

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP143/2017

CATCHWORDS

Injunction; Application by successful party for a costs order; matters to be considered – Section 109 Victorian Civil and Administrative Tribunal Act 1998 Section 92 Retail Leases Act 2003.

APPLICANT	Mr Andrew Yandle Mild to Wild Customs
RESPONDENT	Opal Park Pty Ltd
WHERE HELD	Melbourne
BEFORE	Member H. Davies
HEARING TYPE	Costs Application
DATE OF HEARING	9 and 22 February 2017
DATE OF ORDER	16 March 2017
CITATION	Yandle v Opal Park Pty Ltd (Building and Property) [2017] VCAT 377

ORDER

The application by the respondent for an order as to costs is dismissed.

MEMBER H. DAVIES

APPEARANCES:

For the Applicant	In person
For the Respondent	Mr Wilkinson of Counsel

REASONS

- 1 In the initial application the applicant, as the tenant of premises, sought an injunction restraining the respondent, as landlord, from taking possession of the premises.
- 2 The hearing was over two (2) days- February 9 and 22 2017 when the applicant appeared in person. The respondent was represented by Mr Wilkinson of Counsel.
- 3 The hearing was adjourned part heard on February 9 2017 to enable the applicant to seek legal advice with regard to matters which arose at the hearing by reason of the provisions of the *Retail Leases Act 2003* (“the RLA”).
- 4 On February 22 the Tribunal dismissed the application, giving lengthy oral reasons for its decision. It has to be said that the respondent had a resounding victory, the Tribunal finding that the application itself lacked merit.
- 5 At the conclusion of the hearing, the respondent made an application for costs pursuant to Section 109 of the *Victorian Civil and Administrative Tribunal Act 1998* (“the VCAT Act”). That application was reinforced by submissions filed on behalf of the respondent on 6 March. The applicant made no submissions on the issue of costs.
- 6 On February 21 2017, that is the day before the final hearing, the respondent’s solicitors, GPZ Legal, sent an email to the applicant in which it pointed out what they saw as the weaknesses in his case, pointed out that he had not served documents upon which he intended to rely at the hearing (as ordered on 9 February 2017), and advised that their client would seek an indemnity costs order in the event that the application was dismissed.
- 7 They referred the applicant specifically to Section 109 (3) of the VCAT Act and made a passing reference to Section 92 of the RT Act stating the applicant had “relied on objectively untrue evidence” and the proceeding “had been an unnecessary waste of time and funds on the respondent’s behalf”.
- 8 Nowhere in the respondents submissions, or in the letter referred to above, was there clear reference to the basis upon which this Tribunal should make a costs order, having regard to the provisions of Section 92 (2) of the RLA, albeit that, at the conclusion of the hearing, Mr. Wilkinson did produce the letter referred to above submitting, that by disregarding it and proceeding on February 22, the applicant had acted in a vexatious way and had disadvantaged his client.
- 9 The reasons why the lawyers believed the applicant would fail, as stated in their letter were precisely those that led the Tribunal to dismiss the application.

- 10 There were no documents upon which the applicant intended to rely which should have been served as ordered and he did not produce any such documents on February 22.
- 11 Section 92 of the RLA provides:
- “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.”
- 12 By reason of Section 92 (1) of the RLA, the Tribunal is prohibited from making a costs order under Section 109 of the Victorian Civil and Administrative Tribunal Act. The matters that Section 109 requires the Tribunal to take into account are of no relevance to this application and do not require repeating in these reasons.
- 13 To put an unrepresented party, by virtue of the letter of 21 February, in the position of choosing between withdrawing his application the day before the adjourned hearing was to resume, and facing a costs order application, in the opinion of the Tribunal, was unfair and unreasonable.
- 14 In any event this Tribunal does not regard the conduct of the applicant as vexatious having regard to the principles stated by Deputy President Bowman in *State of Victoria v Bradto Pty. Ltd. and Timbrook Pty. Ltd* [2006] VCAT 1813 (as cited with approval by the Court of Appeal of the Supreme Court of Victoria in *24 Hour Fitness Pty. Ltd v W & B Investment Group Pty. Ltd S APCI 2015 0039*).
- 15 His Honour Judge Bowman there stated, when considering Section 92 (2) of the RTA, 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 a conduct which is seriously and unfairly burdensome, prejudicial or damaging*”.
- 16 In the view of this Tribunal nothing in the conduct of the applicant satisfies this test.

- 17 There are no other matters the Tribunal considers relevant in determining whether this costs application should be granted.
- 18 For the above reasons the application for costs is dismissed.

MEMBER H. DAVIES