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VCAT case against Robert Cripps - Austlii source. Cripps' breach of contract merged with defamation

Victorian Civil and Administrative Tribunal

Vakras & Anor v Redleg Museum Services Pty Ltd (Civil Claims) [2012] VCAT 579 (18 May 2012)

Last Updated: 25 May 2012

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

CIVIL CLAIMS LIST VCAT REFERENCE NO. C5251/2011

CATCHWORDS

Section 77 of VCAT Act – *Fair Trading Act* 1999 – Dispute re breach of contract – Earlier proceedings in Supreme Court involving alleged defamation arising from basically the same facts – Risk of conflicting decisions – Whether appropriate to strike out and transfer VCAT proceeding – Factors to be considered.

FIRST APPLICANT	Demetrios Vakras
SECOND APPLICANT	Lee-Anne Raymond
FIRST RESPONDENT	Redleg Museum Services Pty Ltd (ACN: 105 986 829)
SECOND RESPONDENT	Robert Raymond Cripps
WHERE HELD	Melbourne
BEFORE	Judge Bowman, Acting President
HEARING TYPE	Hearing
DATE OF HEARING	27 April 2012
DATE OF ORDER	18 May 2012
CITATION	Vakras & Anor v Redleg Museum Services Pty Ltd (Civil Claims) [2012] VCAT 579

ORDER

1. Pursuant to s 77 of the *Victorian Civil and Administrative Tribunal Act* 1998, application struck

out and transferred to the Supreme Court of Victoria.

2. Costs reserved.

3. Liberty to apply.

Judge Bowman
Acting President

APPEARANCES:

For the Applicants	The applicants appeared in person
For the Respondents	Ms M.Marcus of Counsel

REASONS

GENERAL BACKGROUND

1. This matter comes before me by way of an application pursuant to s 77 of the *Victorian Civil and Administrative Tribunal Act* 1998 ('the Act'). The respondents, Redleg Museum Services Pty Ltd ("Redleg") and Robert Raymond Cripps ("Cripps") who operate a gallery and whose interests overlap entirely and who had common representation, seek that the proceeding brought in this Tribunal by the applicants Demetrious Vakros ("Vakros") and Lee-Anne Raymond ("Raymond"), who are both artists as well as apparently being partners in life, be struck out and referred to another forum, namely, the Supreme Court of Victoria. Vakros and Raymond, whose interests are also in common, resist such an application.
2. The applicants represented themselves. Ms Marcus of Counsel appeared on behalf of the respondents. No oral evidence was adduced. Various documents were made available to me. In addition, very helpful submissions were made on behalf of both sides of the dispute.

FACTUAL BACKGROUND

3. There are two proceedings on foot, one being before the Supreme Court of Victoria and the other before this Tribunal. These disputes largely have a common factual basis. Vakros and Raymond wished to display an exhibition of artworks in June and July 2009. Redleg and Cripps conduct the Guildford Lane Gallery at Guildford Lane in the CBD of Melbourne. An agreement was reached that the applicants would display their works at Guildford Lane Gallery. The parties entered into a contract to this effect. Valuable consideration passed to the respondents in this regard. The exhibition was conducted from 17 June 2009 until 6 July 2009.
4. Without going into the precise details of what occurred, it would certainly be fair to say, as was put by Ms Marcus, that the relationship between the parties soured. The rights and wrongs of this need not concern us in the present application.
5. The upshot of the discord which developed between the parties was as follows. On 1 April 2011, Redleg and Cripps instituted proceedings in the Supreme Court of Victoria against Vakras

and Raymond for defamation. In May 2011 an Amended Statement of Claim was filed and served. It is alleged that defamatory material was published on a website of Vakras in or about June 2009 and in or about 2 April 2011. It is also alleged that in or about June 2009 defamatory material was published on a website of Raymond. Without going into every detail, it is alleged that the ordinary meaning of the words contained in the articles so published is to the effect that Cripps used economic duress to force the applicants to agree to terms that were not in the original contract for rental of space at the gallery; that he deliberately inhibited the applicant's capacity to promote the exhibition, causing it to fail; that he is a dangerous racist who has embraced the discredited views of national socialism; that Cripps' pattern of intimidating behaviour, as applied to Vakras and Raymond, had left other artists too fearful to describe to the public their own negative experiences with him; that Cripps, as a professional gallerist, has bullied, abused and generally mistreated the artists that he represents and is universally despised and to be avoided at all costs; that various artists have left him and that he ceased to support and actively sabotaged the artists that he represents once he can no longer make any further profit from them; that by reason of these matters and his ignorance of art, he is not a fit and proper person to be a gallerist; and that Redleg is a disreputable company to be avoided by artists and other potential customers. That is a very basic summary of the alleged defamation.

6. Vakras and Raymond, who appear to have legal representation for the purposes of the Supreme Court action but not for the application before VCAT, have filed and served Amended Defences. Vakras denies that his articles were defamatory, and, alternatively, pleads that the contents of the articles were substantially true. Lengthy particulars, based upon assertions of fact, are then set out. There is a further alternative pleading that, if the articles are defamatory, they contained statements of fact that are true in substance and, insofar as they contain expressions of opinion, those expressions are fair comment. Alternative defences on the basis of qualified privilege and s 30 of the *Defamation Act* 2005 are also pleaded. It is pleaded that, if the ordinary and natural meaning of the words of the articles are as pleaded, those meanings are substantially true. I might say that, in attempting to summarise the pleadings, effectively I have combined the thrust of the Amended Defence in relation to each Vakras article. The Amended Defence on behalf of Raymond is along similar lines. It can be seen that the Amended Defences are based substantially upon allegations of fact, particularly relating to contractual matters and the behaviour of Cripps.
7. I turn now to the application issued out of this Tribunal. This was so issued on 12 August 2011. It appears to be issued pursuant to the provisions of the *Fair Trading Act* 1999. Vakros and Raymond seek from the respondents the sum of $34,500 which amount basically relates to the refund of costs associated with the exhibition; the loss of sales; and associated costs as a consequence of various breaches of contract. Vakros and Raymond have also provided a summary of their case, in addition to a lengthy affidavit of some 23 pages.
8. Again, without going into the extensive details set out in these documents, it is apparent that the claim of Vakros and Raymond is based on breach of contract. It is alleged that, after payment of the relevant consideration, Redleg and Cripps, in breach of the contract, began to make alterations to it. It is alleged that they refused to sell a publication which formed an integral part of the presentation, or to store such publication on the premises. By this stage it was too late for Vakros and Raymond to alter arrangements relating to the exhibition. There are further allegations concerning notices put up at the gallery by Redleg and Cripps which were detrimental to the exhibition and of loud abuse on the part of Cripps. They also allege that they were basically barred from attending the gallery despite what was in the contract. There is also reference to the alleged racism matters. In short, Vakros and Raymond seek damages essentially resulting from the breach of a written contract described as an 'Exhibition Agreement' between themselves and, effectively, Redleg and Cripps.

THE LEGISLATIVE FRAMEWORK

9. The respondents' application is pursuant to s 77 of the Act. The relevant subsections are ss 77(1) and (3). They read as follows:

> (1) At any time, the Tribunal may make an order striking out all, or any part, of a proceeding (other than a proceeding for review of a decision) if it considers that the subject matter of the proceeding would be more appropriately dealt with by a tribunal other than the Tribunal, a court or any other person or body.
> (2) If the Tribunal makes an order under sub-section (1), it may refer the matter to the relevant tribunal, court, person or body if it considers it appropriate to do so.

THE COMPETING SUBMISSIONS

(i) The Submissions of Redleg and Cripps

10. As it was the application of Redleg and Cripps pursuant to s 77, Ms Marcus addressed first, speaking to written submissions. Those submissions, both written and oral, could be summarised as follows
11. The Supreme Court proceeding, which was issued earlier, is parallel to the VCAT proceeding and involves many of the same facts and allegations. Both are based on the same exhibition at the Guildford Lane Gallery and involve a contract for hire of it. Both involve alleged conduct of Cripps before and during the exhibition and alleged breaches of the agreement by him. Both involve alleged failure by Cripps to promote the exhibition and damage suffered by Vakros and Raymond as a result. Both involve the same parties.
12. VCAT could not make orders relating to the Supreme Court proceeding, it being a defamation matter, but the Supreme Court can make orders in relation to a breach of contract claim, such as that before VCAT. It is in the interests of justice and the efficient management of both sets of proceedings that the VCAT matter be struck out and transferred to the Supreme Court so that both matters can be heard together. This would also eliminate the risk of different decisions based on the same facts.
13. The Supreme Court proceeding is comparatively well advanced, being next listed for directions on 25 May. Prior to that, Vakras and Raymond are to file and serve further discovered documents and further answers to interrogatories. It is intended that the matter be set down for trial at the next directions hearing, although an actual date for hearing cannot be predicted at this time. The VCAT proceeding was instituted some three months after the Supreme Court proceeding and, because of this s 77 application, Redleg and Cripps have not yet filed a response to the claim of the applicants.
14. There is a considerable overlap of issues in the proceedings. Reference is made to the Supreme Court writ, and in particular to the Defences of Vakras and Raymond. In determining whether these Defences are made out, the Supreme Court will need to investigate and adjudicate upon various factual matters relating to the exhibition in June 2009. Similarly, VCAT will be required to hear evidence about and adjudicate upon various alleged factual matters relating to the same exhibition. Examples of disputed facts common to both proceedings include those relating to the hire of gallery space; an alleged oral agreement concerning sale and distribution of a catalogue; alleged breaches of both the written contract and oral arrangement; the imposition of prohibition relating to attendances by Vakras and Raymond at the gallery; alleged breach of the hiring agreement in relation to return of moneys owed; alleged economic duress by Cripps; and alleged inhibiting of Vakras and Raymond's ability to promote the exhibition by Cripps. Further, the material filed on behalf of Vakras and Raymond effectively concedes that there is a considerable overlapping of issues.
15. Reference is made to the decision in *Raline Industries Proprietary Limited v MJPE Investments Pty Ltd* (Domestic Building) [2006] VCAT 1607 (I might interpose that this is a decision of mine). There it was said as follows:

If a considerable doubt exists as to the power of this Tribunal to make some of those orders, it is preferable the proceeding be struck out and referred to the Court dealing with the related proceedings and where no jurisdictional doubts exist.

It was further stated as follows:

In appropriate circumstances, where the proceedings are intertwined, where duplication should be avoided, and where I am satisfied that there is a risk of conflicting decisions, I have been prepared to accede to applications pursuant to section 77.

16. It is submitted that the present is a similar case. In the present case, there is a risk of duplication of proceedings and conflicting decisions. Further, as a result of the striking out of the current VCAT application and the transferring of it to the Supreme Court, there will not be caused any significant delay or inconvenience.

(ii) **The Submissions of Vakras and Raymon**d

17. Both Vakras and Raymond also advanced arguments, speaking to written submissions which were made available to me. These submissions, written and oral, could be summarised as follows. As each effectively complemented the other, I will summarise them collectively.
18. The matter before VCAT involves breach of contract between a business and individuals. We have the right to seek redress for the wrongdoing of that business through VCAT. We will be able to demonstrate that we adhered to our responsibilities as set out in the contract but Redleg and Cripps did not. The contract was breached in several ways and we seek damages because of this. In August 2011 the action for breach of contract was commenced at VCAT but has been delayed due to adjournments caused by Cripps.
19. The matters can be heard separately. No matter what the outcome of the VCAT proceeding, the defamation matter will nevertheless proceed. The defamation proceeding has its own complexities. There is a danger that, if the VCAT proceeding is struck out and referred to the Supreme Court, it will be subsumed by the defamation proceeding. The two are very different matters. Defamation actions are more involved with the protection of reputation, whereas a breach of contract case deals with the demonstrated facts and there is no interest in considering any motivation for what may have inspired the breach in the first place. Objective proofs are required. The matters should be kept separate and heard in their respective jurisdictions and in their proper legal framework and context.
20. The breach of contract matter is not a preliminary defamation trial. It would be a misuse of time and resources should the VCAT proceeding be struck out. VCAT is better equipped and is the more appropriate jurisdiction in which to have a breach of contract matter heard, and it is our right for it to be heard and decided upon at VCAT.
21. We have a grievance based on breach of contract and we seek a remedy for it, even if we write about the grievance and communicate it to other parties. Claims by Redleg and Cripps that writing about our grievance causes harm to reputations does not remove our right to seek redress for the grievance. Supreme Court arguments about whether Cripps has been defamed are irrelevant to the VCAT application, just as the remedy being sought at VCAT is irrelevant to the Supreme Court claim for defamation. The fact that we wrote concerning what Cripps did does not absolve him of liability for the injury caused to us. The considerations dealt with by one court or tribunal are irrelevant to considerations being dealt with by the other.
22. Further, it is the way Redleg and Cripps have behaved that has ruined their own business and not our writing about it.
23. The matters are separate and amalgamating them would only add greater confusion. The decision of one court is immaterial to the decision of the other. Arguments concerning the

damage done to the reputations of Redleg and Cripps because we wrote about the breach of contract will subsume the breach of contract case and the damage done to us by reason of it. The evidence gathered by us which shows the breach of contract is being used against us as a proof of defamation. If a court considers preservation of reputation to be paramount, it may become impossible to reconcile this with argument based upon the breach of contract. There are no grounds for having our claim for breach of contract struck out because it pertains to matters which might materially be the same as those involved in the defamation case. Redleg and Cripps are attempting to have a pre-trial trial. They are attempting to make it very complicated and overwhelmed by minutiae which are irrelevant in relation to whether the breach of contract action is to be struck out or not. Their argument that, because we are arguing over the same material it may as well be one case, is wrong. In short, our pursuit of damages for breach of contract is incompatible with the aims of defamation law and our action should not be struck out or merged with the defamation case. This would be prejudicial to us in our pursuit of a remedy for breach of contract.

24. Redleg and Cripps, in attempting to have this matter struck out, are attempting to make it 'unknown' that bad behaviour took place and that there was a breach of contract.
25. At the moment there is no set date for the hearing of the defamation case, and the best estimate appears to be that it will be heard in early 2013, as it is anticipated to last approximately 14 days. There is no reason for this to interfere with the VCAT hearing which should be resolved well before that date.
26. There would no defamation case if Cripps had not organised for his staff to commit unlawful acts designed to keep us out of the gallery. Further, the defamation case is itself an abuse of process, attempting to prevent freedom of expression. It is repeated that the cases should not be combined and that the attempt to strike out the VCAT application is an attempt by the respondents to achieve a victory, having breached the contract, and then sued for defamation because we wrote that the contract had been breached.
27. Both scenarios – the breach of contract and the defamation – should be tested separately in court. Any overlap has only occurred because we wrote about the breach of contract. The defamation case is one in which Redleg and Cripps demand an apology or damages because certain matters may have caused them injury. The VCAT application is that it is the very matters which have caused the injury are those matters involving the breach of contract. The intention of each area of law is different. To strike out the VCAT application would in essence expand the ambit of the defamation action in ways not intended by the *Defamation Act*, one object of which is to ensure that the law of defamation does not place unreasonable limits on freedom of expression and, in particular, on the publication and discussion of matters of public interest and importance.

RULING

28. The approach to be adopted in relation to applications pursuant to s 77 has been discussed in many cases, a number of which are decisions of mine. Many of these are set out in paragraph [3225] of *Pizer's Annotated VCAT Act* (3rd edition). At the end of that paragraph the author, Jason Pizer, identifies three themes which he believes have emerged from a consideration of many of the decisions. In my opinion, he has accurately identified these themes which, hopefully, correctly state the general approach that has been adopted. They are as follows:

(1) VCAT is unlikely to exercise its power under s 77 where the application is based upon an alleged lack of expertise, lack of adequate powers in relation to discovery or to sufficiently structured pleadings, or lack of appropriate case management procedures to enable it to deal with complex or sizeable cases.

(2) VCAT is likely to exercise its power under s 77 if there is some doubt about whether it could grant an aspect of the relief sought by a party.

(3) VCAT is likely to exercise its power under s 77 if there are related proceedings already on foot in a court and there is a risk of inconsistent findings.

Relevant decisions are referred to in relation to each of the above. Of course, there are other factors which are to be considered, including cost, convenience, whether proceedings in another jurisdiction are already on foot or merely proposed, the proximity to respective hearing dates, and the fact that VCAT is a less formal jurisdiction than some others with a greater prevalence of self-representation. These are just some of the many matters that are to be taken into account and which will vary from application to application. However, the existence of these other factors does not mean that the three themes identified in *Pizer* are not correctly identified, although obviously each application must be considered on its merits.

29. In the present case, I make the following findings.

(a) The defamation proceedings which are on foot in the Supreme Court of Victoria directly involve and are substantially based upon matters pertaining to the contract for the hire of the Guildford Lane Gallery.

(b) The same parties are involved in each action.

(c) There is no doubt but that the Supreme Court of Victoria possesses the jurisdiction to deal with both the defamation action and an action based upon breach of contract. There has to be very considerable doubt, to put it mildly, that VCAT possesses the jurisdiction to hear the defamation case. It was not argued by Vakras and Raymond that VCAT does possess the jurisdiction to deal with a defamation action. Nevertheless, in fairness, I consider it an issue which should be considered. As has been said many times, VCAT is a creature of statute. It has no inherent jurisdiction. As was observed by Balmford J in *Roads Corporation v Maclaw No. 469 Pty Ltd* [2001] VSC 435; (2001) 19 VAR 169, VCAT's jurisdiction is precisely defined in the various enabling enactments. That VCAT has no inherent jurisdiction was also remarked upon by Maxwell P in *Herald and Weekly Times Pty Ltd v Victorian Civil and Administrative Tribunal & Ors* [2006] VSCA 7.

There is nothing which I could find in the *Defamation Act* which confers jurisdiction upon VCAT, and indeed that Act specifically envisages that defamation actions will be heard by a court. There is no argument but that VCAT does possess jurisdiction in relation to matters involving the *Fair Trading Act* 1999, and it has become essentially the first 'port of call' in relation to such matters. It might be argued that the present defamation action arises out of a consumer and trader dispute within the meaning of s 107 of the *Fair Trading Act*. However, even if the factual basis for each was identical, this argument does not seem to me to be valid. Section 107(2) states that a consumer and trader dispute includes any dispute or claim in negligence, nuisance or trespass that relates to the supply or possible supply of goods or services. Defamation is not included. All the additional powers given to VCAT pursuant to s 109 involve orders relating to unjust terms of a contract or variations of a contract in order to avoid injustice. In short, there is nothing in the *Fair Trading Act* which gives to VCAT the jurisdiction to award damages in respect of defamation in the context of a consumer and trader dispute, or to entertain such an application.

That the Supreme Court of Victoria possesses jurisdiction to deal with a consumer and trader dispute pursuant to the *Fair Trading Act* in the very circumstances with which we are dealing is clear from s 111(1)(c) of that Act. Such a dispute is justiciable if 'the Tribunal refers the proceeding to that court

under s 77 of the *Victorian Civil and Administrative Tribunal Act* 1998'.

In short, the Supreme Court of Victoria possesses the jurisdiction to hear both the defamation action and the application pursuant to the *Fair Trading Act* if the latter is referred to it pursuant to s 77. This Tribunal has jurisdiction to hear the application pursuant to the *Fair Trading Act* but not to hear the defamation action.

(d) That there is a substantial overlapping of basic facts in the two actions seems to me to be undeniable. Effectively, this is conceded by Vakras and Raymond. In their joint affidavit of 15 February 2012, the following is stated:

There is some overlap between the VCAT case and the defamation case with regards to what is written by Raymond ... However, there is considerable overlap between the VCAT case and the defamation case with regards to what is written by Vakras.

In the written material which formed the basis of their oral submissions and which was placed before me, it is stated that ".... matters that appear in this VCAT claim do overlap with those that we have been sued for with regards to defamation ..."

This overlap it is argued, is only because a breach of contract is claimed to be defamatory "because it makes the party that breeched [sic] the contract look bad to a 3rd party because we wrote about it."

The analysis carried out by Ms Marcus in her written submissions demonstrates clearly the considerable number of areas of fact and argument that are common to both actions. I have referred to some of these earlier. I accept her analysis. In each action, much of the dispute involves the terms of the contract and the behaviour of the parties in relation to them. In summary, there is a very considerable overlapping of basic facts and arguments between the two actions.

(e) Because of what I have just stated in (d) above, the following results seem to flow. Firstly, a risk of inconsistent findings immediately arises. Vakras and Raymond did not seem to accept this readily, and seemed to struggle with the concept of the possibility of two courts or tribunals arriving at differing or inconsistent findings when dealing with essentially the same set of facts. I did my best to explain the situation to them. In any event, it seems to me to be apparent that the risk of inconsistent findings if these matters were dealt with by separate decision making bodies is a real one. It has long been recognised that inconsistent findings relating to the same evidence are highly undesirable. Further, the duplication of litigation is in itself undesirable and inefficient. It is by far preferable that, in a situation of overlapping facts and issues, two proceedings be dealt with in the one hearing or in consecutive hearings.

(f) The Supreme Court proceeding was on foot prior to the applicants issuing the VCAT proceeding. Of course, this is far from determinative. However, that the applicants did not issue a proceeding out of this Tribunal until the Supreme Court proceeding was on foot is indisputable and is a factor which can be taken into account, even if the weight to be attached to it may not be as great as that which is attributed to other considerations.

(g) Other factors, such as costs, convenience, degrees of formality and the practical capacity for self-representation, do not seem to be of sufficient weight to overturn factors such as the desirability of avoiding conflicting decisions or the duplication of proceedings. Certainly, it could be anticipated that costs associated with a Supreme Court proceeding would be greater than those at VCAT. However, Vakras and Raymond seemed resigned to the fact that the defamation proceeding will go ahead, irrespective of the breach of contract action, and, as I understand it, have retained solicitors in this regard. Bearing this in mind, the costs distinction between conducting the breach of contract case

regard. Bearing this in mind, the costs distinction between conducting the breach of contract case either as part of or immediately following the defamation action, and conducting the same breach of contract action at this Tribunal, may not be as great as might be imagined. Secondly, the VCAT application has advanced no great distance. It may be that this is because of adjournments essentially at the request of Redleg and Cripps, but an ultimate hearing date would still appear to be some months away. Some steps have been taken in the defamation action, and, whilst a definite hearing date has not been obtained, there seems to be some belief that a hearing in early 2013 might be possible. Whilst it is desirable that matters be litigated as promptly as possible, the comparative delay between jurisdictions would not seem to be a compelling factor. Next, the applicants, when asked about these matters, seemed far more concerned about comparative informality and the capacity to represent themselves. It is to be remembered that they already have legal representation in the defamation action. Whilst this Tribunal is a place where there may be less formality than the Supreme Court of Victoria and where self-representation frequently occurs, neither of these factors seem to me to swing the balance in favour of having separate hearings.

30. In summary, it is my opinion that the interests of justice are best served by acceding to the application of Redleg and Cripps, striking the VCAT proceeding out, and, pursuant to s 77(3) of the Act, referring the matter to the Supreme Court of Victoria. In particular, I am bearing in mind the desirability of avoiding the risk of inconsistent findings and the desirability of avoiding duplication of proceedings. The Supreme Court of Victoria has jurisdiction to hear both proceedings and their interwoven factual base. This Tribunal does not.

Conclusion

31. The application pursuant to s 77 of the Act by Redleg and Cripps is successful. The proceeding is struck out and referred to the Supreme Court of Victoria, where it can be dealt with more appropriately. I shall reserve costs unless there is argument to the contrary, along with liberty to apply.

Judge Bowman
Acting President
