VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO BP1049/2016

CATCHWORDS

LANDLORD AND TENANT – Section 92(2) of the *Retail Leases Act 2003* – whether conduct pre-dating the issuance of proceedings amounts to *vexatiously conducting the proceeding* for the purposes of s 92(2) of the *Retail Leases Act 2003* – whether issuing of notice under s 146 of the *Property Law Act 1958* for a collateral purpose or advantage constitutes an abuse of process amounting to *vexatiously conducting the proceeding*.

APPLICANT	Risi Pty Ltd (ACN 108 095 790)
RESPONDENT	Pin Oak Holdings Pty Ltd (ACN 066 304 710)
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Costs Hearing
DATE OF HEARING	14 December 2016
DATE OF ORDER	19 January 2017
CITATION	Risi Pty Ltd v Pin Oak Holdings Pty Ltd (Building and Property) [2017] VCAT 95

ORDER

1. The Applicant's application for costs is dismissed.
2. No order of the costs.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	Mr J Isles of counsel
For the Respondent	Mr J McKay of counsel

REASONS

INTRODUCTION

1. On 14 December 2016, I made orders, in favour of the Applicant, restraining the Respondent from re-entering premises leased by the Applicant. The Applicant now seeks a further order that the Respondent pay its costs of and incidental to this proceeding.

BACKGROUND

2. The Applicant (**'the Tenant'**) operates a licensed restaurant business from premises located in Moonee Ponds (**'the Premises'**), which it leases from the Respondent (**'the Landlord'**). The restaurant is part of a three level building, which was developed by the Landlord in 1996. Originally, the building comprised an office and car park on the ground floor, with a number of commercial suites on the remaining two floors, together with common areas and elevators. The restaurant now occupies the ground floor.

3. The genesis of the restaurant business began in 1997, when the original tenant and owner of that business first leased that part of the building from the Landlord and undertook fit-out works converting the office area into the licensed restaurant/café. That work was carried out pursuant to a town planning permit dated 23 October 1997 (**'the 1997 Permit'**). There were conditions of that town planning permit which provided, in part as follows:

> 1. Prior to the commencement of the use or development hereby permitted, three copies of a site plan drawn to scale and dimensioned shall be submitted to and approved by the Responsible Authority. Such plan shall be generally in accordance with the plan submitted with the application but modified to show:
>
>   1.1 Internal layout including seating for a maximum of 50 persons.
>
> …
>
> 10. The maximum seating capacity hereby permitted is fifty (50) and shall not be increased without the prior written consent of the Responsible Authority.

4. In 2003, the Tenant purchased the restaurant business and the original lease was assigned to it. That lease is due to expire in November 2017.

5. On 29 July 2016, the Landlord served the Tenant with a notice pursuant to s 146 of the *Property Law Act 1958* (**'the s 146 Notice'**). In that notice, the Landlord alleged, in part:

2. The Tenant has breached the Legality Clause by virtue of the following facts and matters:

   a. The café or restaurant usage carried on at the Premises by the Tenant is permitted by a planning permit granted under the Planning and Environment Act 1987 (Vic) (‘the PEA’), being permit numbered ES/09506 of 23 October 1997 (‘the Permit’).

   b. The Permit provides that:

      I. Prior to the commencement of the use and development permitted under the Permit, three copies of a site plan drawn to scale and dimensioned shall be submitted to and approved by the Responsible Authority (clause 1);

      II. No new buildings or works shall be erected and constructed and no existing buildings shall be enlarged, rebuilt or extended without the consent of the Responsible Authority (clause 2); and

      III. The maximum seating capacity hereby permitted is 50 and shall not be increased without the prior written consent of the Responsible Authority (clause 10).

   c. Copies of the site plan referred to in clause 1 of the Permit have been submitted to the Responsible Authority, the Moonee Valley Council, and approved by the Responsible Authority (‘the Approved Site Plan’).

   d. In contravention of the Approved Site Plan, a previous tenant of the Premises has constructed an additional room or area (‘the Rear Area’) at the rear of the Premises that had been reserved for car parking in the Approved Site Plan. This occurred without the consent of the Responsible Authority. The Rear Area is marked on the attached diagram within the car parking areas numbered 1, 3, 2 and 4 and outlined in red.

   e. The Tenant is presently using the Rear Area as a kitchen and storage facility.

f. Further or alternatively, the Tenant's business currently and consistently utilises more than 50 customer seats at the Premises.

g. Further or alternatively, the Tenant has erected two roller doors in the car park adjacent to the Rear Area without the permission of the Responsible Authority ('the Roller Doors'). The Roller Doors are not included in the Approved Site Plan.

…

3. The Landlord requires the Tenant to remedy the breaches of the Legality Clause within 14 days from the date of service of this notice by:

a. As to the breach described in paragraph 2(e) above:

I. ceasing to use the Rear Area for any purpose save for car parking; and

II. removing any of the Tenants chattels, fixtures or installations therefrom; and

III. allowing the Landlord (and/or its contractors access to the Premises to demolish the structures within the Rear Area and convert that area back into car parking space in conformity with the Approved Site Plan;

Or alternatively to sub paragraphs 3a(i) to (iii), obtaining a variation to the Permit (or a fresh permit) from the Responsible Authority authorising the Tenant's use of the Rear Area as a kitchen and storage facility.

b. As to the breach described in paragraph 2(f), by removing any customer seats from the Premises in excess of the 50 seats permitted under the Permit and refraining from using more than 50 seats within the Premises, or alternatively by obtaining a variation to the Permit (or a fresh permit) from the Responsible Authority authorising the Tenant to use a greater number of seats at the Premises, and complying with this variation or fresh permit.

c. As to the breach described in paragraph 2(g), by removing the Roller Doors and making good any damage to the Premises caused during their removal, or alternatively by obtaining a variation to

the Permit (or a fresh permit) from the Responsible Authority authorising the Roller Doors to remain in situ.

6. Save that the Tenant conceded that the restaurant utilised more than 50 seats, the Tenant otherwise denied the allegations set out in the s 146 Notice. As a consequence, the Tenant issued this proceeding, in which it sought an order restraining the Landlord from re-entering the Premises in reliance on the s 146 Notice.

7. The Tenant's injunction application was first heard by me on 11 August 2016. Mr Isles of counsel appeared on behalf of the Tenant. Mr McKay of counsel appeared on behalf of the Landlord. Affidavits were filed by both parties in support of and in opposition to the Tenant's application.

8. It became clear during the course of that hearing that there was uncertainty as to whether the fit-out works undertaken by the previous tenant, and in particular part of the kitchen, encroached into the car parking area nominated on a hand drawn sketch plan of the site, which was said to have formed part of the town planning approval. As a consequence, I granted an interim injunction restraining the Landlord from re-entering the Premises and made orders for the filing of further affidavit material going to that issue. The proceeding was relisted to be heard on 7 October 2016, at which time further consideration would be given as to whether the interim injunction was to be made interlocutory.

9. By 7 October 2016, some of the issues in contention were no longer at the forefront of the dispute. In particular, on 16 September 2016, the Tenant had sought and obtained an amendment to the 1997 Permit. That amendment extended the seating capacity of the restaurant to 80 persons. In addition, the amendment deleted Condition 1 of the 1997 Permit, which had required three copies of a site plan to be submitted to the responsible authority, prior to the Premises being used.

10. According to the Tenant, the amendment put to rest any suggestion that there were other infringements of the 1997 Permit because it attached an 'as-built' site plan, which was endorsed by the responsible authority. Consequently, the Tenant argued that the endorsement on that site plan confirmed that what was presently constructed, in terms of fit-out works (including the installation of the two roller-doors), was in accordance with current town planning approval.

11. However, and notwithstanding the amendment of the 1997 Permit, the Landlord maintained that the use of the Premises infringed town planning approval. In that regard, the Landlord sought advice from Giovanni Gattini, town planner, who swore an affidavit dated 6 October 2016, deposing to the following:

…

5. On the 29th of August 2016 I contacted Moonee Valley City Council to enquire as to the exact nature of the recent application made by the tenant for 28 to 30 Young Street Moonee Ponds to amend the planning permit MV/9506/1997/A ('permit') affecting that land. I was advised that a request had been made to increase the seating capacity to 80 seats. I was also advised by the officer that no other application had been made, including any application for the approval of any building works. The officer said that the amendment would only affect Condition 10 of Planning Permit MV/9506/1997/A (the permit). Prior to the permit being amended its stipulated maximum seating capacity of 50 seats.

…

8. The drawings approved under the permit have been provided to me by Dahaher Legal. The plan identified as Exhibit CL10 to the affidavit of Carmelo Lastrina dated 2 September 2016 is the approved plan; it shows the restaurant area being limited to a line equating to the dividing wall between the male and female toilets. It also shows a 2.5 m storage area behind a stud wall…

9. The 'as built' plan provided as Exhibit CL11 to the affidavit of Carmelo Lastrina dated 2 September 2016 shows a cafe kitchen extending into the car parking area. The location of the original wheel stops to the car park remains evident on the plan. The cafe kitchen occupies the equivalent of 2 car parking spaces reserved on the drawings approved under the plan…

10. The 'as built' plan is in my opinion inconsistent with the approved plan forming part of the permit. It is obvious that the car park has been impacted by the extension of the cafe kitchen to the north.

12. Consequently, the hearing on 7 October 2016 proceeded. In essence, there were two issues which remained in contention. The first issue related to whether Condition 1 of the 1997 Permit has been complied with (whether three copies of the site plan drawn to scale had been submitted to the responsible authority). The Tenant argued that the amendment to the 1997 Permit deleted that condition. Further, it contended that the endorsed plan forming part of the amendment to the 1997 Permit satisfied that requirement, in any event. According to the Landlord, the amended 1997 Permit only dealt with the issue of seating capacity and nothing else.

13. The second issue concerned whether the as-built fit-out encroached into the car park area. According to the Tenant, there was no encroachment and even if there was, the endorsed site plan attached to the amended 1997 Permit constituted approval for any such encroachment. As indicated above, the Landlord did not accept that proposition.

14. Further affidavits were filed and served prior to and on the day of the hearing. In particular, the Tenant sought and obtained an affidavit from Susan Wlodarczyk dated 6 October 2016. Ms Wlodarczyk was a town planner employed by the responsible authority. In that affidavit, Ms Wlodarczyk deposed to the following:

> 1. On 16 September 2016 the City of Moonee Ponds issued an amended plan in respect to the property at 28 Young Street, Moonee Ponds being planning permit no: MV/9506/1997A.
>
> 2. Condition 1 of this new permit has the word "deleted". This deletes reference to the previous condition 1 in the 1997 permit. This condition required drawings that had been approved by Council to be submitted to Council.
>
> 3. Annexed to the current permit issued on 16 September 2016 and endorsed thereon are plans and specifications of the current dimensions of the café at the ground floor of 28 Young Street, Moonee Ponds including the kitchen and car parking area.

THE HEARING

15. As indicated above, the Landlord maintained its position that the as-built fit-out did not accord with town planning approval. To that end, the Landlord pointed to the hand drawn sketch plan, which accompanied the original 1997 Permit. It was entitled "*Proposed Cafe-Takeaway Situated at Young St. M. Ponds. Seating Approx 50. For Peter Marinelli*".

16. It is clear that this sketch plan did not constitute endorsed plans or plans submitted to the responsible authority in satisfaction of Condition 1 of the 1997 Permit. Indeed, it is likely that this unsophisticated drawing prompted the responsible authority to require more detailed plans, which never occurred.

17. Michael McCabe, the architect engaged by the Tenant and who drew the as-built plans which accompanied the Tenant's application to amend the 1997 Permit, gave evidence during the course of the hearing on 7 October 2016. He confirmed that he attended the Premises and measured the as-built fit-out. He said that his measurements revealed that the as-built fit-out was 200 mm shorter than what was depicted on the hand drawn sketch plan, which accompanied the 1997 Permit. Importantly, he confirmed that there was no encroachment into the car park area.

18. During cross-examination, it was put to him that the area cordoned off by the roller doors and used as a storage area by the Tenant encroached into the car park area, in contravention of the 1997 Permit. He disputed that proposition and said that the area still retained its character as a car space, even though it could be cordoned off when the roller doors were closed. He did not consider that the installation of those two internal roller doors contravened the 1997 Permit. He said that, in any event, the roller doors were now depicted on the endorsed plans, forming part of the application to amend the 1997 Permit. Therefore, there was no basis to argue that the presence of those roller doors in any way contravened town planning approval.

19. Ms Wlodarczyk, the town planning officer employed by the responsible authority, also gave oral evidence. She recalled that the issue regarding any potential infringement of the 1997 Permit was initially raised by Mr Lastrina, the director of the Landlord. She referred to correspondence dated 7 October 2016 from the responsible authority, addressing his concerns.

20. She was asked whether Mr Lastrina's concerns were also held by the responsible authority, to which she answered that they were not. She was asked whether there were any breaches of the town planning approval which would be prosecuted by the responsible authority. She answered that there were none.

21. Importantly, she was asked whether there was any building work undertaken which was not in accordance with the 1997 Permit. She answered that the as-built fit-out was in accordance with the 1997 Permit. She was asked about the roller door or roller screens and whether their installation required town planning approval. She answered that the installation of those two roller doors would not require any town planning approval because it was internal work. She also said that the presence of the roller doors did not diminish the car parking space.

22. Ms Wlodarczyk said that because of the unsophisticated nature of the hand drawn sketch accompanying the original 1997 Permit, the responsible authority required more detailed plans to be submitted and endorsed. She said that the requirement to submit those plans was deleted by the amendment made to the 1997 Permit, given the period of time that has elapsed since that permit was first issued. Her evidence was consistent with that of Mr McCabe; namely, that the plans drawn by him of the as-built fit-out were generally in accordance with the hand drawn sketch plan which accompanied the original 1997 Permit.

23. In my view, it was patently clear at the conclusion of the hearing on 7 October 2016 that the use of the Premises, as at that date, did not contravene town planning approval. Indeed, apart from the allegations

that the seating capacity had been exceeded and the failure to submit detailed plans had contravened town planning approval (both contraventions were cured with the approval of the amendment to the 1997 Permit), the use of the Premises now accorded with the 1997 Permit. On that basis, I had little hesitation in extending the interim injunction and orders were made to that effect.

24. However, given that the Landlord still contended that the Tenant had breached its obligations under the lease, entitling it to forfeit and terminate the lease agreement, I ordered that the proceedings be listed for further hearing on 14 December 2016, at which time the Tribunal would hear and consider whether the lease between the parties was forfeited or alternatively, whether relief against forfeiture should be granted.

25. On 6 December 2016, solicitors for the Landlord wrote to the Tribunal, stating, in part:

> We act on behalf of Pin Oak Holdings Pty Ltd, the Respondent, in the above-named matter and note that a hearing is listed on 14 December 2016 at 10 AM. We are instructed as follows:
>
> 1. On 7 October 2016, this matter was heard before Senior Member Riegler. During this hearing, unforeseen testimony was provided by the Moonee Valley City Council.
> 2. Given the testimony provided by Moonee Valley City Council, our client's position is now untenable. Accordingly, we are instructed that our client consents to the injunction sought by the Applicant in this matter, to restrain our client from re-entering into possession of the leased property at 28 to 30 Young Street, Moonee Ponds in the state of Victoria as sought under the relevant Default Notice.
> 3. We kindly request that the hearing date of 14 December 2016 be vacated and appropriate orders made.

26. On 7 and 8 December 2016, solicitors for the Tenant indicated to the Tribunal that the Tenant required the hearing on 14 December 2016 to remain listed, so as to enable final orders to be pronounced and to allow the Tenant to make an application for costs.

27. On 14 December 2016, both parties appeared and submissions were made on the question of costs.

COSTS IN A RETAIL TENANCY DISPUTE

28. Section 92 of the *Retail Leases Act 2003* (**'the RLA'**) restricts the Tribunal's jurisdiction to award costs in a retail tenancy dispute, such as what is presently before the Tribunal. It states:

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.

29. Mr Isles submitted that the conduct of the Landlord was such that it conducted the proceeding in a vexatious way that had unnecessarily disadvantaged the Tenant, thereby enlivening s 92(2) of the RLA.

30. In the *State of Victoria v Bradto Pty Ltd*,[1] Judge Bowman, sitting as a Vice President of the Tribunal, considered the operation of s 92(2) of RLA. His Honour stated:

> [32] Section 92(2) of the RLA, which is similar in wording in parts of s78 of the VCAT Act, 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.
>
> [33] In relation to what is meant by "vexatious", reference is made to *Oceanic Sunline Special Shipping Company Inc v Fay* (1988) 165 CLR 197. 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.

31. In *Cabot v City of Keilor*,[2] Gobbo J discussed the meaning of vexatious or frivolous as used in s 150 of the *Planning and Environment Act 1997*. At page 223 of his judgment, His Honour stated:

[1] [2006] VCAT 1813.

[2] [1994] 1 VR 220.

> The tribunal adopted the test for vexatiousness expressed by Roden J in *Attorney-General (Vic) v Wentworth* (1988) 14 NSWLR 481 at 491:
>
> > "It seems then that litigation may properly be regarded as vexatious for the present purposes on either objective or subjective grounds. I believe that the test be expressed in the following terms:
> >
> > 1. proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against who they are brought;
> > 2. they are vexatious if they are brought for collateral purposes, and not for the purpose of having a Court adjudicate on the issues to which they give rise;
> > 3. they are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless".

32. The facts in the present case are unique, in the sense that the proceeding was issued by the Tenant, rather than the Landlord and the conduct which is said to enliven s 92(2) of the RLA relates to conduct which pre-dates the issuance of the proceeding. That raises the question whether conduct which pre-dates the issuance of a proceeding can constitute *conducting the proceeding in a vexatious way that disadvantages the other party*?

33. In my view, vexatious conduct which pre-dates the issuance of proceedings will not, of itself, fall within the ambit of s 92(2) of the RLA. However, the continuance of a position which is patently untenable or unconscionable and which has provoked or precipitated the issuance of proceedings, might fall within s 92(2) of the RLA. This is particularly so where the litigant reasonably knew that its position (be it a claim or a defence) was so *obviously untenable or manifestly groundless as to be utterly hopeless* but continued to prosecute it in the face of that knowledge. That scenario is contrasted with the test described by Roden J in *Wentworth* and adopted by Gobbo J in *Cabot*, which contemplates that the intention or motive of the litigant is irrelevant. In other words, the test adopted by Gobbo J in *Cabot* includes taking into account the merits of the proceeding – looked at objectively, rather than simply confining itself to examine how the litigant is conducting the proceeding, once issued.

THE TENANT'S SUBMISSIONS

34. The Tenant's primary submission is that the s 146 Notice was initiated for an ulterior motive and constitutes an abuse of process – designed to avoid any compensation being paid to the Tenant for having to vacate the Premises before the expiration of the lease. That submission needs to

be put into context. In particular, according to the Tenant, the Landlord has orchestrated a course of action which was designed to put pressure on the Tenant to vacate the Premises, so as to allow the Landlord to follow through with its plan to redevelop the building site.

35. The Tenant submitted the issue of the s 146 Notice, which relates to alleged breaches of the 1997 Permit and which concerns conduct occurring prior to the Tenant's occupancy, constitutes an abuse of process because those breaches could have been brought and included in the matters adjudicated in an earlier proceeding in this Tribunal, rather than precipitating or provoking further litigation.[3]

36. The Tenant drew my attention to the decision of the High Court of Australia in *Port of Melbourne Authority v Anshun*,[4] and to the judgment of Beach J in *Burbank Australia Pty Ltd v Luzinat*,[5] where his Honour stated:

> Where a party to a proceeding initiates a second proceeding in a different form in relation to the same subject matter as the first proceeding, prima facie the second proceeding is vexatious and will be stayed: see *McHenry v Lewis* and *Williams v Hunt.*
>
> In such a situation the courts have for many years taken the view that a litigant already deeply involved in one piece of litigation would be unduly harassed if a second piece of litigation was to proceed at the same time as the first. And such a principle applies to proceedings whether they be before a court, a board or a tribunal.
>
> All the more so where there is a significant risk, as there is in the present case, that VCAT's findings and the Board's findings may be in conflict one with the other.[6]

37. Further reference was made to the judgment of Beach J in *Whirlpool (Australia) Pty Ltd v Castel Electronics Pty Ltd*,[7] citing *CSR Limited v Cigna Insurance Australia Ltd*.[8]

THE LANDLORD'S SUBMISSIONS

38. Mr McKay submitted that the Landlord's conduct could not be categorised as vexatious or an abuse of process. He argued that the Landlord acted appropriately by capitulating to the Tenant's application for an injunction restraining re-entry, once it became clear that there was no continuing breach of the lease covenants. This occurred following the issuing of an amendment to the 1997 Permit and confirmation from the

---

[3] *Risi Pty Ltd v Pin Oak Pty Ltd* [2016] VCAT 1112.
[4] (1981) 147 CLR 589.
[5] [2000] VSC 128.
[6] Ibid at [28]-[30].
[7] (2015) FCA 906.
[8] (1997) 189 CLR 345 at 391-2.

responsible authority on 7 October 2016 that there was no extant breach of the town planning permit.

39. Mr McKay argued, that up until Ms Wlodarczyk gave evidence on 7 October 2016, it was unclear whether the Tenant's use of the Premises continued to contravene the 1997 Permit. Therefore, he submitted that when the s 146 Notice was served in July 2016, there were arguable grounds for doing so. In particular, he pointed to the following factors:

    (a) there was a question as to whether the as-built fit-out accorded with the hand-drawn sketch plan attached to the 1997 Permit;

    (b) there was a question whether detailed drawings were submitted to the responsible authority, in accordance with condition 1 of the 1997 Permit; and

    (c) it was conceded that the 50 seat capacity permitted under the original 1997 Permit was exceeded.

40. Mr McKay referred to a letter addressed to the Landlord from the responsible authority dated 24 May 2016, exhibited to the affidavit of Mr Lastrina. That letter stated, in part:

> As per our conversation on 20/4/2016 where you brought to my attention the alleged breaches to the Moonee Valley Planning Permits including ES 9506/1997 which relate to the Ground Floor and the setup-operation of the Food & Drink business known as 'HARRY'S BAR' within your property complex.
>
> You brought attention to the use of the ground floor disabled toilet as a storage closet, also the car park area having two roller doors installed as storage space for the restaurant and restricting the prescribed number of car spaces and the required vehicle wheel stops not being installed to the concrete floor, also the number of seats exceeding the maximum 50 endorsed, the redline liquor area does not include any outdoor use and any new building works require Council consent.
>
> …
>
> The issues you mentioned I have confirmed they are in breach accordingly, you are required to undertake all of the above-mentioned reinstatement works by 04/07/2016.

41. Mr McKay further submitted that it was not vexatious for the Landlord to rely upon provisions of the lease agreement in order to re-enter the Premises, provided there were reasonable grounds upon which to do so. This was the case even if the Landlord held a collateral motive, such as wanting the Premises to be vacated in order to allow the Landlord to undertake its redevelopment of the building. Reference was made to the judgment of Sifris J in *Melbourne City Investments Pty Ltd v Myer*

Holdings Limited (No 2),[9] where his Honour cited the following extract from the judgment of Maxwell P and Nettle JA in *Treasury Wine Estates Limited v Melbourne City Investments Pty Ltd*:

> **Consideration**
>
> 9. As the law stands, the only legitimate purpose for bringing a proceeding is to vindicate legal rights or immunities by judgment or settlement. Consequently, unless the predominant purpose of bringing a proceeding is a legitimate purpose, the proceeding is an abuse of process and is liable to be stayed.
>
> 10. The question for determination, therefore, is whether MCI's purpose of "generating legal fees for Mr Elliott" is a legitimate purpose. Plainly enough, generating legal fees does not constitute a purpose of vindicating legal rights or immunities. Obtaining payment of legal costs is but a corollary, or an incident, or a by-product, of the successful vindication of rights.
>
> 11. It is necessary, then, to examine the notion of "collateral advantage". The authorities distinguish between two types of case. On the one hand, a proceeding will not be regarded as an abuse of process by reason only that it is brought for the purpose of taking collateral advantage of any judgment or settlement in vindication of legal rights or immunities which might be obtained in the proceeding. On the other hand, if a proceeding is brought for the predominant purpose of obtaining collateral advantage from the existence of the proceeding as such, as opposed to collateral advantage flowing from any judgment or settlement in vindication of legal rights or immunities which might be obtained in the proceeding, it will be an abuse of process and liable to be stayed.
>
> 12. In our view, the proceeding by MCI against Treasury falls into the second of these categories. What distinguishes the two categories is the use to which the proceeding is put. ln the present case, MCI is using the cause of action to create an income-generating vehicle for its solicitor. It has no interest in vindicating its rights, or obtaining a remedy, as such.
>
> 13 The nature of the cause of action – as a claim based on an alleged breach of disclosure requirements – is immaterial to MCI's purpose. Its sole purpose has only ever been to create for itself – in this case, by acquiring a small parcel of shares

[9] [2016] VSC 655.

> – a cause of action of sufficient merit to induce the defendant company to pay Mr Elliott's fees.
>
> 14 It seems to us that this is a clear example of an abuse of process. The processes of the Court do not exist – and are not to be used – merely to enable income to be generated for solicitors. On the contrary, they exist to enable legal rights and immunities to be asserted and defended. In the common form of class action, that is the sole purpose of the proceedings. The members of the class wish to vindicate their rights. The fact that success will result in the solicitors' fees being paid does not affect the propriety of the proceeding.[10]

42. Therefore, Mr McKay submitted that, as there were legitimate grounds raised in the s 146 Notice, the mere fact that the Landlord would benefit collaterally was immaterial. Further, he argued that, once it became clear that those grounds had fallen away, by virtue of the amendment to the 1997 Permit and the evidence of Ms Wlodarczyk, the Landlord acted diligently by capitulating to the Tenant's application.

SHOULD COSTS BE ORDERED?

43. In the present case, they may well be grounds for concluding that the Landlord's behaviour was unduly harsh. In particular, the alleged breaches upon which it relied, by and large, related to matters which occurred many years before the Tenant occupied the Premises. To agitate the responsible authority into generating the letter dated 24 May 2016 was self-serving and designed to provide a basis upon which the Landlord could argue that the Tenant was in breach of its obligations under the lease. The unforgiving nature of the Landlord's conduct is further exemplified by the fact that the matters raised in the 24 May 2016 letter were not brought to the attention of the Tenant until after it was served with the s 146 Notice. By that time, the moratorium granted by the responsible authority had already expired and the Landlord relied on this factor in order to bolster its argument that it was critical for there be compliance with the 1997 Permit, so as to avoid any prosecution being mounted against it.

44. Be that as it may, I do not consider that the Landlord's conduct, even if found to be unduly harsh or reprehensible – and to have precipitated this proceeding – falls within the ambit of s 92(2) of the RLA.

45. As I have already indicated, s 92(2) of the RLA 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. Therefore, continuing

[10] [2014] VSCA 351 at 3-4 (footnotes omitted).

to prosecute or defend a proceeding where there is no substance to the claim or defence may constitute vexatious conduct falling within the ambit of s 92(2) of the RLA.

46. That being the case, can it be said that the Landlord continued to prosecute the breaches alleged in the s 146 Notice where they lacked any substance or where that conduct was orchestrated solely for a collateral purpose? In my view, the evidence does not go that far.

47. Despite what may have motivated the Landlord to investigate whether there was compliance with the 1997 Permit, the evidence establishes that, at the very least, the seating capacity permitted under the 1997 Permit had been exceeded. This ultimately necessitated an amendment to that permit. Further, given the evidence of Giovani Gattini, the town planner engaged by the Landlord, I am unable to conclude that up until 7 October 2016, the allegations concerning encroachment into the car space were *so obviously untenable or manifestly groundless to be utterly hopeless.*

48. In my view, there is insufficient evidence for me to be satisfied that the issuing of the s 146 notice constitutes an abuse of process, as characterised in the extract of the *Treasure Wines Estates* judgment cited above. In other words, I find that it was open for the Landlord to issue the s 146 Notice. If by virtue of that action, the Landlord obtained a collateral advantage, then that is a by-product of it enforcing its rights under the lease and not an abuse of process.

49. Consequently, I do not find that the Landlord has conducted the proceeding vexatiously, notwithstanding that its conduct, which pre-dates the issuing of this proceeding, may justifiably be criticised as being unduly harsh.

SENIOR MEMBER E. RIEGLER