VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

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| BUILDING AND PROPERTY LIST | vcat reference No. BP1247/2016 |
| CATCHWORDS | |
| RETAIL LEASE: applications by tenant and landlord for costs under [s92](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/rla2003135/s92.html) of the [*Retail Leases Act 2003*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/rla2003135/) (Vic); tenant’s claim succeeded; Landlord’s counterclaim dismissed. | |

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| APPLICANT | River View Pty Ltd |
| RESPONDENT | Primrose Meadows Pty Ltd ACN: 089 757 755 |
| WHERE HELD | Melbourne |
| BEFORE | Senior Member L Forde |
| HEARING TYPE | Costs Hearing |
| DATE OF HEARING | 3 April 2019 |
| DATE OF ORDER | 1 May 2019 |
| CITATION | River View Pty Ltd v Primrose Meadows Pty Ltd (Costs) (Building and Property) [2019] VCAT 631 |

# Order

1. Primrose Meadows Pty Ltd is to pay River View Pty Ltd’s costs of the proceedings other than the costs relating to the painting issue, such costs, if not agreed, to be assessed by the Victorian Costs Court on the scale of costs in Appendix A of Chapter 1 of the rules of the County Court. The costs relating to the painting issue are fixed at 5% of the total costs.
2. Primrose Meadows Pty Ltd’s application for costs is dismissed.

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| L Forde  **Senior Member** |  |  |

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| APPEARANCES: |  |
| For Applicant | Ms L Papaelia of counsel |
| For Respondent | Mr J Levine of counsel |

# Reasons

### Background

1. On 18 October 2018, I made orders in favour of the applicant (tenant) and dismissed the respondent’s (landlord’s) counterclaim. The parties had until 30 November 2018 to apply on the question of costs.
2. On 28 November 2018, the tenant filed an application for costs against the landlord.
3. The landlord did not file an application for costs by 30 November 2018. In oral submissions to the Tribunal at the costs hearing, counsel for the landlord made an application for costs limited to costs relating to the inadmissibility of certain paragraphs of the witness statements filed by the tenant. Despite the noncompliance with the orders made on 18 November 2018, no objection was raised by the tenant to the late costs application.
4. The background facts are set out in my reasons dated 18 October 2018. The tenant claimed that it exercised an option in its lease and sought a declaration to that effect as well as specific performance of an agreement for lease commencing 2 September 2016. The landlord denied the tenant validly exercised the option. In its counterclaim, the landlord sought a declaration that the rent for the term commencing 2 September 2011 be determined by a specialist retail valuer and that the tenant pay the shortfall between what it had paid and the rental determination. The landlord also sought a finding that the tenant was on a monthly tenancy from September 2016, having not validly exercised the option, and that the tenant paint the hotel and pay damages and costs.

# General principles applicable to costs applications under section 92

1. [Section 109](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/vcaata1998428/s109.html) of the [*Victorian Civil and Administrative Tribunal Act 1998*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/vcaata1998428/)(Vic*)* **(the Act)** empowers the Tribunal to make costs orders in certain circumstances.
2. [Section 92](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/rla2003135/s92.html) of the [*Retail Leases Act 2003*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/rla2003135/) (Vic) (**RLA**) overrides s109 of the Act. It provides:

(1) Despite anything to the contrary in Division 8 of [Part 4](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/rla2003135/index.html#p4) of [the Act], each party to a proceeding before the Tribunal under [Part 10 of the [*Retail Leases Act*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/rla2003135/)] is to bear its own costs in the proceeding.

(2) However, at any time the Tribunal may make an order that a party shall 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 the mediation or other form of alternative dispute resolution under this Part.

1. The parties do not rely upon [section 92(2)(b)](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/rla2003135/s92.html) of the RLA.
2. It follows, that if I am to order costs against either party, I must be satisfied that it is fair to do so because I find that the party conducted the proceeding in a vexatious way that unnecessarily disadvantaged the other party.

### Conducting the Proceeding in a Vexatious Way

1. In a much-quoted decision *Attorney-General (Vic) v Wentworth*,[[1]](#footnote-1) Roden J stated:

It seems to me that litigation may properly be regarded as vexatious for present purposes on either subjective or objective grounds. I believe that the test may be expressed in the following terms: -

(a) proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought;

(b) they are vexatious if they are brought for collateral purposes,and not for the purpose of having the Court adjudicate on the issues to which they give rise;

(c) 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.

1. The relevant test for vexatious conduct was carefully considered by Vice President Judge Jenkins, in *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd*[[2]](#footnote-2) where Her Honour concluded:

By reason of the factual circumstances described above and the findings made following the damages hearing, I am satisfied that the Applicant:

(a) commenced an action for damages, following the finding that the Respondent was in breach of the lease, in circumstances where the Applicant, properly advised, should have known it had no chance of success;

(b) persisted in what should, on proper consideration, be seen to have been a hopeless case;

(c) engaged in conduct which caused a loss of time to the Tribunal and the Respondent;

(d) commenced a proceeding in wilful disregard of known facts or clearly established law; and

(e) made allegations as to losses which it claimed to have incurred, which ought never to have been made.

[78] In consequence, I am satisfied that the Applicant has conducted the proceeding in a vexatious way that has unnecessarily disadvantaged the Respondent. Accordingly, I am satisfied that the Respondent is entitled to an award of costs subsequent to the liability hearing, to the extent that such costs relate to the preparation for and hearing of the application for damages.

1. In *24 Hour Fitness*, on an unsuccessful application for leave to appeal against the decision of Judge Jenkins, the Court of Appeal referred to these paragraphs with evident approval. On appeal [[3]](#footnote-3) the applicant submitted that for the purposes of [section 92](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/rla2003135/s92.html) of RLA, it is the conduct of the party in the proceeding that is material, not a consideration of the strength of its claims as had been taken into account at first instance. The Court of Appeal rejected the submission stating:

[28] The applicant’s criticism does not take into account the Tribunal’s detailed analysis of the 14 matters upon which the respondent relied as constituting vexatious conduct. As can be seen from what we have set out above, the Tribunal carefully considered each of those matters and made findings in respect of them. It is obvious that the Tribunal relied upon those findings in reaching the conclusion that the case was an appropriate one in which to order costs. True it is that the Tribunal also considered the hopelessness of the applicant’s claim, but there is no error in that. The strength of the applicant’s claim for damages was a relevant factor to take into account.

[29] It would be artificial to attempt to evaluate the manner in which the proceeding was conducted by a party without having regard to the strength of that party’s case. In the present circumstances, it was relevant [for the purpose of determining whether the applicant conducted the proceeding in a vexatious way] that the applicant pursued the damages claim, in circumstances that it was bound to fail.

### Tenant’s costs application

1. The tenant relied on the following factors identified in or cited with approval in *24 Hour Fitness* as being relevant to whether a proceeding has been conducted vexatiously by the landlord:
2. Where a party persists in what should, on proper consideration, be seen to be a hopeless case;
3. Where a party makes a false allegation of fraud;
4. Where a party engages in conduct which causes loss of time to the Tribunal and to the other parties;
5. Where a party conducts a proceeding in a way productive of serious and unjustified trouble or harassment and where there is conduct that is seriously and unfairly burdensome, prejudicial or damaging.
6. The tenant’s submission as to why the landlord’s case was hopeless can be summarised as follows:
   * + - 1. In relation to each of the four issues in the proceeding the landlord made untenable or manifestly groundless arguments;
         2. As to the first issue of whether the tenant was entitled to a new lease from September 2016, the landlord accepted that the tenant sent a letter exercising its option for a further term commencing 2 September 2011. The landlord argued that the tenant was not entitled to a new lease because the previous term’s lease was void, the terms of settlement were void and the tenant was in breach for failing to paint the whole of the premises. In respect of the first two arguments, the tenant held, at a minimum on the landlord’s arguments, a lease in equity from 2 September 2011. In relation to the third argument the landlord confirmed that no notice of default had been issued to the tenant in relation to this alleged breach prior to the exercise of the option. Under s27(2) of the RLA the tenant even if it was in breach would be entitled to a new lease;
         3. As to the second issue of whether the landlord was entitled to have the rent determined by a specialist retail valuer on the basis that the lease by renewal and/or terms of settlement were void, it was clear on the evidence that the documents were not void. It was clear, as Mr D’Anna knew, that the landlord engaged Mr Strassman to act on its behalf to deal directly with the tenant about the rent and on that basis the landlord is bound by the acts of Mr Strassman entering into the deed of settlement. This was knowledge peculiarly within Mr D’Anna’s knowledge. He chose to put the tenant to the expense and time of proving that Mr Strassman had authority. The evidence did not support the landlord’s claim that the lease by renewal was void because Mr D’Anna signed it before the handwritten amendments changing the rent were made to the document. This assertion was not supported by the evidence and in particular the letter from the landlord’s solicitors asking the tenant to execute the three original leases by renewal and return the documents to the landlord for signing by the landlord;
         4. As to the third issue of whether the landlord was entitled to an order that the tenant paint the premises (**painting issue**) on the basis that the tenant failed to paint the premises in breach of lease, the argument was untenable because the tenant had invoices supporting that the works were done, and the landlord accepted at the hearing that the works done by the tenant were sufficient; and
         5. As to the fourth issue of whether the landlord was entitled to damages for the tenant’s unconscionable conduct, there was no prospect of success as there was no evidence. There was no medical evidence to support a claim that Mr D’Anna was under a special disadvantage in 2012. No evidence was called about whether the refurbishment agreement was an improvident transaction. The only evidence called to establish that the lease by renewal was an improvident transaction was an assessment of rent by Mr Conway who is a real estate agent and not a valuer. Mr Conway is also the joint owner with Mr D’Anna of two properties. Furthermore, Mr Conway’s assessment was based upon the landlord’s estimate of the actual income of the hotel which was not supported by any evidence.
7. The tenant’s submission as to the landlord’s false allegations of fraud can be summarised as follows
8. On the second day of hearing the landlord made an application to amend its defence. Until that time, it appeared that the landlord admitted that Mr D’Anna signed the lease by renewal in around June 2012 after handwritten amendments were made of reducing the rent;
9. By its amended points of defence the landlord alleged that Mr D’Anna signed the document in around December 2011 prior to the rental reduction being made. The effect of the amendment was to make an implied allegation that Mr O’Halloran acted fraudulently by amending the document after Mr D’Anna had signed it or that Mr O’Halloran was complicit in Mr Strassman’s fraud in doing this;
10. This implication was expressly made by Mr D’Anna who asserted in evidence that Mr O’Halloran was complicit in Mr Strassman’s alleged fraud; and
11. The Tribunal found that there was no evidence whatsoever to support this allegation which was pure conjecture;
12. The tenant’s submission as to whether the landlord engaged in conduct which caused loss of time to the Tribunal and to the other parties can be summarised as follows:
13. The application to amend its defence by the landlord caused the loss of half a day’s hearing time on day two of the hearing which was listed for three days;
14. Day three of the hearing was vacated to allow the tenant to consider further evidence required because of the amendment;
15. An extra witness was called, and the matter listed for a further two days;
16. These actions unnecessarily disadvantaged the tenant in circumstances where all the tenant was trying to do was secure its lease.
17. The tenant’s submission as to whether the landlord conducted the proceeding in a way productive of serious and unjustified trouble or harassment and where there is conduct that is seriously and unfairly burdensome, prejudicial or damaging case can be summarised as follows:
18. the landlord made baseless allegations of fraud and criminal conduct against the tenant and was evasive and obstructionist in the conduct of the proceedings;
19. In his solicitor’s letter dated 8 November 2016 the landlord threatened to issue proceedings in the Victorian Federal Court which threat, when read with earlier communications, made it clear that the landlord was inferring that Mr O’Halloran had engaged in criminal conduct;
20. On 9 December 2016 the landlord’s then solicitors wrote to the Tribunal advising that various agreements relating to the lease had been obtained by fraudulent conduct and enclosed a copy of a letter to the Victorian Police which stated that the tenant and Mr Strassman had committed a fraud on the landlord;
21. During the hearing Mr D’Anna gave evidence that was evasive and inconsistent; and
22. On the second day of the hearing the landlord sought to amend its points of defence to make an implied allegation that Mr O’Halloran acted fraudulently even though there was no evidence to support such an allegation.
23. The landlord’s submissions in response to the tenant’s costs application can be summarised as follows:
24. No determination was made by the Tribunal as to whether Mr Strassman had written authority to act for the landlord;
25. There was no “killer point” to show the landlord should not have argued Mr Strassman lacked authority;
26. Just because the Tribunal did not accept Mr D’Anna’s evidence, does not mean that he was not entitled to bring the case;
27. The case of whether Mr Strassman had authority was not bound to fail;
28. Vexatious conduct must be more than maintaining a hopeless proceeding;
29. The landlord was entitled to put the tenant to proof;
30. The amendment to the defence was to clarify an ambiguity as it was described by the Tribunal, so it cannot be vexatious;
31. The strength of the landlord’s case is a relevant factor but in itself insufficient to justify making a costs order;
32. The Tribunal did not accept the landlord’s submissions, but this does not mean its case was hopeless;
33. The time spent on arguing whether the tenant was entitled to exercise the option did not take up much time so cannot be said to be productive of serious and unjustified trouble or harassment;
34. The landlord cannot be held liable for costs based on any actions of Mr D’Anna whilst giving evidence. The Tribunal cannot take into account misconduct of Mr D’Anna. Witness immunity protects any evidence of Mr D’Anna from use by the Tribunal in awarding costs. The case of *D’Orta-Ekenaike v Victorian Legal Aid* was relied upon to support this proposition. Counsel for the landlord did not have a copy of the decision with him or refer to any specific passages in the decision; and
35. The evidence given by Mr D’Anna cannot justify a costs order against the landlord. It falls well short of the requirements of s 92(2) of the RLA.

### Finding on Tenant’s costs application

1. I find that the landlord conducted the proceedings in a vexatious way by persisting in what should, on proper consideration, be seen to be a hopeless case and by making a false allegation of fraud. I make this finding based on the following matters:
2. There were four issues for determination by the Tribunal. The landlord was unsuccessful on each issue and other than the issue in relation to painting the premises, the landlord was bound to fail for the reasons that follow;
3. Regardless of whether the terms of settlement or lease by renewal were binding, the tenant from September 2011 had at the very least a lease in equity. The landlord did not challenge that the tenant exercised the option for the further term from September 2011. Having at a minimum a lease in equity the tenant had the right subject to s27 of the RLA to exercise the option for a further term from September 2016. It was not challenged that the tenant exercised the option for that further term. The landlord contended however, without any evidence to support it, that the tenant was in breach at the time of the purported exercise and accordingly the option was not exercised. Given the lack of any evidence by the landlord other than mere assertion of a breach, this claim was bound to fail. It was utterly hopeless;
4. The determination of whether the terms of settlement and lease by renewal were void depended upon whether the acts of Mr Strassman bound the landlord. I found the documents to be binding on the parties. On 18 October 2018, I found that Mr Strassman had actual authority to act on behalf of the landlord and accordingly the landlord was bound by his actions. I set out in paragraphs 25 to 42 of my reasons dated 18 October 2018 the reasons for making that finding. Part of my reasoning was based upon what Mr D’Anna said in evidence and part relied upon the evidence of other persons and documents. I did not find Mr D’Anna to be truthful in his recollection of events.
5. The authority of Mr Strassman was clearly within Mr D’Anna’s knowledge. He continually denied Mr Strassman’s authority to act for him notwithstanding that his denial conflicted with the evidence presented at the hearing as set out in my reasons. He was the only person who knew the truth of his engagement of Mr Strassman yet he chose to put the tenant to proof to dispute the landlord’s position regarding Mr Strassman’s authority. The tenant was successful in challenging Mr D’Anna’s assertion. Apart from his bald assertion denying any agency, no other evidence was put forward by Mr D’Anna or the landlord to counteract the evidence produced by the tenant on the issue;
6. By maintaining its denial of Mr Strassman’s authority in circumstances where Mr D’Anna knew that denial was false, the landlord conducted the proceeding in a vexatious way that unnecessarily disadvantaged the tenant;
7. The landlord’s claim for unconscionable conduct (the fourth issue) was unsupported by any evidence. To succeed in the claim the landlord had to show amongst other matters that Mr D’Anna was under some special disadvantage from around June 2012. No medical evidence was produced for the period before July 2015. The only evidence produced by the landlord in support of the claim concerned Mr D’Anna’s health from July 2015.This evidence was irrelevant to the issue to be considered as it was not temporally relevant. In the absence of any evidence other than Mr D’Anna’s assertion, the landlord did not discharge its onus of proof.
8. Had an analysis of the evidence to support the unconscionable conduct claim been made prior to hearing, it would have been clear that the claim was utterly hopeless;
9. The claims in relation to the lease by renewal and refurbishment agreement being improvident transactions were again unsupported by the evidence for the reasons set out in paragraphs 64 to 69 of my reasons dated 18 October 2018;
10. The landlord maintained its claims for damages for unconscionable conduct and improvident transaction throughout the hearing but fell very short of discharging its onus of proof in relation to the claim;.
11. The landlord raised on numerous occasions in correspondence between the parties and with the Victorian Police and during the trial, allegations of fraud against Mr O’Halloran, a director of the tenant. In submissions on day one of the hearing counsel for the landlord said that he would be submitting that Mr Strassman and Mr O’Halloran had business dealings. This claim seems to be abandoned during the hearing. In cross examination of Mr O’Halloran, counsel for the landlord put questions to him about being “a cheat and a liar;”
12. On day 2 of the hearing the landlord produced an amended defence which contained an implied allegation of fraud against Mr O’Halloran. On further question of counsel, the landlord’s position was that the allegation “doesn’t necessarily have to be against Mr O’Halloran. It could be against Mr Strassman as well.” The landlord’s position was that someone altered the document and the suspicion was that Mr O’Halloran was involved. There was no evidence to support the suspicion against Mr O’Halloran;
13. It was not disputed that Mr D’Anna had a difficult relationship with Mr O’Halloran following a rental determination unfavourable to the landlord in about 2006. From that time, Mr D’Anna avoided direct contact with Mr O’Halloran;
14. I find that the Landlord’s unsubstantiated claims of fraud against Mr O’Halloran and claims that Mr O’Halloran had business dealings with Mr Strassman were likely motivated by Mr D’Anna’s dislike of Mr O’Halloran; and
15. The doctrine of witness immunity is irrelevant to whether I order costs against the landlord based on evidence given by Mr D’Anna. To submit as counsel for the landlord submitted that the landlord cannot be held liable for costs based upon actions of Mr D’Anna giving evidence is to misunderstand the principle of witness immunity. There is no suggestion that an action will be taken against Mr D’Anna personally based on evidence given by him at the hearing.
    * + - 1. The painting issue was pursued by the landlord and ultimately conceded by the landlord through the cross-examination of Mr D’Anna. There is no evidence before me that supports a finding that the making of the painting issue was vexatious. The claim was not hopeless or untenable. It was a claim where the evidence did not support a finding that the tenant was in breach of the lease for failing to fulfil its painting obligations. Mr D’Anna accepted that the painting carried out by the tenant was enough. This is not the same as conceding that the tenant complied with all its obligations to paint under the lease.
16. I do not find that the landlord engaged in conduct which caused loss of time to the Tribunal by reason of amending its defence for the following reasons:
17. As set out in the transcript, I found that clause 9 of the defence was open to two interpretations;
    * + - 1. The landlord was given leave to file an amended defence to address the ambiguity in clause 9;
          2. There was no evidence to suggest that the landlord had been intentionally ambiguous in the defence; and
          3. Although half a day of hearing was wasted by reason of the amendment, the delay on its own does not amount to vexatious conduct.
18. For the reasons stated I find that the landlord conducted the proceedings in a vexatious way that unnecessarily disadvantaged the tenant. The disadvantage to the tenant included being put to the cost of engaging legal representation, preparing for the hearing and attending a four-day hearing. The tenant was forced to pursue legal proceedings to obtain a lease in circumstances where the landlord had no proper basis for denying the tenant’s entitlement to a lease.
19. I conclude that it is fair that the landlord is to pay the tenant’s costs of the proceedings other than costs relating to the painting issue, such costs, if not agreed, to be assessed by the Victorian Costs Court on the scale of costs in Appendix A of Chapter 1 of the rules of the County Court.
20. I estimate the time spent during the hearing on the painting issue as being approximately 5% of the hearing time, and fix the relevant percentage at 5%.

### Landlord’s costs application

1. The landlord’s submission on its oral costs application can be summarised as follows;
2. The landlord seeks its costs relating to its challenge of inadmissible parts of the tenant’s witness statement.
3. Ultimately the tenant made concessions and withdrew certain parts of its witness statement. The inclusion of the inadmissible evidence caused the tenant to prepare written submissions and argue the admissibility at the first day of the hearing;
4. The tenant’s conduct was vexatious because the landlord should have been put on notice that parts of the witness statements would be withdrawn. This unnecessarily disadvantaged the landlord as it prepared written submissions; and
5. The relevant parts of the transcript of the hearing (copy handed up) are from page 34 onwards.
6. The tenant’s submissions in relation to the landlord’s costs application can be summarised as follows:
7. The tenant only agreed to withdraw a small portion of the witness statements relating to paragraphs concerning a previous mediation;
8. In agreeing to withdraw these paragraphs, the tenant was not conceding that they were inadmissible; and
9. The remainder of the witness statements remained notwithstanding the landlord’s objections.

### Finding on Landlord’s costs application

1. The landlord’s application for costs is dismissed for the following reasons:
2. As set out clearly in the transcript of the hearing from page 34, most of the time spent on the application by the landlord concerning admissibility of parts of the tenant’s witness statements related to unsuccessful objections by the landlord;
   * + - 1. The concessions made by the tenant to redact some parts of the statements were made on the basis that the tenant did not concede the landlord’s claims of inadmissibility to be correct but was prepared to omit certain parts of the statements;
         2. The Tribunal is not bound by the rules of evidence; and
         3. The landlord’s concession to redact some parts of the witness statements falls well short of vexatious conduct.

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| L Forde  **Senior Member** |  |  |

1. [(1988) 14 NSWLR 481](http://www.austlii.edu.au/cgi-bin/LawCite?cit=%281988%29%2014%20NSWLR%20481) at 491 [↑](#footnote-ref-1)
2. [[2015] VCAT 596](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2015/596.html) [↑](#footnote-ref-2)
3. [[2015] VSCA 216](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSCA/2015/216.html) [↑](#footnote-ref-3)