VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO BP 1034/2017

CATCHWORDS

COMMERCIAL TENANCY DISPUTE – Costs – whether fair to order costs where the Applicant discontinues his claim. Section 109(3) of the *Victorian Civil and Administrative Tribunal Act 1998*.

APPLICANTS	Sanh Van Phan
RESPONDENT	Thuy Tran
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	In Chambers
DATE OF WRITTEN SUBMISSIONS	24 August 2017
DATE OF ORDER	18 September 2017
CITATION	Phan v Tran (Building and Property) [2017] VCAT 1503

ORDER

1. The Respondent's application that the Applicant pay her costs is dismissed.
2. Further to the Tribunal's orders dated 11 August 2017 and for the avoidance of any doubt, the interim injunction granted pursuant to Order 2 dated 31 July 2017 is dissolved.
3. No order as to costs.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	On the papers
For the Respondent	On the papers

REASONS

1. The Respondent is the registered proprietor of land located in Lara (**'the Property'**). On 4 February 2017, the Respondent and the Applicant entered into a written lease agreement under which the Applicant was to lease the Property for one year. Under that lease, the Applicant used the Property for farming herbs, which he on-sold at fresh food markets.

2. On or about 5 July 2017, the Respondent served the Applicant with a notice to vacate the Property. The notice alleged that rent and outgoings where substantially in arrears and that the Property had been damaged by the Applicant.

3. By an application dated 31 July 2017, the Applicant commenced this proceeding, seeking injunctive relief restraining the Respondent from re-entering the Property.

4. On the same day, orders were made, *ex parte*, granting interim injunctive relief to restrain the Respondent from re-entering the Property. Further orders were made on that day setting out a timetable for various interlocutory steps to be undertaken by the parties leading to a further hearing of the Applicant's application on 14 September 2017. Those interlocutory orders required the Applicant to file and serve *Points of Claim* by 14 August 2017 and for the Respondent to file and serve *Points of Defence* and any *Counterclaim* by 28 August 2017.

5. By letter dated 10 August 2017 from the Applicant's solicitors, the Applicant sought to discontinue his application:

> Our client now seeks to discontinue his Application.
>
> We inform that subsequent attempts to contact the Respondent have failed to elicit any response. Accordingly, our client does not have the consent of the Respondent to withdraw his application under Order 4.26 of the *Victorian Civil and Administrative Tribunal Rules 2008*.
>
> In the above circumstances, we respectfully request that our client's Application be struck-out with a right of reinstatement.
>
> Given that the injunction hearing on 31 July 2017 was heard *ex parte* and the Respondent has not filed and served any Points of Defence and Counterclaim, we reverently submit that there be no order as to costs consistent with s 109(1) of the Act.

6. On 10 August 2017, the Respondent responded to the Applicant's correspondence in an email forwarded to the Tribunal:

> I wish to bring this matter forward and follow the Orders of Senior Member Levine dated 31st July 2017 pursuant to s 140(1)(a)(ii) of

> the *Victorian Civil and Administrative Tribunal Act 1998 ("the Act").*
>
> In addition, I **object** the applicant to be withdrawn his application under Order 4.26 of the *Victorian Civil and Administrative Tribunal Rules 2008*. Further, I **object** the Application to be struck-out with the right of reinstatement given the seriousness breached of tenancy agreement by the tenant. [sic]
>
> …

7. Notwithstanding the objection raised by the Respondent to the proceeding being either withdrawn or struck-out, orders were made by the Tribunal on 11 August 2017 as follows:

> Having regard to the Applicant's correspondence, in which he advises that he wishes to discontinue his application and noting that there is no counterclaim by the Respondent, the Tribunal orders:
>
> 1. Subject to Order 2 of these orders, the proceeding is struck out with a right to apply for reinstatement.
>
> 2. Liberty to apply on the question of costs, provided such liberty is exercised by 25 August 2017.

8. On 28 August 2017, the Respondent filed comprehensive written submissions seeking an order that the Applicant pay her costs of and associated with the application. By that written submission, the Respondent claims $330 in respect of legal costs and $1,750, which is described as compensation for *approximately 50 hours to work on the case as I took days off from work.*

9. Given that the Respondent's written submission did not request a hearing to determine her application for costs, the written submission is taken as being an application made "on the papers", without the need for either party appearing.

10. Having regard to s 109(3) of the *Victorian Civil and Administrative Tribunal Act 1998* (**'the Act'**) and the written submissions filed by the Respondent, I do not consider it fair that costs should be ordered in this proceeding. What follows are the reasons upon which I have formed this view.

COSTS

11. Orders for costs in the Tribunal are regulated by Division 8 of Part 4 of the Act. Section 109 of the Act states:

> **109. Power to award costs**
>
> (1) Subject to this Division, each party is to bear their own costs in the proceeding.

(2) At any time, the Tribunal may order that a party pay all or a specified part of the costs of another party in a proceeding.

(3) The Tribunal may make an order under sub-section (2) only if satisfied that it is fair to do so, having regard to –

(a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as –

(i) failing to comply with an order or direction of the Tribunal without reasonable excuse;

(ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;

(iii) asking for an adjournment as a result of (i) or (ii);

(iv) causing an adjournment;

(v) attempting to deceive another party or the Tribunal;

(vi) vexatiously conducting the proceeding;

(b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;

(c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;

(d) the nature and complexity of the proceeding;

(e) any other matter the Tribunal considers relevant.

12. In *Vero Insurance Ltd v The Gombac Group Ltd*,[1] Gillard J stated:

[20] In approaching the question of any application for costs pursuant to s.109 in any proceeding in VCAT, the Tribunal should approach the question on a step by step basis as follows:

(i) The prima facie rule is that each party should bear their own costs of the proceeding.

(ii) The Tribunal may make an order awarding costs, being all or a specified part of costs, only if it is satisfied that it is fair to do so. That is a finding essential to making an order.

[1] [2007] VSC 117.

(iii) In determining whether it is fair to do so, that is, to award costs, the Tribunal must have regard to the matters stated in s.109(3). The Tribunal must have regard to the specified matters in determining the question, and by reason of paragraph (e) the Tribunal may also take into account any other matter that it considers relevant to the question.

13. There seems to be two principal matters raised by the Respondent in support of her application for costs.

14. First, she alleges that the supporting affidavit material was misleading in that it stated that the Respondent was poised to re-enter on 1 August 2017 when in fact the notice specified 2 August 2017. This led to the injunction application being heard on 31 July 2017, which gave the Respondent little or no time to prepare and appear, either personally or by telephone.

15. Second, the Respondent contends that after consulting with a lawyer on 2 August 2017, she spent considerable time reviewing documentation in order to prepare her defence and counterclaim. She states:

> On 2 August 2017, I also took a day off at work to see the Lawyer at Practical Legal Solution firm. The Lawyer charged me $330/hour for consultation. The Lawyer then provided an estimated quotation from $5,000 to $8,000 to review documents prior prepares Points of Defence and Counterclaim later on. Since the Lawyer did not provide me the fixed cost for the proceeding, therefore I decided to take some time off work to review the documents and represent myself. In general, I have spent at least 5 hours a day to work on my case for approximately 10 days. (Refer to Appendix 5)

16. In my view, the fact that the Respondent did not appear at the *ex parte* hearing on 31 July 2017 is not a factor weighing in favour of a costs order against the Applicant. In fact, the reverse is true. By not having to appear meant that the Respondent did not expend money on legal representation; or lose time off work.

17. Further, the fact that the Respondent subsequently spent 50 hours *to work on her case* does not take the matter any further. In particular, as at the date when the Applicant sought to discontinue his application, the time for filing *Points of Claim* had not yet arisen. Therefore, I fail to understand how any of those 50 hours could be attributed to preparing *Points of Defence*, given that there was no claim document to respond to. In all likelihood, the 50 hours *to work on her case* must have related to the Respondent's potential claim against the Applicant.

18. It appears that the Respondent may have formed the view that the striking out of the proceeding in some way affects her ability to claim against the Applicant. Put simply, that view is not correct. The orders

made on 11 August 2017, striking out the proceeding, do not affect the Respondent's right to pursue a claim against the Applicant.

19. However, given that this proceeding has been struck out, save and except for the question of costs, the proper course may be for the Respondent to initiate her own fresh proceeding, should she wish to do so.

20. Therefore, I do not consider this to be a factor in favour of ordering costs against the Applicant.

21. Further, I do find that that a litigant's own time in preparing for a hearing constitutes *costs*, for the purpose of s 109 of the Act. My view is reinforced by what the High Court of Australia observed in *Cachia v Hanes*.[2] In that case, the High Court confirmed that the term *costs*, when used in court rules, does not include time spent by a lay litigant preparing and conducting his or her case, but is confined to money paid or liabilities incurred for professional legal services.

22. In the present case, the only legal *costs* incurred are those said to have been incurred when the Respondent consulted with *Practical Legal Solution* ($330).

23. In my view, the fact that the Applicant has withdrawn his application, and by implication, no longer seeks injunctive relief, is, of itself, not a ground upon which to order costs. Other factors need to be taken into consideration. These include the timing of the discontinuance, the merits of the application and what legal costs have been incurred prior to the discontinuance, to mention only a few factors.

24. In the present case, the Applicant has sought to discontinue the proceeding at a very early stage and prior to any of the interlocutory steps having to be completed by the parties. In my opinion, it would not be fair to order costs against a party if he or she has adopted the reasonable course of discontinuing litigation after realising or being informed that there is little prospect of succeeding at final hearing.

25. Further, it cannot be said that the Applicant's application was completely without merit, as interim injunctive relief was granted, albeit on *ex parte* basis. Nevertheless, a court or tribunal must exercise care in granting injunctive relief in circumstances where it is only favoured with one side of the story. Consequently, it is reasonable to assume that the Tribunal must have been satisfied that there was some basis upon which to grant the relief sought, even if only on an interim basis.

26. Finally, the legal costs incurred by the Applicant are limited to a single legal consultation at a cost of $330. The intervention by the Respondent, in seeking to discontinue the proceeding at an early stage

[2] (1994) 179 CLR 403, 409.

in the proceeding, prevented those costs escalating. As I have already indicated, I do not consider it appropriate or fair to order costs against a party who acts promptly and reasonably in discontinuing a proceeding.

27. Therefore, having carefully considered the written submissions of the Respondent and bearing in mind that s 109 of the Act is premised on a presumption that costs will not follow the event, I do not consider it fair that a costs order should be made in this proceeding.

SENIOR MEMBER E. RIEGLER