

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP599/2019

CATCHWORDS

Costs application: Section 92 of the *Retail Leases Act 2003* considered; s 115B of the *Victorian Civil and Administrative Tribunal Act 1998* considered in relation to reimbursement of fees.

APPLICANT	Mandel Nominees Pty Ltd (ACN 004 931 364)
FIRST RESPONDENT	Spare Change Sunshine Pty Ltd (Deregistered 17/4/17)
SECOND RESPONDENT	Hui Xia Zhou
WHERE HELD	Melbourne
BEFORE	Member C Edquist
HEARING TYPE	Costs Hearing
DATE OF HEARING	25 June 2019
DATE OF RECEIPT OF APPLICANT'S SUBMISSIONS ON COSTS	3 July 2019
DATE OF RECEIPT OF SECOND RESPONDENT'S SUBMISSIONS ON COSTS	10 July 2019
DATE OF ORDER	20 September 2019
CITATION	Mandel Nominees Pty Ltd v Spare Change Sunshine Pty Ltd (Building and Property) [2019] VCAT 1391

ORDER

The applicant's claim for costs against the second respondent is dismissed.

MEMBER C. EDQUIST

REASONS

Introduction

- 1 This decision relates to an application for costs made by the applicant pursuant to leave granted at a hearing on 25 June 2019. In brief, the applicant, Mandel Nominees Pty Ltd (“**Mandel Nominees**”) as landlord had entered into a lease with Spare Change Sunshine Pty Ltd (“**Spare Change**”) as tenant of premises in Dawson Street, Sunshine. Spare Change breached the lease by becoming deregistered on 17 April 2017, and Mandel Nominees brought this proceeding seeking an order for possession against Spare Change, and seeking damages against the guarantor of the tenant’s performance of the lease, namely Hui Xia Zhou, the second respondent.
- 2 On 5 April 2019 the Tribunal made an order giving possession of the premises to Mandel Nominees, and directed that possession of the premises be provided by 3 May 2019. Questions of damages were reserved for hearing on 25 June 2019.
- 3 An affidavit sworn by a director of Mandel Nominees, Mr Leon Mandel, on 9 May 2019 was filed in support of the claim for damages. No material was filed by Ms Zhou in relation to damages.
- 4 The hearing on 25 June 2019 came on before me. I made an order for payment of damages of \$68,571.06 and for reimbursement of fees of \$982.70. Costs were reserved, on the basis that by 9 July 2019 the parties were to exchange short submissions on costs addressing the following two issues:
 - (a) whether for the purposes of s 92(2)(a) of the *Retail Leases Act 2003* (“**the RLA**”) Ms Zhou had conducted the proceeding in a vexatious way that unnecessarily disadvantaged Mandel Nominees; and
 - (b) whether terms of the lease creating an entitlement in the applicant to costs are applicable in the light of s 94 of the RLA.

Two claims for costs made

- 5 Analysis of the written submissions put forward by Mandel Nominees indicates that two claims for costs are made. The first is a claim made against Ms Zhou in respect of the costs incurred by Mandel Nominees in obtaining possession of the premises against the deregistered tenant Spare Change. These costs were said to total \$15,738.25 inclusive of GST¹. This claim was put under the indemnity contained in clause 15.1.3 of the lease for loss resulting from the landlord having entered into the lease and due to the lease becoming unenforceable against the tenant. Under the indemnity, it is argued that Ms Zhou as guarantor must indemnify Mandel Nominees as landlord for costs notwithstanding the fact that Mandel Nominees was prohibited by the operation of s 92 of the RLA from obtaining an order for

¹ Refer paragraph 7 of the affidavit of Lien Mandel sworn 9 May 2019.

costs from the tenant. It was emphasised that the claim was not a claim for costs in the proceeding, but a separate claim to enforce the indemnity.²

- 6 The second claim for costs was a conventional claim for costs made under ss 92(2)(i) of the RLA on the basis that Ms Zhou was alleged to have behaved in a vexatious way that unnecessarily disadvantaged Mandel Nominees.

Disposition of the first claim for costs

- 7 In Mr Mandel's affidavit of 9 May 2019, details were given of losses and damages claimed against Ms Zhou. Those losses and damages included legal costs and disbursements incurred in bringing the proceeding.

- 8 In paragraph 7 of the affidavit, the following costs were particularised:

(a) Account of 17 August 2019 issued by B Gershov, Lawyer, including disbursements (inclusive of GST)	\$6,938.25
(b) Senior Counsel fees (inclusive of GST)	\$8,800.00
Sub total	<u>\$15,738.25</u>

9. These costs and disbursements were evidenced by copies of the following invoices:

(a) Mr Gershov, 4 April 2019:	\$1,070.70
(b) Mr Gershov, 17 April 2019, of \$8,507.55 less fees included of George H Golvan QC of \$2,640.00:	\$5,867.55
Total of Mr Gershov's fees	<u>\$6,938.25</u>
(c) Mr Golvan's invoice, 3 April 2019	\$6,160.00
(d) Mr Golvan's invoice 9 April 2019	\$2,640.00
Total of Mr Golvan's fees	<u>\$8,800.00</u>

10. It follows that this head of loss and damage had been fully disclosed to Ms Zhou before the damages hearing on 25 June 2019. The only issue was whether the claim for costs made under the indemnity was precluded by operation of s 94 of the RLA.

11. Ms Zhou filed written submissions on costs dated 9 July 2019. In those submissions, Ms Zhou did not directly address the effect of s 94 of the RLA on Mandel Nominees's claim for costs under the indemnity, even though the orders made at the conclusion of the hearing on 25 June 2019 effectively directed her to do so. Nonetheless, it is necessary to deal with the issue.

12. Section 94 of the RLA provides:

(1) A provision of a retail premises lease or of an agreement (whether or not the agreement is between parties to a retail premises lease) is void to the extent that it is contrary to or inconsistent with anything in

² Refer Mandel Nominees's written submissions at [8].

this Act (including anything that the lease is taken to include or provide because of a provision of this Act).

13. Mandel Nominees is relying on a provision of the lease that it contends enables it to recover from the guarantor the costs incurred in bringing a proceeding for an order for possession against the tenant. It concedes, at [8], that it could not recover these costs against the tenant itself. Notwithstanding, it says the claim for costs made under the indemnity is valid because it is a claim for a loss resulting from it having entered into the lease, and due to the lease becoming unenforceable against the tenant. The claim under the indemnity “is not a claim for costs in the proceeding, but a separate claim to enforce the indemnity against loss”.
14. I do not accept that the indemnity contained in clause 15.1.3 of the lease can prevail over s 92 of the RLA. Section 92(1) is very broad in its scope, as it provides that “each party to a proceeding before the Tribunal under this Part is to bear its own costs in the proceeding”.
15. Mandel Nominees was the party that instituted this proceeding in order to recover possession of the premises. As a party, it must bear its costs of the proceeding, unless the default position regarding costs established by s 92(1) is displaced by s 92(2).
16. If the indemnity contained in clause 15.1.3 were to be applied in the manner contended for by Mandel Nominees, Mandel Nominees could, even though it is a party to the proceeding, recover its costs by operation of that clause. Section 94(1) of the RLA strikes down any provision of a retail premises lease which is contrary to or inconsistent with anything in the RLA. On this basis, I find that to the extent that clause 15.1.3 of the lease operates to create an entitlement in Mandel Nominees to recover its costs, it is void. I accordingly find that Mandel Nominees’ claim for costs, made under the indemnity, fails.

THE CONVENTIONAL CLAIM FOR COSTS

- 17 Mandel Nominees accepts that the Tribunal has jurisdiction to award costs under s 92 of the RLA. Ms Zhou contests this. She contends that the Tribunal has no jurisdiction to hear and determine an application by a landlord against a guarantor of a tenant’s obligations under a retail premises lease by reason of the operation of s 89(1) of the RLA. For convenience, I set out the provision:

89 Jurisdiction of Tribunal

(1) The Tribunal has jurisdiction to hear and determine an application by any of the following persons seeking resolution of a retail tenancy dispute—

(a) a landlord or tenant under a retail premises lease;

(b) a guarantor of a tenant's obligations under a retail premises lease;

(c) a person who has given an indemnity to a landlord for loss or damage arising as a result of a breach by a tenant of a retail premises lease;

(d) a specialist retail valuer.

- 18 Ms Zhou’s argument is that the current application for costs is not an application brought within the ‘narrow definition’ of “retail tenancy dispute” as prescribed in s 89(1) of the RLA.
- 19 The definition of *retail tenancy dispute* is, primarily, to be found in s 81(1) of the RLA, and reads as follows:

(1) In this Part, *retail tenancy dispute* means a dispute between a landlord and tenant—

(a) arising under or in relation to a retail premises lease to which—

(i) this Act applies or applied because of Part 3; or

(ii) the **Retail Tenancies Reform Act 1998** or the **Retail Tenancies Act 1986** applies or applied; or

(b) arising under a provision of the **Retail Tenancies Reform Act 1998** or the **Retail Tenancies Act 1986** in relation to a lease to which that Act applies or applied; or

(c) arising under a lease that provides for the occupation of retail premises in Victoria to which none of those Acts apply or applied—

despite anything to the contrary in this Act (apart from subsection (2) and section 119(2)).

- 20 If the definition finished there, then Ms Zhou’s argument that Mandel Nominee’s claim was not a retail tenancy dispute may have had a basis. However, she overlooks ss 81(1A) which provides:

In addition, a *retail tenancy dispute* includes—

(a) a dispute between a landlord and a guarantor of a tenant's obligations under a lease arising in circumstances referred to in subsection (1)(a), (b) or (c); and

(b) a dispute between a landlord and a person who has given an indemnity to the landlord for loss or damage arising as a result of a breach by a tenant of a lease in circumstances referred to in subsection (1)(a), (b) or (c).

- 21 Because the present proceeding is concerned with a dispute between a landlord and a guarantor of a tenant’s obligations under a lease to which the RLA applies, and that guarantor is also a person who has given an indemnity to the landlord for loss and damage arising as a result of a breach by a tenant under such a lease, I find that by reason of both ss 81(1A)(a) and (b), the present dispute is a retail tenancy dispute.

- 22 Because the proceeding is concerned with a retail tenancy dispute, and because the application has been brought by a landlord under a retail premises lease, the Tribunal is given jurisdiction by s 89(1)(a).

- 23 A further argument raised by Ms Zhou is that s 91 of the RLA “restricts the Tribunal’s discretion on the question of costs in circumstances where [the section] expressly prescribes orders that the Tribunal can make”.
- 24 This argument is misconceived. Under s 91 of the RLA, the Tribunal may make certain orders in relation to retail tenancy disputes, but its power to make an award of costs is not to be found in that section. Rather it is to be found in s 92. Because this provision is pivotal, I set it out in full:
- 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.
- 25 It was common ground between the parties that if s 92 was to be engaged, it was because Ms Zhou had conducted the proceeding in a vexatious way that unnecessarily disadvantaged Mandel Nominees.

Vexatious conduct

26. In *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd*³ the Court of Appeal said, at [4]:

Section 92(2)(a) was considered by Deputy President Bowman in *State of Victoria v Bradto Pty Ltd and Timbrook Pty Ltd* (‘Bradto’). He observed that the provision requires the Tribunal to be satisfied that it is fair to order costs because a party conducted the proceeding in a vexatious way and that such conduct unnecessarily disadvantaged another party to the proceeding. Deputy President Bowman referred to the distinction between a proceeding which is conducted in a vexatious manner and the bringing or nature of the proceeding being vexatious. He held that 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.’ This encapsulates the circumstances in which conduct may be classified as vexatious.

³ [2015] VSCA 216.

27 Ms Zhou referred to the decision of Member Kincaid in *Grenville Trading Pty Ltd v Brasnell Ltd*⁴ in which he referred to the same principles.

Discussion

28 To engage s 92(2)(a), Mandel Nominees must establish vexatious conduct on the part of Ms Zhou. The factors relied on were enumerated in Mandel Nominees's submissions at [17]. In short, they were:

- (a) Ms Zhou failed to file and serve any response material prior to the hearing or giving an indication of what defences she proposed to adopt at the hearing;
- (b) she did not personally attend the hearing, and this caused delays because her representative Mr Nguyen had to request adjournments to make telephone calls in order to obtain instructions, and of course she could not be cross-examined;
- (c) a new and potentially serious defence was raised to the effect that she could not speak English when she executed the guarantee; and
- (d) in respect of the majority of the claims there was no bona fide defence.

29 While I accept each of these criticisms of the conduct of Ms Zhou, I do not think her conduct was vexatious. At the hearing Mr Nguyen speedily conceded on her behalf a number of issues, but contested the claim for liability in respect of damage to the shop front. The reasonableness of that course became clear when Mandel Nominees dropped the claim at the hearing. The import of this is that, even though it could not necessarily be said that Ms Zhou was acting vexatiously merely by insisting on a hearing regarding damages, it certainly could not be said that she was acting vexatiously when a rebuttal at the hearing of one of the claims made against her proved to be justified.

30 In these circumstances, I find that the conduct of Ms Zhou prior to and at the hearing on 25 June 2019 was not vexatious. The claim for costs made by Mandel Nominees under ss 92(2)(a) is accordingly dismissed.

MEMBER C. EDQUIST

⁴ [2018] VCAT 1332, at [47].