Useful Supreme Court and VCAT decisions about renting

The following case summaries are examples of cases that are often heard and decided in the Residential Tenancies List at VCAT under the *Residential Tenancies Act 1997*.

They describe how the Supreme Court of Victoria and VCAT have interpreted and applied the law.

These summaries may help in predicting the outcome of a future VCAT case.

VCAT is bound to follow decisions of the Supreme Court that are directly on point.

VCAT members should follow decisions of other members that are directly on point unless it is thought the earlier decision is clearly wrong. When a VCAT member decides a case, the member's reasoning is persuasive in future VCAT cases.

Abandonment

VCAT Decision – Director of Housing v Clavant (Residential Tenancies) [2017] VCAT 795 (2 June 2017)

Section 241 *Residential Tenancies Act 1997* (the Act) – application for declaration of abandonment – premises not declared abandoned.

Relevant law

Section 241 of the Act says that if a landlord believes that a tenant has abandoned rented premises, the landlord may apply to VCAT for an order declaring that the tenant has abandoned the premises. If VCAT makes the declaration, the tenancy ends and the landlord may take possession of the premises.

Background

The tenancy commenced in March 2016. In late 2016, an incident occurred at the rented premises causing the tenant to fear for his personal safety. Following the incident, the tenant intermittently spent time away from the premises, either with his mother or at a caravan park. In early 2017, the tenant applied to the Director of Housing (the landlord) for a transfer of tenancy to an alternate location due to his personal safety concerns.

The Director of Housing (the landlord) applied to VCAT seeking a declaration of abandonment. The Director submitted that the tenant had no intention of residing at the premises on a permanent basis and stated that:

- The caravan park had advised the Director that the tenant was living there.
- The tenancy transfer document signed by the tenant noted the tenant's postal address as 'c/o' another address, and his residential address as 'c/o' the caravan park.
- The premises had not been maintained in that there were overgrown gardens and rubbish.
- The meters show minimal use of utilities.

- Neighbours advised the Director that they had not seen the tenant for several weeks.

The tenant said he had not abandoned the rented premises because:

- He did not have a long term arrangement with the caravan park but paid fortnightly rental to ensure that he had a place to stay when he was unable to stay at either the premises or his mother's house.
- He returned to the premises on a regular basis and continued to store his personal belongings and furniture there.
- He maintained the connection of utilities.
- Until such time as a tenancy transfer was approved, he would continue to reside at the premises on occasions when he did not believe his personal safety was at risk.
- He had entered into and maintained a payment plan with the landlord for rental arrears.

What factors are relevant to deciding if a tenant has abandoned rented premises?

VCAT found that the tenant had not abandoned the rented premises and stated:

- It would set a dangerous precedent to conclude that an overgrown garden and presence of rubbish meant that a tenant had abandoned a property. Many tenants do not maintain rented premises to the standard expected by a landlord. However, this in itself does not indicate that a tenant no longer wishes to reside at the rented premises and that the premises have been abandoned. [Para 23]
- The tenant's use of alternate addresses did not in itself indicate an intention to abandon the premises. It is reasonable to expect a person with personal safety concerns of the nature experienced by the tenant would use alternate addresses when interacting with government agencies so as to avoid missing out on receiving mail when staying away from the premises. [Para 24]
- The tenant's actions in storing his belongings at the rented premises and maintaining the connection of utilities were not the actions of a person who had left without the intention of returning. [Para 25]

VCAT Decision – Director of Housing v Verde (Residential Tenancies) [2015] VCAT 1162 (1 July 2015)

Section 241 *Residential Tenancies Act 1997* (the Act) – application for declaration of abandonment – premises declared abandoned

Relevant law

Section 241 of the Act says that if a landlord believes that a tenant has abandoned rented premises, the landlord may apply to VCAT for an order declaring that the tenant has abandoned the premises. If VCAT makes the declaration, the tenancy ends and the landlord may take possession of the premises.

Background

The Director applied to VCAT seeking a declaration of abandonment. The rented premises were without power and therefore had no facilities for lighting, heating, hygiene, cooking or refrigeration. The premises were insecure and had been extensively damaged. The rent was deducted from the tenant's disability support pension via Centrepay and was not in arrears.

The tenant said he stayed at the premises at least one night per week entering the premises late at night and sleeping on a couch with a blanket. Otherwise he stayed at the homes of his girlfriend or a

relative. He said he stayed elsewhere as he feared for his safety because other people accessed the unsecured premises.

When has a tenant abandoned rented premises?

VCAT did not find the tenant's evidence that he stayed at the premises at least once per week credible. It did not accept that the tenant slept on a couch in winter in premises that were unlocked, unheated, unplumbed and unlit. In granting the declaration of abandonment, VCAT said:

- Whether premises are abandoned is a question of fact. [Para 14]
- In most instances, a landlord will not be aware of a tenant's whereabouts, state of mind or intentions. The only evidence open to a landlord is in most instances the visible state of the premises, the reports of neighbours and the failure of a tenant to respond to a landlord's attempts to communicate with the tenant by appropriate means such as telephone, letter, email or home visits. Common signs of abandonment are the disconnection of services, unsecured premises, unmaintained garden or exterior and uncollected mail. [Paras 12, 14]
- Payment of rent does not prevent a declaration of abandonment. This is clear from a reading of section 242 of the Act which deals with rent paid in advance of the date of abandonment. [Para 11]
- The starting point for an applicant under section 241 is to establish a reasonable basis for a belief that the tenant has abandoned the premises. Once a landlord has established that all appearances and information indicate that a tenant has abandoned the premises, the onus shifts to the tenant to establish otherwise. [Paras 12,14]
- Had it been accepted that the tenant slept on the couch at least once per week, in the face of other uncontroverted facts, that would not have been a sufficient response to the prima facie evidence of abandonment. [Para 17]
- The fact that the tenant did not have exclusive possession was relevant. Other people could and did freely enter the premises because they were unsecured. VCAT found that the tenant did not control, nor did he have the intention to exert control over entry to the premises. [Para 18]

VCAT Decision – Director of Housing v Zavos (Residential Tenancies) [2014] VCAT 283 (18 March 2014)

Section 241 *Residential Tenancies Act 1997* (the Act) – application for declaration of abandonment – premises **not** declared abandoned

Relevant law

Section 241 of the Act says that if a landlord believes that a tenant has abandoned rented premises, the landlord may apply to VCAT for an order declaring that the tenant has abandoned the premises. If VCAT makes the declaration, the tenancy ends and the landlord may take possession of the premises.

Background

In May 2013 the tenant moved her furniture out of the rented premises, fearful for the safety of herself and her sons, due to assaults and break-ins at the premises. By July 2013, the tenant was feeling safer and moved items back into the premises. However, she then spent most nights away, returning once a week to collect her mail and maintain the premises. She otherwise stayed with her mother and acted as her mother's carer. She had been on the public housing waiting list for some years for a transfer to a three bedroom home to accommodate herself, her mother and children. The tenant continued to pay rent and the utilities, connected at the premises in her name.

The Director of Housing (the landlord) applied to VCAT seeking a declaration of abandonment. The rented premises were without power and therefore had no facilities for lighting, The Director said VCAT should give consideration to the demand and pressure on waiting lists for public housing.

What factors are relevant to deciding if a tenant has abandoned rented premises?

In rejecting the Director's application, VCAT considered the meaning of 'abandonment'.

- It referred to the test set out in *Nicholas v Andrew* [1920] NSWStRp 18 where the Full Court of the Supreme Court of New South Wales stated that the question of abandonment by a person: *"is not conclusively answered by showing that he may for a short period of time have ceased to be in actual physical occupation of the land. We do not think the mere non-user of the land for a time is conclusive evidence of abandonment of possession".* [Para 22]
- It also referred to the dictionary definition of abandon: "leaving a place empty or uninhabited, without intending to return". [Para 23]
- Taking into account the payment of rent, the connection of utilities, the regular attendance for maintenance, the existence of most personal items including furniture and a desire to return, VCAT concluded that the tenant had not abandoned the rented premises. While she was not living in the property, she was using it. She had not left it empty, nor left it behind completely. She was returning periodically and had an intention to return more permanently. [Para 24]
- VCAT noted that the "hardship" likely to be experienced by a party to an application was not a matter that arose for consideration when determining whether the rented premises were abandoned. Therefore, demand for public housing and pressure on waiting lists were not relevant. [Para 25]

Bond and compensation

VCAT Decision - Garcia v Van Unen (Residential Tenancies) [2020] VCAT 86 (28 January 2020)

Sections 210, 417, 419 *Residential Tenancies Act 1997* (the Act) – landlord's application for bond and compensation for cleaning and damage; tenants' counterclaim for failure to maintain garden – part of bond awarded to landlord

Relevant law

Section 210 of the Act says that in certain circumstances a party to a tenancy agreement may apply to VCAT for an order for payment of compensation to the applicant by the other party to the tenancy agreement for any loss or damage suffered because the other party has failed to comply with their duties under the Act or one party has paid to the other more than is required under the Act or the agreement.

Section 417 says a landlord may apply to VCAT for a determination directing the Authority to pay an amount of bond to the landlord. Section 418 says that such an application can be made for unpaid rent, while section 419 says that such an application can be made on other grounds, such as lack of cleanliness, damage or loss of goods.

Background

The landlord claimed compensation for carpet cleaning, carpet replacement, damaged walls and lights and glass replacement in windows. The landlord's claim was partly successful.

The tenants claimed compensation on account of the landlord's failure to comply with the tenancy agreement, which required her to maintain the garden. The tenants' claim was dismissed as the claim was not proved, nor any loss established.

What considerations are relevant to a claim for compensation?

In considering each of the claims, VCAT stated:

- The burden of proof rests with whoever brings an application to VCAT. This means that an applicant must produce sufficient evidence during the course of a hearing to support what they say, and to prove their case.
- Even though the rented premises may show signs of damage by the end of a tenancy when it was undamaged at the start, it does not automatically mean that the landlord is entitled to compensation. The landlord has to prove and not merely assert, that the tenant was the person who damaged it and that the tenant failed in his or her obligation to avoid damaging the rented premises. Normal living is expected to have a deleterious effect on the state of rented premises. Breakages, scuff marks, scratches and dents are not necessarily inconsistent with normal wear and tear, and the landlord is not entitled to compensation simply because things break or wear out.
- Section 211 of the Act details matters which may be considered by VCAT in making its decision in respect of applications made under section 210, including whether or not the person from whom compensation is claimed has taken all reasonable steps to comply with the duties under this Act or the tenancy agreement, whether or not the applicant has consented to the failure to comply with the duties, whether or not money has been paid to or recovered by the applicant by way of compensation, whether any reduction or refund of rent or other allowance has been made to the applicant, whether or not action has been taken by the applicant to mitigate the loss or damage, any offer of compensation, and any action taken by the person from whom compensation is claimed to repair the damage at that person's own expense.

- The fact that a landlord has not undertaken repairs is not necessarily a bar to a claim for compensation, but it may make the task of proving loss problematic.
- VCAT's task is to consider the evidence that the parties bring to the hearing and decide if an applicant has proven, through evidence, their claim. VCAT considers whether the loss is reasonable, having regard to the general conduct of the parties, the age and condition of any items damaged, whether items have been repaired or replaced, and whether attempts have been made to ensure the loss is the least that is reasonably possible. [Paras 17-20].

VCAT Decision – Jones v Lo (Residential Tenancies) [2018] VCAT 485 (28 March 2018)

Sections 209, 472 *Residential Tenancies Act 1997* (the Act) - compensation application by a tenant for lack of repair – compensation awarded

Relevant law

Section 209 of the Act enables a party to a tenancy agreement who has served a breach of duty notice on the other party, to apply to VCAT for a compliance or compensation order.

Section 472 gives VCAT the power to make various orders in a proceeding, including the power to award compensation.

Background

The tenant sought an order for compensation totalling $6392.51, under sections 209 and 472 of the Act.

The tenant claimed that the landlord had breached section 68 of the Act, which requires that the landlord maintain the premises in good repair. The tenant claimed that the landlord had failed to repair a rear glass sliding door. The compensation claim included loss arising from higher energy bills ($224.52). The remainder of the claim related to loss of quiet enjoyment, including compromise to the tenant's safety. The tenant valued the loss as 15 percent of the rent from the date she claimed that she reported the fault until July 2017, and then 50% of the rent she was paying, until the repair was completed.

What was the legal basis for the compensation claim?

Although the application was made under section 209 of the Act, there was no evidence that the tenant had given the landlord a breach of duty notice, with which the landlord had failed to comply. The giving of a breach of duty notice is a condition precedent to making the application. VCAT noted section 209 was not available to the tenant as the basis for an application for compensation. However, VCAT relied on section 472(f) of the Act which states that VCAT, on an application or in proceedings before it, may make any orders it thinks fit to require the payment of compensation to any other person. [Para 14]

What is the purpose of compensation?

VCAT noted that: "Compensation is not to be regarded as a punishment. It is not a penalty imposed on a party to a tenancy agreement, because they have not complied with their obligations. Compensation is ordered to redress the loss that a party has suffered as a result of the other party to a tenancy agreement breaching the Act or the tenancy agreement. That loss is sometimes easily quantifiable, such as when an item has been broken and requires replacement. On the other hand, a party's loss may be as nebulous as the right to enjoy one's property in peace, or to expect that fittings and fixtures work as they should. That is of course much harder to quantify." [Para 15]

What matters are relevant in determining the amount of compensation that should be awarded?

In determining the amount of compensation to be awarded to the tenant, VCAT took into account that:

- A party seeking compensation is expected to do everything that is reasonable to ensure that any loss that they suffer is kept to a minimum. That may include taking reasonable steps to protect one's rights, especially when a solution is readily available. [Para 23]
- The Act provides that a tenant may arrange for urgent repairs relating to lack of security to be carried out to the rented premises if the tenant has taken reasonable steps to arrange for the landlord or the landlord's agent to immediately carry out the repairs and the tenant is unable to get the landlord or agent to carry out the repairs. While these provisions do not remove the landlord's responsibility to maintain rented premises, they provide a speedy solution. VCAT found the tenant's answer to its question as to why she did not take advantage of her rights under the Act to be unpersuasive. [Para 24]
- VCAT considered that neither party had acted reasonably because the landlord should have attended to the repair without delay and the tenant had remedies easily available to her under the Act. This would have avoided a 10-month delay and a compensation claim of nearly $6,400. [Para 25]
- Having regard to the conduct of the parties, VCAT ordered compensation in favour of the tenant of $10 a week for the inconvenience caused by the lack of repair, for 12 weeks. VCAT considered this a reasonable time for the tenant to have progressed and ultimately resolved the failure to repair, under the various provisions of the Act available to her. [Para 26]

VCAT Decision – Ryan v Balanon (Residential Tenancies) [2015] VCAT 431 (13 April 2015)

Sections 210, 417, 418 *Residential Tenancies Act 1997* (the Act); Part IVAA *Wrongs Act 195*; section 126 *Victorian Civil and Administrative Tribunal Act 1998* (the VCAT Act) – landlord claim for bond and compensation for rent arrears – tenant argument for apportionment of rent arrears between tenants rejected – landlord claim successful

Relevant law

Section 210 of the Act says that in certain circumstances a party to a tenancy agreement may apply to VCAT for an order for payment to the applicant by the other party to the tenancy agreement of compensation for any loss or damage suffered because the other party has failed to comply with their duties under the Act or one party has paid to the other more than is required under the Act or the agreement.

Section 417 says a landlord may apply to VCAT for a determination directing the Authority to pay an amount of bond to the landlord. Section 418 says that such an application can be made for unpaid rent, while section 419 says that such an application can be made on other grounds, such as lack of cleanliness, damage or loss of goods. A bond claim must be made within 10 business days of the end of the tenancy but VCAT has the power to extend that time under section 126 of the VCAT Act.

Part IVAA of the *Wrongs Act 1958* provides that in relation to certain claims for economic loss, liability may be apportioned between concurrent wrongdoers.

Background

The landlord claimed the bond and compensation for rent arrears, garden maintenance, rubbish removal and repairs, against three tenants. As the claim for bond had not been made within 10 business days after the end of the tenancy, the landlord also sought an extension of time in which to make a claim for bond under section 126 of the VCAT Act.

One tenant had paid more of his share of rent than the other two. He submitted that the landlord's claim for compensation for unpaid rent should be apportioned between the tenants, *"taking into account their respective responsibility for the loss or damage",* according to Part IVAA of the *Wrongs Act 1958*. Under that Act a claim may be apportioned between concurrent wrongdoers, reflecting that proportion of the loss or damage claimed that the court considers just having regard to the extent of the defendant's responsibility for the loss or damage. Part IVAA applies to *"a claim for economic loss or damage to property in an action for damages (whether in tort, in contract, under statute or otherwise) arising from a failure to take reasonable care".*

The tenant submitted that the landlord's application against the three tenants arose *"out of a failure to take reasonable care to ensure that rent was paid".*

What factors are relevant when determining an application for an extension of time?

VCAT rejected the landlord's application for an extension of time under section 126 of the VCAT Act despite accepting that the landlord had a good excuse for the delay in making the application for bond. It took into account the delay of some months and that one of the tenants, whose whereabouts was unknown by the date of the application, had not been served with a copy of the application. VCAT said:

- Whether or not there is an acceptable explanation for the delay is one factor to be taken into account when considering whether or not to extend time under section 126, although it has been held that an acceptable explanation is not an essential pre-condition for such extension, and time may be extended even in the absence of an acceptable explanation.
- Other factors to be taken into account include whether it is fair and equitable in the circumstances to extend time. The factors are described in (*Hunter Valley Developments Pty Ltd v Minister for Home Affairs and Environment* (1984) 3 FCR 344.) [Para 38]

Can a claim for rent arrears be apportioned between tenants?

VCAT rejected the submission that a landlord's claim for arrears of rent was capable of being apportioned between the tenants under the *Wrongs Act 1958*.

VCAT held:

- The failure to pay rent in breach of the Act does not arise from a failure to take reasonable care, and a claim simply for arrears of rent is not an apportionable claim; each tenant in a joint tenancy will therefore be liable for the whole amount owing. [Para 29]
- The failure to pay rent is a breach of a contractual duty to pay a specified sum on a regular basis; it is not a breach of any duty of care. [Para 33]

Challenging a notice to vacate

VCAT Decision - Hartley v Anderson (Residential Tenancies) [2017] VCAT 212

Section 266 *Residential Tenancies Act 1997* (the Act) – application for declaration that notice to vacate under section 263 of Act is of no effect – declaration granted

Relevant law

Section 263 of the Act provides that a notice to vacate may be given to a tenant without specifying a reason for the giving of the notice.

Section 266(2) of the Act provides that a notice given under section 263 is of no effect if it was given in response to the exercise, or proposed exercise, of a right under the Act.

Section 68(1) of the Act is a duty provision which requires that the landlord must ensure that the rented premises are maintained in good repair.

Background

The tenant had been residing in the rented premises for some time. Two windows were broken by an unknown person. The matter was reported to the police and to the landlord's agent. The landlord's agent advised the tenant to repair the windows and claim reimbursement. The tenant subsequently requested that the landlord reimburse the cost of repairing two broken windows in the rented premises. Initially the landlord refused but later reluctantly agreed that the cost should be deducted from the next rental payment. The rent had recently been increased from $1803 to $1828 per calendar month. The tenant deducted the cost of the repair form the first rental payment due at the increased rate.

Seven days later, the landlord served the notice to vacate under section 263 of the Act.

The tenant brought an application to VCAT challenging the validity of the notice to vacate and alleged that the notice was given in response to the exercise by the tenant of a right under the Act, namely, in response to the tenant's request that the landlord pay for the repair of the broken windows pursuant to the landlord's obligation to repair under section 68 of the Act.

After the commencement of the application by the tenant, the landlord stated that the reason for the notice to vacate was that the landlord wanted to increase the rent markedly above the existing rate of rent and at an interval of less than six months (which was prohibited under the existing tenancy by virtue of section 44(4A) of the Act). The landlord provided the tenant with a report, dated after the VCAT application was made, as evidence that the market rent was significantly more than the landlord had sought when the notice of rent increase was served. The landlord said that the rental of $1828 per calendar month had been fixed 60 days before coming into effect (as required by section 44(1) of the Act) and in that 60 day interval, rental prices in the South Frankston rental market had increased exponentially.

What considerations are relevant to deciding if the notice to vacate was given in response to a proposed exercise of a right under the Act?

VCAT stated that the following considerations were relevant:

- The tenant sought the reimbursement of the costs of the window repairs from the landlord pursuant to the landlord's obligations under the Act. The landlord initially refused to pay for these repairs. There was no basis for the landlord to refuse or for the later reluctance to pay the full cost. [Para 2]
- The landlord agreed to the deduction of the cost of the repairs from the tenant's next rent payment. Within seven days of this reduced rent payment, the landlord served the notice to

vacate. The timing between these events allowed VCAT to infer a nexus between the exercise by the tenant of their rights under the Act and the issuing of the notice to vacate. The evidential burden then shifted to the landlord to satisfy VCAT that the notice to vacate was not issued in retaliation for the tenant's exercise of their rights. [Paras 30-31]

- The landlord lacked contemporaneous evidence to support the alleged reason for the giving of the notice, being that the landlord desired a far higher rent for the property. The landlord had increased the rent at every opportunity and the last increase had come into effect seven days before serving the notice to vacate. It was implausible that rents had increased exponentially in the 60 days since the notice of rent increase was served. The only market appraisal provided to VCAT was dated after the application to VCAT by the tenant. The market appraisal was silent on any increase in the relevant period relied upon by the landlord and nothing in the report supported such a dramatic increase in rent. The methodology of the market appraisal was poor and the scope for manipulation and/or error was high. [Paras 33-38]
- The evidence of the landlord's representative that the landlord considered it was "fairer and more just" to serve a notice to vacate on the tenant rather than tell the tenant that he wanted more rent under a new lease, bore the hallmarks of a self-serving, ex post facto justification. [Para 42]
- As the landlord's evidence was both unsatisfactory and implausible, the landlord failed to satisfy VCAT that the notice to vacate had been issued for reasons that were inconsistent with retaliatory conduct. VCAT declared that the notice to vacate was of no effect. [Para 43]

Compliance orders for breach of duty

VCAT Decision - Director of Housing v VWM (Residential Tenancies) [2017] VCAT 369 (5 June 2017)

Sections 60, 208, 209, 212 *Residential Tenancies Act 1997* (the Act) – application for compliance orders alleging breach of section 60 – compliance order granted

Relevant law

Section 60(2) of the Act says that a tenant must not use the rented premises or common areas; or permit his or her visitors to use the rented premises or common areas; or otherwise permit the use of the rented premises, in any manner that causes an interference with the reasonable peace, comfort or privacy of any occupier of neighbouring premises.

Section 208 says that a person to whom a duty is owed under a duty provision may give a breach of duty notice to a person in breach of that duty and sets out what such a notice must contain.

Section 209 says that if a breach of duty notice is not complied with, the person who gave the notice may apply to VCAT for a compensation order or a compliance order.

Section 212 says that in an application under section 209, if VCAT is satisfied that the person was entitled to give the breach of notice and it was not complied with, VCAT may make any or all of the following orders:

- The person in breach must remedy the breach as specified in the order;
- The person in breach must pay compensation as specified in the order;
- The person in breach must refrain from committing a similar breach.

Background

The tenant was the sole tenant of a unit in a block of 22 units owned by the landlord. On 7 July 2014, the landlord served on the tenant a notice of breach under section 208 of the Act. This notice stated that the tenant was in breach of her duty under section 60(2) of the Act and set out the following details:

> *You have used the premises or common areas or permitted their use in a way that caused interference with the peace, comfort or privacy of neighbours.*
>
> *On 17 June 2014 you have used the rented premises and the common area in a way that causes interference with the reasonable peace, comfort of occupying neighbouring premises. Your actions included loud yelling, inappropriate language and throwing items across the common area.*
>
> *I require you to remedy the breach within 14 days after receiving this notice by not allowing your visitors to use the common areas of the premises and any other areas in a way that creates interference with peace, quiet and enjoyment of the neighbours. There should not be any fighting, yelling, using abusive language at all times, need to respect the privacy and comfort of your neighbours or pay me $0.00 compensation*

On 10 November 2014, the landlord served on the tenant a notice of breach under section 208 of the Act. This notice stated that the tenant was in breach of her duty under section 60(2) of the Act and set out the following details:

> *You have used the premises or common areas or permitted their use in a way that cause interference with the peace, comfort or privacy of neighbours.*

On 9 November 14 (am) your visitors use the premises in a way that caused interference with the peace, quiet, comfort or privacy of neighbours. Your visitors were having a very aggressive argument on the stairs in the common area and caused nuisance to neighbours.

I require you to remedy the breach within 14 days after receiving this notice by not allowing your visitors to use the common areas of the premises and any other areas in a way that creates interference with peace, quiet and enjoyment of the neighbours. There should not be any fighting, yelling, using abusive language at all times, need to respect the privacy and comfort of your neighbours or pay me $0.00 compensation

On 13 March 2015 the landlord applied to VCAT for a compliance order under section 212. The application stated in part:

Ms [VWM] continues to use the premises and common areas in a way that causes interference with the peace, quiet, comfort and privacy of the neighbours. The verbal abuse, yelling, damaging neighbour's property has been an ongoing issue. On 3 March 2015 Ms [VWM] continued with her inappropriate behaviour in the common area and damaged the neighbour's property (broke two cameras) and was banging on his door while yelling and using threatening behaviour.

The matter was first listed for hearing on 30 March 2015. On that date the tenant did not attend the hearing and the Tribunal (differently constituted) made a compliance order requiring the tenant and her visitors to immediately stop "All yelling, screaming, making loud noises, fighting and using threatening and abusive language. All aggressive and nuisance behaviour which interferes with the peace, comfort or privacy of her neighbours." The order stated that the tenant must not commit a similar breach until 30 March 2017.

On 13 September 2016 the tenant lodged an application for review of VCAT's order dated 30 March 2015. The review was granted, but VCAT decided to confirm the original order.

Were the breach of duty notices valid?

VCAT found that breach of duty notices were valid and said that:

- To be valid, breach of duty notices must contain all the particulars set out in section 208(2).
- The validity of the notices is determined by their compliance with the provisions of the Act and not by their compliance with the landlord's policy documents.
- The particulars given in each notice contained sufficient detail to enable the tenant to understand the facts being alleged against her and they contained all the information required by section 208(2).
- The notices specified the breaches alleged against the tenant, they gave details of the loss or damage caused by the breach, they required the tenant to remedy the breach within the required time, they stated that she must not commit a similar breach again and they advised her that a notice to vacate may be given if the notice was not complied with.
- The notices were in writing, addressed to the tenant and signed by the landlord's housing agent.

Did the conduct complained of in the breach of duty notices occur?

VCAT looked at the evidence to determine if the conduct complained of occurred and said:

- Both the tenant and the neighbour who lodged the complaint with the landlord told VCAT that they did not now recall the specific event. The Housing Services Officer of the landlord gave evidence that she received a complaint from the neighbour at the time and her evidence was supported by the neighbour's written complaint. VCAT was satisfied that on 17 June 2014, the tenant and her boyfriend were yelling, using abusive language and throwing things across the common areas of the flats and the neighbour complained to the housing officer about the tenant's conduct. [Para 28]

- A video recording taken by CCTV cameras on 9 November 2014, recorded a loud argument between the tenant and her boyfriend which started off camera and eventually spilled into the vicinity of the stairwell and the balcony recorded by the cameras. The footage recorded the tenant and her boyfriend screaming and using abusive language before a neighbour came out and attempted to intervene. The tenant's boyfriend grabbed a chair and sought to attack the neighbour and the neighbour threatened to call the police. [Para 30]

Did the tenant's conduct breach a duty provision of the Act?

VCAT said the landlord was entitled to give the breach of duty notices because the tenant had failed to comply with the breach of duty notices and said:

- The CCTV footage of the incident on 9 November 2014 shows a frightening and distressing incident.
- The tenant's conduct on 17 June 2014 and on 9 November 2014 each constituted a breach of the tenant's duty under section 60(2).
- VCAT did not accept that the conduct complained of was properly characterised as trivial, rather it was a serious breach of the peace, comfort or privacy of the neighbours.
- The CTV footage of the incident that occurred on 3 February 2015, showed the tenant and her partner on the balcony outside the neighbour's home. The footage showed the tenant approached the neighbour's unit while screaming abusive language and smashed the CCTV cameras with a stick. [Para 40]
- The tenant was charged and convicted of offences relating to the incident on 3 February 2015. The tenant's conduct on 3 February 2015 constituted a breach of her duties under the Act, interfering with the peace, quiet, comfort or privacy of neighbours. The tenant therefore committed a similar breach to those the subject of the breach of duty notices for the purposes of section 208(2)(d). By doing so she failed to comply with breach of duty notices. [Para 42]

Should a compliance order be made?

The tenant argued that VCAT should exercise its discretion not to make a compliance order given her extreme vulnerability and difficult circumstances, as once a compliance order was made any minor breach could give rise to a possession order. It was argued that the effects of eviction for the tenant would be severe and the seriousness of making a compliance order was disproportionate to the conduct that brought about the issue of the compliance notices.

In determining if a compliance order should be made VCAT said:

- The tenant was extremely vulnerable. A medical report stated that she suffered from an acquired brain injury and associated intellectual impairment, mental health conditions and a substance use disorder. Her intellectual capacity had been assessed as being at the level of a pre-schooler. A neuropsychological report confirmed her medical conditions and set out her difficult personal situation. [Para 51]
- In considering the exercise of the discretion under section 212 of the Act, VCAT was required to give proper consideration to human rights set out in the Charter of Human Rights and Responsibilities Act 2006.
- The tenant's right not to have her privacy or her home unlawfully or arbitrarily interfered with was engaged by the making of a compliance order under section 212 and the possible eviction that may potentially follow.
- The making of a compliance order did not of itself affect the tenant's right to remain on the property, although it could form the basis of an application for a possession order. The prospect of the tenant losing long-term housing was an extremely serious matter for the tenant exacerbated by her particular vulnerability. The making of a compliance order was warranted, taking into account Charter considerations. [Para 52]

The tenant argued that the terms of any compliance order should be less severe than those contained in the order made 30 March 2015 and any prohibition on conduct should be limited to conduct in the common areas of the premises. It was also argued that a less onerous time period should be imposed. In confirming the earlier order VCAT said:

- The Act did not place any time limitations on a compliance order made under section 212. A two-year period determined by VCAT was not too long in the circumstances of the case.
- The terms of the compliance order should not be limited to the tenant's conduct in the common areas. The compliance order made by VCAT on 30 March 2015, did no more than require the tenant to comply with her duties under the Act which required her (among other things) not to interfere with the peace, quiet, comfort or privacy of her neighbours.

Creation of a tenancy

Supreme Court Decision - Cosic v Director of Housing & Anor [2007] VSC 486 (7 December 2007)

Section 233 *Residential Tenancies Act 1997* (the Act) – application for creation of a tenancy – application unsuccessful

Relevant law

Section 232 of the Act says that in certain situations a person who has been residing in rented premises as his or her principal place of residence and who is not a party to a tenancy agreement in relation to those premises, may apply to VCAT for an order requiring the landlord of the premises to enter into a tenancy agreement with the person.

Section 233 gives VCAT power to require the landlord to enter into a tenancy agreement with the person, if satisfied of the matters set out in that section. Under section 233, VCAT must be satisfied that the hardship suffered by an applicant if no order is made will be greater than the hardship that the landlord would suffer if the order were made.

Background

The Director of Housing (the landlord) applied to VCAT for an order for possession of the rented premises based on rent arrears owed by the tenant. The brother of the tenant applied to VCAT seeking a tenancy agreement with the landlord.

VCAT granted the Director's application for a possession order in respect of the rented premises and refused the brother's application for the creation of a tenancy agreement.

VCAT was:

> "not satisfied that the [brother] would suffer severe hardship if compelled to leave the premises, nor that any hardship to the [brother] would be greater than the hardship to the landlord, who is responsible for the orderly and lawful maintenance of a waiting list of persons in need of public housing".

The brother appealed to the Supreme Court.

On appeal, it was submitted that there was no statutory basis for VCAT to consider hardship other than financial suffered by the landlord, where the landlord was the Director. The juxtaposition of the words "hardship" and "suffered", construed in their ordinary meaning, meant that the hardship to a landlord such as the Director could only be financial and no more. Such words denoted personal deprivation and did not extend to corporate inconvenience or administration, nor to consideration of those who may be on a waiting list held by the Director.

What is the meaning of "hardship" in section 233 for the Director or a corporate landlord?

The Supreme Court dismissed the appeal and held:

- The hardship to be taken into account must be experienced by the tenant and by the landlord respectively, not anyone else. VCAT cannot have regard to any vicarious hardship suffered by other persons, that is, it cannot have regard to hardship suffered by those on the Director's waiting list. [Paras 39, 49]
- That is not to say that in a case involving the Director where the discretion under section 233(a) to (c) applied, that the issue of those who wait their turn for months, perhaps years, on

a waiting list, would not be a valid consideration in terms of whether to exercise the discretion. [Para 39]

- Hardship is not limited to “personal” hardship such as pain, distress or injury and it is not the case that the only relevant consideration for a corporation is whether it will suffer financial hardship. [Para 40]
- In determining whether there is hardship, any appreciable detriment is relevant, which includes consideration of the administration of the Director’s waiting list and any adverse effect upon it. [Paras 46, 48]
- If consideration of the waiting list had been found not to be relevant under section 233(1)(c), it was nevertheless clearly relevant to the general exercise of the discretion under section 233. [Para 53]

Duties

Landlord's duty to maintain rented premises

Supreme Court Decision – Shields v Deliopoulos [2016] VSC 500 (7 September 2016)

Section 68 *Residential Tenancies Act 1997* (the Act) - compensation application by a tenant for lack of repair – no compensation awarded – Court found VCAT erred

Relevant law

Section 68 of the Act says a landlord must ensure that the rented premises are maintained in good repair.

Background

The tenant claimed compensation at VCAT for loss associated with the landlord's failure to maintain the rented premises in good repair. The premises were in poor condition at the start of the tenancy. The rent charged reflected this. Many of the items that the tenant claimed required repair during the tenancy were in need of repair at the start.

VCAT found that there was no failure by the landlord of his obligation to maintain the rented premises in good repair, saying what is reasonably required of a landlord relating to his or her duty to maintain premises in good repair must be determined by an examination of the whole tenancy agreement. It inferred from the evidence that a co-tenant had agreed, at the commencement of the tenancy, to absolve the landlord from undertaking repairs in return for a low rent. VCAT found it relevant that there was no increase in rental over the five years of the tenancy. It noted it was not logical to impose an obligation on a landlord to upgrade the standard of premises, without there being a commensurate increase in rent.

The tenant successfully appealed to the Supreme Court, arguing among other things that VCAT had erred in law in its interpretation of section 68 of the Act, which provides that a landlord must ensure that rented premises are maintained in good repair.

What is the meaning and extent of the landlord's obligation to maintain rented premises in good repair?

The Supreme Court decided:

- The obligation to maintain rental premises in good repair imports an obligation to put them in good repair in the first place. [Paras 32-37]
- The term 'good repair' means 'tenantable repair', or 'reasonably fit and suitable for occupation'. While what amounts to 'good repair' may be referable to the age and character of the relevant premises, it cannot ordinarily be qualified by the state of repair at the commencement of the tenancy, regardless of the state of repair. [Para 38]
- The duty imposed upon a landlord to ensure that rental premises are in good repair is strict and absolute and imposes an obligation upon a landlord to identify and rectify any defects of which they are aware or ought to be aware. [Para 30]
- The question of whether the putting of premises in good repair amounts to an 'upgrade' of the premises is not relevant to the question of whether the premises are being maintained in good repair: in many instances it will be inevitable that effecting repairs will 'upgrade' the standard of the premises. [Para 40]
- The obligation of a landlord cannot be diluted by charging a low rent. [Para 38]

- The Act does not allow the parties to a residential tenancy agreement to 'contract out' of their rights and obligations under the Act. A tenant's failure to complain, or continued occupation of the premises, might be relevant to the amount of compensation payable, and a landlord might fulfil its obligations by reaching an agreement with the tenant to carry out repair works. However, such an agreement cannot absolve a landlord of their duty or modify the content of that duty. [Para 41]

VCAT Decision – Stransky v Dobrila (Residential Tenancies) [2018] VCAT 462 (28 March 2018)

Sections 67, 68(3) *Residential Tenancies Act 1997* (the Act) - compensation application by a tenant for lack of repair; owners corporation responsible – compensation not awarded

Relevant law

Section 67 of the Act says a landlord must take all reasonable steps to ensure that the tenant has quiet enjoyment of the rented premises during the tenancy agreement.

Section 68(1) says a landlord must ensure that the rented premises are maintained in good repair.

Section 68(3) says if a landlord owns or controls rented premises and the common areas relating to those rented premises, the landlord must take reasonable steps to ensure that the common areas are maintained in good repair.

Background

The tenant rented premises in a block of units affected by an owners corporation. She claimed compensation from the landlord on the basis that the landlord had failed to maintain the premises in good repair. In part, her claim related to issues with a security door leading to the carport and a garden area, each of which was part of the common property in the block.

What is the landlord's duty to repair in relation to common areas?

Concerning the tenant's claim for compensation because of a malfunctioning security door, VCAT said:

- As the security door was not part of the rented premises, the landlord had no duty under section 68(1) of the Act to maintain it in good repair. Section 68(3) imposed a duty on the landlord to ensure that the common areas were maintained in good repair, if she controlled those common areas.
- The definition of "common area" in section 3 is in terms of "facilities" provided for the use of tenants. This would cover circumstances where there are several rented premises in a building and the tenants share a kitchen, bathroom or toilet. VCAT doubted that "facilities" included a security door.
- There was no evidence that the landlord controlled any common areas. She might have done so if she held a majority of votes amongst members of the owners corporation, but there was no evidence that she did. Therefore, the landlord had no duty under section 68 of the Act to ensure that the security door was maintained in good repair.
- Nevertheless, a landlord has a duty under section 67 of the Act to take all reasonable steps to ensure that the tenant has quiet enjoyment of the rented premises. If something is happening on or about common property which might adversely affect a tenant's quiet enjoyment of rented premises, the landlord cannot disclaim any responsibility and say that it is wholly the owners corporation's responsibility; the landlord has an obligation to take all reasonable steps to ensure that the owners corporation attends to the problem.
- VCAT accepted that a malfunctioning security door gave the tenant legitimate concern for her security and, to that extent, affected her quiet enjoyment of the rented premises. It examined

the history of the steps taken by the landlord's agents to contact the owners corporation and have the issue of the security door dealt with. VCAT decided the agents had acted upon the tenant's complaints by communicating promptly with the owners corporation's manager and reporting the outcome to the tenant. It was not in the landlord's power to fix the door herself; it was the owners corporation's responsibility. VCAT decided the agents could not reasonably have been asked to do more than they did and there was no breach by the landlord of her duty under section 67 of the Act to take all reasonable steps to ensure that the tenant had quiet enjoyment of the rented premises. [Paras 30-40]

Concerning the tenant's claim for compensation because of a deteriorating garden area:

- It was the owners corporation's responsibility to maintain the garden. There was no evidence that the landlord had control of the garden. Therefore section 68(3) of the Act did not impose upon her any duty to maintain it.
- VCAT accepted that the garden was not maintained, and this had affected the tenant's enjoyment of the garden. She frequently used it for rest and relaxation.
- However, unlike the condition of the security door, the condition of the garden did not affect her quiet enjoyment *of the rented premises* and so there was no breach of the landlord's duty under section 67 of the Act to take all reasonable steps to ensure that the tenant had quiet enjoyment of the rented premises. [Paras 41-46]

VCAT Decision - Van Ristell v Director of Housing (Residential Tenancies) [2017] VCAT 480 (6 April 2017)

Section 68 *Residential Tenancies Act* 1997 (the Act) – application for compensation due to breach of duty to maintain premises in good repair – Compensation order granted as landlord knew or ought to have known of serious structural issues with rented premises

Relevant law

Section 68 of the Act says the landlord has a duty to ensure that the premises are maintained in good repair.

Background

In 2012 the ceiling in the main bedroom was cracking and dust was falling on the floor. The tenant reported the issue.

The landlord said that on 24 July 2012, it raised a work order to repair the cracks in the main bedroom ceiling and to paint. It said the contractor attended the rented premises but was unable to attend to the job as "a leak was present".

On 7 August 2012, a work order was raised which required the following works to be undertaken: "(a) Plumbing Repairs: Please inspect leak to bed 1 GE waiting on works so can go ahead with repairs – Downpipe full of muck; cracked roof tiles (b) Reset up to 50 loose or displaced roof tiles. Reset up to 50 tiles. (c) Remove downpipe and clear blockage in downpipe. Unblock downpipe"

On 12 September 2012, a further work order was raised in relation to the ceiling with the job description advising that "plaster ceiling damaged in water leak (now fixed), water marked and cracks in plaster."

The tenant said the contractor changed the ceiling and threw out the insulation. She did not observe any investigation inside the roof cavity or any other room of the house.

The tenant said that on 8 July 2016, the entire ceiling in the lounge room collapsed.

The tenant applied to VCAT for compensation from the landlord after her possessions were destroyed in the incident.

When will a landlord be regarded as having breached their duty to keep the premises in good repair?

In determining that the landlord had breached the duty by failing to keep the premises in good repair VCAT said:

- In *Shields v Deliopoulos* [2016] VSC 500, the Court found that the duty to maintain the rented premises begins as soon as the tenancy commences.
- The landlord has an ongoing obligation to identify any defects in relation to the rented premises – the duty imposed upon a landlord to "ensure that rental premises are in good repair" is strict and absolute, and imposes an obligation upon a landlord to identify and rectify any defects of which they are aware or ought to be aware.
- The strict obligation is consistent with the presence of the word “ensure” in section 68 of the Act, which the authorities suggest is synonymous with “make sure”. [Paras 39-41]
- In this case, the landlord’s actions following the ceiling cracking in 2012, were grossly inadequate. Merely replacing the ceiling plaster and a few tiles, without further investigation of the cause of the cracking or a report to determine if other parts of the ceiling needed to be replaced, failed to make the rented premises safe, let alone satisfy the obligation on the landlord to ensure the rented premises were in good repair. [Para 42]
- If there had been water leaking back into the roof cavity as suggested by the work order dated 7 August 2012 and the subsequent engineers report, then at a minimum there should have been investigative works to determine if the insulation had been affected or plaster in other parts of the house had been compromised. The engineer’s report suggested that the structural issues were also to blame for cracking in the ceiling in 2012. It describes the roof above the lounge room and bedroom as being “warped”. This warping must have been evident when the roof tiles were replaced in 2012, as there is no suggestion in the engineer’s report of any tiles having cracked. [Para 44]
- Taking into account the deficient investigative and repair works in 2012, and the subsequent engineer’s report about the cause of the ceiling collapse in 2016, the landlord knew or ought to have known that the premises were not in good repair. In failing to carry out works to put the premises in good repair, the landlord has breached its duty under the Act. [Para 46]

VCAT Decision – Hicks v Pradolin (Residential Tenancies) [2015] VCAT 20 (7 January 2015)

Sections 68, 209 *Residential Tenancies Act 1997* (the Act) – compensation application by a tenant for lack of repair – failure to appropriately repair - compensation awarded

Relevant law

Section 68 of the Act says a landlord must ensure that the rented premises are maintained in good repair.

Section 209 says if a breach of duty notice is given to a party to a tenancy agreement and it is not complied with, the person who gave the notice may apply to VCAT for a compensation order or a compliance order.

Background

The tenant obtained an order for repairs at the rented premises. According to VCAT’s order, the repairs were to be carried out by the landlords in a proper and tradesman like manner employing qualified tradesmen. One of the relevant repairs related to external concreted areas. The tenant later renewed the case alleging that repairs to cracked and uneven concrete at the rear of the property had not been appropriately done.

The tenant argued that the replacement of the area of uneven concrete with crushed rock and cement slurry was not an appropriate method for repair. Another issue was the effect the works had on the concrete step leading to the back door of the rented premises. The rectification work reduced a step riser to approximately 40-50 millimetres in height. The tenant complained that this constituted a tripping hazard and as such, the repair had not been carried out in a proper and tradesman like manner. He also complained that the step did not comply with relevant building codes.

The tenant also claimed compensation of $945.25 because of the alleged failure. This was equal to 5% of the rent for a period of approximately four months, based on a daily rent of $39.88.

What is meant by "good repair"?

In considering what was required of the landlord when undertaking repairs, VCAT took into account:

- The test set out in *T v Director of Housing* [2013] VCAT 2195 at para 36:

  > "The standard of rented premises in the RTA is "good repair". In *Cooke v Cholmondeley* [1858] EngR 994; (1858) 4 Drew 326 at 327-328 Kindersley V-C said a building in good repair must be *"in such a state that they may be fit for use and enjoyment. They must be put in such a state of repair as will satisfy a respectable occupant using them fairly"* and a similar term *"in good tenantable repair"* was referred to in *Proudfoot v Hart* (1890)25 QBD 42 at 50-53 per Lord Esher who said *"The age and character of the house is relevant ...the house need not be put into perfect repair: it need only be put into such a state of repair as renders it reasonably fit for the occupation of a reasonably minded tenant ..."* and *"the age of the house .. the character of the house .. and the locality of the house must be taken into account".* While these decisions were made a long time ago (and today I would replace "respectable" with "reasonable") they clearly set out the standard required by a landlord when maintaining a rented premises." [Para 24]

- Regarding the tenant's complaint that the work was not done by a qualified tradesman, VCAT said that it was the standard of work that was important as some types of repair do not require a tradesperson. It is for the landlord to complete the repair works and there is no right given to the tenant to demand that works be undertaken in a particular way or by a particular person. However, he is entitled to expect that the work be carried out in a proper and tradesman like manner. [Paras 25, 32]
- To carry out work in a "proper manner" the work must comply with any relevant building regulations. Here, the evidence was unclear. [Para 32]
- VCAT found that the replacement of the area of uneven concrete with crushed rock and cement slurry was an appropriate method for repair, taking into account the age of the rented premises and its general condition. The tenant could not demand, or indeed expect the landlord to remove all of the concrete from the area of the old carport and replace it with new concrete. To do so would result in the rented premises being in a better condition than they were at the commencement of the tenancy. A landlord's duty is only to maintain. A landlord is not required to improve or enhance. [Paras 28, 30]
- Whether a method of repair will be "a long-term fix" is a matter for the landlord. [Para 30]

How was the amount of compensation determined for the landlord's failure to repair?

VCAT accepted that the landlord had failed to repair within a reasonable time when faults were brought to his attention. It found the claim for compensation at 5% of the daily rent for the period claimed, to be reasonable in all of the circumstances. In fixing that rate, VCAT considered VCAT decisions which demonstrated a range of compensation awarded for various items, as follows:

- leaking toilet 5% of rent
- inability to use cooking facilities 10% of rent
- leaking roof 5% of rent
- poor quality patch repair to carpet 1% of rent

- non-working heater 10% of rent
- lack of air-conditioning $10.00 per day
- leaking roof & inaccessibility of toilet $5.00 per day
- inadequate cleaning in a rooming house $5.00 per day
- inadequate room security in a rooming house $5.00 per day. [Paras 60-64]

VCAT Decision - T v Director of Housing (Residential Tenancies) [2013] VCAT 2195 (11 December 2013)

Section 68 *Residential Tenancies Act 1997* (the Act) – application for non-urgent repairs

Relevant law

Section 68 of the Act says the landlord has a duty to ensure the premises are maintained in good repair.

Background

The premises were built in about 1996 and the tenancy commenced in 2006.

There was a disagreement as to the cause and the solutions for gaps at the top and bottom of the front door.

The tenant wanted a new, properly fitting door with no gaps. If there was a gap at the bottom of the front door, she wanted a threshold plate.

The landlord offered to install a weather seal at the top of the door, a retractable weather shield at the bottom of the door and appropriate ramps at each side of the door. It said these would effectively seal the door and enable access.

There was evidence that any door would have the same issues as the current door because the wall was out of plumb.

When will a landlord be regarded as having breached their duty of keeping the premises in good repair?

In determining whether the landlord had breached the duty of keeping premises in good repair VCAT said that:

- The standard of rented premises in the Act is “good repair”.
- In *Cooke v Cholmondeley* (1858) 4 Drew 326 at 327 -328 the Court said a building in good repair must be “in such a state that they may be fit for use and enjoyment. They must be put in such a state of repair as will satisfy a respectable occupant using them fairly”.
- A similar term “in good tenantable repair” was referred to in *Proudfoot v Hart* (1890)25 QBD 42 at 50-53 as “The age and character of the house is relevant …the house need not be put into perfect repair.: it need only be put into such a state of repair as renders it reasonably fit for the occupation of a reasonably minded tenant …” and “the age of the house ..the character of the house.. and the locality of the house must be taken into account”. While these decisions were made a long time ago (and “respectable” would be replaced with “reasonable”) they set out the standard required by a landlord when maintaining a rented premises. [Para 36]
- In this case, the gaps around the front door mean the premises were not in good repair. The parties agreed that further works were required so that the doors were in good repair. The walls were out of alignment for reasons which included the original construction of the

building. The walls should not be rebuilt to effect a "perfect" front door. The door, if the gaps are attended to appropriately, would be in the condition required for these premises. This may mean the doors will not be completely sealed and there will be some gap. Doors can have small defects that do not mean they are not in good repair. The door cannot be square, and it will have gaps. Those gaps are to be filled as best as possible and then ramps installed to allow access. There may be some light, draught and noise entering through the front door, but this may be considered a reasonable state of repair for this dwelling.

- It is for the landlord to complete the repair works and there is no right given to the tenant to demand that works be undertaken in a particular way or by a particular person. [Para 39]

Landlord's duty to provide quiet enjoyment

VCAT Decision - Alex Taxis Pty Ltd v Knight (Residential Tenancies) [2016] VCAT 528 (30 March 2016)

Section 67 *Residential Tenancies Act 1997* (the Act) – application for compensation for breach of duty of quiet enjoyment – application dismissed as no significant loss of quiet enjoyment

Relevant law

Section 67 of the Act says that a landlord must take all reasonable steps to ensure that the tenant has quiet enjoyment of the rented premises.

Background

The landlord had its office below the rented premises. The building was zoned commercial and the landlord let another office to a commercial tenant.

On 21 June 2015, the tenant served the landlord with a breach of duty notice, indicating that the landlord had breached the tenant's right to quiet enjoyment because of a vibration from the landlord's offices. There was no dispute that the vibration was from a server and noises associated with the running of the landlord's business.

The tenant applied to VCAT seeking compensation for the breach of her right to quiet enjoyment.

The tenant argued that her quiet enjoyment had been interrupted by a continual noise from the landlord's server and business operations. The noise began in March 2015 and ceased on Christmas Eve. The tenant sought compensation equivalent to half the rent for the period plus removalist's costs.

The tenant said she did not move out because of the noise and has not spent any time away from the premises.

When will a landlord be regarded has having breached the duty to provide quiet enjoyment?

In determining that the landlord had not breached the duty to provide quiet enjoyment VCAT said:

- There was noise emanating from the office of the landlord. The noise was sufficient for the City of Melbourne to confirm electrical noise was audible in the flat on two occasions. The tenant did not suffer any financial loss, she did not have to pay for any alternative accommodation. Further, she continued to offer rooms on Airbnb. The rooms were well received and there was no evidence of any complaints from her guests due to the noise. [Paras 34-35]

- Whilst the noise would have been clearly audible, the tenant had inspected and then leased premises in a commercial building above an existing office. Noise emanating from below was not unexpected in such a situation. [Para 36]
- Had the noise been so intrusive as to justify a refund of half the rent, the tenant would have vacated the rented premises for at least a few nights, or her guests would have complained about it, or she would have made a timely application to VCAT, having served a breach of duty notice in June 2015, which was not complied with. To wait a further six months to do so was not reasonable. [Para 37]
- There was nothing on the Airbnb reviews to suggest that the guests were inconvenienced by the noise or that they were offered or had to wear any earplugs. VCAT did not accept that the tenant's guests failed to complain because they did not spend time in the premises or because they were too tired at night to hear the noise. It was more likely that the noise was not as intrusive as claimed. [Para 38]
- While the existence of the noise was proven, whether that noise affected the tenant's enjoyment of the premises was best determined by her actions. The noise was not as significant an interruption to the tenant's quiet enjoyment as she had claimed, given that she was able to continue to reside there and offer accommodation for which she accepted payment. [Para 39]

Tenant's duty to avoid damage and keep premises reasonably clean

VCAT Decision - Clarke v Cremor-Peel (Residential Tenancies) [2015] VCAT 1291 (19 August 2015)

Sections 61, 63 *Residential Tenancies Act 1997* (the Act) – application for bond and compensation for breach of tenant's duties to avoid damage to the rented premises and keep the premises in a reasonably clean condition – some breaches of duty found.

Relevant law

Section 61(1) of the Act says that a tenant must ensure that care is taken to avoid damaging the rented premises.

Section 63 says that a tenant must keep the rented premises in a reasonably clean condition.

Background

The tenancy was for a period of 22 months.

The landlord made claims for the bond and compensation for breach of duty by the tenant for cleaning, steam cleaning, repairs to walls, ceilings, blinds and the garden.

When will the tenant be regarded as having breached their duty?

In determining that the tenant had not breached their duty in the majority of the claim VCAT said that:

- The tenant was not liable for any deterioration in the condition of the premises while he was in residency that was the result of fair wear and tear. The mere fact that any part of the premises was in a lesser state at the end of a tenancy than at the beginning did not automatically mean that the tenant was liable to pay compensation. In the absence of clear evidence as to the lesser state being due to misuse or damage by the tenant, or that the premises were not reasonably clean, the landlord had not discharged the landlord's obligation to prove that the tenant was liable to pay compensation. [Para 18]
- Access to the top of high cupboards was difficult and possibly dangerous - the cleaning of this area was a maintenance issue that was the responsibility of the landlord. [Para 26]

- Even if there was some dust on sills, skirting boards, inside cupboards and marks on windows, this was to be expected on the vacation of a premises and, in particular, at the end of a tenancy of 22 months. [Para 32]
- The tenant was not expected to leave the premises in a pristine condition, which would be the condition the landlord may wish to have the premises in to show them to prospective tenants. At the end of a tenancy, the landlord would expect to pay for a professional "exit clean" and this was what the landlord had done. [Para 33]
- Pruning of trees and bushes is a specialist job which has aesthetic consequences. Pruning by a tenant can cause friction where a tenant decides to prune trees or bushes in a way that does not accord with the landlord's requirements. At the end of 22 months, trees may need pruning, and this was the landlord's responsibility. [Para 48]
- The landlord claimed for high pressure washing for the outside paved areas. There was no evidence by way of the exit report or photos to support a claim that this was anything other than maintenance work by a prudent landlord at the end of a tenancy. [Para 54]

Tenant's duty not to install fixtures without consent

VCAT Decision - Director of Housing v Davatzis (Residential Tenancies) [2018] VCAT 494

Section 64 *Residential Tenancies Act 1997* (the Act) – application for compliance order to remove fixtures – compliance order granted as no consent to install fixtures

Relevant law

Section 64(1) of the Act says that a tenant must not without the landlord's consent install any fixtures on the rented premises or make any alterations, renovations or additions to the rented premises.

Section 64(2) says that a tenant who has installed fixtures (whether or not with the landlord's consent) must restore the premises before the end of the tenancy or pay the landlord the cost of restoration.

Background

The tenancy commenced in June 1998. The tenant had installed fixtures (security cameras) without the landlord's consent.

The landlord served the tenant with a breach of duty notice alleging breach of section 64 of the Act. The landlord required the tenant to remove the cameras within 14 days.

The tenant argued:

- the cameras were not fixtures and were easily removable;
- section 64(1) should be read with section 64(2) and accordingly if fixtures were installed without consent, a tenant has an option to reinstate at the end of the tenancy.

When will an item be regarded as a fixture?

VCAT found that:

- The law for determining whether an item is a fixture at law was laid down in the English decision of *Holland v Hodgson* [1861] All ER Rep 237. The Court held "that which is annexed to the land becomes part of the land".

- Whether a particular item becomes part of the land (and therefore becomes a fixture) depends on the degree of annexation and the object of annexation. The method of annexation to the land or to the fabric of the construction and whether it can be easily removed without injury to the fabric of the building are important considerations. In determining the object and the purpose of the annexation, a relevant factor is whether the item was for the permanent and substantial improvement of the dwelling or whether it was merely for a temporary purpose or the more complete enjoyment and use of it as a chattel. [Paras 16-7]
- In this case, the cameras were hard wired by a complex electrical network to the fabric of the structure. The mounting for the cameras was by way of drilling into the walls and veranda fascia and was affixed to the building itself. While the effect of this was to enhance the enjoyment and use of the premises by the tenant, the object or purpose of the installation was for the purpose of providing permanent improvement to the security of the premises. The cameras had been installed with permanence in mind. They were intended to be permanently affixed to the building structure. Whilst the cameras could be unplugged and removed, they were mounted high on the wall and the back-veranda fascia. Removal would require significant works and cause damage. [Para 19]
- After considering the method of installation, the position of the mounted cameras, the fact that the cameras were hard wired and plugged in and would be difficult to remove and could not be removed without damaging the building, VCAT found that the security cameras were fixtures. [Para 20]

As there was no dispute that the tenant failed to obtain the consent of the landlord to install the fixtures, VCAT found that the tenant was in breach of section 64(1) of the Act.

VCAT rejected the tenant's submission that she could rectify the issue at the end of the tenancy because of the operation of section 64(2). VCAT referred to the comments of Associate Justice Mukhtar of the Supreme Court of Victoria in the case of *Petko Petkov v Director of Housing,* 8 October 2015 (unreported), that section 64(2) "is permissive. It does not mean that a breach of section 64(1) means that the tenant can enjoy the use of the unlawfully installed fixture until termination of the tenancy."

Entry by landlord

VCAT Decision - Ward v Paskett (Residential Tenancies) [2019] VCAT 98 (21 January 2019)

Sections 85, 86, 88 *Residential Tenancies Act 1997* (the Act) – application for compensation for breach of quiet enjoyment as right of entry notice invalid – compensation ordered as entry notice invalid

Relevant law

Section 85 of the Act relevantly says that a landlord or landlord's agent has the right to enter rented premises together with any person necessary to achieve the purpose of entry for a purpose set out in section 86, if at least 24 hours' notice has been given in accordance with section 88 of the Act.

Section 86(1)(c) of the Act says that a right of entry may be exercised if entry, is required to allow the landlord to carry out a duty under the Act, the tenancy agreement or any other Act.

Section 88 of the Act sets out the requirements for a notice of entry, including that a notice of entry must "state why the landlord or landlord's agent wishes to enter...".

Background

The owners' corporation of an apartment block had given the landlord notice that it required access to the courtyard area of the rented premises to paint an external wall.

The agent had sought the tenant's agreement to painters accessing the courtyard for the purpose of painting the wall.

The tenant advised the agent that he worked from home and would permit the painters access to the courtyard on weekends only. The tenant claimed that due to the nature of his work he would be unable to work whilst the painters were in attendance and would consequently lose a day's earnings or have to make up that working day on a weekend.

The owners' corporation was going to be charged an additional $2,500 for the painters to attend the courtyard on the weekend.

On 21 April 2017, the agent served a notice of entry pursuant to section 86 of the Act.

The section 86 notice stated under the heading "Reason for Notice: Section 86 I wish to enter the premises on 02 May 2017 at 9.00AM to carry out my legal duty as a landlord. Details are attached to this notice."

A cover letter included the following:

> "*Further to our discussion regarding the above mentioned subject [Notice of Entry – Tuesday, May 2, 2017] I attach with this cover note a Notice of Entry.*
>
> *As stated, no one needs to enter the inside of the premises, instead access is only required to the courtyard...I further suggest that it would be in your best interest to move the items yourself so as to avoid any mishandling by the painters but I will leave that decision to yourself."*

On 2 May 2017, the painters let themselves into the courtyard from a back lane. The painters spent a full day painting the wall.

Was the right of entry notice valid?

In determining that the entry notice was not valid VCAT said:

- It was not clear if the wall to be painted was owned by the landlord or formed part of the common property, nor was it clear whether the wall was controlled by the landlord, as no evidence was presented in this respect. If it was not owned or controlled by the landlord, then according to section 68(3) of the Act, the landlord did not have a duty under the Act to maintain it. If the maintenance of the wall was not the legal duty of the landlord, it followed that the landlord did not have a valid ground for entry pursuant to section 86(1)(c) of the Act. [Paras 20-22]
- A statement of a landlord's reason for entry is a requirement under section 88(b) of the Act for a valid notice. For that requirement to be meaningful, sufficient particulars must be given for the tenant to identify what it is that the landlord proposes to do upon entry and in this case the duty that the landlord is proposing to fulfil. [Para 29]
- The notice of entry in this case stated that the landlord's reason for entry was "to carry out my legal duty as a landlord". That statement gave no particulars and if there was nothing more, the notice would be deficient.
- The section 86 notice did attach a cover letter and referred in the notice to the attachment. The wording of the cover letter, "Further to our discussion regarding the abovementioned subject" did not incorporate sufficient particulars. There was not enough detail for the tenant to identify what it was that the landlord proposed to do upon entry and the duty that the landlord was proposing to fulfil. Accordingly, the section 86 notice together with the cover letter were deficient as a section 86 notice of entry and invalid. [Paras 31-32]

VCAT Decision - Teh v Malmberg (Residential Tenancies) [2013] VCAT 1329

Sections 85, 86 *Residential Tenancies Act 1997* (the Act) – application for order that tenant allow the landlord's agent to inspect the rented premises – order granted.

Relevant law

Section 85 of the Act says that a landlord or the landlord' s agent has a right to enter the rented premises for particular purposes if at least 24 hours' notice has been given to the tenant in accordance with section 88.

Section 86(1)(f) of the Act provides that a right of entry in respect of rented premises may be exercised if the entry is required to enable inspection of the premises and entry for that purpose has not been made within the previous six months.

Background

The landlord said that on 12 March 2013, a notice to enter under section 86 of the Act was served on the tenant by registered post. The notice advised that the landlord sought to inspect the rented premises on 19 March 2013 at 11:00am.

The landlord's agent attended the rented premises on 19 March 2013 and was not permitted by the tenant to enter or inspect the rented premises. The landlord sought a compliance order to gain access. The tenant said that:

- they did not receive the notice under section 86 until after the day of the proposed inspection,
- they had a number of actions against the landlord and the agent including stalking,
- in the last inspection in 2010, the landlord used videos and there were some goods that were damaged or taken,

- the landlord could inspect the rented premises, but the tenant would prefer a date in three weeks' time.

What factors are relevant to deciding if an order should be made allowing the landlord to inspect the rented premises?

In determining what factors were relevant, VCAT said that:

- The tenants did not collect the registered post until after the date of the proposed inspection. However, the landlord correctly served the notice by registered post pursuant to section 86 of the Act. The tenants were deemed to have received the notice in the ordinary course of the post which was two business days after postage. The notice contained a detailed letter from the landlord's agent explaining the reason for the inspection and the date and time. The notice contained the reason why the landlord wished to inspect the rented premises and the date and time of the inspection. The tenants were notified correctly. [Para 17]
- The tenants did not have a valid reason to refuse entry to the landlord's agent. [Para 18]
- While the tenants may have had concerns regarding potential property damage or that property may go missing during the inspection, section 90 of the Act allows a tenant to seek compensation for any damage caused during an inspection. [Para 20]
- At the hearing the tenants agreed that the landlord could inspect the rented premises but sought a date in excess of 3 weeks later. This was not a reasonable period. There were no legal proceedings on foot that would give rise to a valid reason for the inspection to occur in three weeks' time. [Para 21]
- There was no evidence to determine that an order should not be made that the tenants permit the landlord via their agent to inspect the rented premises. [Para 23]
- The last time there was an attempt to inspect the rented premises by the landlord or their agent was in 2010. The landlord had a right to inspect the rented premises given that they have not been inspected for more than 6 months. [Para 24]

Possession of rented premises

Immediate notice to vacate - premises unfit to live in

Supreme Court Decision - Handler v Casey [2019] VSC 599 (4 September 2019)

Section 245 *Residential Tenancies Act 1997* (the Act) - application for possession on basis premises unfit for human habitation – possession order granted

Relevant law

Section 245 of the Act says a landlord may give a tenant a notice to vacate rented premises if the premises are unfit for human habitation or have been destroyed totally or to such an extent as to be rendered unsafe.

Background

The landlord gave the tenant a notice to vacate under section 245 of the Act on the basis that the premises were unfit for human habitation. This followed a raid by Victoria Police which uncovered a clandestine laboratory for the production of methamphetamine on the rented premises and the receipt of an improvement notice from the Council by the landlord that prohibited public access and required remediation works. The landlord then obtained a possession order at VCAT.

The tenant sought leave to appeal to the Supreme Court on the basis that VCAT erred in accepting that contamination with methamphetamine fell within the meaning of 'unfit for human habitation' under section 245 of the Act.

What is meant by "unfit for human habitation"?

In dismissing the tenant's application for leave to appeal, the Supreme Court cited with approval the following cases [Paras 77-85]:

- In *Price v Johnson* [2014] VCAT 581, VCAT dismissed an application for a possession order where the notice to vacate under section 245 had been issued because there was no firewall between the premises and an adjacent unit. VCAT observed that the question of whether premises were unfit for human habitation turned upon consideration of whether they were dangerous when in *ordinary use*. As there was no risk of immediate danger, the absence of a fire wall was not considered sufficient to render the premises unfit for human habitation and justify the notice to vacate.
- In *Morgan v Liverpool Corporation* [1927] 2 KB 131, Atkin LJ held that: "If the state of repair of a house is such that by ordinary use damage may naturally be caused to the occupier, either in respect of personal injury to life or limb or injury to health, then the house is not in all respects reasonably fit for human habitation."
- The above test was applied in *Gray v Queensland Housing Commission* [2004] QSC 276 where a tenant alleged that her landlord had failed to maintain the premises in a reasonable state of repair because the landlord had installed kitchen tiles which were slippery when wet and posed danger to tenants. Chesterman J considered that the ordinary use of the premises would involve walking only on dry floors, and promptly mopping up any liquid that was spilt. Chesterman J concluded that the ordinary use of the house would not cause danger to tenants and therefore that it was fit for the tenant to inhabit.
- In *Jones v Bartlett* (2000) 205 CLR 166 the High Court summed up the authorities as follows: "The thread running through these cases is that a dangerous defect will, or may, cause injury to persons using the premises in an ordinary way. They are defects in the sense that they are more than dangerous; they are dangerous in a way not expected by their normal use. Many domestic items might be said to be dangerous: gas ovens, caged fans, hard floors, electrical

circuits and panes of glass may cause serious or even fatal injuries ... However, they are ordinarily only dangerous if misused. They will only be defective if they are dangerous when being used in a regular fashion and ordinarily would not be dangerous when so used."

The Supreme Court rejected the tenant's submission that contamination by methamphetamine residue did not fall within the meaning of 'unfit for human habitation' and that VCAT should not have had regard to the *Clandestine Drug Laboratory Remediation Guidelines* when determining whether the rented premises were fit for human habitation. The Court said:

- The authorities establish that premises will be unfit for human habitation where there is a danger posed to occupants which would naturally flow from their ordinary use. The evidence showed that the danger to occupants of the rented premises in this case was, 'purely by standing in there and breathing'.
- The Guidelines stand as an independent document classifying the extent of contamination which falls within an acceptable level or a dangerous zone. They provide an objective standard to which the Courts may properly have regard in determining issues of habitability. In the absence of any contrary expert evidence the Court or VCAT can properly have regard to the Guidelines in relation to safe or acceptable levels of contamination. [Para 87]

Immediate notice to vacate - malicious damage

VCAT Decision - Director of Housing v Cochrane (Residential Tenancies) [2014] VCAT 1180 (28 August 2014)

Section 243 *Residential Tenancies Act 1997* (the Act) - application for possession for malicious damage – possession order refused

Relevant law

Section 243 of the Act says that a landlord may give a tenant a notice to vacate rented premises if, by the conduct (by act or omission) of the tenant or the tenant's visitor, damage is maliciously caused to the premises or common areas.

Background

The Director of Housing (the landlord) served the tenant with a notice to vacate under section 243 of the Act on the grounds that the tenant had caused malicious damage to the rented premises. Photographic evidence dating back to 2010 showed broken windows, holes in internal walls, damage to doors, doorframes, paintwork and carpet, and extensive graffiti on the inside and outside of two external sleep outs. However, there was no evidence of recent damage.

The landlord said that a notice to vacate on the grounds of malicious damage had not been served upon the tenant until 2014 as there had been a number of children under the age of 18 living in the property and the landlord did not wish to serve the notice to vacate until that was no longer the case.

Must the conduct or omission that is the cause of malicious damage be current and continuing at the date a notice to vacate under section 243 is served?

In dismissing the landlord's application for possession, VCAT said:

- Section 243 is of a similar urgent nature to the provision in relation to danger in section 244 of the Act. The provisions are similar in the sense that sub-section (2) of both provisions state that the notice may specify a termination date which is the date on which the notice is given or a later date. A provision which allows for a notice to vacate to be issued with a termination date that does not give a tenant warning or time to vacate the premises is a provision for situations of some particularly pressing urgency. Both provisions also state that if the requirements of section 330 are satisfied, an order for possession must be made, allowing

VCAT no discretion to delay or adjourn the making of a possession order and therefore increasing the seriousness and significance of the provision. [Para 9]

- In *Director of Housing v Pavletic* [2002] VSC 438 the use of the present term 'endangers' was interpreted by the Supreme Court to mean that the conduct must be continuing at the time the notice to vacate was given. Part of the court's reasoning was that to interpret the law in the opposite way would lead to 'harsh, unfair and absurd results'. So too could a strict interpretation of section 243 'damage is maliciously caused' produce an equally unjust and harsh result. [Paras 11-12]
- An additional basis upon which VCAT formed its view as to the interpretation of section 243 was the application of the *Victorian Charter of Human Rights and Responsibilities 2006*. VCAT considered the tenant's rights to privacy, family and home. [Paras 14-18]
- The correct interpretation of section 243 of the Act is to require any conduct or omission that is the cause of malicious damage to be current and continuing at the date the notice to vacate is served. [Para 19]

Immediate notice to vacate – endangering the safety of neighbours

Supreme Court Decision - Smith v Director of Housing [2005] VSC 46 (20 January 2005)

Sections 244, 319(d) *Residential Tenancies Act 1997* (the Act) – application for possession due to endangerment – notice found by Court to be invalid

Relevant law

Section 244 of the Act says that a landlord may give a tenant a notice to vacate if the tenant or tenant's visitor by act or omission endangers the safety of occupiers of neighbouring premises.

Section 319(d) says a notice to vacate is not valid unless, with some exceptions, it specifies the reason or reasons for giving the notice. If the notice to vacate is not valid, an application to VCAT for possession based on the notice cannot succeed.

Background

The landlord gave the tenant a notice to vacate under section 244(1) of the Act. The notice to vacate stated: "You or your visitor have endangered the safety of neighbours. On 05/10/04 at approximately 10.10 a.m. housing workers visiting the rented premises … were threatened by a visitor to the property with a knife."

The landlord applied to VCAT for a possession order. On hearing the application, it became apparent that the danger alleged by the landlord involved three incidents of threats to neighbours made by the tenant. VCAT amended the application to include these threats. At a later hearing VCAT made a possession order.

The tenant appealed to the Supreme Court saying the notice to vacate did not comply with section 319(d) of the Act, because it did not give reasons that related to section 244 of the Act (that is, it described threats to housing workers, not neighbours).

On appeal, the landlord submitted that although the notice did not, on its face, invoke section 244 of the Act because the stated facts did not refer to neighbours, the fact that the notice was preceded by the words: *"You or your visitor have endangered the safety of neighbours"* saved it as a valid notice, as that was the reason for the notice being given.

What is meant by the requirement in section 319(d) of the Act to include on a notice to vacate 'the reason or reasons' for giving the notice?

The Supreme Court rejected the landlord's submission and held:

- Under section 319 of the Act, for a notice to vacate given on the ground referred to in section 244 to be valid, it must comply with five statutory criteria. It must be in a relevant prescribed form (s.391(a)), it must be addressed to the tenant or resident (s.319(b)), it must be signed by the person giving the notice or their agent (s.319(c)), it must specify the reason or reasons for giving the notice (s.319(d)) and it must specify the date by which compliance is required (s.319(e)). If the criteria are not all present, the notice is invalid. In the absence of some saving provision in the Act, a notice which is deficient in one or other of the requirements referred to is void and of no effect. [Para 14]
- The requirement laid down in section 319(d) is designed to require advice to be given to the tenant as to the reason the landlord demands possession with a sufficient degree of detail to enable the tenant to understand the facts being alleged as a basis for terminating the tenancy. It requires no technical expression, no particular formal verbal formula and no particular legal knowledge to answer the question "Why is this notice being given?" A basic facility for communication in plain English is enough. [Para 17]
- A reason specified on a notice to vacate that merely repeats the words in the section of the Act which is invoked does not satisfy the requirements of section 319(d). [Para 16]

The Court held that the notice to vacate did not comply with section 319(d) of the Act and was ineffective to support an application under section 322 of the Act for possession. VCAT did not have the power to cure the situation by amending the application. The source of the application, and thus the jurisdiction of VCAT, was the notice to vacate. The application could never be wider than that notice, nor could it validly allege any facts not alleged in the original notice to vacate.

Note: On section 319(d) of the Act, see Jafarpourasr v Tancevski [2018] VSC 497 (4 September 2018) summarised below.

Supreme Court Decision - Director of Housing v Pavletic [2002] VSC 438 (15 October 2002)

Section 244 *Residential Tenancies Act 1997* (the Act) - application for possession for endangerment – possession order refused

Relevant law

Section 244 of the Act says that a landlord may give a tenant a notice to vacate rented premises if the tenant or the tenant's visitor by act or omission endangers the safety of occupiers of neighbouring premises.

Background

The Director of Housing (the landlord) served a notice to vacate on the tenant under section 244 of the Act. The landlord then applied for a possession order from VCAT.

VCAT found that the tenant had abused and made serious threats to a neighbour on several occasions. However, VCAT dismissed the application by the landlord for a possession order because the use of the present tense "endangers" in section 244 of the Act required that the landlord must show that the danger to the safety of the neighbours was continuing at the time the notice to vacate was given. VCAT was not satisfied that the conduct complained of was continuing.

VCAT also said: "The behaviour complained of must seriously endanger the safety of occupiers of neighbouring premises" and held that the conduct of the tenant was not "endangering conduct" within the meaning of the provision.

The landlord appealed to the Supreme Court. Two questions of law were raised:

A. Is the landlord only authorised to give a notice to vacate premises under section 244 of the Act where the tenant or visitor, the subject of the notice to vacate, is continuing to endanger the safety of an occupier of neighbouring premises at the time when the notice is given; or is it sufficient that the tenant or visitor by one act or one omission has endangered the safety of an occupier of neighbouring premises?

B. May a landlord only give a notice to vacate premises under section 244 of the Act where the act or omission on the part of the tenant or visitor, the subject of the notice to vacate, seriously endangers the safety of occupiers of neighbouring premises?

Must the act or omission of the tenant under section 244 of the Act represent a continuing danger?

In dismissing the appeal, the Court confirmed the interpretation of section 244 of the Act that VCAT had adopted, namely that there had to be a continuing danger when the notice to vacate was served. The Court said that:

- The prima facie interpretation of the phrase, "endangers the safety of occupiers", is that it refers to a danger to such safety existing at the time of the notice to vacate. The drafter chose the word "endangers" and if it had been intended to have a meaning other than "is endangering", some other form of language would have been used, such as "has endangered". [Para 15]
- The landlord may be vulnerable to litigation if the landlord does not act in such circumstances where it would be reasonably prudent to do so. But what is required is to provide the landlord with protection where there is a reasonable basis for concluding that the safety of occupiers of neighbouring premises is endangered - that is, that the danger is continuing. [Para 17]
- The alternative interpretation would lead to harsh, unfair and absurd results. First, it would not matter how long ago the alleged act or omission endangering the safety of occupiers of neighbouring premises occurred. It is one thing to empower a landlord with the power to give the notice and provide a blunt and speedy procedure where, at the time of the notice, acts or omissions of the tenant's visitor are endangering the safety of occupiers of neighbouring premises. It is another to give such a power and procedure where there is no such present endangerment but there was in the past. [Para 18]
- "Endangers" means "is endangering". [Para 20]

Must the act or omission of the tenant under section 244 of the Act represent a serious danger?

It was submitted that because VCAT had stated that the behaviour complained *of "must seriously endanger the safety of occupiers of neighbouring premises",* VCAT had changed the test from that spelt out in section 244. The Court stated that:

- If VCAT did intend to add a further qualification by using the word "seriously" then it was wrong to do so. [Para 22]
- However, VCAT was merely attempting to emphasise the fact that the power to give a notice to vacate under section 244 required a real risk of danger to the physical or mental health of occupiers and not some remote or faint possibility of such. The Act in using the composite expression "endangers the safety" requires no less than that. [Para 23]
- In addition, the factual findings made by VCAT were such that no endangerment was identifiable at the time of the giving of the notice and, therefore, whatever test of endangerment was used by VCAT and whatever error may have been made in the definition of the test, it was of no consequence. [Para 24]

VCAT Decision - Billing v Plunkett (Residential Tenancies) [2015] VCAT 931

Sections 319, 279 *Residential Tenancies Act 1997* (the Act) – application for declaration that a notice to vacate room in a rooming house invalid – declaration refused despite the incorrect section number included in notice to vacate, as sufficient facts alleged in the notice

Relevant law

Section 319 of the Act prescribed the matters with which a notice to vacate must comply. One of those matters is that the notice to vacate must specify the reason or reasons for giving the notice.

Section 279 of the Act allows a rooming house owner to give a resident an immediate notice to vacate, if resident, by act or omission, causes a danger to any person or property in the rooming house.

Section 280 of the Act allows a rooming house owner to give a resident a notice to vacate, if the resident seriously disrupts the quiet and peaceful enjoyment of the other residents.

Background

The rooming house owner served a notice to vacate on the resident stating the reasons for the notice were as follows:

> *280 – abusing potential residents, abusing owners. Placing an empty bottle of alcohol in kitchen during potential resident's visit. Locking owner out of the house!*
>
> *283- Instead of clearing common area, 4 more cartons arrived 1/6/15. Smoking area for all guests now non-accessible. Bedroom is a potential hazard due to hoarding.*
>
> *280 – Creating as much noise as possible during new residents interview.*

The tenant applied to have the notice to vacate declared invalid and the rooming house owner restrained from evicting the tenant.

Will the reasons in a notice to vacate be regarded as sufficient if the section number of the Act relied upon is incorrect?

VCAT found that:

- The notice to vacate made vague allegations of noise and abuse. The allegations were not that the conduct was directed at or was suffered by the actual residents, but by potential residents and by the rooming house owners. The allegations were too vague and unparticularised to satisfy the requirements of section 319 of the Act. Abuse of potential residents and owners were not grounds entitling the giving of a notice under section 280 of the Act, as the effect of the conduct must be on other residents. To that extent the notice to vacate was inadequate. [Para 7]
- The reference in the notice to vacate to section 283, rather than to section 279, was incorrect. The reference to an incorrect or non-existent section number in a notice to vacate will not invalidate the notice as long as the facts relied upon are clearly set out in the notice and those facts entitle the landlord to give the notice: *Veitch vs Director of Housing* [2008] VSC 442 at [23]. Section 319 of the Act does not impose a requirement to insert a section number; it does require the specifying of the reason or reasons for giving of the notice. The notice to vacate was not invalid for referring to the incorrect section of the Act. [Para 11]
- The notice to vacate did allege the relevant facts which could sustain a reason for the notice being given under section 279 of the Act, even though it referred to section 283 instead of the correct section 279. [Para 12]

- Sections 321B and 321C although giving a right to challenge notices under some specified sections, do not give that right for a notice under sections 279 or 280. Such an application is correctly made under sections 446(b) and 452(2)(a). [Para 14]
- The restraining order was refused on the basis that the evidence did not show that the rooming house owner had threatened to evict the resident in a way that did not comply with the Act. [Para 17]

14 day notice to vacate – assigning or subletting without consent

Supreme Court Decision - Swan v Uecker [2016] VSC 313 (10 June 2016)

Section 253 *Residential Tenancies Act 1997* (the Act) – application for possession on basis that tenant sublet without consent – possession order refused on basis tenant had not sub-let – Court found that tenant had sub-let

Relevant law

Section 253 of the Act says that a landlord may give a tenant a notice to vacate rented premises if the tenant has assigned or sub-let or purported to assign or sub-let the whole or any part of the premises without the landlord's consent.

Background

The landlord served a notice to vacate under section 253 of the Act and sought an order for possession at VCAT on the basis that the tenants had sublet the rented premises without consent by allowing AirBnB guests to stay at the apartment for short term stays, booked through the AirBnB website.

VCAT dismissed the application, finding the AirBnB guests did not have exclusive possession of the rented premises and that the tenants had granted licences only to the AirBnB guests, not leases. Therefore, VCAT found that the tenants had not sublet the apartment. The landlord appealed to the Supreme Court.

Has a tenant sublet if the tenant rents the premises to AirBnB guests?

The questions of law raised by the appeal were:

- Whether there was any evidence before VCAT to support VCAT's finding that the tenants were able to access the rented premises during each Airbnb stay?

  The Court held that there was no evidence before VCAT to support its finding that the tenants were able to access the apartment during each AirBnB stay. As this finding was critical to VCAT's ultimate conclusion that the AirBnB guests did not have exclusive possession of the apartment and that, as a consequence, there had been no sub-lease of the apartment by the tenants, VCAT had erred in law. [Paras 49-59]

- When determining whether a person has exclusive possession of premises, is it relevant to consider whether that person can be made to leave the premises if they stay longer than the period that has been agreed?

  The AirBnB Agreement provided that if a guest stayed past the agreed checkout time without the host's consent, they no longer had a license to stay and the host was entitled to make the guest leave. The Court held that whether the tenants were able to make an overstaying guest leave the apartment was not relevant to the question of whether that guest was in exclusive possession of the apartment during their stay. By taking into account the tenant's ability to make an overstaying guest leave, VCAT took an irrelevant matter into account. [Paras 60-69]

- When determining whether a person has exclusive possession of a premises, is it relevant to consider whether the premises is a person's principal place of residence?

VCAT took into account the tenant's retention of the rented premises as their principal residence before, during and after, each of the AirBnB guest stays. The Court held that this matter was not relevant to whether an AirBnB guest had exclusive possession of the apartment. [Paras 70-74]

In allowing the appeal, the Court said:

- The test to be applied to distinguish between a lease and a licence is whether or not what is granted is exclusive possession. [Para 31]
- To establish whether there has been a grant of exclusive possession, the Court has looked at two things: the nature of the rights which, in terms, have been granted; and the intention of the parties (*Lewis v Bell* (1985) 1 NSWLR 731). [Para 31]
- When considering intention, the Court does not look at the label attached by the parties to the transaction but upon the nature of the right which the parties intend the person entering upon the land shall have in relation to the land (*Radaich v Smith* [1959] HCA 45). Was the grantee given a legal right to the exclusive possession of the premises for a term? Leases can be created by express agreement—for days or even hours (*Genco v Salter* [2013] VSCA 365). [Paras 31, 42]
- There is a broad spectrum of residential accommodation available, ranging from the usual hotel room licensing arrangements through to long-term serviced apartment agreements which, on any view, would be taken to be leases. The question in this case was where the AirBnB agreement fell on this spectrum. [Para 40]
- Although the occupancy granted to the AirBnB guests in this case was for a relatively short time, the quality of that occupancy was not akin to that of a "lodger" or an hotel guest. Rather, it was the possession that would be expected of residential accommodation generally. The tenants had, by means of the AirBnB agreement, effectively and practically passed their right of exclusive occupation, with all its qualities, to their AirBnB guests for the agreed period under the AirBnB agreement. [Para 46]
- The AirBnB agreement for occupation of the whole of the apartment was properly to be characterised as a lease between the tenants and the AirBnB guests for the period of occupation agreed between them. It followed that the tenants had entered into a sub-lease in breach of their agreement with the landlord.

Supreme Court Decision - Janusauskas v Director of Housing [2014] VSC 650 (17 December 2014)

Section 253 *Residential Tenancies Act 1997* (the Act) – application for possession on basis that tenant sublet without consent – possession order granted

Relevant law

Section 253 of the Act says a landlord may give a tenant a notice to vacate rented premises if the tenant has assigned or sub-let or purported to assign or sub-let the whole or any part of the premises without the landlord's consent.

Background

In 2013, the tenant entered into a tenancy agreement with the Director of Housing (the landlord) for a two-bedroom flat where he was to live with his carer.

In May 2013, the landlord gave approval to the tenant for a temporary overseas absence. The landlord then learnt that the tenant, prior to his departure, placed a notice on the website known as 'Couchsurfing', advertising the availability of his room at the premises. In response, two travellers on

a working holiday moved into one of the rooms in the premises and started paying rent to the tenant from 1 July 2013.

The landlord served a notice to vacate under section 253 of the Act on the basis that the tenant had sublet the rented premises without consent. The landlord applied to VCAT for a possession order. VCAT found that the applicant had granted to the travellers exclusive possession of one of the bedrooms in the premises and had therefore sublet or at least purported to sublet, part of the rented premises without the respondent's permission contrary to section 81 of the Act, entitling the respondent to serve a notice to vacate.

The tenant sought leave to appeal to the Supreme Court.

When will a tenant be regarded as having sublet rented premises?

The tenant argued that VCAT erred in holding that the applicant granted exclusive possession of the premises (or part thereof), or that he purported to do so.

- The Court rejected that argument and held that there was evidence upon which VCAT could reasonably conclude that the applicant had granted exclusive possession of his room to the travellers during the period of his absence. VCAT referred to the content of the emails between the applicant and the travellers as evidencing the grant to the travellers of a right to exclusively occupy the applicant's room for a period of six months in return for looking after his dog and paying him rent. The applicant offered the travellers his room for a substantial period of time and made arrangements for the travellers to pay significant sums described as 'rent' directly into his bank account. In the initial emails to the tenant, the travellers said that their existing sublease was coming to an end and that they were looking forward to having a 'home'. [Paras 32-37]
- VCAT had found that the 'exact commencement and termination dates were never set'. The tenant argued that VCAT erred in finding there was a lease rather than a licence because, as a matter of law, for an agreement to be construed as a lease, it must clearly identify the parties to the agreement, the land to be let, the commencement date of the agreement, the duration of the agreement, and the rent to be paid pursuant to it.
- The Court held that the requirement for a lease to contain or specify an 'exact' commencement date is not unqualified, as it may be inferred having regard to the circumstances of the agreement, and/or the language used by the parties in reaching that agreement. In this case, it was evident that the exclusive possession of the room (and the lease) was to commence as soon as the travellers had visited the premises, found the room to be suitable for their needs and been given the key to enable them to move in. [Paras 38-43]

The tenant submitted that VCAT was required to find an intention by the parties to create legal relations and it failed to do so.

- The Court decided VCAT had correctly said that one does not look to the intention of the parties as to the legal consequence of their agreement but to the rights and duties they have in fact created. VCAT found that 'regardless of his subjective intentions, [the applicant] in fact granted [the travellers] the right to exclusively occupy his room for up to six months to the exclusion of all others'.
- The Court noted that this was not a case where, despite the existence of an arrangement that on its face creates a legal relationship, particular circumstances, such as the existence of 'family relationships, charity or hospitality', militate against a finding that there was a legally binding arrangement between them. The parties were not in any kind of special relationship and they entered into an arrangement for the room on what were largely commercial terms involving the payment of rent in return for possession of the room. [Paras 46-53]

Finally, the tenant argued that VCAT erred in failing to disclose its path of reasoning when concluding that the applicant 'purported' to sublet the premises to the travellers.

- The Court concluded that a reference to a 'purported' assignment or subletting in section 253 of the Act reflects the fact that an assignment or subletting without the consent of a landlord will be invalid and can therefore only be a 'purported' assignment or subletting. That is because section 81(3) provides that an assignment or subletting of the whole or any part of the rented premises without the landlord's consent is invalid unless VCAT has determined that consent is not required. [Paras 54-64]

In refusing leave and dismissing the tenant's application, the Supreme Court stated:

- VCAT correctly identified the distinguishing feature of a lease to be the grant of exclusive possession, which carries with it the right to exclude all others, including the grantor. VCAT set out 'some useful directions' as to what the criteria for the grant of exclusive possession might be, including the following:
    a) a person may retain legal possession (that is, exclusive possession) even though another person has sole physical occupation of the premises;
    b) the words used by the parties are not conclusive; and
    c) an intention to create the relationship of landlord and tenant is not necessary in the formation of a lease. [Para 16]

14 day notice to vacate – failure to comply with a Tribunal order

VCAT Decision - Director of Housing v MJ (Residential Tenancies) [2013] VCAT 1322

Section 248 *Residential Tenancies Act 1997* (the Act) – application for possession order for tenant's non-compliance with a compliance order – possession order granted

Relevant law

Section 248 of the Act says that a landlord may give a tenant a notice to vacate rented premises if the tenant fails to comply with an order of VCAT under section 212.

Section 330 of the Act says VCAT must make a possession order if the landlord was entitled to give the notice to vacate; the notice has not been withdrawn; the landlord has complied with section 72 of the *Victorian Civil and Administrative Tribunal Act 1998* (the VCAT Act); and the tenant is still in possession of the rented premises after the termination date specified in the notice to vacate.

Section 332 of the Act says VCAT must not make a possession order if the application is supported with a notice to vacate given under section 248, 282, 307 or 317U; and the failure to comply with an order of VCAT was trivial or has been remedied as far as possible; there will not be any further breach of the duty; and the breach of duty is not a recurrence of a previous breach of duty.

Background

The tenancy commenced in May 1989. The rented premises were in a development of six units. A neighbour (the neighbour) had been a tenant in another property in the development since August 1993.

VCAT made a compliance order on 2 May 2012. The order included a direction to the tenant as follows:

> *Refrain from using the rented premises or permitting their use in a way that causes a nuisance particularly by verbally abusing residents of adjoining properties.*

On 8 October 2012 a notice to vacate pursuant to section 248 of the Act was served on the tenant, alleging the tenant had breached the compliance order. The evidence presented was as follows:

- Documents tendered by the landlord alleged incidents of the tenant screaming abuse at a neighbour, deliberately throwing bottles in an aggressive manner and slamming doors so as to antagonise and intimidate the neighbour, banging doors and revving a car in the driveway between 1.00 am and 3.30 am, in conjunction with a visitor to the rented premises sounding the horn of the motor vehicle between 1.00 am and 2.00 am, laughing and talking loudly in the common area between 1.00 am and 2.00 am and leaving a motor vehicle with the engine running in the common area, talking loudly and shining lights in the neighbour's front windows and banging rubbish bin lids at 3.00 am.
- The landlord alleged that on 7 and 8 October 2012, the tenant made threats to kill the neighbour resulting in Police being called and the tenant being formally interviewed by the Police. It was alleged that on 9 October 2012, the tenant screamed abuse at the neighbour and used highly offensive language and on 5 November 2012, the tenant was alleged to have abused and sworn at the neighbour and made comments to the effect that "you're going to leave in a wooden box" and that "I know people". This incident resulted in Police attending at the rented premises and speaking with the tenant.
- The landlord relied upon evidence from a housing officer, the neighbour, the neighbour's daughter and a police constable called to the rented premises. The neighbour's daughter also played a recording of an alleged interaction with the tenant. The recording depicted a female person swearing loudly, yelling and using highly offensive language.

The tenant denied all the allegations but conceded she had been arrested on or about 8 October 2012.

What factors are relevant to deciding whether to grant a possession order?

In determining that a possession order should be granted VCAT said that:

- The criminal charges brought against the tenant had not been heard and determined. Whilst the criminal charges would be heard and determined based on the criminal standard of proof, VCAT was not required to be satisfied beyond reasonable doubt that the incidents as alleged did occur. VCAT was only required to be satisfied on the balance of probabilities that the alleged incidents occurred. [Para 39]
- On the balance of probabilities, the incidents on 7 and 8 October 2012 did occur and constituted a breach of the compliance order by the tenant. [Para 37]
- The tenant did not deny that it was her voice on the recording swearing and using highly offensive and abusive language. On the balance of probabilities, the recording was a recording of the tenant and the recording was made subsequent to the date of the compliance order. Accordingly, the recording represented a record of a further act on non-compliance on the part of the tenant. [Paras 40-43]
- Taking into account the general history of the behaviour of the tenant towards the neighbour and her daughter and to the bald denials made by the tenant in response to the allegations put to her by the landlord, VCAT was not satisfied that there would be no further breaches of the duty in section 60 of the Act, if a possession order were not to be made. [Para 49]
- VCAT was satisfied that the incidents on 7 and 8 October 2012 which involved threats to kill were anything but trivial in nature. [Para 47]
- As the requirements of section 330 were made out and section 332 did not apply, the landlord was entitled to a possession order.

14 day notice to vacate – use of premises for illegal purpose

Supreme Court Decision - Veitch v Director of Housing [2008] VSC 442 (21 October 2008)

Sections 250, 319 *Residential Tenancies Act 1997* (the Act) – application for possession order on the basis of the tenant using or permitting the use of the rented premises for drug trafficking – possession order granted – Court found notice to vacate valid despite error as to section number

Relevant law

Section 250 of the Act says that a landlord may give a notice to vacate to a tenant, if the tenant has used or permitted the use of the rented premises for any purpose that is illegal at common law or under an Act.

Section 319 prescribes the matters with which a notice to vacate must comply. One of those matters is that the notice to vacate must specify the reason or reasons for giving the notice.

Background

On the execution of a warrant by the police at the rented premises, quantities of drugs found at the premises were 7.4 grams of impure methylamphetamine and 45.4 grams of impure cannabis. Other items found were described as "deal bags", brewer's sugar (said to be used as a cutting agent) and a notebook containing a record of commercial transactions.

A notice to vacate was served by the landlord on the tenant alleging as follows:

> *"You have used the premises, or permitted their use, for an illegal purpose. On or about 6 April 2006 you used or permitted the rented premises to be used for the purpose of trafficking amphetamines and cannabis, a drug of dependence, contrary to subsection 71(1) of the Drugs, Poisons and Controlled Substances Act 1981."*

The notice to vacate contained an error. There was no section 71(1) of the Drugs, Poisons and Controlled Substances Act 1981. There was a section 71 which dealt with trafficking in a quantity of a drug of dependence which was not less than a "large commercial quantity". The quantities of drugs found at the rented premises were not large commercial quantities within the meaning of the Drugs, Poisons and Controlled Substances Act. There was also a section 71AC which dealt with trafficking in a drug of dependence.

The facts proved at VCAT did not and could not establish trafficking in a large commercial quantity.

VCAT granted a possession order and the tenant appealed the decision to the Supreme Court.

The tenant submitted that the VCAT order should not have been made because the basis upon which it was sought as revealed in the hearing was not the reason specified in the notice - trafficking in a large commercial quantity - but another reason - trafficking per se. The facts proved at the VCAT hearing did not and could not establish trafficking in a large commercial quantity, which was the reason specified in the notice to vacate.

When will errors in the notice to vacate cause the notice to be invalid?

The Court in finding that the notice to vacate was valid said:

- The applicable principles to be applied are those set out in *Smith v Director of Housing* [2005] VSC 46. In this matter the notice did comply with the requirements of subsection 250(1) and subsection 319(d) of the Act and VCAT did not err in finding that the landlord was entitled to give the notice to vacate. [Para 22]

- The notice clearly set out the provision of the Act relied upon and the incident upon which the landlord relied. The notice gives a date and alleges drug trafficking. Evidence was given to VCAT concerning drug trafficking on that date. The VCAT order was made upon the basis of that evidence. [Para 23]
- The Court did not read the reference to the non-existent section 71(1) as being an allegation that the trafficking alleged was trafficking in a large commercial quantity. The error in the notice did not mean that the notice failed to specify a matter within section 250 of the Act. It did not render the notice unintelligible or ambiguous.
- The reference to a non-existent section did not invalidate the notice because the facts relied upon were clearly set out and those facts entitled the landlord to give the notice. [Para 23]

VCAT Decision - Director of Housing v ZZ (Residential Tenancies) [2020] VCAT 317 (13 March 2020)

Section 250 *Residential Tenancies Act 1997* (the Act) – application for possession order pursuant to a notice to vacate alleging use of rented premises for illegal purpose – possession order granted

Relevant law

Section 250 of the Act says that a landlord may give a notice to vacate to a tenant, if the tenant has used or permitted the use of the rented premises for any purpose that is illegal at common law or under an Act.

Background

A notice to vacate was issued on the basis that the tenant had used the premises or permitted their use for an illegal purpose. The rented premises had been raided on 2 October 2019 by members of the Special Operations Group and the Clandestine Drug Laboratory Squad. The tenant had been arrested on that date and remanded into custody. There was evidence in the rented premises of a drug laboratory.

What is meant by illegal "use"?

The word "use" is not defined under the RTA but there were a number of authorities on this issue, and the following principles were taken from cited authorities:

- the verb "use" should be given its natural and ordinary meaning. The ordinary meaning accorded to this verb by the Oxford English Dictionary is – "utilization or employment for or with some aim or purpose". The Macquarie Dictionary definitions of "use" include – "to put into service", "to avail oneself of", "to exploit to one's own end" and "to apply to one's own purposes";
- the "use" does not have to involve the whole of the residential premises;
- the "use" may be incidental or subsidiary to another use;
- the specified illegal act or activity must be committed or carried out on the premises;
- the premises must not merely be the scene of the illegal activity;
- the use of the premises must be an essential element of the illegal activity; and
- whether the premises are used for an illegal purpose or not, is a question of fact.

When will rented premises be regarded as having been used or permitted to be used for an illegal purpose?

In determining that the premises had been used for an illegal purpose VCAT said:

- It was not necessary to establish that the tenant has been convicted of an offence relating to the alleged conduct to meet the requirements of section 250 of the Act.
- VCAT must decide for itself whether the tenant used the rented premises, or permitted the premises to be used, for an illegal purpose.
- The evidence established that on 2 October 2019, police officers raided the rented premises and found a significant volume (30 litres) of the proscribed drug, DMT. The tenant was the sole occupant of the rented premises and was found in the premises by the police.
- Furthermore, the police found scientific glassware and other ingredients consistent with the operation of a clandestine laboratory, together with zip lock bags and drug paraphernalia. The police officers reported that the internal surfaces of the premises were spattered with a brown liquid consistent with the liquid analysed as DMT. The centre point of this spatter was a mixing or blending appliance located on the kitchen bench.
- Photographs showed internal surfaces of the kitchen to be splattered and caked with a brown residue. This residue was said to be identical with the 30 litres of brown liquid identified by forensic chemists as the illicit drug DMT. The photographs also show drug paraphernalia on the kitchen stove, smoke blackened ceiling and walls, and a disconnected range-hood.
- Looking at all of the evidence VCAT was satisfied that it was sufficiently cogent to establish, to the civil standard of proof (having regard to the gravity of the allegations), that the tenant installed and operated a clandestine drug laboratory at the rented premises; or permitted the installation and operation of a clandestine drug laboratory at the rented premises; and that this laboratory produced a significant quantity of DMT, a proscribed drug of dependence under the *Drugs, Poisons and Controlled Substances Act 1981*. The use of the premises for the purpose of manufacturing illicit drugs fell within the terms of section 250 of the Act.
- In such circumstances the use of the premises was both an integral and essential component of the illegal activity given that the physical facilities of the premises, and the services connected to the premises, had been used as indispensable elements of the illegal activity.
- Furthermore, the premises had been used to conceal the illegal activity. This latter factor was, in itself, crucial to the illegal purpose, namely, the installation and operation of a “clandestine” drug laboratory.

VCAT Decision - Director of Housing v Schiller (Residential Tenancies) [2014] VCAT 1156

Section 250 *Residential Tenancies Act 1997* (the Act) – application for a possession order for use of rented premises for illegal purpose – dismissed

Relevant law

Section 250 of the Act says that a landlord may give a notice to vacate if the tenant has used or permitted the use of the rented premises for any purpose that is illegal at common law or under an Act.

Background

A notice to vacate was served on the tenant alleging that the tenant used or permitted the use of the rented premises for an illegal purpose.

The police had executed a search warrant on the rented premises and found heroin and money on the person of the tenant’s partner. The heroin was of a trafficable quantity. Other illicit substances found on the premises were not of a trafficable quantity.

Police had observed over a period of time before the execution of the warrant a number of persons attending the rented premises for a short period. No charges were laid in relation to drug trafficking.

The tenant pleaded guilty to possession of two ecstasy tablets and the tenant's partner pleaded guilty in relation to the heroin.

The tenant claimed no knowledge of the heroin or the attendance of third parties at the rented premises.

When will rented premises be regarded as having been used or permitted to be used for an illegal purpose?

In determining if the premises had been used for an illegal purpose VCAT said that:

- The mere existence of illicit drugs on a person who happens to be present in the rented premises is insufficient for a finding that the premises have been used for an illegal purpose.
- Whether or not it can be said that premises have been used for an illegal purpose depends on the circumstances of the illegal activity or action, not just on whether illegal activity occurred.
- If the rented premises are central and essential to the illegal activity, they are being used for an illegal purpose, and the grounds for a section 250 notice to vacate would be made out. See *Director of Housing v TP* (Residential Tenancies) [2008] VCAT 1275 (24 June 2008). [Para 12-13]
- In the present case the illicit drugs were on the person of the tenant's partner who happened to be in the premises. There was no evidence the rented premises were being used to store the illicit drugs.
- VCAT was not satisfied that there was a sufficient connection between the rented premises and the illegal activity. [Para 15]
- If the landlord had proved the relevant connection between the illegal activity and the rented premises, it had not proved that the tenant permitted the use of the premises for the activity, as the tenant's evidence that she had no knowledge of the heroin was accepted by VCAT. [Para 17]

VCAT Decision - Director of Housing v Hogg (Residential Tenancies) [2013] VCAT 1256

Section 250 *Residential Tenancies Act 1997* (the Act) – application to summarily dismiss a possession application pursuant to a notice to vacate alleging use of rented premises for illegal purpose – summary dismissal application dismissed

Relevant law

Section 250 of the Act says that a landlord may give a notice to vacate rented premises to a tenant, if the tenant has used or permitted the use of the rented premises for any purpose that is illegal at common law or under an Act.

Background

A notice to vacate was served by the landlord on the tenant alleging that the tenant used or permitted the use of the rented premises for a purpose that was illegal at common law or under an Act. The notice to vacate had an attached document containing particulars.

At the time the notice to vacate was given neither the tenant nor the other person named in the attachment had been convicted of an offence related to the rented premises. The other person was later convicted of several offences.

The tenant applied to summarily dismiss the possession application. The law requires that such an application be decided on the basis that all the applicant landlord's alleged facts are able to be proved at the final hearing.

When will conduct be regarded as having used or permitted to use premises for an illegal purpose?

In determining use of premises for an illegal purpose VCAT said that:

- VCAT does not need to make a criminal finding of guilt. VCAT's task is to decide whether the facts alleged in the notice to vacate have been proved on the balance of probabilities, although the seriousness of an allegation of illegality requires VCAT to be cautious. "When, in a civil proceeding, a question arises whether a crime has been committed, the standard of persuasion is … the same as upon other civil issues … but weight is given to the presumption of innocence and exactness of proof is required": *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362-363, per Dixon J. [Para 20]
- If it was necessary that a criminal conviction be proved, section 250 would have stated this, it did not. [Para 22]
- The notice to vacate does not need to specify the offence that has been committed. The notice to vacate needs to allege the facts which, if proved, would constitute an offence. See *Veitch v Director of Housing* [2008] VSC 442. [Paras 25-27]
- The mere fact that an illegal act was committed on the premises would not be sufficient, the facts proved would have to connect the illegal act to the premises use.
- While VCAT has no power to make a finding of criminal guilt, in accordance with a criminal standard of proof, performance of its task in determining whether there has been a use for the purpose described in section 250(1) does not require it to make such a finding.
- VCAT's task is to decide whether the facts alleged in the notice to vacate have been proved on the balance of probabilities, although the seriousness of an allegation of illegality requires VCAT to be cautious. [Para 30]

14 day notice to vacate - rent arrears

VCAT Decision - Leung v Zoubek (Residential Tenancies) [2014] VCAT 687 (21 May 2014)

Sections 246, 331(1) *Residential Tenancies Act 1997* (the Act) - application for possession for rent arrears – payment plan made

Relevant law

Section 246 of the Act says that a landlord may give a tenant a notice to vacate rented premises if the tenant owes at least 14 days rent to the landlord.

Section 331(1) says where a notice to vacate is given because of rented owed, VCAT may dismiss or adjourn the case if it considers that satisfactory arrangements have been or can be made to avoid financial loss to the landlord.

Background

The landlord served the tenant with a notice to vacate for rent arrears. VCAT had previously made two payment plan orders. In addition, there were several previous occasions when the landlord had renewed the application for possession but had withdrawn the renewal application before hearing.

The central issue was whether VCAT should again exercise its discretion under section 331(1) of the Act to either dismiss or adjourn the landlord's application for a possession order if satisfied that satisfactory arrangements had been or could be made to avoid financial loss to the landlord.

What factors are relevant when VCAT is considering making a payment plan order under section 331(1) of the Act?

In considering how to exercise the discretion in section 331(1) of the Act, VCAT adopted the considerations enunciated in *IR v VSH* [2006] VCAT 2349, namely that VCAT should take into account such things as the history of the tenancy, the amount of the arrears and the prospects of repayment, the competing financial and other hardships of the tenant and landlord, and the general conduct of the parties. VCAT also said it was appropriate to consider the tenant's ability to sustain the tenancy into the future. [Para 10]

In deciding to adjourn the application and make a payment plan order, VCAT took into account the following factors:

- A lengthy history of the tenant having difficulty paying rent in a timely manner, with a pattern of falling into arrears and then making efforts to "catch up" in order to avoid eviction.
- The late payments causing financial hardship to the landlord. There was maintenance required on the property that the landlord could not afford.
- The tenant's financial difficulties arose from the nature of his employment. He worked for his father, who would often delay payment of his monthly wages, while waiting for payments from customers. The tenant gave evidence that he would rectify this problem in the future.
- The tenant had been in possession of the rental premises since July 2009, with his wife and four children. The family regarded the rental premises as their long-term home. It would be a significant hardship for the family of six to relocate from their well-established home at short notice, if faced with eviction.
- The tenants had already made efforts to reduce the rental arrears. At the time of the request for a renewal of the application there were rental arrears of $2,246.80. As at the date of the hearing, the rental arrears stood at $561.00.
- The tenant proposed to clear the arrears and bring the rent into advance, by three lump sum payments within a reasonably short period. He also put forward a proposal for ongoing weekly rent payments to ensure that the rent remained paid in advance and would not again fall into arrears.
- The proposal put forward by the tenant was realistic. It would ensure the landlord would receive the rent owed within a reasonably short period, so that immediate financial loss could be avoided. The tenant was genuine in his evidence. There was no malice or ill intent when rental payments were late in the past.
- The competing hardships of the landlord and tenant weighed in favour of attempting to maintain the tenancy. The longevity of the tenancy and the tenant's family circumstances indicated that the family's hardship in being evicted from the property, when they appeared to have the ability to make up the rental payments, exceeded the financial disadvantage and hardship of the landlord. [Paras 11-19]

VCAT Decision - Sutrave v Paterson (Residential Tenancies) [2014] VCAT 1331 (8 September 2014)

Sections 246, 331(1) *Residential Tenancies Act 1997* (the Act) – application for possession for rent arrears – possession order granted

Relevant law

Section 246 of the Act says that a landlord may give a tenant a notice to vacate rented premises if the tenant owes at least 14 days rent to the landlord.

Section 331(1) says where a notice to vacate is given because of rented owed, VCAT may dismiss or adjourn the case if it considers that satisfactory arrangements have been or can be made to avoid financial loss to the landlord.

Background

The landlord served the tenant with a notice to vacate for rent arrears. VCAT had previously made a payment plan order. The landlord renewed the application, seeking a possession order.

The central issue in this matter was whether VCAT should again exercise its discretion under section 331(1) of the Act to either dismiss or adjourn the landlord's application for a possession order on the basis that satisfactory arrangements could be made to avoid financial loss to the landlord.

The tenant submitted that she had the capacity to meet a payment plan which would clear the arrears owed and have her rent paid one month in advance, within two months of the hearing. The plan included immediate payment of $500, payments of $1,500 per fortnight ($375 towards arrears) by the tenant from her Centrelink payments, gifts from support agencies of $1,500, a Centrelink advance loan of $1,180 and increased contributions from her two adult sons, who were employed as tradespersons.

What factors are relevant when VCAT is considering making a payment plan order under section 331(1) of the Act?

VCAT pointed out that the discretion in section 331(1) of the Act is only enlivened if VCAT is satisfied that satisfactory arrangements have or can be put in place to avoid financial loss to the landlord. [Para 13]

The onus was on the tenant to satisfy VCAT that she could put in place satisfactory arrangements by making up the arrears payable and maintaining the ongoing rental. [Para 17]

In this case, the evidence presented did not satisfy VCAT. In deciding to make a possession order and refuse an adjournment with a payment plan, VCAT took into account:

- The tenant's explanation of why she had not met the previous payment plan. VCAT concluded from this evidence that she had never had the financial capacity to meet that plan.
- The household income and the ability of the household to meet rental payments. VCAT was not satisfied that there was clear information about household income, nor how much the tenant's adult sons were willing to contribute to rent.
- The fact that there was no independent evidence provided to verify the proposed contributions from welfare organisations or the ability of the tenant to obtain an advance from Centrelink.
- In any event, VCAT held concerns that the tenant was relying on loans and grants to pay rental, as this indicated the tenant was in some financial difficulty and would struggle to maintain the ongoing rent. [Paras 14-16]

VCAT Decision - IR v VSH (Residential Tenancies) [2006] VCAT 2349 (10 July 2006)

Sections 246, 331(1) *Residential Tenancies Act 1997* (the Act) – application for possession for rent arrears – possession order granted

Relevant law

Section 246 of the Act says that a landlord may give a tenant a notice to vacate rented premises if the tenant owes at least 14 days rent to the landlord.

Section 331(1) says where a notice to vacate is given because of rented owed, VCAT may dismiss or adjourn the case if it considers that satisfactory arrangements have been or can be made to avoid financial loss to the landlord.

Background

The landlord served the tenant with a notice to vacate for rent arrears. The tenant, VHS, sub-let the rented premises to five foreign students. Substantial problems which had arisen with the bathroom and plumbing at the premises had resulted in the students travelling to other locations to use a shower or toilet and, in some instances, living elsewhere while having to make their rental payments to VSH. VSH had withheld the rental payments from the landlord due to the issues with the plumbing. At the time of the hearing, VSH owed $2,226 in rent.

The central issue in this matter was whether VCAT should exercise its discretion under section 331(1) of the Act to either dismiss or adjourn the landlord's application for a possession order on the basis that satisfactory arrangements had been or could be made to avoid financial loss to the landlord.

What factors are relevant when VCAT is considering making a payment plan order under section 331(1) of the Act?

VCAT said:

- In considering if and how to exercise its discretion, VCAT is required to take into account such things as the history of the tenancy, the amount of the arrears of rental, the prospects of repayment, the competing financial and other hardships of the landlord and the tenant, and the general conduct of the parties. [Para 26]

VCAT refused to exercise its discretion to adjourn the matter under section 331(1) of the Act after taking into account:

- The tenant's conduct in withholding rent from the landlord, when the tenant had received rent from the sub-tenants;
- There was no hardship to the tenant by the making of a possession order if the premises were in fact "unliveable" as claimed. The only hardship would be to the sub-tenants, who had in any event made semi-permanent arrangements to live elsewhere because of the plumbing issues;
- Since the commencement of the tenancy only one full month's rent had been received from the tenant;
- The relationship between landlord and tenant had deteriorated to such an extent that it was unworkable. [Para 27]

28 day notice to vacate - mortgagee in possession

VCAT Decision - Perpetual Corporate Trust Ltd v Dickinson (Residential Tenancies) [2017] VCAT 791

Sections 268, 319 *Residential Tenancies Act 1997* (the Act) – application for possession of rented premises by mortgagee entitled to possession - application dismissed

Relevant law

Section 268 of the Act says that if a mortgagee of rented premises under a mortgage entered into before the tenancy agreement was entered into becomes entitled to possession of, or to exercise a

power of sale in respect of, the rented premises, the mortgagee may give the tenant a notice to vacate the premises.

Section 319 of the Act prescribes the preliminary requirements for a valid notice to vacate.

Section 351 of the Act provides that if a possession order is granted pursuant to a notice to vacate, a person who obtains a possession order may apply for a warrant of possession. Such a warrant authorises a police officer or other authorised person to enter the rented premises, by force if necessary, and to compel all persons occupying the rented premises to vacate and give possession of the premises to the person who obtained the possession order.

Background

The landlord took out a loan over the rented property. When the landlord defaulted on the loan, the mortgagee obtained judgment for possession of the property in the County Court of Victoria.

The rented property comprised a house and two self-contained bungalows at the rear of the premises. The house on the property was occupied by tenants but those tenants had vacated.

One of the self-contained bungalows at the rear of the premises was occupied by the tenant. The other self-contained bungalow was occupied by a tenant in a related case.

The landlord sent the tenant a notice to vacate under section 268 of the Act requiring the stating that the premises were the address of the main house on the property, not the self-contained bungalow where the tenant resided.

The mortgagee submitted that the notice to vacate served on the tenant sufficiently identified the rented premises as stated in the notice to vacate.

Did the notice to vacate sufficiently identify the rented premises?

In determining whether the rented premises were correctly identified in the notice to vacate VCAT said that:

- The rented premises were identified in the notice as the whole of the property containing the house and two bungalows. This was not an accurate description of the rented premises in circumstances where the tenant occupied only one of the three self-contained buildings on that property. [Para 7]
- If an order for possession was made in the terms sought by the mortgagee and a warrant of possession was executed, the consequence will be that all persons residing in any of the three buildings on the property would be evicted pursuant to an order made against the particular tenant in relation to his occupation of just one of those buildings.

A more appropriate description of the rented premises in the notice would clearly identify the particular bungalow which was rented by the tenant as the rented premises. The notice was invalid as it did not sufficiently identify the rented premises. The proceeding was struck out. [Paras 9-10]

VCAT Decision - Commonwealth Bank of Australia v Kungal (Residential Tenancies) [2013] VCAT 1906

Sections 268, 319 *Residential Tenancies Act 1997* (the Act); sections 60, 72 *Victorian Civil and Administrative Tribunal Act 1998* (the VCAT Act) - application for possession of rented premises by mortgagee – meaning of entitled to possession in section 268 - application dismissed as all tenants not served with the notice to vacate

Relevant law

Section 268 says that if a mortgagee of rented premises under a mortgage entered into before the tenancy agreement, becomes entitled to possession of the rented premises, the mortgagee may give the tenant a notice to vacate the premises.

The notice must specify a termination date that is not less than 28 days after the date on which the notice is given.

Section 319 of the Act prescribes the preliminary requirements for a valid notice to vacate. One of those requirements is that the notice to vacate must be addressed to the tenant.

Section 72 of the VCAT Act says that an applicant must serve a copy of an application on each party; and on any other person entitled to notice of the application.

Section 60 of the VCAT Act says that VCAT may join a party to the proceeding if the person ought to be bound by, or have the benefit of, an order of VCAT.

Background

The tenancy agreement in this case commenced after a mortgage was taken out on the rented premises. The landlord subsequently defaulted on the mortgage.

The landlords were sent a Notice of Default and Notice of Demand provided for in the mortgage contract. The landlords failed to pay the amount demanded by the due date.

The Bank issued a writ and statement of claim in the County Court against the mortgagors, seeking possession of the property and the payment of the full amount owing under the loan. No court order was made at the time of the VCAT hearing in which the mortgagee sought possession.

There were three tenants of the rented premises but only one of the tenants was served with the notice to vacate.

What is meant by the mortgagee being 'entitled to possession' in section 268?

In determining that the mortgagee was entitled to possession as required by section 268 of the Act, VCAT stated that:

- The ability of a mortgagee to serve a notice to vacate only arises where (1) the tenancy agreement was entered into after the mortgage was executed and (2) where a mortgagee becomes entitled to either (a) possession of the rented premises or (b) to exercise a power of sale. [Para 8]
- While the mortgagee had not been granted possession of the rented premises by order of the Court, the combination of the default of payment by the landlord, the Memorandum of Common Provisions and section 78 of the *Transfer of Land Act 1958*, resulted in the Bank being a mortgagee that was "entitled to possession" of the property.
- The Oxford Dictionary defines "entitled to" as giving someone a legal right or just claim to receive or do something. The combined effect of service of the Notice of Default, noncompliance with the Notice and the Memorandum of Common Provisions, gave the Bank a statutory right to take possession of the rented premises, therefore it did not need an order of a Court to be "entitled to possession". [Paras 18-20]
- The Bank was therefore able to serve a notice to vacate on the tenants pursuant to section 268 of the Act.

Should all tenants be named on the notice to vacate?

In considering the requirement for all tenants to be named on the notice to vacate, VCAT said:

- The combined effect of a strict requirement in section 319 of the Act for the notice to be addressed to the tenant and for it to be in a form which provides for the name of the tenant to be inserted, means that unless the notice to vacate correctly names each of the tenants, then the notice is not valid. [Para 36]
- The potential ramifications for a tenant of a valid notice to vacate are grave, with a landlord being granted possession of the property. To require anything less than the names of each and every tenant who is a party to the tenancy agreement to be on a notice to vacate, would be contrary to the intention of the legislators and be highly prejudicial to tenants not named. [Para 37]
- As the notice to vacate did not identify or name two of the three tenants, the notice to vacate was invalid.

Should the landlord/mortgagor be given notice of the VCAT proceeding?

In considering whether the landlord/mortgagor should be a party to and/or be put on notice of the proceeding, VCAT said:

- The result of a successful application by a mortgagee for possession is that a tenant who is evicted from rented premises may have a claim against a landlord for compensation arising from a breach of the landlord's duty to provide quiet enjoyment.
- Further, a landlord is in the best position to respond to assertions by the Bank that it is entitled to possession and the rent or profits from the rented premises.
- In any application by a mortgagee for possession, the landlord is entitled to notice of the proceeding as a person whose interests are affected by the proceeding. [Paras 45-6]

60 day notice to vacate - occupation by landlord, family member or dependent

Supreme Court Decision - Jafarpourasr v Tancevski [2018] VSC 497 (4 September 2018)

Sections 258, 319(d) *Residential Tenancies Act 1997* (the Act) - application for possession due to intended occupation by landlord, family member or dependent – possession order granted – Court found VCAT erred - landlord's grandson not a dependent

Relevant law

Section 258 of the Act says a landlord may give a tenant a notice to vacate rented premises if the premises are immediately after the termination date to be occupied the landlord, a close family member or a person who normally lives with the landlord and is wholly or substantially dependent on the landlord.

Section 319(d) says a notice to vacate is not valid unless, with some exceptions, it specifies the reason or reasons for giving the notice. If the notice to vacate is not valid an application to VCAT for possession based on the notice cannot succeed.

Background

The landlord gave the tenant a notice to vacate under section 258 of the Act. The notice to vacate stated: "occupation by landlord's family. The premises are to be occupied by my great grandson who is dependent on me immediately after the termination date."

At a VCAT hearing, VCAT determined that the landlord was entitled to give the tenant the notice to vacate and made an order for possession of the property. The tenant successfully appealed to the Supreme Court.

What is meant by the requirement in section 319(d) to include on a 60 day notice to vacate 'the reason or reasons' for giving the notice?

On appeal, the tenant submitted that the notice to vacate was not valid pursuant to section 319(d) of the Act because it did not adequately particularise the basis for the notice.

The Supreme Court held:

- The reasoning in *Smith v Director of Housing* [2005] VSC 46 extends beyond 'danger notices' to any notice to vacate for which reasons are required to be provided pursuant to section 319(d) of the Act. Any notice to vacate for which reasons are required to be given must explain "why is this notice being given?". [Para 46]
- That it might be difficult for a tenant to challenge the entitlement of a landlord to terminate a tenancy on the basis that the facts relied upon are peculiarly within the knowledge of the landlord does not usurp the statutory requirement to give reasons, particularly given that it is accepted that, if the landlord's entitlement to terminate is challenged by the tenant, the onus lies upon the landlord to establish the facts necessary to supports its entitlement to terminate the tenancy. [Para 48]
- To the extent that previous VCAT decisions have stated that *Smith* does not apply save in cases of alleged misconduct or breach on the part of the tenant, those decisions are wrong. [Para 48]
- The degree of particularity required in a notice to vacate will vary according to the circumstances. While it is not necessary or appropriate to lay down hard and fast guidelines for the degree of detail required to be included in a notice to vacate, relevant factors would include:

  (a) the length of the notice period: the shorter the notice period, the more detail is required;

  (b) the nature of the reasons advanced in the notice, with greater detail required where some misconduct is alleged, or where an alleged breach is capable of being remedied by the tenant;

  (c) in cases where there might be genuine debate about whether there is a need to vacate the relevant property, such as where repairs and/or renovations are planned, more detail would be required; and

  (d) for notices relying upon section 258, the notice to vacate should at least include details of the family relationship between the landlord and the person who is going to be living in the property. [Para 50]
- The scope of section 319(d) does not require the landlord to identify the evidence which supports the assertion by the landlord that a family member falls within the terms of section 258(1)(b)(ii) of the Act (s.258(1)(b)(ii) refers to a person who normally lives with the landlord and is wholly or substantially dependent). [Para 51]
- Requiring a notice of this nature to include, for example, the facts relied upon to establish the dependency of the family member is not supported by the terms of the Act or the reasoning in *Smith*. [Para 54]

In the present case, the notice to vacate specified the respondent's 'great grandson' was to be the immediate occupier of the property, and that the 'great grandson' was dependent upon the respondent. The court was satisfied that this information was sufficient (though barely) to comply with the requirements of section 319(d).

What is meant by wholly and substantially dependent?

The tenant also submitted that VCAT erred in its interpretation of 'wholly and substantially dependent' under section 258(1)(b)(ii) of the Act.

The Supreme Court held that the expression 'wholly or substantially dependent' meant that the relevant person had a need to rely upon another for financial support, as opposed to simply receiving financial support. [Paras 81-84]

VCAT found that the grandson was being 'assisted by' the respondent. That finding, to the extent that it was said to support the respondent's entitlement to recover possession of the property, either amounted to a misconstruction of section 258(1)(b)(ii), or to taking into account an irrelevant consideration. That is, it was not sufficient to establish that the great grandson had a need for the landlord's financial support. [Para 85]

60 day notice to vacate – rented premises to be repaired, renovated or reconstructed

VCAT Decision - Wariphonphailin v Mackenzie (Residential Tenancies) [2017] VCAT 1980

Sections 255, 319 *Residential Tenancies Act 1997* (the Act) – application for a possession order where premises were to be repaired, renovated or reconstructed immediately after the termination date – possession order refused

Relevant law

Section 255 of the Act says that a landlord may give a tenant a notice to vacate rented premises if the premises are to be repaired, renovated or reconstructed immediately after the termination date and this cannot be done while the tenant is living in the premises and the landlord has obtained all the necessary permits and consents to carry out the work.

Section 319 of the Act prescribes the preliminary requirements for a valid notice to vacate. One of those requirements is that the notice to vacate must specify the reason or reasons for giving the notice.

Background

The managing agent served a notice to vacate on the tenant pursuant to section 255(1) of the Act. The reason for the notice was stated to be:

> *The premises are to be repaired, renovated or reconstructed immediately after the termination date and this cannot be done while you are living there. I have all the necessary permits and consents.*

The landlord applied to VCAT for a possession order on the basis of the notice to vacate.

At the hearing, the landlord could not provide VCAT with any evidence of the scope of the works of the repairs or renovations and said they had not yet been ascertained.

When will reasons in a notice to vacate be regarded as sufficient and when will reasons in a notice to vacate be regarded as proved?

In considering if there was sufficient information in the notice to vacate VCAT said that:

- A notice to vacate under the Act must contain sufficient information so that the tenant knows the claim against them or the reasons for the notice being given. Mere recitation of the words of the section in this case were found to be inadequate as it did not comply with the requirements of section 319 of the Act. See *Smith v Director of Housing* [2005] VSC 46. [Para 7]

- The requirements under the Act make it implicit that the landlord must have identified the scope of the works to be done and taken some preliminary steps towards the works, at the very least ascertaining if any permits or consents are required to be obtained, prior to giving a notice to vacate to a tenant.
- In addition, the landlord is required to have obtained all the necessary permits and consents at the time the notice is given. [Para 13]
- The notice to vacate in this matter provided no detail of the scope or nature of the works proposed by the landlords. This was inadequate to constitute the reasons for giving the notice as required by section 319 of the Act.
- The notice to vacate was therefore invalid as it did not comply with section 319 of the Act. No possession order could be made when there was no valid notice to vacate. [Paras 15-16,19]
- As the landlords had not identified the works to be carried out to the rented premises, they could not have known if any permits were necessary or if the tenants were required to vacate to enable them to carry out the works.
- Without knowing what repairs or renovations were going to be done, the landlords had also failed to prove the grounds for giving the notice to vacate and were not entitled to give the notice.

VCAT Decision - Heydon v Hallingbury Pty Ltd (Residential Tenancies) [2013] VCAT 1884

Sections 255, 319 *Residential Tenancies Act 1997* (the Act) – notice to vacate for repair, renovation or reconstruction immediately after the termination date found to be valid - possession granted

Relevant law

Section 255 of the Act says that a landlord may give a tenant a notice to vacate rented premises if the premises are to be repaired, renovated or reconstructed immediately after the termination date and this cannot be done while the tenant is living in the premises and the landlord has obtained all the necessary permits and consents to carry out the work.

Section 319 of the Act prescribed the preliminary requirements for a valid notice to vacate. One of those requirements is that the notice to vacate must specify the reason or reasons for giving the notice.

Background

The landlord served a notice to vacate on the tenant which relevantly stated:

> *The premises are to be repaired, renovated or reconstructed immediately after the termination date and this cannot be done while you are living there. I have all the necessary permits and consents. Please see attached quotes for the works the landlord will be proceeding with once the tenant vacates the property*.

Attached to the notice to vacate were two pages of quotes for refurbishment works. One page relating to refurbishment work to be carried out to the development, and one page relating to refurbishment work to be carried out to the rented premises.

The refurbishment work to be carried out to the rented premises was listed as:

> *Re-wire 12 apartments with new fuse box with safety switch*
>
> *Install and supply new air conditioners*
>
> *Demolition of kitchen, bathrooms to remove bathtubs and tiles*
>
> *Demolition of all wardrobes*

Install and supply kitchen with Caesar stone benchtop

Install and supply kitchen appliances as discussed

Install and supply hot water units

Install and supply new wardrobes, vanities and shower screens

All plumbing works-kitchen and bathroom

Install and supply floor coverings.

The landlord applied to VCAT for a possession order. The tenant challenged the notice to vacate on the basis that the notice did not have the sufficient degree of particularity to allow them to understand the reasons for the notice and to contest the notice. Both matters were heard together.

In summary, the landlord gave evidence as follows:

- the rented premises were a one-bedroom apartment contained in an apartment development constructed in the 1960's;
- the development contained twelve one-bedroom apartments, set out in two separate buildings each containing six apartments (the development");
- each building in the development contained one apartment on the ground level, three apartments on level one, and two apartments on level two. The rented premises were on level one;
- the apartments in the development were last refurbished in or about the late 1980's or early 1990's;
- the landlord had owned the development since 1992;
- of the twelve apartments in the development, three were vacant awaiting refurbishment. The remaining nine apartments, one of which was the rented premises, were let to tenants, the majority of which were let on fixed term tenancies;
- the tenants' tenancy began on 12 February 2005 - the tenancy was periodic; and,
- the other two apartments contained on the same level as the rented premises were vacant and had been stripped out in readiness for refurbishment works to commence.

When will reasons in a notice to vacate be regarded as sufficient and when will reasons in notice to vacate be regarded as proved?

In determining that the reasons given in the notice were sufficient VCAT said that:

- A mere repetition of the words of the relevant section of the Act was not sufficient to satisfy the requirement of section 319(d) for a notice to vacate to be valid. The reason for giving the notice to vacate did not require any technical language or form, see *Smith v Director of Housing* [2005] VSC 46 (20 January 2005) [Paras 28, 30]
- The attachment to the notice to vacate set out a significant amount of detail as to the works proposed to be carried out to the rented premises and to the development.
- There is nothing in *Smith*'s case that would preclude the required information being presented in the manner adopted by the landlord.
- The notice to vacate and the attachment given to the tenant was sufficient notice of the reasons for the giving of the notice.
- The notice to vacate complied with section 319 of the Act and was therefore valid. [Paras 31-32, 38]

- The landlord had in place all permits for the external works and did not require permits for the proposed internal works. The nature of the works described in the notice to vacate and its attachment could not be undertaken if the tenants remained in occupation.
- The landlord had proven the reasons stated for the giving of the notice to vacate. [Paras 31-32, 38]

60 day notice to vacate – rented premises to be sold

VCAT Decision - Wade v McKenzie (Residential Tenancies) [2016] VCAT 482 (23 March 2016)

Section 259 *Residential Tenancies Act 1997* (the Act) – application for possession order on basis of a notice to vacate stating the premises were to be sold or offered for sale immediately after the termination date – possession order granted

Relevant law

Section 259 of the Act says that a landlord may give a notice to vacate on the basis that the premises are to be sold or offered for sale immediately after the termination date.

Background

The tenancy was for a period of approximately ten years. The landlord served a notice to vacate on the tenant under section 259 of the Act on the basis that the premises were to be sold or offered for sale immediately after the termination date.

The tenant argued that the landlord was not entitled to give the notice to vacate because:

- The landlord's intention was to repair or renovate the property prior to the sale of the property and therefore the landlord had no intent to sell the property immediately after the termination date on the notice; and
- the property had neither been sold nor offered for sale immediately after the termination date specified in the notice.

The landlord gave evidence:

- of his intention at the time the notice was given to sell the property as soon as possible;
- that he had obtained advice that he should not list the property until he had obtained vacant possession;
- that he continued to intend to sell the property as soon as he had access to the property after some minor works; and
- that he had commenced those works with the tenant in possession.

At what point is the intention to sell important?

VCAT accepted that the landlord intended to sell the rented premises immediately after the termination date on the notice to vacate, and that he was entitled to serve the notice under section 259. VCAT said:

- The landlord's evidence was that he had every intention of selling the property as soon as the property became available to him. He intended to do some repairs – including replacing the carpet. Some of the repairs had been completed with the tenant in possession. The sales agent inspected the property to provide a sales appraisal and would list the property as soon as it was available.

- Had the landlord sold the property with vacant possession on the day after the termination date of the notice to vacate – and the tenant failed to have complied with the notice – the landlord would be compromised in relation to the sale of the property.
- The fact that a landlord cannot be guaranteed vacant possession until a possession order is made is a factor to consider.
- VCAT was assisted in ascertaining the interpretation of 'immediately' by the discussion in *Lister v Forth Dry Dock & Engineering Co Ltd* [1990] 1 AC 546 at 576 that the word 'in its ordinary signification... involves the notion that there is, between two relevant events, no intervening space, lapse of time or event of any significance'. From that case and others cited it seemed that 'immediately' varies with its context, and that circumstances may determine the proximity to the event that is necessary.
- The context here was that the tenant had been in possession for over 10 years. The landlord had a clear intention to sell the property with vacant possession. He had commenced the work in preparation for sale. The landlord had been advised to wait until he had vacant possession before listing the property for sale. He had applied for possession after the expiry of the notice to vacate because the tenant had not vacated – confirming his intention to proceed. The landlord had indicated to his agent and VCAT that he would accept an offer at any time – and that the property had been offered for sale, but without an authority in writing.
- VCAT concluded that the time between the termination date on the notice to vacate and the making of an order for possession were sufficiently proximate to satisfy the requirement of 'immediately' in this case. [Paras 24-26]

60 day notice to vacate – end of fixed term agreement

VCAT Decision - Kerkvliet v Cosgrove (Residential Tenancies) [2014] VCAT 899

Sections 266, 259 *Residential Tenancies Act 1997* (the Act) – application for possession order for sale of rented premises – what is a fixed term agreement - possession order refused

Relevant law

Section 259 of the Act says that a landlord may serve a notice to vacate if the rented premises are to be sold or offered for sale immediately after the termination date specified in the notice to vacate.

Section 266 of the Act says that certain specified notices to vacate (including a notice given under section 259) are invalid if the termination date stated on the notice is earlier than the end of the fixed term.

Background

The tenancy commenced in 2011. The parties had two fixed term tenancy agreements, the second was to expire in April 2013.

The tenant gave evidence that in December 2013, the landlord's agent offered a third 12-month fixed term, which the tenant accepted in writing.

The landlord signed the new formal lease agreement, but the tenant had not signed.

In May 2014, the landlord served on the tenant a notice to vacate pursuant to section 259 of the Act, alleging that the rented premises were to be sold immediately after the termination date on the notice. The termination date was before the end of the third fixed term lease.

When will the parties be regarded as having entered into a lease?

In considering whether the parties had entered into a third fixed term lease, VCAT said that:

- For a tenancy agreement to be covered by the Act, it does not need to be in writing and may be express or implied. [Para 20]
- Where there is no written and signed tenancy agreement and there is a dispute about whether or not a binding agreement has been made or what its terms are, VCAT will enforce a tenancy agreement if:
    - There is some other document, signed by that party, the contents of which sufficiently record or refer to the terms of the alleged tenancy agreement to form a 'memorandum or note' of it; or
    - There is a 'memorandum or note' signed by an authorised agent of that party (for example, if the tenant is seeking to enforce the agreement against the landlord, and the landlord's agent has signed a letter that sufficiently records or refers to its terms, and the landlord had given written authority to the agent to enter into a tenancy agreement on the landlord's behalf); or
    - The tenant has been let into possession of the rented premises; this is 'part performance' of the alleged tenancy agreement, making it inequitable for a party to rely on the statutory provision requiring writing. [Para 28]
- In this case there was an offer in writing by the landlord's agent, signed by the property manager, for a fixed term on the existing terms and conditions. The offer was not subject to any further documentation. The tenant accepted this offer in writing. [Paras 31-2]
- When the offer was accepted by the tenant there was a binding tenancy agreement under the Act, recorded in writing, for a further twelve months on the same terms and conditions as the current lease. [Para 34]
- Further, the landlord had signed the fixed term lease, which the tenant could enforce against the landlord. [Para 36]

What happens if the termination date in the notice to vacate is before the end of the fixed term tenancy?

There was a fixed term tenancy agreement in place at the time the notice to vacate was served and the termination date on the notice was before the expiry of the fixed term. The notice to vacate was therefore invalid under section 266 of the Act. [Para 37]

Reduction of a fixed term tenancy

VCAT Decision - Eape Holdings Pty Ltd v Chao (Residential Tenancies) [2015] VCAT 418 (22 January 2015)

Section 234 *Residential Tenancies Act 1997* (the Act) – application for reduction in fixed term lease by landlord due to financial pressures – application dismissed as circumstances not unforeseen

Relevant law

Section 234 of the Act says that VCAT may make an order to reduce the term of a fixed term tenancy if it is satisfied that, due to an unforeseen change in the applicant's circumstances, the severe hardship which the applicant would suffer, if the term of the agreement were not reduced, would be greater than the hardship which the other party would suffer if the term were reduced.

Background

On 29 August 2014, the landlord entered into an exclusive sale authority with an agent for the sale of the rented premises.

On 8 September 2014, the landlord leased the rented premises to the tenants commencing on 19 September 2014 for a fixed term of 12 months.

The landlord applied to VCAT seeking to reduce the fixed term from 12 months to 6 or 9 months so that it could sell the property. It claimed that at the time of entering into the sales authority, the sale of the rented premises was not urgent. However, as a result of unforeseen costs the landlord had suffered hardship requiring an urgent sale of the rented premises. These costs were:

- The rented premises suffered damage that required repair works resulting in unforeseen costs totalling $4,666.00.
- Due to damage at another property owned by the landlord, the landlord incurred 'unforeseen' costs totalling $1,518.00.
- The landlord had purchased a third property. Due to the vendor failing to settle, the landlord incurred additional legal costs in the amount of $2,944.98.
- The third property was the subject of a break-in and malicious damage, which resulted in repair costs totalling $5,702.00 and delay in receiving rental income.

Was there an unforeseen change of circumstances?

In finding that the circumstances were not unforeseen VCAT said:

- In this case the landlord was in the business of owning and renting premises. The costs incurred by the landlord in the repair and maintenance of rented premises were incurred in the course of conducting its business as a landlord and therefore could not be said to be unforeseen. [Para 13]
- The landlord was not entitled to a reduction of the tenancy agreement merely due to the fact that it was under financial pressure as a result of it not conducting its business in a manner that allowed for the costs of repair and maintenance of its properties. [Para 14]

Rent increases

VCAT Decision - Shepherd v Loddon Valley Housing Services (Residential Tenancies) [2019] VCAT 1795 (18 November 2019)

Sections 45, 46 and 47 *Residential Tenancies Act 1997* (the Act) - Application by tenant for orders that proposed rent excessive – rent reduced

Relevant law

Sections 45, 46 and 47 of the Act deal with claims by tenants that rent is excessive because services or facilities have been withdrawn, or that a proposed rent increase is excessive. VCAT can order that the rent be reduced, taking into account specified factors.

Background

The tenancy started in March 2012 for a single storey two-bedroom villa unit in Horsham. On 26 June 2019, the landlord gave the tenant a notice of rent increase under section 44 of the Act increasing the weekly rent from $167.30 per week to $206.83 per week from 9 September 2019. The tenant applied to the Director of Consumer Affairs (the Director) for an investigation and report on whether the proposed rent increase was excessive under section 45 of the Act.

The rental agreement between the parties required the tenant to pay the rent at a rate of 30% less than the market rent or 30% of the tenant's gross income if that was more favourable to the tenant.

The tenant applied to VCAT for an order that the proposed rent was excessive under section 46 of the Act.

The tenant submitted:

- The Director's report which relied upon an estimate by two real estate agents that the property would be listed for $270.00 to $280.00 per week, and which provided a comparable listing for $275.00 per week.
- A Department of Health and Human Services Report dated June 2019 which provided that the median rent in June 2019 for Horsham was $270.00 per week.

The landlord submitted:

- A desktop analysis report by CXR Property based upon another two-storey townhouse in the same complex as the rented premises, assessing the market rent of the townhouse at $350.00.

The tenant argued that the townhouse the subject of the landlord's report was for a two-storey villa with an additional powder room, larger floor space and room for a study and therefore it was not a comparable property.

What matters are relevant in determining whether the proposed rent is excessive?

In assessing whether the rent or proposed rent was more than that which should reasonably be paid by a tenant, VCAT considered the factors under section 47(3)(a) to (ha) of the Act. [Paras 15-21]

Regarding the market rent for comparable properties and the rented premises, VCAT preferred the Director's report over that of the landlord's, given:

- The Director's report was based upon an inspection of the property while the landlord's report was only a desktop analysis.
- The report of the landlord was not based upon a comparable property.

- The report of the Director occurred in September 2019 whilst the report of the landlord was 12 months old. [Para 13]

VCAT:

- Assessed that the market rent was in the middle of the range proposed by the Director at $275.00. [Para 14] This was reduced by 30% as per the rental agreement, resulting in an amount of $192.50. [Para 26]
- Directed that the rent must not exceed $192.50 for a year. [Para 29]
- Directed additional rent payments be refunded. [Para 31]

VCAT Decision - Pepper and Pope v White (Residential Tenancies) [2018] VCAT 2026 (19 December 2018)

Sections 45, 46, 47 *Residential Tenancies Act 1997* (the Act) - application by tenant for orders that proposed rent excessive – rent not reduced

Relevant law

Sections 45, 46 and 47 of the Act deal with claims by tenants that rent is excessive because services or facilities have been withdrawn, or that a proposed rent increase is excessive. VCAT can order that the rent be reduced, taking into account specified factors.

Background

The tenancy started in November 2014 for a three-bedroom, two-bathroom unit in Broadford, with the tenant paying $275.00 per week in rent. The rent was increased to $285.00 and in October 2018 to $320.00 per week.

The tenant applied to VCAT for an order that the proposed rent was excessive under section 46 of the Act.

The tenant submitted:

- A report by the Director of Consumer Affairs (the Director) dated 10 October 2018 relying upon a real estate agent opinion, as well as three comparable properties.
- Further comparative properties available on the rental market.

The landlord submitted:

- Internet reports for eight comparable properties in Broadford to support the contention that the rent being charged was reasonable.

What matters are relevant in determining whether the proposed rent is excessive?

Comparable properties:

In assessing the evidence as to “comparable properties” provided by the parties, VCAT found that:

- The report of the Director relied upon an opinion of an unnamed real estate agent and further relied upon comparable properties that were not located in Broadford, so the material was not of assistance to VCAT. [Para 14]
- Whilst four of the comparable properties provided by the agent were in a newer condition, they were useful to understand the ‘upper end of the range’ for a property of the same style, standard and size. [Para 16]

- The comparable properties provided by the tenant only had one bathroom and were much older in age and condition. These properties, if a second bathroom were added, in the opinion of VCAT could have justified a rental amount of $320. [Para 18]
- All comparable properties provided as evidence were distinguishable from the rented premises to some extent. Despite this, there were more similarities than differences and the material demonstrated a broad range to VCAT that was of assistance in assessing a reasonable rent amount. [Para 19]

State of repair:

- VCAT considered the various maintenance items complained of by the tenant and the responses by the landlord's agent in relation to those items. Whilst it was relevant to consider the state of repair of the premises, VCAT concluded that the items complained of did not diminish the value of the rented premises to the extent that the rent charged was unreasonable. [Paras 20 -24]

Rent increases in previous years:

- The rent increases detailed in the Director's report were not in the previous two years. Therefore, little weight could be given to that information. The proposed rent increase of 12.3% occurred after a three-year period.
- The rent increase that was the subject of the application came after a change in ownership. VCAT found that there was nothing unusual or significant about the timing of the increase that would impact on its assessment of what a tenant might reasonably be expected to pay for this property. The test is not whether a rent increase, at any given time, is reasonable, but whether the actual rent being charged is reasonable. [Para 35-39]

As the Director's report failed to provide an opinion on what the rent should be or what was reasonable, VCAT found it unpersuasive. As it appeared that there was a broad range in the price that could be obtained for a three-bedroom, two-bathroom unit in Broadford, VCAT was of the view that the rent of $320 per week was not unreasonable for a tenant to be charged, and the application was dismissed.

VCAT Decision - Jakubauskas v Berlyn (Residential Tenancies) [2017] VCAT 1603 (5 October 2017)

Sections 45, 46, 47 *Residential Tenancies Act 1997* (the Act); section 126 *Victorian Civil and Administrative Tribunal Act 1998* (the VCAT Act) - application by tenant for orders that proposed rent excessive – rent reduced

Relevant law

Sections 45, 46 and 47 of the Act deal with claims by tenants that rent is excessive because services or facilities have been withdrawn, or that a proposed rent increase is excessive. VCAT can order that the rent be reduced, taking into account specified factors.

Background

The tenancy started in July 2001 in respect of a two-bedroom unit in Wendouree. In 2014, VCAT had set the rent at $204.75 per week. On 3 February 2017, the landlord gave the tenant a notice of rent increase from $204.75 to $210.00 per week from 11 April 2017.

The tenant applied to the Director of Consumer Affairs (the Director) for a report on whether the proposed rent was excessive. The Director's report concluded that the proposed rent was excessive. In May 2017, the tenant applied to VCAT under section 46 of the Act for a declaration that the proposed rent was excessive.

The tenant submitted the Director's report dated 6 April 2017. The officer who conducted the inspection and prepared the report also gave direct evidence. The report included an assessment by two separate estate agencies who gave an opinion that the market rent for the rented premises was $170 to $180 per week. The agents were not paid, and the officer who conducted the inspection declined to identify the agents.

The Director's report included an assessment of comparable properties on the internet. The seven properties assessed as comparable by the inspector had market rents of between $170 to $190 per week. The officer declined to provide the exact addresses of these properties for privacy reasons but provided street names.

The report indicated the condition of the rented premises was fair to good condition and the interior of the property did not appear to have been updated. Minor gardening was carried out at the premises by the landlord.

The landlord submitted that the Director's report was unreliable as it did not provide factual evidence in support of the assessment and did not provide sufficient details of the comparable properties. The landlord also submitted a spreadsheet of 175 properties in the areas with rents ranging from $170 to $1,100 per week. He gave evidence that since 2014 he had undertaken 110 hours of labour at the rented premises with $3,000 spent on the exterior and $3,500 spent on the interior.

What matters are relevant in determining whether the proposed rent is excessive?

VCAT considered the factors under section 47(3) of the Act and took into account the following:

- Given that the officer who conducted the inspection declined to provide full address details of the comparable properties in the Director's Report, VCAT gave no weight to this evidence. [Para 43]
- The same criticism was equally applicable to the landlord's spreadsheet evidence of comparable properties, as it lacked any details other than the address and the rental amounts for those properties. The wide range of rental amounts indicated that the properties were likely of dramatically different standards or condition. [Paras 44 - 45]
- The landlord gave evidence that rental values had increased in the area by 6-8% from 2014 to 2017. If an increase of 6% was applied to the rental value of the property as assessed by the Director in December 2014, the rental value would still only be $180.00 to $190.00 per week, which was significantly less than the current rental of $204.75. [Para 48]
- The most persuasive evidence for VCAT was the evidence of the local agents who assessed the market rent at $170 to $180 per week, as they inspected the rented premises and were in a position to assess the condition of the property. [Paras 46]
- The Director's report indicated that the interior of the premises had not been updated since 2014. [Para 49]

What amount of rent should be specified?

Despite the evidence that the market rent was less than that currently being charged, VCAT considered that section 45 of the Act allows a tenant to either challenge the current rent (where the landlord has reduced or withdrawn services, facilities or other items provided with the rented premises) or a proposed rent increase.

As the current rent was not challenged and the application by the tenant was in relation to the proposed rent increase, VCAT considered that it could not set a rental amount lower than the current rental amount and therefore ordered that the rent not exceed $204.75. [Para 54]

Restraining orders

VCAT Decision - Burch v Tucker (Residential Tenancies) [2018] VCAT 292

Sections 452, 472 *Residential Tenancies Act 1997* (the Act); section 123 *Victorian Civil and Administrative Tribunal Act* (1999) (the VCAT Act); section 201 *Australian Consumer Law and Fair Trading Act* (2012) (the ACL&FT Act) – application for orders restraining landlord from executing warrant of possession and cancellation of warrant – refused

Relevant law

Section 472 of the Act provides that VCAT may make any orders to restrain any action in breach of a tenancy agreement or the provisions of the Act relating to the tenancy agreement and make any orders it thinks fit to require any action in the performance of a tenancy agreement or of duties under the Act relating to the tenancy agreement.

Section 123 of the VCAT Act says that VCAT may grant an injunction in any proceeding if it is just and convenient to do so.

Section 201 of the ACL&FT Act gives power to grant injunctive relief if a person has engaged in conduct that is a contravention of the provisions in the ACL&FT Act. Part 2.2 contains a prohibition against unconscionable conduct when a person is providing goods or services in trade or commerce.

Background

The landlord issued a notice to vacate to the tenant on the basis that she was in arrears of rent by more than 14 days and a possession order was granted with a vacate date of 23 October 2017.

On 16 January 2018, the landlord lodged a request with the principal registrar for a warrant of possession. A warrant of possession was issued.

On 24 January 2018, the tenant lodged an application with VCAT seeking an interim restraining order preventing the landlord from evicting her and an order cancelling the warrant of possession. An interim restraining order was granted.

At the final hearing, the tenant argued that the tenant and the landlord entered into an agreement under which the tenant was able to remain at the rented premises despite the possession order (the Extension Agreement). The tenant was required to pay rent arrears to the landlord and ongoing rent. The tenant also agreed to comply with her obligation as a tenant to maintain the property in a clean and good condition. In return, the landlord agreed not to purchase a warrant of possession.

The tenant argued she had paid the full amount of the arrears and full amount of ongoing rent on time, in reliance on the Extension Agreement. The tenant alleged that the landlord requested a warrant of possession in breach of the Extension Agreement.

The tenant sought from VCAT:

- An order restraining the landlord from breaching the Extension Agreement by taking or attempting to take possession of the rented premises while the tenant was complying with the Extension Agreement (pursuant to paragraph 472(1)(a) of the Act).
- An order requiring the landlord to comply with the conditions of the Extension Agreement (pursuant to paragraph 472(1)(b) of the Act).
- An order cancelling the warrant of possession (pursuant to paragraph 472(1)(g) and section 356(3) of the Act).
- In the alternative, an injunction pursuant to section 123 of the VCAT Act to prevent the execution of the warrant of possession.

- In the alternative, an injunction pursuant to section 201 of the ACL&FT Act preventing Ms Tucker from attempting to obtain possession of the rented premises in contravention of the Extension Agreement on the basis that the landlord has acted unconscionably in requesting the warrant.

The tenant also argued that when the Extension Agreement was entered into, this constituted a new tenancy agreement, and the former tenancy agreement was ended by consent. The new tenancy agreement could only be ended in accordance with the Act (see section 216 of the Act), and it was no longer open to the landlord to seek to enforce the possession order made on 23 October 2017.

What considerations are relevant to the granting of a restraining order or injunction?

In determining that the application for an injunction or restraining would not be granted VCAT said:

- The email negotiations show that the landlord intended to rely on her right to purchase a warrant of possession as a means to end the existing tenancy and would only refrain from doing so in certain circumstances. The negotiations between the tenant and the landlord related to the circumstances in which the tenant could continue her existing tenancy. There was no agreement to commence a new tenancy. [Para 17]
- If the correct interpretation of the email exchange is that, provided the relevant conditions were met, the tenant would be able to stay until “after Christmas”, the landlord did not breach the Extension Agreement by requesting a warrant of possession on 16 January 2018. The alternative interpretation is that the tenant could remain on as a tenant indefinitely as long as the rent was paid on time and the house was cleaned. Whether the landlord breached the Extension Agreement therefore depended on whether the tenant met these specified conditions. [Paras 19-20]
- To meet the terms of the lease, and the conditions of any “Extension Agreement”, the tenant’s rent needed to be one month in advance on the 7th of each month. The tenant did not meet that requirement in the period prior to the landlord purchasing the warrant of possession. [Para 26]
- On either interpretation of the Extension Agreement, at the time of requesting the warrant the landlord was entitled to exercise her legal right to purchase a warrant in order to regain possession of the rented premises. That was because the tenant did not meet the conditions specified by the landlord in her emails (which constituted the Extension Agreement). It was only if those conditions were met that the landlord was prepared to allow the tenant to remain in the rented premises. [Para 42]
- The conduct complained of was the landlord’s request to VCAT for the issue of a warrant of possession. When requesting the issuing of the warrant, the landlord was relying on her legal right to purchase a warrant of possession in accordance with the possession order made by VCAT. By requesting the warrant, the landlord was not in breach of the tenancy agreement, nor was she in breach of any provision of the Act. Therefore, no restraining order could be granted pursuant to section 472 of the Act, as the conduct to be restrained was not in breach of a tenancy agreement or the provisions of the Act relating to the tenancy agreement, Nor did the proposed restraining order require any action in the performance of a tenancy agreement or of duties under the Act relating to the tenancy agreement. [Para 26]
- There was no basis to conclude that it was just or convenient to grant an injunction under section 123 of the VCAT Act that would prevent the landlord relying on her legal right to obtain possession of the rented premises in accordance with the possession order. Therefore, the tenant was not entitled to injunctive relief under section 123 of the VCAT Act. [Para 44]
- Further, there was no basis to conclude that the landlord acted unconscionably in purchasing a warrant in order to regain possession of the rented premises. No action taken by the landlord could be regarded as unconscionable, a term which connotes conduct that is “unfair or unreasonable”, involves a “pejorative moral” element or moral fault, and demonstrates a “high degree of moral obloquy” or adverse moral judgement (see *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* (2013) ATPR 42-429 at 43,071-3).

Therefore, the tenant was not entitled to injunctive relief under section 201 of the ACL&FT Act. [Para 45]

VCAT Decision - Rosser v St Kilda Community Housing Ltd (Residential Tenancies) [2014] VCAT 497

Sections 452, 472 *Residential Tenancies Act 1997* (the Act) – application for restraining order for breach of Act – restraining order granted

Relevant law

Section 472(1)(a) of the Act provides that VCAT may make any orders it thinks fit to restrain any action in breach of a tenancy agreement or the provisions of the Act relating to a tenancy agreement.

Section 472(1)(b) of the Act provides that VCAT may make any orders it thinks fit to require any action in the performance of a tenancy agreement or of duties under the Act relating to the tenancy agreement.

Background

The resident was given use of a shed under the stairwell of the property for the safe storage of his personal items within the rooming house premises. The previous housing manager made the arrangement with the resident, on condition that the resident paid $40 to change the locks.

On 31 March 2014, the resident received a note from the owner stating:

> "*Dear Mark, we require you to remove all Items from our storage shed within the next seven days and return your key as we will be changing the lock after 7 days*."

The owner alleged there was an agreement to hand over the keys on Monday 4 April 2014, although the resident said this was not correct. On 3 April 2014, the resident was confronted at the storage shed by a locksmith changing the barrel of his lock on the door. The resident intervened and gave the owner back the barrel placed on the door by the locksmith. The resident then applied for a restraining order preventing further action by the owner.

The owner argued it was entitled to take back the storage shed because there was no exclusive use agreement and because the storage of the items was a fire risk.

What factors are relevant to deciding whether to grant a restraining order?

In considering whether to grant a restraining order VCAT said that:

- The agreement was that the resident would have exclusive use of the storage shed. This was supported by the changing of the lock on the shed to fit the same key as the resident's room and that the owner had not used or sought to use the shed for more than two years.
- The "consideration" for the resident using the facility was his payment of the $40 fee to change the lock and a settlement of his concerns about security. [Para 21] There was an agreement between the parties that the resident was to have exclusive use of a room and a storage shed under a rooming house arrangement. [Para 23]
- The owner was not able to advise VCAT of any specific items of the resident that created a fire risk. However, if there was a fire risk, there were procedures available to the owner under the Act, to regain possession of the shed.
- Further, if there was an emergency, the owner was entitled to access the shed to deal with that immediate danger or risk. The owner had not complied with any of the requirements under the Act to regain possession of the shed or gain access for the purpose of an inspection. [Paras 25-28]

- For VCAT to grant a final restraining order, there must be a breach of an agreement or the Act and VCAT must be satisfied that there is a real risk of the behaviour continuing.
- Based on VCAT's findings, the owner had breached both the Act and the agreement between the parties in trying to gain possession of the shed, otherwise than in accordance with the Act. [Paras 32-33]
- Without a restraining order it was more than likely that the owner would continue its attempts to gain possession of the shed, without complying with the Act, due to the owner's conduct in changing the locks without warning, making veiled threats to the resident that he would only get paid an order for compensation made by this Tribunal when he returned the keys to the shed, the evidence, general behaviour and attitude of the owner. [Para 35]

VCAT Decision - Jones v Director of Housing (Residential Tenancies) [2013] VCAT 2184

Sections 85, 86, 87 *Residential Tenancies Act 1997* (the Act) – application for final restraining order to prevent the landlord's representative taking photographs during an inspection of the rented premises - order refused

Relevant law

Section 85 of the Act says that a landlord has a right to enter rented premises together with any persons who are necessary to achieve the purpose of the entry at any time agreed with the tenant, if the tenant has consented not more than 7 days before the entry; or for a purpose set out in section 86, at any time between 8 a.m. and 6 p.m. on any day (except a public holiday) if at least 24 hours' notice has been given to the tenant in accordance with section 88.

Section 86(1)(c) says that right of entry may be exercised in order to enable the landlord to carry out a duty under the Act.

Section 86(1)(f) of the Act says that a right of entry in respect of rented premises may be exercised if the entry is required to enable inspection of the premises and entry for that purpose has not been made within the last six months.

Section 87 of the Act says that a person exercising a right of entry must do so in a reasonable manner and must not stay or permit others to stay on the rented premises longer than is necessary to achieve the purpose of the entry without the tenant's consent.

Section 67 of the Act says that a landlord must take all reasonable steps to ensure that a tenant has quiet enjoyment of the rented premises during the tenancy agreement.

Section 68 of the Act says that the landlord has a duty to ensure that the rented premises is maintained in good repair.

Background

The landlord gave notice to the tenant that a contractor was to enter the rented premises for the purpose of accurately recording the current condition of the rented premises and any damage or wear and tear, so that the landlord could maintain the premises in good repair.

The landlord said they did not intend to photograph the tenant's goods and would allow the tenant to inspect the photographs and delete any photographs showing the tenant's goods.

The tenant objected to the taking of any photographs in his unit as:

- it was a breach of his privacy and a breach of his quiet enjoyment of the rented premises.
- he objected to moving his belongings for the purpose of the photographs

- he was concerned the photographs may inadvertently include his belongings.

When will conduct during an inspection be regarded as reasonable?

In determining what behaviour was reasonable when conducting an inspection VCAT said that:

- The Act limits a landlord's right to enter a tenant's rented premises and gives a tenant a right to quiet enjoyment of a rented premises. [Para 23]
- The landlord has a right to enter the rented premises in order to enable it to carry out its duty to ensure that the rented premises are maintained in good repair and in order to inspect the rented premises in circumstances where an inspection has not been conducted within the last six months. [Para 24]
- If a landlord significantly disregards the privacy of a tenant when exercising a right of entry, the landlord may not be exercising the right of entry in a reasonable manner. For example, a landlord who opens drawers in furniture belonging to a tenant in his or her bedroom during an inspection is unlikely to be exercising the landlord's right of entry in a reasonable manner. [Para 25]
- The purpose for which the landlord intended to take the photos was to accurately record the current condition of the unit and any damage or wear and tear, so that it could comply with its duty to maintain the unit in good repair.
- The photos of the rented premises would provide the landlord with accurate and up-to-date information about the condition of the unit and enable it to arrange for any immediate repairs and maintenance as well as to plan for any future repairs and maintenance.
- The landlord would not take any photos of the tenant's belongings when photographing damage or wear and tear and the tenant could easily remove his belongings from view in the kitchen and bathroom before photos were to be taken of these rooms.
- VCAT was satisfied that the landlord intended to exercise its right of entry in a reasonable manner as required by section 87 of the Act by taking photographs for the purpose of the landlord's duty to maintain the rented premises in good repair. [Paras 27-29]
- Generally, VCAT would only find that a landlord had breached a tenant's right to quiet enjoyment if the landlord or its agent had attempted to enter the rented premises other than in accordance with sections 85 to 91 of the Act. [Para 31]
- The tenant's quiet enjoyment of the property would not be breached if the landlord took photographs of the rented premises or if the tenant was required to move his belongings out of view before the photographs were taken. [Para 30]

Service of documents

Service of notice to vacate

Supreme Court Decision - Mendes v Baptcare Ltd [2019] VSC 790 (10 December 2019)

Section 506(3) *Residential Tenancies Act 1997* (the Act) – Court found tenant given notice to vacate

Relevant law

Section 506(3) of the Act sets out the ways in which a notice to vacate must be given, including delivering the notice to the tenant personally, sending it by registered post, by electronic communication in accordance with the *Electronic Transactions (Victoria) Act 2000*, or in a manner ordered by VCAT.

Background

The rooming house owner gave the resident a 120-day notice to vacate without specifying a reason, under section 288 of the Act. The notice to vacate was sent by registered post in December 2018. There was a subsequent meeting between the rooming house owner and the resident, at which the rooming house owner explained to the resident that he no longer met their eligibility criteria for housing. VCAT subsequently made a possession order.

The resident sought leave to appeal to the Supreme Court, which was refused.

One of the arguments relied upon by the resident was that he had not received the 120-day notice to vacate. He said that Australia Post did not have access to residents' doors in the rooming house and that the post was delivered to the rooming house owner for distribution to the residents. He said he had no knowledge of receiving any registered post.

When has a resident been served with a notice to vacate?

The Court noted that the rooming house owner had sent the resident a letter dated 27 December 2018 which said : "With this letter please find a copy of the 14 day notice to vacate for rent arrears and a copy of the 120 day notice to vacate as a result of no longer meeting the eligibility criteria for Baptcare Sanctuary. These notices have also been sent by registered post." The case notes exhibited to VCAT recorded a request by the resident for a meeting on 28 December 2019 in response "to a letter of notice to vacate".

The Court stated that:

- There is no requirement that a notice to vacate be served on an individual by registered mail, although this may be one method of proving service in accordance with section 506 of the Act. There was clear evidence before VCAT that the notice had been received by the resident even if the registered post copy had not come to his attention. There was no error in VCAT's finding that the notice was validly served. [Para 43]

Supreme Court Decision - Kornucopia Pty Ltd v Li [2019] VSC 441 (1 July 2019)

Section 506(3) *Residential Tenancies Act 1997* (the Act); section 109X *Corporations Act 2001* – service of a notice to vacate - Court found corporation served at registered office

Relevant law

Section 506(3) of the Act sets out the ways in which a notice to vacate must be given, including delivering the notice to the tenant personally, sending it by registered post, by electronic communication in accordance with the *Electronic Transactions (Victoria) Act 2000*, or in a manner ordered by VCAT.

Section 109X of the *Corporations Act 2001* provides in part that for the purposes of any law, a document may be served on a company by:

a) leaving it at, or posting it to, the company's registered office; or

b) delivering a copy of the document personally to a director of the company who resides in Australia or in an external Territory.

Background

On 9 January 2019, a notice to vacate was delivered to the office of BDO accountants in Collins St, Melbourne, which was the premises recorded with ASIC as the corporate tenant's registered office. A process server acting for the landlord handed the notice to vacate to a receptionist at BDO's office.

Following the landlord's application for possession, VCAT ordered that the tenant "Kornucopia" was required to leave the rented premises due to rent arrears.

The tenant applied for leave to appeal the VCAT order on the basis that the notice to vacate was not given to a person authorised to receive it on Kornucopia's behalf. The tenant argued that the notice was not validly served because it was served at Kornucopia's previous registered office and not on any of its officers.

Can a corporate tenant be personally served with a notice to vacate?

Section 506(3) of the Act deals with service of a notice to vacate, and includes personal service on a tenant, but does not specifically provide for a means of serving a corporation. The Supreme Court held that the provisions of section 109X of the *Corporations Act 2001* were therefore relevant.

Kornucopia argued that simply leaving the notice to vacate at BDO's office was not giving a notice to vacate as required by section 506(3) of the Act. Giving notice required handing the document to a person authorised to receive it, for instance a director of the company.

The Supreme Court rejected that submission and held that:

- In the case of a corporation, the giving of notice occurs by leaving, giving or delivering the document to a person able to receive such a document at the registered office. The receptionist is such a person and in this case handing the notice to the receptionist at the company's registered address satisfied the requirements of section 109X of the *Corporations Act 2001*. [Paras 20, 22]
- The question of what constitutes 'leaving' a document at a company's registered office in order to satisfy section 109X service requirements was addressed in *SV Steel Supplies Pty Ltd v Palwizat* [2007] QSC 24. In that case, service was purportedly effected by a statutory demand being placed under the door of a company's registered office, as the office was closed. This mode of service was challenged by the corporation upon whom the document was served. Cullinane J held that service was validly effected in accordance with section 109X, and stated:

There is no requirement that service be effected for the purposes of section 109X(1)(a) during office hours or which requires any particular steps to be taken to bring it to the notice of any person in the office.

- In accordance with this authority, section 109X of the *Corporations Act 2001* does not impose an obligation beyond physically leaving a document for service at a registered office in a secure and noticeable place. [Para 21]
- Section 109X of the *Corporations Act 2001* does not limit the concurrent operation of section 506(3) of the Act. Rather it provides a means of personally serving a document on a corporation. [Para 23]

When does a change of address for a corporation's registered office become effective?

As at the date of service of the notice to vacate on 9 January 2019, Kornucopia had changed their registered office to a new address, but ASIC's records had not been updated to record that change. A letter from Kornucopia's accountants showed that ASIC was not notified of the change of address until 6 February 2019.

The Supreme Court noted that, by reason of section 142(3) of the *Corporations Act 2001* a notice of change of address of a registered office only takes effect on the seventh day after the notice is lodged with ASIC. Therefore, on the day the process server served the notice to vacate, Kornucopia's registered office remained the office of BDO accountants. [Para 7]

The Court concluded that the notice to vacate was left at, and delivered to, Kornucopia's registered office on 9 January 2019 and therefore the notice to vacate was given to the tenant, as required by section 506(3) of the Act.

Service of VCAT application

Supreme Court Decision - Bundy v Alberts & Anor [2007] VSC 90 (2 April 2007)

Section 322(1) *Residential Tenancies Act 1997* (the Act) - time for VCAT application – service of notice to vacate and application – Court found service not valid

Relevant law

Section 322(1) of the Act says that a landlord may apply to VCAT for a possession order for rented premises if the landlord has given the tenant a notice to vacate the premises (other than a notice under section 261 or section 263).

Background

The landlord issued a notice to vacate and an application to VCAT that had already been lodged online with VCAT, by enclosing both documents in the same envelope and sending them to the tenant by registered post. VCAT subsequently made a possession order.

The tenant appealed to the Supreme Court arguing that VCAT had no jurisdiction to make a possession order, because the terms of section 322(1) of the Act state that a landlord may apply to VCAT for a possession order if the landlord has given the tenant a notice to vacate. In this case, the application to VCAT had been made before the notice to vacate had been given to the tenant.

The landlord argued that any such defect could be cured by the application of section 126(2)(b) of the *Victorian Civil and Administrative Tribunal Act 1998* (the VCAT Act), which empowers VCAT to disregard failures to comply with statutory or procedural requirements when it considers it is in the interests of justice to do so.

Can a notice to vacate and VCAT application be served concurrently on the tenant?

The Court concluded that VCAT did not have jurisdiction to hear the landlord's possession application because no notice to vacate had been given to the tenant at the time the application to VCAT was lodged.

In allowing the appeal and quashing VCAT's possession order, the Court stated that:

- Under section 126(2(b) of the VCAT Act, VCAT may waive compliance with any procedural requirement, other than a time limit that VCAT does not have power to extend or abridge. Under section 126(4) of the Act, however, VCAT may not extend or abridge time or waive compliance if to do so would cause any prejudice or detriment to a party, or potential party, that cannot be remedied by an appropriate order for costs or damages. It follows that the exercise of power in accordance with the above must be done so, in favour of the party the subject of the vacation order. It also seems a proper construction of section 126(2)(b) that the procedural requirements referred to therein are those which arise after the commencement of a proceeding in VCAT and that is not the application here. [Paras 16-17]
- No application was made before VCAT to abridge time or to waive non-compliance with the requirements of section 322(1) and in any event as the application was not validly before VCAT, VCAT could not make an amendment which sought to give VCAT jurisdiction where none previously existed. [Para 17]

Strict compliance with the procedural requirements contained in section 322(1) is a prerequisite to a valid application for possession being made. [Para 15]

VCAT Act - extension of time to apply

VCAT Decision - Ross v Tacton Building Design & Development (Residential Tenancies) [2019] VCAT 1420 (21 August 2019)

Section 126 *Victorian Civil and Administrative Tribunal Act 1998* (the VCAT Act); sections 263, 266 *Residential Tenancies Act 1997* (the Act); sections 3, 8,13A *Electronic Transactions (Victoria) Act 2000* (the ETV Act) – application for extension of time to apply for order that a notice to vacate was invalid – extension of time granted, order granted that notice to vacate was of no effect

Relevant law

Section 126 of the VCAT Act that VCAT may extend any time limit fixed by an enabling enactment for the purpose of commencing a proceeding.

Section 126(4) of the VCAT Act provides that VCAT may not extend time if to do so would cause any prejudice or detriment to a party that cannot be remedied by an appropriate order for costs or damages.

Section 263 of the Act enables a landlord to give a tenant a notice to vacate without specifying a reason for giving the notice.

Section 266(2) of the Act states that a notice under section 263 is of no effect if it is given in response to the exercise, or proposed exercise, by the tenant of a right under the Act.

Section 266(3) of the Act provides that a person is not entitled to apply to VCAT challenging the validity of a notice under section 263, after the end of 60 days after the date on which the notice was given.

Section 8 of the ETV Act says that a requirement to give information in writing is taken to have been met if the information is given by way of electronic communication and if, amongst other matters, the person to whom the information is given consents to the information being given by means of electronic communication.

Section 3 of the ETV Act says that consent is defined in to include situations in which consent can be reasonably inferred from the conduct of the person concerned but does not include consent that is given subject to certain conditions, unless those conditions are met.

Section 13A of the ETV Act says that the time at which a person receives an electronic communication is the time at which the electronic communication becomes capable of being retrieved, unless the parties agree otherwise.

Section 13A(2) of the ETV Act says that it is to be assumed that the electronic communication is capable of being retrieved when it reaches the addressee's electronic address.

Background

In 2014, the landlords entered into a tenancy agreement with the tenants. The most recent lease agreement was signed on 1 August 2018 for a fixed period ending on 4 August 2019.

A 120-day notice to vacate for no specified reason was served by the landlords on the tenants by email on 31 May 2019 and again by email and registered post on 3 June 2019. The notice required the tenants to vacate by 1 October 2019.

On 31 July 2019, the tenants lodged an application with VCAT, in part, seeking the following orders:

- An extension of time for filing the application challenging the 120 day notice to vacate;

- An order that the notice to vacate was of no effect, on the basis that it had been issued in response to the exercise, or proposed exercise, by the tenants of a right under the Act.

When was the notice to vacate served on the tenants?

In determining when the notice to vacate was served on the tenants VCAT said that:

- Section 506(3) of the Act says that a notice to vacate must be given personally to a tenant, or be sent by registered post, by electronic communication in accordance with the ETV Act or in a manner ordered by VCAT. [Para 10]
- In this case, the tenants signed a residential tenancy agreement on 1 August 2018. A clause of that agreement was that the tenants accepted electronic communication, including receipt of notices electronically. There were no qualifications or conditions placed on the consent clause. The tenants had signed the page containing that clause. The parties were in the habit of corresponding with each other via email.
- The 120-day notice to vacate was sent by the landlords to the tenants via email on 31 May 2019 and is therefore assumed to have reached the tenants' email address on the same day. [Paras 13-4]

As the tenants applied to VCAT within 60 days of being given notice to vacate, should time be extended?

In determining whether time should be extended VCAT said:

- The tenants lodged an application with VCAT challenging the notice to vacate on 31 July 2019, which was 61 days after they were given the notice to vacate. The tenants had miscalculated the 60 day time period for lodgement of the application, and hence filed the application with VCAT one day later than required. The tenants had made a genuine error in calculating the time in which they were required to lodge their challenge to the 120-day notice to vacate.
- VCAT had to consider whether to grant the extension would cause prejudice or detriment to the landlords.
- In *Taylor v Rizvanovic* [2016] VCAT 484, VCAT had considered whether it was possible for a tenant to dispute the validity of a 120-day notice to vacate at the time of the landlord's application for possession, in circumstances where the tenant had not lodged a pre-emptive challenge to the notice to vacate. VCAT came to the following conclusions:

  > *… the effect of subsection 266(3) is to limit the tenant's ability to "apply to the Tribunal" to pre-emptively challenge the validity of a notice to vacate after the 60-day timeframe. However, the provision does not specifically prevent the tenant from raising the issue of the validity of the notice at the time of the landlord's application for possession. The plain meaning of the words indicates that it remains open to a tenant to raise with the Tribunal the potential application of subsection 266(2) of the Act, as a response to a landlord's application for possession, where the application is based on a notice to vacate under section 263.*

- In this case, VCAT reasoned that if it refused the tenants' application for an extension of time, the tenants could still argue, at the time of the landlords' application for possession, that the notice to vacate was invalid for the reasons specified in section 266(2) of the Act. If that was found to be the case, the ineffective notice could not be relied upon by VCAT to make an order of possession.
- When the landlords were asked their views about the tenants' request for an extension of time, the landlords indicated that they wanted the matter resolved. [Paras 17-20]
- Therefore, it was not detrimental to the landlords to extend time, so that the tenants' pre-emptive challenge to the 120-day notice to vacate could be considered. The landlord's view was that he preferred an early resolution of the issue. In circumstances where the application was only one day late through inadvertent error, VCAT decided to extend the time for lodgement of the tenants' application challenging the validity of the notice to vacate. [Paras 23-24]

VCAT Decision - Hobsons Bay Caravan Park Pty Ltd v Smith (Residential Tenancies) [2017] VCAT 948 (28 June 2017)

Section 126 *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act); section 326 *Residential Tenancies Act 1997* (the Act) – application for extension of time to apply for a possession order – extension of time granted

Relevant law

Section 126(1) of the VCAT Act states that VCAT may extend any time limit fixed by an enabling enactment for the purpose of commencing a proceeding.

Section 126(4) of the VCAT Act provides that VCAT may not extend time if to do so would cause any prejudice or detriment to a party that cannot be remedied by an appropriate order for costs or damages.

Background

It was well known that the caravan park in which the resident resided had been sold and a large development was proposed. As at the date of hearing, there were only four remaining residents in the caravan park.

On 22 February 2016, the caravan park owner served a notice to vacate upon the resident with a termination date (required date to vacate) of 26 February 2017.

On 11 April 2017, the caravan park owner sought to file with VCAT an application for a possession based on the notice to vacate.

The application was rejected by VCAT registry because the application was made out of time. Under section 326 of the Act, the caravan park owner was required to make any application for possession within 30 days of the termination date on the notice to vacate. The application should have been made no later than 28 March 2017.

The caravan park owner applied for an extension of time under section 126 the VCAT Act.

What factors are relevant to deciding whether to grant an extension of time?

In granting the extension of time VCAT said:

- Section 126 of the VCAT Act provides that VCAT has the power to extend the time in which the caravan park owner may commence the application for possession.
- In *Lukose v Nursing and Midwifery Board of Australia* [2015] VCAT 229, VCAT found that section 126 of the VCAT Act confers a broad discretion on VCAT to extend the time within which proceedings may be commenced under an enabling enactment.
- Section 326(1) of the Act prescribes a procedural time limit within which to commence a proceeding. That time limit may be extended under section 126 VCAT Act.
- Section 326 does not provide for a statutory limitation period by prohibiting a proceeding after the 30-day time limit has expired. [Paras 10-11]
- In deciding whether to grant the extension of time, VCAT should consider the factors identified in *Hunter Valley Developments Pty Ltd v Minister for Home Affairs and Environment* (1984) 3 FCR 344. The presence or absence of a particular factor is not determinative.
- In addition to the *Hunter Valley Development* factors, the specific considerations under section 126(4) of the VCAT Act must be taken into account, and were considered by VCAT as follows: [Para 12]
    - *Whether the applicant for an extension of time could show an acceptable explanation of the delay*

The delay in lodging the application was caused by human error. An incorrect application was made within time. By the time the mistake was discovered, the 30-day time limit in which to file an application based on the notice to vacate had expired. The mistake was an acceptable explanation for the delay.

- *Whether it was fair and equitable in the circumstances to extend time*

  The caravan park owner had made it known for more than a year that the caravan park was closing to make way for a large development. The failure of the caravan park owner to lodge the application was not a case of the caravan park owner having a change of mind or deciding that the resident should remain but was caused by human error. The caravan park owner's intention had always been to require the resident to vacate so the caravan park owner could deliver vacant possession to the purchaser in accordance with its contractual obligations.

- *Whether the applicant's conduct was inconsistent with making the application*

  Despite the caravan park owner failing to make the application within time, the caravan park owner had consistently maintained that it intended to recover possession of the site. There was no question of the caravan park remaining open for business and this was not a case where the caravan park owner had a change of plans or changed its mind.

- *Whether the resident had suffered detriment or prejudice by the delay*

  Apart from the attendant anxiety and stress caused by additional legal proceedings, the delay had not caused the resident any prejudice or detriment.

- *Unsettling of established practices*

  The usual practice was that an extension of time is not ordinarily or routinely granted to enable a landlord or caravan park owner to commence an application for possession once the 30-day time period under section 326 of the Act has expired. VCAT said that there would be limited circumstances in which it would be appropriate and just for VCAT to exercise its discretion to extend the 30-day time limit to make an application for possession. However, VCAT considered this was one of those rare cases. Taking into account the human error, the lengthy notice period that would be required to serve a fresh notice to vacate and the fact that the caravan park owner had made it known for over a year that the caravan park was closing down permanently because it had been sold, it was not just to require the caravan park owner to re-serve the notice to vacate to enable a new possession application to be made.

VCAT Act - review of an order

VCAT Decision - Director of Housing v Johnson (Residential Tenancies) [2017] VCAT 285 (24 February 2017)

Section 120 *Victorian Civil and Administrative Tribunal Act 1998* (the VCAT Act) - application for review of orders made in absence of a party – order refused due to prejudice to other party due to passage of time

Relevant law

Section 120 of the VCAT Act says that a person in respect of whom an order is made can apply to VCAT for a review of the order if the person did not appear and was not represented at the hearing at

which the order was made. The applications must be made within the time limit specified in the VCAT Rules, which is 14 days after becoming aware of the order.

Section 126(1) of the VCAT Act states that VCAT may extend any time limit fixed by an enabling enactment for the purpose of commencing a proceeding.

Section 126(4) of the VCAT Act provides that VCAT may not extend time if to do so would cause any prejudice or detriment to a party that cannot be remedied by an appropriate order for costs or damages.

VCAT may hear and determine the application under section 120 if it is satisfied that-

- the applicant had a reasonable excuse for not attending or being represented at the hearing; and
- it is appropriate to hear and determine the application having regard to whether the applicant has a reasonable case to argue in relation to the subject matter of the order; and any prejudice that may be caused to another party if the application is heard and determined.

Background

The tenant sought a review of two Tribunal orders made in 2005 and 2006. The first order was made on 5 September 2005 for possession and rent arrears.

The second order was made on 21 February 2006 and required the tenant to pay compensation to the landlord for repairs. The tenant sought review and argued she only became aware of the orders on 13 December 2016. She sought a review of the possession order as she disagreed with the order requiring her to pay rent owed of $.

The tenant said she had a reasonable excuse for not being present or represented at the hearings because she was not aware of the hearings, as she had not resided at the rented premises for six months prior to the hearing dates.

Did the tenant have a reasonable excuse for not attending the hearings?

VCAT found that the tenant was not present or represented at the hearings, as she had no knowledge of the hearings and, in those circumstances, had a reasonable excuse for not attending or being represented at the hearings. [Paras 12-14]

Did the tenant apply for the review within 14 days of becoming aware of the orders?

VCAT found that although the tenant was aware that she owed a large amount to the landlord in rent arrears, she was not aware of the formal possession order having been made until 13 December 2016, more than 11 years later. As the application for review of the possession order was made on 23 December 2016, the tenant had met the requirements of the VCAT Rules and lodged her application within 14 days of becoming aware of the order. [Para 21]

Did the tenant have a reasonable case to argue if granted a review of the orders?

In determining whether the tenant had a reasonable case to answer VCAT looked at the following circumstances:

- the increase in rent arrears between the date of the notice to vacate and the possession order,
- that the tenant had signed an agreement acknowledging the amount of rent she owed,
- that she did not make an application for a rent rebate for the period she was in jail,
- that she had not established that such a rebate would have been granted, whether such a rebate could be applied retrospectively, or what effect that would have had on the arrears.

VCAT was not satisfied that a Tribunal rehearing the matter of how much rent was outstanding would make any different order than the one made on 5 September 2005.

VCAT was not satisfied that the tenant had a reasonable case to argue that the rent owing at the time the possession order was made is any less than the amount set out in the order. [Para 30]

Would the landlord suffer prejudice if the review was granted?

In determining that the landlord would suffer prejudice if the review was granted, VCAT said:

- The applications for review were made more than 11 years after the original orders were made. The evidence of the landlord is that the relevant files are either in archive, in storage or destroyed. VCAT's paper files were destroyed and had to be recreated from the computer system. The tenant conceded that it would now be difficult to reconstruct the records.
- It was not reasonable, or even possible, to expect the landlord to try to reconstruct all of the material that would be required in evidence to substantiate its claims for rent arrears and compensation for repairs. No cost order, or payment for the reimbursement of fees, would be able to rectify the inability to create those documents.
- In those circumstances, the prejudice that the landlord would experience if either order were set-aside and reheard could not be overcome by an award of costs or reimbursement of fees. It was not appropriate to grant the applications for review. [Paras 38-39]

VCAT Decision - Director of Housing v Patkas (Residential Tenancies) [2016] VCAT 1062 (24 June 2016)

Sections 120, 126 *Victorian Civil and Administrative Tribunal Act 1998* (the VCAT Act) – application for review of order granted in absence of a party – order refused as no reasonably arguable case and prejudice to other party

Relevant law

Section 120 of the VCAT Act says that a person in respect of whom an order is made can apply to VCAT for a review of the order if the person did not appear and was not represented at the hearing at which the order was made. The applications must be made within the time limit specified in the VCAT Rules, which is 14 days after becoming aware of the order.

Section 126(1) of the VCAT Act states that VCAT may extend any time limit fixed by an enabling enactment for the purpose of commencing a proceeding.

Section 126(4) of the VCAT Act provides that VCAT may not extend time if to do so would cause any prejudice or detriment to a party that cannot be remedied by an appropriate order for costs or damages.

VCAT may hear and determine the application under section 120 if it is satisfied that-

- the applicant had a reasonable excuse for not attending or being represented at the hearing; and
- it is appropriate to hear and determine the application having regard to whether the applicant has a reasonable case to argue in relation to the subject matter of the order; and any prejudice that may be caused to another party if the application is heard and determined.

Background

On 16 February 2016, the landlord sent a notice to vacate on the basis of arrears of rent.

The notice to vacate had a termination date of 12 March 2016. The landlord applied to VCAT for a possession order.

The tenant failed to attend the hearing on 24 March 2016 and a Possession Order was made.

On 16 May 2016, the landlord applied for a warrant of possession. It was issued by the principal registrar the following day.

On 25 May 2016, the tenant applied for a review and rehearing of the application for a possession order.

Did the tenant have a reasonable excuse for not attending the hearing?

The tenant was mistaken about the time of the hearing. The tenant intended on attending the hearing but arrived late. In these circumstances, VCAT found the tenant had a reasonable excuse for not attending the hearing.

Did the tenant have a reasonable case to argue?

In determining whether there was a reasonable case to answer VCAT found that the tenancy was not sustainable for the following reasons –

- there was a lengthy history of rental arrears,
- the rent payments were inconsistent (even when the tenant had regular work),
- irregular and unsustainable methods (bankruptcy and sale of assets) had been used to reduce the rental arrears,
- the tenant's inability to make payment of the rent even when faced with eviction, and
- the tenant's proposed payment of $40 per fortnight in addition to her usual rent would place the tenant under extreme financial pressure. [Para 39]

VCAT was not satisfied that if the review was granted, VCAT would exercise its discretion to place the tenant on another payment plan. The most probable outcome would be another order for possession. [Para 42]

Was there any prejudice to the other party by re-opening the case?

Given the history of possession orders, constant delays because of review applications and the uncertainty of the tenant being able to meet any commitment to pay the rent let alone the arrears, VCAT found that the landlord would be prejudiced by re-opening the case. [Para 44]

Was there a reason to extend time for the tenant to make the application, given she did not apply for review within 14 days of becoming aware of the order?

After being advised that the hearing had proceeded in her absence, the tenant said she immediately attended at the office of the Director of Housing at Broadmeadows. One week after the possession order was granted, the tenant entered into a payment plan with the landlord and said she understood that she had six months to pay off the arrears.

It was only after a default on this payment arrangement, that the landlord applied to purchase a warrant of possession. After police attended and advised that they would be executing the warrant, the tenant applied to VCAT for review.

The tenant said she was unaware of her right to seek a review until just before the review application was filed. VCAT said that given the history of rental arrears, the tenant's appearances before VCAT and previous review applications, the tenant was well aware of her right to seek a review of the order and that such an application had to be made within 14 days of becoming aware of the order.

VCAT was not satisfied that the tenant had an acceptable excuse for delaying seven weeks beyond the statutory time frame in which to seek a review and nor was it fair and equitable to the landlord to allow such a delay. The application to extend time to the day the application was rejected. [Paras 28-32]

Warrant of possession

Extension, postponement, stay

VCAT Decision - Effendy & Anggrek v Kornucopia Pty Ltd (Residential Tenancies) [2019] VCAT 1146 (1 August 2019)

Sections 123, 149 *Victorian Civil and Administrative Tribunal Act* (the VCAT Act) – application for rolling 30 day stays until appeal resolved or 21 day stay to seek a further stay from Supreme Court – order granted staying possession order and prohibiting execution of the warrant of possession for 7 days with all future stays to be dealt with by the Supreme Court

Relevant law

Section 149 of the VCAT Act says that VCAT on application of a party or on its own initiative, may stay the operation of any orders it makes pending the determination of any appeal that may be instituted under the VCAT Act. VCAT may attach conditions to the stay.

Section 123 says that VCAT on application of a party or on its own initiative, may grant an injunction, including an interim injunction in any proceeding if it is just and convenient to do so.

Background

On 16 July 2019, under section 330 of the *Residential Tenancies Act 1997* (the Act), VCAT made a possession order, based on a notice to vacate for the non-payment of rent.

VCAT ordered Kornucopia must vacate the rented premises that day, that the landlords could request a warrant of possession to be issued by VCAT's principal registrar, and that Kornucopia pay the landlords rent owed of $17,360.75, with the Residential Tenancies Bond Authority to pay the $2,600 bond to the landlords on termination of the tenancy.

At the request of the landlords, on 18 July 2019, VCAT issued a warrant of possession.

On 25 July 2019, VCAT received an application from Kornucopia, seeking a stay of the possession order as it had lodged an application seeking leave to appeal to the Supreme Court of Victoria. Kornucopia attached its Notice of Appeal.

What factors are relevant to granting a stay pending an appeal?

In determining what factors were relevant to granting a stay of the possession order and a prohibition on execution of the warrant of possession, pending an appeal, VCAT said:

- In *Quick v Lam-Ly Pty Ltd* [2019] VSCA 111 at [11], the Supreme Court described the "stay application principles" that should be considered [from 27]:

  > *In deciding whether to order a stay of execution, the court has a wide discretion and is required to take into account all of the circumstances of the case. The party applying for a stay bears the onus of demonstrating that a stay is justified. Ordinarily, a successful party is entitled to the benefit (or fruits) of the judgment and the presumption that the judgment is correct.*
  >
  > *… the power to order a stay will generally not be exercised unless the party seeking the same demonstrates special or exceptional circumstances.*
  >
  > *Special circumstances may be found to exist where the applicant is able to demonstrate that there is a real risk that it will not be possible to restore the applicant substantially to his or her former position if the judgment against the applicant is executed before the conclusion of the appeal. However, the*

prospect that the appeal may be rendered nugatory must be balanced against a [principle] that the successful party is entitled to the fruits of its judgment.

In order to justify the grant of a stay, an applicant should also demonstrate that there is at least an arguable ground of appeal. That said, ordinarily, the court does not have before it sufficient materials to consider, in detail, the merits of the grounds of appeal relied upon in the application for leave to appeal. In such a case, unless there is no arguable ground of appeal, or the appeal is not bona fide, the court ordinarily will focus on matters relevant to the enforcement of the judgment, rather than matters that are relevant to its validity or correctness.

- At [45], the Supreme Court found in the matter before it:

  "*..even if I were persuaded that Mr Quick had a ground of appeal that was at least arguable, there is no basis in this case for staying the orders that have been made against him so that he may continue to 'adversely possess' the premises pending the hearing of his application for leave to appeal, without paying or securing the outstanding rent that has accrued (and continues to accrue*)."

- The common practices of other parts of VCAT is that section 149 of the VCAT Act is often used to provide enough time for applicants to make an application in the Supreme Court for a stay of VCAT orders. That is appropriate in the context of the Supreme Court's comments as to it being desirable that a dispute be before, so far as possible, a single jurisdiction. Where the substance of the dispute is before the Supreme Court, the application for an ongoing stay should be dealt with by the Supreme Court. [Para 28]
- There was nothing in this case that supported VCAT continuing the stay and related orders, extending the life of the warrant of possession each 30 days, until the Court decided the application for leave to appeal and potentially then the appeal. The substance of the dispute was before the Court and that is where the substantive issue of an ongoing prevention of eviction was preferably dealt with.
- A seven day stay was appropriate. A longer stay would be unjust to the landlord, where VCAT had ordered rent be paid and where, without any apparent credible basis, Kornucopia had been in possession of the rented premises for over half a year without paying rent. Seven days was sufficient for Kornucopia to make any further stay application to the Court.

VCAT gave no credence to:

- vague offers and submissions concerning compromise by Kornucopia;
- Kornucopia's talk, without persuasive evidence, of being owed money by the landlords and a soon to eventuate counterclaim;
- contemplation of setting off orders to pay in this matter against prospective orders in as yet un-commenced legal proceeding, with no credible evidence that such would commence;
- Kornucopia's claimed difficulties of being able to seek a stay from the Court;
- potential difficulties for the Court with a short time frame, as VCAT was satisfied that the seven-day time limit would not unduly hamper the Court. [Paras 48-55]

VCAT Decision - Housing Choices Australia v Court (Residential Tenancies) [2014] VCAT 1369 (22 October 2014)

Sections 352, 354 *Residential Tenancies Act 1997* (the Act) – application for possession order due to arrears of rent – possession order granted, date for execution of warrant of possession extended and postponed

Relevant law

Section 352(1) of the Act says that VCAT may provide in a possession order that the issuing of a warrant of possession be postponed for a period specified in the order if VCAT is satisfied that the tenant would suffer hardship if the warrant were not postponed; and the hardship would be greater than any hardship that the landlord would suffer because of the postponement.

Section 354(1) says that on the application of the person who obtained the warrant of possession, VCAT may from time to time make an order extending the time in which the warrant of possession may be executed. Section 354(2) limits the time for an extension of a warrant to 30 days.

Background

VCAT allowed the tenant a review and rehearing in relation to a previously made possession order based upon rent arrears. A warrant of possession had been issued before the review application was made.

When VCAT informed the parties that the original possession order was affirmed, the tenant requested that the issuing of a warrant of possession be postponed for 30 days pursuant to section 352 of the Act on the basis of the tenant's hardship.

VCAT refused to direct postponement of the issuing of a warrant under the section 352, as this section presupposed that a warrant has not yet been issued. In this case, the warrant had already been issued; it had not been cancelled; so VCAT's discretion to postpone the issue of a warrant pursuant to section 352 had no application in circumstances where a warrant has already been issued. [Para 6]

The tenant said she would suffer hardship in these circumstances and requested VCAT set aside the possession order made on 27 August 2014, direct that the warrant be cancelled and make a fresh possession order allowing then for VCAT to consider the operation of section 352 as the landlord would be required to apply for the issue of a new warrant of possession.

VCAT refused to do so. VCAT said it was entitled to affirm a possession order already made in circumstances where a review and rehearing has been granted and VCAT decides that the possession order should be affirmed. It was not required to set aside the possession order and make a new possession order although it was not prohibited from doing so. The issue of the tenant's hardship and allowing extra time to vacate where the tenant is likely to suffer hardship could still be dealt with by VCAT pursuant to section 354 of the Act, which allows for an extension of the time allowed for execution of the warrant.

What factors are relevant to deciding whether to stay or extend the executing of a warrant of possession?

In deciding to stay the execution of the warrant for three weeks and extend the period for the execution of the warrant for the maximum 30 days, VCAT took into account that the tenant:

- Had resided at the rented premises since 1998, and it had been her family home for many years;
- Had two children attending a local school, being evicted would impact upon their secure schooling and the family would suffer stress and upheaval;
- relied on Centrelink payments for her income and did not have the capacity to pay the arrears other than over a 2-year period of repayments;
- suffered from epilepsy which would make the challenge of dealing with leaving the rented premises more difficult for her.

VCAT concluded:

- These were all relevant considerations which went to the hardship of the tenant and taking these issues into account, VCAT considered it appropriate to extend the warrant for the maximum period allowed under section 354 of 30 days.
- Given the hardship that would flow to the tenant, VCAT further directed a stay on the operation of the warrant for three weeks. The tenant had three secure weeks at the rented premises before the police may attend and execute the warrant. The warrant could be executed within the remaining one-week period. [Para 11]

- The landlord would continue to suffer financial loss during a stay of the warrant, but the tenant was entitled to a reasonable time to make arrangements for her departure from the premises given her personal hardships. In view of all of the circumstances put before VCAT, a stay of three weeks was a reasonable time. [Para 15]

Legal effect of execution of warrant

VCAT Decision - Director of Housing v Prideaux (Residential Tenancies) [2015] VCAT 1317 (17 August 2015)

Sections 334 *Residential Tenancies Act 1997* (the Act); section 12 *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act) - application for review of possession order after execution of warrant of possession – jurisdiction of VCAT – application dismissed due to lack of jurisdiction as execution of warrant terminates the lease

Relevant law

Section 334(1) of the Act says if a possession order is made under this Division in respect of rented premises, the tenancy agreement terminates at the end of the day before the day on which possession of the rented premises is delivered up to the landlord or the mortgagee.

Section 446 relevantly provides that VCAT has jurisdiction to hear and determine an application under this Act relating to any matter arising in relation to a tenancy agreement or a proposed tenancy agreement of premises situated in Victoria; and any matter referred to it under this Act.

Section 120 of the VCAT Act relevantly provides that a person in respect of whom an order is made may apply to VCAT for a review of the order of the person did not appear and was not represented at the hearing at which the order was made.

Background

The landlord filed an application for possession of the premises pursuant to subsection 322(1) of the Act after serving a notice to vacate pursuant to section 244.

On 10 April 2015, VCAT granted a possession order in the absence of the tenant.

The tenant's representative had sent a facsimile letter to VCAT on 9 April 2015, time stamped 1745 requesting an adjournment on the basis that the tenant only learned of the hearing on 9 April 2015 and had sought assistance from the representative that day.

The landlord advised VCAT on 17 August 2015 that the Director was not made aware of the tenant's application for an adjournment prior to the hearing on 10 April 2015.

As the Tribunal member made no mention of the adjournment request it is possible that the request for an adjournment did not come before the member prior to her making the order for possession.

VCAT issued a warrant of possession on 20 April 2015 at the request of the landlord. The warrant was executed at 12.00 pm on 21 April 2015 by the Bellarine Police.

VCAT's file shows that an application for a review hearing was filed by email by the tenant's representative on 21 April 2015 which was time stamped 1311.

VCAT granted a stay of the possession order at 1339 o'clock on 21 April 2015. In accordance with VCAT's normal practice, the stay order was faxed to the Bellarine Police, but notification was received back from the Bellarine Police as follows:

> "*21.4.15 1635 hrs*

**Attached Warrant was executed prior to receiving the attached request".*

The application for review was subsequently heard.

Does VCAT have jurisdiction over a tenancy after a warrant of possession has been executed?

In determining that VCAT did not have jurisdiction to grant a new tenancy or set aside a possession order that has been carried out, VCAT said:

- The key issue was whether the tenant had a reasonable case to argue in relation to the subject matter of the order. The tenant cannot show he had a reasonable case to argue as the tenancy ended under section 334 on 20 April 2015.
- As a result of the ending of the tenancy, VCAT was "functus officio". As VCAT's powers come from legislation, it had no jurisdiction to grant a new tenancy or set aside its possession orders that have been carried out. [Para 40]
- The submission by the tenant that execution of the warrant of possession was nothing more than the changing of locks ignores the legal consequences of execution of a warrant. Execution of a warrant terminates a tenancy pursuant to Division 1 of Part 7 of the Act on the day before execution. [Paras 43-44]
- It was not necessary for VCAT to consider section 232 of the Act, as the tenant had not made application for a new tenancy to be created under this section. However, it was noted that in *Apkarian v Director of Housing* (Residential Tenancies) [2014] VCAT 1348 at [21- 25], VCAT found that a former tenant had no standing to make an application pursuant to section 232 for the creation of a new lease. [Para 42]

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