which asked for the matter be listed on 10 July 2015.

- 31 I consider that this contention is well-founded. The injunction granted on 9 June 2015 was granted on the express condition that the Applicant was to provide a bank guarantee in the sum of \$33,000, by 30 June 2015. That deadline was extended by the Tribunal on 1 July 2015 to 9 July 2015.
- 32 The Respondents were transparent about their position at the hearing on 8 July 2015. They flagged that if the Bank Guarantee was not provided on 9 July 2015 they would re-enter the Premises on the morning of 10 July 2015. And this is precisely the course they adopted. The Respondents are entitled to say, accordingly, that they did not need to come back to the Tribunal on 10 July 2015 because, once 9 July 2015 had passed without the Bank Guarantee being provided, they were entitled to re-enter the Premises and forfeit the Lease. They did not need any order of the Tribunal.
- 33 In these circumstances I find that the Applicant acted vexatiously in seeking to have the matter listed for further hearing on 10 July 2015, and then failing to appear. This vexatious conduct unnecessarily disadvantaged the Respondents because they had to appear on 10 July 2015 for no essential purpose.
- 34 For these reasons, I order that the Applicant is to pay the costs of the appearance of the Respondents at the hearing on 10 July 2015.
- 35 The relevant Counsel's fees are set out in Exhibit MLG-2 to Ms Grose's affidavit. They are the fees for half a day's preparation, for which Mr Truong charged \$1,650 (which I take to include GST), and the appearance fee for half a day, for which \$1,650 was also charged. The total Counsel's fees allowed in respect of the hearing on 10 July 2015 are \$3,300.
- 36 In respect of an instructing solicitor for the hearing on 10 Jul 2015, the fee allowed on the County Court scale, according to Exhibit MLOG-1 to Ms Grose's affidavit, is \$608. I allow that figure.
- 37 The total fees that the Applicant must pay to the Respondents in respect of the hearing on 10 July 2015 are therefore fixed at \$3,908.

MEMBER C EDQUIST