

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

RESIDENTIAL TENANCIES DIVISION

RESIDENTIAL TENANCIES LIST

VCAT REFERENCE NO. R2022/9513

CATCHWORDS

Application for compliance, alleged breach of s. 60 (2) quiet enjoyment of neighbours, whether breaches proven, notice refers to neighbouring tenant, are witnesses neighbouring tenants, can notice be read to include occupier of neighbouring premises.- *Residential Tenancies Act 1997* ss 3, 60(2), 208, 209, 212 (1) (c).

APPLICANT	Homes Victoria
RESPONDENT	KTS
WHERE HELD	Melbourne
BEFORE	R. Phillips, Member
HEARING TYPE	Hearing by zoom videoconference
DATE OF HEARING	24 November 2022, 7 December 2022
FINAL SUBMISSIONS	23 December 2022
DATE OF ORDER	20 January 2023
DATE OF WRITTEN REASONS	20 January 2023
DATE OF AMENDED WRITTEN REASONS	1 February 2023
CITATION	Homes Victoria v KTS (Residential Tenancies) [2023] VCAT 73

ORDERS

VCAT orders:

1. The respondent is to be known as KTS for the purpose of these reasons.

VCAT finds:

There is insufficient evidence to prove that the renter failed to comply with the breach of duty notice dated 17 December 2021.

VCAT orders:

The application is dismissed.

R. Phillips
Member

APPEARANCES:

For Applicant

Ms Varney of counsel

Mr Harkerss - Instructing solicitor

Ms Pappas – Homes Victoria

Mr Mirabito – Department of Families, Fairness
and Housing - Child Protection

Mrs McCallum – witness

Neighbour 3 - witness

Mr Finney - witness

For Respondent

Mr Grey of counsel

Ms Layman - Instructing solicitor

Ms Banks - solicitor

KTS – In person

REASONS

Background

- 1 This is an application for a compliance order based on an allegation that the renter has not complied with a Notice of Breach (the notice) alleging a breach of s. 60 (2) of the *Residential Tenancies Act 1997 (Vic) (the Act)*.
- 2 Ms Varney outlined at the commencement of the hearing that two witnesses who had made statements requested that they not be identified in these reasons. One of these witnesses gave evidence at the hearing. The respondent had no objection to this so for the purpose of these reasons, these witnesses will be referred to as Neighbour 2 and Neighbour 3.
- 3 In addition, Mr Grey requested that pursuant to section 17 of the *Open Courts Act 2013 (Vic)*, the identity of the renter be anonymized on the basis of the allegations made and the potential impact in relation to future housing and the renter's medical conditions. The applicant did not object to this and taking into account the evidence and nature of these proceedings, in particular the potential impact in relation to future housing I am satisfied that an order is necessary in the interest of justice. I therefore ordered that the name of the renter be anonymized.
- 4 The application was heard on 24 November 2022 via zoom. In her written submissions Ms Varney requested written reasons for my decision. After hearing all the evidence and submissions I reserved my decision.
- 5 On reviewing the evidence, I decided to recall the parties to clarify one particular aspect of the evidence, specifically to provide evidence about the legal basis of Neighbour 3's occupation of her premises. The parties attended and it was agreed that further material would be provided by the applicant by 21 December 2022, with final submissions to be made by both parties by 23 December 2022.
- 6 I have now made my decision and finalised the order. These are the reasons for my decision.

The law

- 7 Section 60 (2) of *the Act* states as follows:

RESIDENTIAL TENANCIES ACT 1997 - SECT 60

Renter must not cause nuisance or interference

S. 60(1)

- (1) A renter must not use the rented premises or permit their use in any manner that causes a nuisance.

S. 60(2)

- (2) A renter must not—
 - (a) use the rented premises or common areas; or
 - (b) permit his or her visitors to use the rented premises or common areas; or

(c) 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.

- 8 Section 208 of *the Act* allows the applicant to give a breach of duty notice to the person who has allegedly breached a duty, such as the duties set out in ss. 60(2). This section states that the notice must specify the breach and that the person in breach either remedy the breach, if possible, or pay compensation. The notice must also state that the renter must not commit a similar breach again.
- 9 If a breach of duty notice is not complied with, s.209 (1) allows the applicant to apply to the Tribunal for a compliance order.
- 10 Section 212 states that, if satisfied that the person was entitled to give the notice and that notice was not complied with, the Tribunal may make a compliance order to the effect that the person in breach must refrain from committing a similar breach.

Standard of proof.

- 11 It was not contested that the standard of proof in matters such as this is based on the *Briginshaw* principles.
- 12 As stated by Justice Garde, a previous President of VCAT, found in the case of *GLS v PLP (Human Rights) [2013] VCAT 221* where there are serious allegations made then it is accepted that the principles of *Briginshaw v Briginshaw [1938] HCA 34* apply.
- 13 He stated that at paragraph 45 ... “strong evidence is required – clear and cogent – assessed with care and caution”.
- 14 So while the standard of proof is the balance of probabilities, the matters to be considered by me are sufficiently serious i.e. – allegations of threats and violence, that clear and cogent evidence is required before I can be reasonably satisfied that allegations have been made out. I must assess the evidence with care and caution.

ISSUES

- 15 There are four primary issues;
- Is the notice valid?
 - Is there sufficient evidence to substantiate the allegations in the notice?
 - Did the renter fail to comply with the notice?
 - Are there sufficient grounds for making a compliance order?

IS THE NOTICE OF BREACH VALID? - YES

- 16 There was no dispute that the notice served on the renter and dated 17 December 2021 complied with the requirements set out in s. 208 of *the Act*.
- 17 The notice at paragraphs 10 - 13 states as follows:

10 I believe you have breached your duty as a renter because:

Section 60 (2)

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.

The Director of Housing has received ongoing complaints regarding your behaviour at the rented premises.

11. Loss or damage caused is

You the renter, KTS, have caused an interference with the peace, comfort and privacy of neighbouring renters as outlined in attachment one.

12 Compensation or compliance required

I require you to remedy the breach within seven days after receiving this notice

13 You must not commit a similar breach again ...

- 18 An attachment to the notice sets out the five incidents relied on to substantiate the notice.

DID THE RENTER FAIL TO COMPLY WITH THE NOTICE? – YES

Evidence relied on

- 19 The applicant relied on the following evidence:
- incident log sheets prepared by Ms Pappas
 - oral evidence of Ms Pappas
 - letter prepared by Mr Mirabito provided to Homes Victoria by email dated 15 December 2021
 - oral evidence of Mr Mirabito
 - oral evidence of Mrs McCallum, mother of Neighbour 2.
- 20 Ms Pappas gave evidence that she is a Housing Services officer and provided the incident log forms referred to in this matter. She said that she provides this form with a cover sheet explaining how to complete the form when she is contacted by neighbours who have a complaint. In this case she gave blank forms to the Owners Corporation and the completed forms were sent back to her by Mr Finney.
- 21 The usual complaints process is to make contact with the relevant parties. She will either proceed to take further action or not. She said many people choose not to give evidence.
- 22 She said she referred the renter to Tenancy Plus for support and that the NDIS process had commenced. She said it is difficult to assess the success of the referral. There are still complaints by other neighbours.

- 23 Under cross-examination from Mr Grey, she said that she could not state when the log sheets were filled in. When it was put to her that the date of the log sheets was some weeks after the incident, therefore raising the question that the log sheets may not have recorded the witnesses' feelings on the day of events, Ms Pappas repeated that she could not say when the forms were completed. She said there was ongoing conflict between the renter and Neighbour 2 and that the volume and nature of current complaints are similar to the earlier complaints.

Allegations of breach

Incident one

- 24 It is alleged that on 4 November 2021, the renter was heard yelling at a neighbouring renter calling her a "prostitute" as well as other abusive and threatening language. This incident allegedly took place in front of the neighbour's young child.
- 25 The applicant relied on the incident log sheet dated 30 November 2021. This document states that person making the complaint "was greeted with verbal abuse and offensive language in front of my daughter". The document states the impact as "anxiety, fearful, on edge".
- 26 The applicant also relied on a letter from Mr Mirabito stating that Child Protection visited the witness on this day and was told about the allegation. No further evidence was given on this point by Mr Mirabito.
- 27 No further evidence was given in relation to this allegation. The witness who made this statement to Homes Victoria did not give evidence. The renter did not give evidence.
- 28 Mr Grey submitted that this allegation should not be accepted because it was not corroborated and as the evidence was based on a statement provided to Homes Victoria, and nothing else, there was not the opportunity to test the evidence and applying the Briginshaw principles the evidence should not be relied on.
- 29 I agree with Mr Grey in relation to this incident and am not satisfied that there is sufficient evidence provided in relation to this incident to substantiate the breach.

Incident two

- 30 It is alleged that on 10 November 2021, the renter was heard engaging in a dispute with a neighbouring renter. It is alleged that the renter antagonised the neighbour and threatened to physically attack the neighbour. It is alleged that this behaviour is recorded in a video.
- 31 The applicant relied on the letter from Mr Mirabito which states that Child Protection received a report of an incident late on 10 November 2021 where police were called in relation to the dispute. The letter states that both the renter and the neighbour had been intoxicated and both are in declining mental health. The letter notes that the dispute was ultimately settled and that

the renter posted a video of the neighbour to her Facebook page. The letter notes that during the recording, the renter is heard antagonising Neighbour 2 and both Neighbour 2 and the renter are seen making threats to engage in a physical altercation with each other.

- 32 Mr Mirabito gave evidence at the hearing. He said that he had provided this letter to Ms Pappas and that there was ongoing conflict between Neighbour 2 and the renter. He said the link to the video is no longer active however he has seen the video. He said it appeared that the video was taken from the renter's balcony with the renter providing commentary and using swearing and derogatory terms towards Neighbour 2. He said that the renter was speaking loud enough for Neighbour 2 to react. She was walking up and down the driveway talking on her phone and raising concerns about the renter's behaviour. It was possible that there was substance use. He said that the renter was being antagonistic but could not recall specific details. Towards the end of the video Neighbour 2 appeared to feel threatened, walked up steps and said not to threaten her child.
- 33 He also saw a second video where Neighbour 2's former husband told the renter to leave them alone and the renter responded by saying that she wanted to be left alone. He said that when he spoke with the renter she acknowledged that she had posted the videos online and they are available via public access. He did not know whether this was deliberate.
- 34 Under cross-examination he stated that the information provided by him was based on conversations with Neighbour 2, Neighbour 2's mother and the renter.
- 35 As with incident one, no verbal evidence was given by Neighbour 2 or the renter.
- 36 The most reliable evidence is that of Mr Mirabito who viewed the videos. Unfortunately, the videos were not available to the Tribunal.
- 37 It would appear from Mr Mirabito's evidence that this incident arose as a result of conflict between Neighbour 2 and the renter. I accept his evidence that the renter was swearing and using derogatory terms towards Neighbour 2. It would appear that both parties may have been intoxicated, but that does not justify behaviour which interferes with the peace and comfort of a neighbour. I also accept that the renter posted a video of the interaction on the internet which in my view constitutes a breach of the privacy of Neighbour 2.
- 38 I am satisfied that this incident substantiates the breach.

Incident three

- 39 It is alleged that on 13 November 2021, the renter engaged in a verbal and physical altercation with Neighbour 2. This is described as blocking the path of the neighbour such that she was unable to pass on the communal stairway. It is alleged that a heated discussion occurred and the renter kicked the

neighbour in the stomach. It is further alleged that the renter admitted to this action.

- 40 An incident log sheet was received by Homes Victoria dated 30 November 2021 describing the incident. The log sheet states that Neighbour 2 went upstairs and encountered the renter who blocked her passage and after a heated discussion kicked her in the stomach resulting in Neighbour 2 falling onto the landing. She stated that she reported this incident to the police and was too scared to go outside.
- 41 Mr Mirabito gave evidence that he had spoken to the renter about this allegation. The renter stating that she held out her leg and that this could have constituted a kick. She said that this was as a result of conflict between Neighbour 2 and herself and that she did not feel responsible for the conflict.
- 42 Neither Neighbour 2 or the renter gave evidence in relation to this incident.
- 43 While there is no corroboration of the incident as reported by Neighbour 2, I accept the evidence of Mr Mirabito that he spoke with the renter about this incident and she confirmed that in her words, she had held out her leg blocking Neighbour 2. Whether this constituted a kick and whether Neighbour 2 fell as a result of the renter's actions is unclear, however I am still satisfied that by blocking Neighbour 2's path the renter's actions constitute a breach of the obligation not to interfere with the peaceful and quiet enjoyment of Neighbour 2.
- 44 This incident substantiates the breach.

Incident four

- 45 It is alleged that on 16 November 2021, the renter threatened Neighbour 2. It is alleged that the renter placed a hand on her throat making a cutting action and verbally abusing and threatening her.
- 46 This incident is described in an incident log sheet dated 30 November 2021. The log sheet also states that Neighbour 2 told the renter to stop the threats and then her mother came out and told both of them to stop behaving in this way.
- 47 Mr Mirabito referred to this incident in his letter stating the Child Protection received a call from Neighbour 2's mother who advised that she witnessed the renter antagonising her daughter. She said she was outside her daughter's flat when the renter confronted her daughter, placed her hand on her throat in a cutting motion and verbally abused her daughter which then escalated into an argument between them. The letter also notes that the renter had been knocking on Neighbour 2's windows at night and that Neighbour 2's mother had witnessed the renter antagonising her daughter.
- 48 In his evidence to the Tribunal he stated that it was typical to have ongoing disputes between both of these parties and he had spoken to them both about this.

- 49 Mrs McCallum gave evidence to the Tribunal. She said that on 16 November 2021 the renter made a threatening gesture to her daughter by running her fingers across her throat. She was in the flat inside the screen door. Her daughter was outside the flat, smoking. She said to her daughter – ‘you’re fucked’. She said the renter would also make intimidating chatter with a smirk on her face. She found this threatening. She believed that her daughter was harassed by the renter and she was concerned about her daughter’s welfare as she had come from a difficult situation.
- 50 She said that the renter also made threats to her daughter about her granddaughter. She said on one occasion the renter came out onto the balcony and played loud music and talked to herself and pretended to be calling on the phone.
- 51 I find the evidence of Ms McCallum persuasive. She has confirmed the version of events as they relate to threats made by the renter as recorded in the incident log and the letter of Mr Mirabito. This behaviour in my view is clearly a breach of the renter’s obligation to not interfere with the peace and comfort of her neighbour.
- 52 This incident substantiates the breach.

Incident five

- 53 It is alleged that on 17 November 2021, the renter verbally threatened the safety of Neighbour 2 and her young child, claiming that she was going to have the neighbour’s child removed from her care. It is also alleged that at 2 a.m. she was seen making disruptive noises outside Neighbour 2’s unit and tapping on the window, waking Neighbour 2’s child from her sleep causing fear for the neighbour’s safety.
- 54 An incident log sheet dated 30 November 2021 describes an alleged incident at 2 a.m. on 17 November stating that the renter made loud disruptive noises outside the Neighbour 2’s window, waking her daughter and that she then went to the front of the flat causing further disturbance. Neighbour 2 then contacted police.
- 55 Mr Mirabito in his letter records that Child Protection received a report concerning this allegation. Child Protection assessed that Neighbour 2’s child was not safe to remain in their current premises and directed that the child live elsewhere until the issues were resolved.
- 56 In his verbal evidence, Mr Mirabito stated that he was made aware of threats made by the renter in relation to removing Neighbour 2’s child from her care as well as threats made to Neighbour 2’s husband.
- 57 It was put to him by Mr Grey that because the relationship had diminished so significantly, and noting that the incident reports were made some weeks after the alleged incidents, that the deterioration in the relationship may well have been the cause for the reports rather than the accuracy of the information reported. Mr Mirabito said that Neighbour 2 was open and honest and the information she provided was supported by her mother.

- 58 The evidence in relation to this incident is based on the incident log report. There is no first hand oral evidence that can substantiate the claim of the alleged threat and the only other supporting evidence, the letter from Mr Mirabito, is in my view not sufficient for me to be satisfied that this incident has been proven, given the standard of proof required.
- 59 I am not satisfied that there is sufficient evidence provided in relation to this incident to substantiate the breach.

Conclusion

- 60 I have found that incidents two, three and four substantiate the allegations in the breach.

DID THE RENTER FAIL TO COMPLY WITH THE NOTICE? NO

Wording of the notice

- 61 As already stated in these reasons (see paragraph 17) the notice sets out in paragraphs 10-13: s.60 (2), the breach of the renter, the compliance required and the requirement to not commit a similar breach.
- 62 Paragraph 10 of the notice repeats the wording of s.60(2), i.e. it refers to an interference with the peace, comfort or privacy of neighbours.
- 63 In paragraph 11 reference is made to the peace, comfort and privacy of neighbouring renters.
- 64 Paragraph 12, which sets out the compliance required, specifies that the renter is required ...’to take appropriate action to avoid the recurrence at any time in the future by not using the rented premises in any manner that causes interference with the peace, comfort or privacy of neighbouring renters.’
- 65 In final submissions, the applicant states that the notice should be read as extending to any “neighbouring occupier”.
- 66 The argument to support this is that the notice does not distinguish between neighbours who were renters and those who occupy the premises on some other basis. It is submitted that in the notice there is no distinction between the word “neighbours” used in paragraph 10 and “neighbouring renters” used in paragraphs 11 and 12, and that there is nothing in the content of the notice to suggest that Homes Victoria was limiting their warning to the renter to a smaller subset of neighbours.
- 67 It was submitted that the Tribunal has in the past read a notice to determine its fair meaning and this would be appropriate as distinct from a strict or technical approach which would be inconsistent with s.98(1) of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic) (VCAT Act)*.
- 68 Mr Grey submitted that the purpose of the breach notice was to specify the allegations so that the renter could understand the conduct complained of and how they can remedy the breach or not engage in conduct that constitutes a further breach.

- 69 It was submitted that the obligation therefore is limited to neighbouring renters, rather than a broader range of people. He referred to the definition of renter in the *Act*, the fact that “occupier “ is not used in the notice, an assumption that the renter could rely on the wording of the notice and the fact that the incidents relied on related to allegations from a neighbouring renter.
- 70 I have considered both submissions. It is clear that s.60 (2) places an obligation on the renter to not interfere with the quiet enjoyment of neighbours. This includes neighbours who are renters, owner occupiers, licensees e.g. some Air BNB occupants etc.
- 71 The notice puts the renter on notice of the breach as specified, together with a warning not to commit a similar breach. It is up to the rental provider to draft the “warning “ or the “compliance required “. They must be clear about what action requires addressing and the person or class of persons it is seeking to protect.
- 72 The evidence relied on to substantiate the breach related to incidents involving a neighbouring renter solely - she is a renter in a neighbouring unit.
- 73 The notice was drafted referring to the section (as required) and then set out the allegation and the action that the renter was directed not to take.
- 74 The notice stated that the renter was to comply with the notice by not interfering with a neighbouring renter. The renter was entitled to read her obligation in the context of the notice as relating solely to neighbouring renters. There is nothing in the notice to make reference to an occupant of neighbouring premises. If the rental provider wanted to include other neighbours they could have drafted the notice to state this, but they did not.
- 75 Can this notice therefore be read to incorporate a neighbouring occupant. In my view no. The term renter is defined in *the Act* and there is no basis to change the extent of the obligation to persons other than those described in the notice.
- 76 The applicant referred to s.98 of the *VCAT Act*, submitting that the Tribunal should not strictly interpret the words of the notice.
- 77 Section 98 deals with Tribunal procedure, specifically with reference to the rules of natural justice, the rules of evidence etc. There is nothing in this section that suggests how the Tribunal should interpret evidence or legislation. I reject this submission by the applicant.

Evidence relied on – are the witnesses “neighbouring renters?”

- 78 Two witnesses are relied on for the compliance application - Neighbour 3 and Mr Finney.
- 79 Both gave evidence at the hearing. Neighbour 3 stated that she occupied neighbouring premises with her immediate family. No further evidence was given about the basis of her occupation at the hearing. Following directions that the applicant provided further evidence about the legal basis of her

occupation, evidence was provided that her parents signed a tenancy agreement and by way of a statutory declaration, Neighbour 3 stated that she occupied the premises. No evidence was given about the indicia of a tenancy and there is no submission that Neighbour 3 is a renter.

- 80 In its further submission, the applicant states that Neighbour 3 occupies the neighbouring premises with her immediate family with her parents as lessees.
- 81 Mr Finney gave evidence that he is a rental provider and the owner of unit three which is situated below the rented premises. He said his unit is rented and he is the chairperson of the Owners Corporation committee.
- 82 On the evidence before me I am not satisfied that Neighbour 3 is a renter. The submissions made by the applicant are based on her being an occupant. I accept that she lives at the premises with her parents but in the absence of any evidence that she is a renter I assume that she is occupying the premises under a licence/permission given by her parents. Either way I do not have to determine the legal basis of her occupation, simply that she is not a renter.
- 83 Mr Finney is also not a renter. The incident that was relied on in the application related to him visiting the unit that he owns and rents. The applicant submitted that when he visited the property he did that in his capacity as “landlord of that property”. The evidence substantiates this assertion. The written submission then states that the renter’s obligation extends towards “a person with rights to access a neighbouring unit”.
- 84 There is no legal basis to support this assertion and I reject it. As previously stated, the obligations set out in the notice relates to a neighbouring renter. Mr Finney is not a neighbouring renter.

Conclusion

- 85 While I am satisfied that the renter’s actions constitute a breach of s.60(2) for the purposes of the notice, I have no evidence that the notice has not been complied with because the evidence relied on relates to allegations concerning an interference with the peace, comfort or privacy of neighbouring occupiers not neighbouring renters, and the obligation imposed by the notice is an obligation solely in respect of neighbouring renters. Given this conclusion, it is not necessary to consider the final issue – whether are there sufficient grounds for making a compliance order?
- 86 Accordingly, I must dismiss the application.

R. Phillips
Member