VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

RESIDENTIAL TENANCIES DIVISION

CIVIL CLAIMS LIST VCAT REFERENCE NO. **R2020/33436**

CATCHWORDS

Application for Costs, s 74(2)(b) and s 109 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) , whether the withdrawal of an application for a review under s 120 of the VCAT Act enlivens the provisions of s 74 (2)(b), whether an application under s 120 of the Act is an application for the purposes of s 74 (2)(b),s 109 considered.

APPLICANT	70 Esplande Brighton Pty Ltd
RESPONDENT	Omry Shani
WHERE HELD	Melbourne
BEFORE	Member J Sharkie
HEARING TYPE	Costs Application
DATE OF HEARING	13 August 2024
DATE OF ORDER	15 November 2024
CITATION	70 Esplanade Brighton Pty Ltd v Shan (Residential Tenancies) (Costs) [2024] VCAT 1098

ORDER

1. The application of the applicant for costs is dismissed.

J Sharkie
Member

APPEARANCES:

For Applicant	Ms M Nemeth, solicitor
For Respondent	no appearance

REASONS

1 The applicant,70 Esplande Brighton Pty Ltd ("70 Esplanade"), seeks a costs order.

History of the proceeding

2 70 Esplanade commenced the proceeding on 6 November 2020 seeking compensation against the respondent, Mr Shani.

3 On 6 July 2023, an order was made ordering Mr Shani to pay 70 Esplanade the sum of $15,703.15.

4 On 28 May 2024, Mr Shani filed an application for review pursuant to s 120 of the *Victorian Civil and Administrative Act 1998* (Vic) ('VCAT Act') seeking a review and rehearing of the order made on 6 July 2023 in his absence ('the application').

5 On 20 June 2024, the application came before the Tribunal for a hearing. However, the hearing did not proceed. The application was adjourned to 16 July 2024 because Mr Shani required the assistance of an interpreter.

6 On 20 June 2024, Mr Shani made an oral application for reconstitution of the Tribunal under s108 of the VCAT Act.

7 On 27 June 2024, an order was made dismissing Mr Shani's application for reconstitution ('the reconstitution order').

8 After the reconstitution order Mr Shani requested the application to be withdrawn. From the face of the email, it was not copied to 70 Esplanade ('the request to withdraw').

9 On 11 July 2024, an order was made withdrawing the application.

10 After the order was sent to the parties 70 Esplanade sought an order for costs.

11 On 15 July 2024, an order was made which provided 70 Esplanade with an opportunity to file any submissions in relation to costs by 26 July 2024. Mr Shani was given an opportunity to file any submissions in response by 9 August 2024.

12 70 Esplanade filed submissions on 26 July 2024.

13 Mr Shani filed submissions on 6 August 2024.

14 The costs application was heard at an in-person hearing on 13 August 2024.

15 At the costs application hearing 70 Esplanade was represented by a legal practitioner. Mr Shani did not attend the hearing.

Background

16 70 Esplanade was granted leave to be legally represented at the hearing on 20 June 2024.[1]Costs have no doubt been incurred. The decision to engage legal representation was a decision of 70 Esplanade.

[1] Unusual in an application of this nature.

17 Mr Shani may have only been aware of the engagement of legal representation by 70 Esplanade on 20 June 2024.From that date he was aware that the applicant had legally representation.

18 He would have been aware of the potential impact of legal representation costs when a costs order was made in favour of 70 Esplanade as part of the reconstitution order.

Submissions in support of the application for costs.

19 70 Esplanade claims an entitlement to costs to be paid by Mr Shani pursuant to s 74(2)(b) of the VCAT Act.

20 Further, 70 Esplanade submits that the "entire proceedings" have been "conducted" by Mr Shani in a manner which has unnecessarily disadvantaged 70 Esplanade having regard to factors set out in s 109(2) of the VCAT Act.

21 70 Esplanade submits that the application is an application within the meaning of s 3 of the VCAT Act.

22 Given the withdrawal of the application at the request of Mr Shani, 70 Esplanade submits that the provisions of s 74(2)(b) apply and the Tribunal should exercise its discretion to award costs against Shani.

23 It was submitted that the decision in *Juresko v Watts & Ors*[2] is authority for the proposition that the principles in s 109 of the VCAT Act do not directly apply to a consideration of a costs application made in consequence of a withdrawal of a proceeding.

24 In support of the proposition reference is made to the following passage of DP Steele.[3]

> 9. There is disagreement amongst the authorities and various decisions made by the Tribunal about whether the principles in section 109 of the *Victorian Civil and Administrative Tribunal Act 1998*,which sets out principles about costs order in this Tribunal, apply to a costs order under section 74(2)(b). In my view the better approach is that section 109 does not directly apply but that the principles in section 109 are relevant to any decision under section 74(2)(b). What section 109 says is that each party bears their own costs in the preceding. That is the usual position in an application. If an applicant withdraws after a Respondent and has incurred costs, the Respondent has no opportunity to say to the Tribunal, "Well I was right all along and it's not fair that I should have to spend a whole lot of money in defending myself". When a claim is determined by the Tribunal, the Respondent has an opportunity to say that and then section 109 comes into play and the Tribunal takes into account the factors set out in that section….
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> … However if the Applicant withdraws they may have put a Respondent to a whole lot of expenses without ever giving the

[2] [2007] VCAT 2462.
[3] Ibid 6.

> respondent an opportunity to have the rights and wrongs of that expense decided upon.
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> (10) That can be a vexatious thing to do in my view. Sometimes it is unavoidable, but the unfairness of putting a Respondent to the expense defending an action which is in withdrawn is something that has to be taken into account…
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> (18).. costs following withdrawal are different from ordinary costs orders. Withdrawal has put the Respondent to expense without the Respondent having any opportunity to prove that he was in the right and thus have some expectation of recovering at least part of his costs."

25 70 Esplanade submitted that in relation to the relevance of the factors in s 109(3) of the VCAT Act, Mr Shani conducted the "entire" proceeding in a matter which unnecessarily disadvantaged 70 Esplanade.

26 Initially reliance was made on factors relating to the alleged conduct of Mr Shani regarding the proceeding commenced by 70 Esplanade. It was conceded at the hearing of this application that four of those factors did not relate to the proceeding[4] and were withdrawn.

27 The factor which remained related to the alleged vexatious conduct of Mr Shani. It was argued that the vexatious conduct included the bringing of the application more than ten months after the order made on 6 July 2023, failing to file any substantive material to support the application and withdrawing the application "at the last minute".

Submissions of Mr Shani

28 Shani did not attend the hearing but filed submissions with the Tribunal. The submissions explained that the reason he did not pay rent was because 70 Esplanade failed to pay him for plumbing work which he paid for at the rented premises.

29 Attached to his submission was a tax invoice for the alleged plumbing costs and requested the Tribunal "to withdraw any cost that (70 Esplanade) ask". I interpreted this submission has meaning that when determining the request for costs by 70 Esplanades I should consider the fact that Mr Shani had allegedly incurred the expenses relating to the plumbing work.

Consideration of the applicable law and principles relating to the costs application.

30 Section 109(1) of the VCAT Act sets out the general rule relating to costs namely that each party in a proceeding is to bear their own legal costs. Section 109(2) states that the Tribunal may make a costs order at any time in a proceeding. Section 109(3) states that the power to make a costs order under s 109(2) is subject to it being fair to do so, having regard to the factors set out in s 109(3).

31 However, where a party withdraws an application, the position is different.

[4] Being submissions concerning s 109(3) (i), (ii), (iii) and (iv).

32 Section 74 of the VCAT ACT provides as follows:

> **Withdrawal of proceedings**
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> (1) If the Tribunal gives leave, an applicant may withdraw an application or referral before it is determined by the Tribunal.
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> (2) If an applicant withdraws an application or referral—
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> (a) the applicant must notify all other parties in writing of the withdrawal; and
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> (b) the Tribunal may make an order that the applicant pay all, or any part of, the costs of the other parties to the proceeding; and
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> (c) the principal registrar may refund any application fee paid by the applicant; and
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> (d) the applicant cannot make a further application or request or require a further referral in relation to the same facts and circumstances without the leave of the Tribunal.
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> (3) Subsection (2)(a) does not apply if the principal registrar notifies the other parties in writing on behalf of the applicant.

33 It has been decided[5] that an application under s 120 of the VCAT Act is to be regarded as a stand-alone proceeding. If the application was an interlocutory proceeding, s 74 of the VCAT Act would not apply.[6] The application was not an interlocutory application. It was an application to which s 74(2)(b) of the VCAT Act could apply.

34 I adopt the analysis of Member Sweeney in *De Jonk v Aumeca Owners Corporation Pty Ltd*[7] regarding the operation of s 74 and s 109 of the VCAT Act[8] when he said:

> 8. In *Taylor & Ors v Owners Corporation RP2044*[9] I considered the operation of s74(2)(b) and s109 of the VCAT Act. Those considerations are pertinent to the present proceeding and are repeated here. In *Taylor* I (Member Sweeney) referred to the decision of Deputy President McKenzie in *Asgari v SBS Radio.*[10] In respect of the operation of s74(2)(b) of the VCAT Act she said:
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> > Section 74(2)(b) is a separate power to order costs on the withdrawal of a proceeding. There is no rule here that costs lie where they fall, unless the Tribunal considers it fair to order otherwise. Here the Tribunal has an unfettered and broad discretion as to costs, similar to the discretion which the Anti-discrimination Tribunal had under the now

[5] *Falconbridge Pty Ltd v Yarra CC* (2005) VCAT 2449 at (23).
[6] *Owners Corporation 2 Plan No PS515508R v MAV Group Pty Ltd* (Building and Property) [2015] VCAT 1025. However, that it not to say that a party responding to a withdrawn interlocutory application could not make an application under s 109 of the VCAT Act.
[7] [2020] VCAT 1439.
[8] Ibid para 8 – 15.
[9] [2019] VCAT 2011,44-50.
]10] [2001) VCAT 1755.

> repealed s.138 of *Equal Opportunity Act 1995*. However, the fact that there is a broad and unfettered discretion under s 74(2)(b) of the VCAT Act also means that there can be no automatic rule that costs will always be awarded against the withdrawing party. The decision as to costs must be based on the particular circumstances of each case. There is no reason why similar factors to those which have been taken into account in decisions under s.138 of the *Equal Opportunity Act*, could not also be taken into account in determining whether or not to award costs under s74(2)(b) of the VCAT Act. (As to this, see *Kallinikos v. Hellinger*, a decision of VCAT dated 15 March 2000). These factors include whether a complaint has been instituted vexatiously, that is, predominantly to embarrass the Respondent, or place an unreasonable burden on a Respondent, or for some purpose other than the adjudication of rights under the *Equal Opportunity Act*; whether the applicant has conducted the proceeding unreasonably; whether the applicant has made or persisted in a claim in which he or she had no genuine belief, or in circumstances where, although he or she may have genuinely believe the complaint to be well founded, the claim had no foundation and no reasonable person would have believed that it had.

9. In *Luchio Nominees Pty Ltd v Eppping Fresh Food Market Pty Ltd*,[11] Member Edquist applied the principle espoused in *Asgari* that there is no automatic rule that costs will always be awarded against the withdrawing party. The discretionary power to award costs under s74(2)(b) of the VCAT Act is governed by the overarching obligation on the Tribunal to act fairly and according to the substantial merits of the case, imposed by s 97 of the VCAT Act. Section 74(2)(b) does not establish a 'policy' in favour of granting an order for costs.[12] Again, the decision to award costs must depend upon all the circumstances of the case.

10. Whilst s74(2)(b) does not deal with the content of a costs order and is regarded as an empowering provision to award costs after a party withdraws an application,[13] assessing the substantial merits of a case can be considered against the matters enunciated by Deputy President McKenzie in *Asgari* (above).

11. In addition the consideration of the discretion to award costs may include those factors listed in s109(3) (*Fernandez v Amatek Pty Ltd*).[14]

12. Following from the above considerations informing the exercise of a discretion to award costs, the Tribunal has had regard to a number of cases concerning 'conduct', s 109(3)(c), as being a consideration for whether to award costs where a party has

[11] [2016] VCAT 969.
[12] *Transport Accident Commission v Busuttil* (2001) VSC 325.
[13] *Transport Accident Commission v Coyle* (2001) VSCA 236.
[14] [2001] VCAT 1979.

withdrawn its application. These include a failure to give reasonable notice of intention to withdraw the proceeding (*Price v Stonnington CC*[15]), vexatiously conducting the proceeding by sitting on hands and bringing the application at a very late date (*Kameel Pty Ltd v Casey CC*[16]), where the proceeding was 'severely flawed' (*Decleah Investments Pty Ltd v Cardinia SC*).[17]

13. In relation to vexatiously conducting a proceeding, it is important to recognise that it is the 'conduct of the proceeding' that is the matter to be considered rather than whether the proceeding itself may be vexatious (*Caldwell v Cheung*).[18]

14. In relation to a consideration under s 109(3)(c) of the VCAT Act, the relative strengths of the claims made, including whether a party has made a claim that has no tenable basis in fact or law, this phrase has been held to refer to cases where, amongst other matters, one party has had an extremely weak or even untenable case but persisted in putting it when it had no reasonable prospect of success (*Thirty Fourth Enterprise Pty Ltd v Leggetts Tennis and Squash Centre Pty Ltd (No2).*[19] The sub section is intended to identify circumstances in which one party 'has pressed a clearly implausible, manifestly weak or incredible case' (*Hickey v Port Phillip CC*).[20] Generally, decisions on this consideration infer that there has to have been a hearing and a determination on the merits before s 109(3)(c) is enlivened (*Dennis Family Corporation Pty Ltd v Casey CC).*[21]

15. In *High Quality Quarry Products Pty Ltd v Environment Protection Authority*[22] SM Billings referred to discussion on the operation of s 74(2)(b) by DP McKenzie:

> 14.In my view the proper approach to the question is the one taken by the Tribunal in cases such as *Fernandez v Amatek Pty Ltd*[6]. DP McKenzie there noted that the power in section 74 to award costs is differently expressed to the power in section 109 containing VCAT's general power to award costs. She went on to say this –
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> > "The effect of s.109 is that each party bears his or her own costs unless the Tribunal, after considering a number of listed factors, considers it fair to order otherwise ... [Section] 74(2)(b) is not a provision like this. It gives the Tribunal broad and unfettered discretion as to costs on the withdrawal of the proceeding.

[15] [1999] VCAT 1284.
[16] [2006] VCAT 526.
[17] [2011] VCAT 1292.
[18] [2008] VCAT 1794 at [15].
[19] [1999] VCAT 27.
[20] [2001] VCAT 231 at [15].
[21] [2008] VCAT 691.
[22] [2011] VCAT 496 at [14].

> [O]ne of the implications from the broad and unfettered discretion conferred is that there ought be no automatic rule that costs should always or generally be awarded against the withdrawing applicant. [T]he non application of such an automatic rule is in the Tribunal's equal opportunity jurisdiction, also consistent with the conciliation focus of the Equal Opportunity Act and its character as legislation with a social rather than a commercial objective and also with the principle that people should not be deterred from accessing that jurisdiction by fear that if they withdraw their complaints they will automatically have to pay costs to the respondents.
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> However, the circumstances of a particular case may justify an award of costs. Circumstances which have been held to justify awards of costs have occurred on a number of occasions. The circumstances include, but are not limited to, the matters listed in s. 109(3) and s. 78(1) of the VCAT Act. Examples are that the applicant has conducted the proceeding in a way that unnecessarily disadvantages the respondent; for example by breaching Tribunal direction or vexatiously conducting the proceeding, or has made a claim with no tenable basis."

> 25. I add my view that, depending on the circumstances, the Tribunal should not discourage an applicant from withdrawing an application at the earliest opportunity whenever that is appropriate."

35 The power given to the Tribunal under s 74(3) of the VCAT Act is discretionary. There can be no presumption that 70 Esplanade is entitled to an order for costs.

36 The fundamental principle in any costs application is whether it would be fair to award costs in the applicant's favour. Section 74(2)(b) does not alter that fundamental principle. Something exceptional is required.

37 By way of guidance, and having regard to the view expressed by DP McKenzie that circumstances justifying an award of costs include, but are not limited to the matters listed in s 109(3) which reads as follows; s 109(3):

> (3) The Tribunal may make an order under subsection (2) only if satisfied that it is fair to do so, having regard to—
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> (a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as—
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> (i) failing to comply with an order or direction of the Tribunal without reasonable excuse;
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> (ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;
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> (iii) asking for an adjournment as a result of (i) or (ii);
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> (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.

Determination of the application.

38 Mr Shani's submission does not assist. He says that the reason he did not pay rent[23] was because he asserts that 70 Esplanade should compensate him for plumbing works undertaken at the rented premises. Mr Shani can make an application for compensation recover the plumbing costs. The fact that he is of the view that 70 Esplanade is indebted to him is irrelevant to the question of whether Mr Shani should be ordered to pay the costs. His assertion relating to the plumbing compensation cannot be raised as a set off to this costs application.

39 I turn now to the submission of 70 Esplanade. The thrust of the submission is that Mr Shani has vexatiously conducted the application by bringing it more than ten months after the order was made in June 2023, failing to file any substantive material, and withdrawing the application following the reconstitution order

40 The application did not proceed. No determination was made as to the merits of the application. There is no finding as to why the application was made so long after the order of June 2023. In this regard I adopt the comments of Member Sweeney referred to above.[24] There has been no "determination on the merits."[25] The hearing on 20 June 2024 made no finding regarding the application. The hearing of the application was incomplete. According to the order it was adjourned to 16 July 2024 so that an interpreter could be arranged to assist Mr Shani.

41 It is not uncommon for a party in the Residential Tenancies list to lodge an application under s 120 of the VCAT Act after the expiry of the fourteen-day lodgement period referred to in that section. Leave to extend time is often given provided the explanation for the delay is reasonable. In general terms, provided there is a reasonable position as to why the party was not in attendance when the order was made in his absence and has an arguable position, the application should not be dismissed simply because it was made outside the fourteen-day period if a reasonable explanation is given.

42 I am not persuaded that the apparent late filing of the application constitutes vexatious behaviour on the part of Mr Shani. He commenced an application

[23] Which formed a substantial component of the order dated 6 July 2023.
[24] Parag 34 at parag 14 of his decision.
[25] Ibid.

which he was entitled to do under s 120 of the VCAT Act. The fact that the application was filed beyond the fourteen-day period referred to in s 120 would have been a matter to be considered at the hearing The fact that the application is late does not necessarily mean it has been lodged vexatiously, particularly when the reasons for the late filing have neither been tested nor determined in a hearing. It is the conduct of the proceeding to be considered rather than whether the proceeding itself was vexatious.[26]

43 70 Esplanade submits that no substantive material was filed in respect of the application. In the Residential Tenancies list it is not unusual for material not to be filed in support s 120 applications. Oftentimes s 120 application hearings proceed based on verbal evidence. The fact that material has not been lodged in support of the application is not indicative of vexatious conduct.

44 On 27 June 2024, Mr Shani sent an email to the Tribunal requesting that the application be withdrawn. He did not copy 70 Esplanade into the email. The application was withdrawn by order dated 11 July 2024.

45 Section 74(1) requires an applicant to notify all other parties of the withdrawal. A request to withdraw an application is not a withdrawal. The application is not withdrawn until the Tribunal says it is, this does not occur until the order dated 11 July 2024. In the Residential Tenancies list leave of the Tribunal to seek a withdrawal is not required.[27] As leave is not required in the Residential Tenancies list the request may be regarded as withdrawal. However, until the order is made theoretically the request to withdraw could be withdrawn. However as stated by Member Sweeney "failure to give reasonable notice of intention to withdraw"[28] may be conduct to be regarded by the Tribunal as to whether to award costs.

46 The withdrawal order was not made until 11 July 2024 notwithstanding the request was made by Mr Shani on 27 June 2024. Mr Shani did not notify 70 Esplanade of his request to withdraw.

47 Section 74(1) does not require an applicant to notify all other parties of a request to withdraw. However, parties ought to be aware that if correspondence is sent to the Tribunal all other parties should be copied into that correspondence.

48 In the Residential Tenancies list parties are invariably self-represented. Mr Sharni was self-represented. It cannot be assumed that Mr Sharni was be familiar with the processes and procedure of the Tribunal, including the need to "copy in" the other party to correspondence sent to the Tribunal. Mr Shani failed to "copy in" 70 Esplanade to the request to withdraw but that fact alone is not sufficient to give rise to a situation where the Tribunal ought to exercise its discretion under s 74(2)(b).I do not consider that the failure to "copy in" alone amounted to vexatious conduct nor is it an exceptional

[26] Ibid at parag 13.
[27] Clause 69 Schedule 1 VCAT ACT.
[28] Ibid at paragraph 12.

circumstance which gives rise to a situation where I should exercise my discretion to award costs in favour of 70 Esplanade.

49 The submission of 70 Esplanade relies upon to a late issued application which had no material filed in support, had not been determined and in respect of which the applicant in the application requested a withdrawal without copying in 70 Esplanade. For the reasons outlined there is insufficient reason having regard to the overarching obligation to act fairly to award costs in favour of 70 Esplanade.

50 The application for costs is dismissed.

J Sharkie
Member