

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

RESIDENTIAL TENANCIES DIVISION

RESIDENTIAL TENANCIES LIST

VCAT REFERENCE NO. R2023/10478

CATCHWORDS

Challenge to the validity of a 60 day notice to vacate under section 91ZZS of the *Residential Tenancies Act 1997 (Vic)* – notice given by corporate entity on the purported grounds that the rental provider’s child was moving into the rented premises – section 91ZZA – individual – no basis for a corporate entity to have a relative move into the property – Declaration that the notice to vacate is invalid.

APPLICANT	Sharon Myers
RESPONDENT	Tank Building Pty Ltd (ACN 650247091)
WHERE HELD	Teleconference
BEFORE	Member F. Gelev
HEARING TYPE	Hearing
DATE OF HEARING	8 May 2023
DATE OF ORDER	8 May 2023
DATE OF REASONS	15 May 2023
CITATION	Myers v Tank Building Pty Ltd (Residential Tenancies) [2023] VCAT 552

ORDER

VCAT finds:

1. The residential rental provider gave the renter a notice to vacate under the following section of the *Residential Tenancies Act 1997 (Vic)*.

91ZZA – Premises to be occupied by residential rental provider or provider’s family

2. The notice to vacate is not valid for the reasons which will be provided in writing at the request of the respondent.

VCAT orders and declares:

1. The notice to vacate is invalid and of no effect.

Member F. Gelev

APPEARANCES:

Applicant

In person

Respondent

Ms R. Moshel (real estate agent)

REASONS

BACKGROUND

1. On 9 March 2023, Tank Building Pty Ltd (ACN 650 247 091) (the rental provider) issued a notice to vacate under section 91ZZA of the *Residential Tenancies Act 1997* (Vic) (*the Act*). The notice was purportedly given on the basis that the daughter of the company director wants to move into the premises.
2. The notice to vacate was accompanied by a statutory declaration, dated 14 February 2023, sworn by Tania Austin, in her capacity as director of the rental provider. The statutory declaration explained that Sky Austin, the daughter of Ms Austin, is a dependent and that Ms Austin understands the property cannot be re-let for a period of six months after the date on which notice was given, unless approved by the Tribunal.
3. On 4 April 2023, Sharon Myers, (the renter) lodged this application under section 91ZZS of the Act. She seeks to challenge the notice on the basis that a corporate entity, the rental provider in this case, cannot issue a valid notice under sub section 91ZZA(1)(b) of the Act.

Challenging the Validity of a 60-day Notice to Vacate

4. Section 91ZZS of the Act enables a renter to apply to VCAT pre-emptively to challenge certain kinds of notices to vacate, provided the application is made within 30 days of the renter being given a notice to vacate.
5. Section 91ZZT then provides that at the hearing of an application under section 91ZZS, the Tribunal may determine whether or not the notice is valid. A notice given under section 91ZZA is one such notice that can be challenged under section 91ZZS .

The relevant provisions

91ZZA Premises to be occupied by residential rental provider or provider's family

- (1) A residential rental provider may give a renter a notice to vacate rented premises if the premises are immediately after the termination date to be occupied—
 - (a) by the residential rental provider; or
 - (b) in the case of a residential rental provider who is an individual—
 - (i) by the residential rental provider's partner, child, parent or partner's parent; or

- (ii) by another person who normally lives with the residential rental provider and is wholly or substantially dependent on the residential rental provider.

91ZZS Renter may apply to Tribunal

- (1) On or before the hearing of an application for a possession order in respect of a notice to vacate given under section 91ZX, 91ZY, 91ZZ, 91ZZA, 91ZZB or 91ZZC, a renter who has received the notice to vacate may apply to the Tribunal challenging the validity of the notice to vacate.
- (2) An application under subsection (1) must be made within 30 days after the notice to vacate is given.

91ZZT What can the Tribunal order?

- (1) On an application under section 91ZZS, the Tribunal may determine whether or not the notice to vacate is valid.
- (2) If the Tribunal determines that the notice to vacate is valid, the renter is not entitled to further apply to the Tribunal to challenge the validity of the notice to vacate unless the Tribunal is satisfied that exceptional circumstances exist which justify reconsideration of the determination made under this section.

The Grounds to give a Notice to Vacate under section 91ZZA

- 6. The words of subsection 91ZZA(1)(b) are clear: it is a precondition to the ability of a rental provider to be able to give a notice to vacate, because a relative is moving in, that the residential rental provider is an individual.
- 7. The word ‘individual’ is not defined in the Act. The *Interpretation of Legislation Act 1984* defines ‘individual’ as a ‘natural person’. The Macquarie dictionary defines the word thus: noun, ‘a single human being, as distinguished from a group.’
- 8. The Tribunal finds that the word ‘individual’ in the Act refers exclusively to natural persons (humans) and not corporate entities such as the respondent.
- 9. In any event, even if the words in subsection 91ZZA(1)(b) ‘in the case of a residential rental provider who is an individual’ were disregarded, a residential rental provider which is a company cannot have human relatives such as partner, child, parent or partner's parent.
- 10. In circumstances where the rented premises are owned and rented out through a company, it is not possible to issue a valid notice to vacate on the basis that a relative of one of the directors – be it a daughter or any other relative of the sole director – wants to move into the premises.

11. On 2 May 2023, the rental provider's director, Ms Austin, swore a new statutory declaration. The first three paragraphs repeated the contents of the February statutory declaration that accompanied the notice to vacate. Paragraph 4 stated that Tank Building Pty Ltd had passed a resolution of the sole director pursuant to section 248B of the *Corporations Act 2001* (Cth) with regards to providing a notice to vacate and provision of accommodation to Miss Sky Austin.
12. No company resolution can change the factual matrix of the case. The director of Tank Building Pty Ltd, Ms Austin, is not the residential rental provider. The rental provider in this case is not an individual and it does not have relatives. Tank Building Pty Ltd cannot give a valid notice to vacate under subsection 91ZZA(1)(b), regardless of what resolution it might pass.

Conclusion

13. As the rental provider did not have grounds under the Act to give a notice to vacate for the daughter of the sole director to move into the rented premises under section 91ZZA, the application by the renter to declare the notice to vacate invalid, must succeed.
14. Pursuant to section 91ZZT the Tribunal declared that the notice to vacate was invalid and of no effect.

Member F. Gelev