

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

RESIDENTIAL TENANCIES DIVISION

RESIDENTIAL TENANCIES LIST

VCAT REFERENCE NO. R2024/11727

CATCHWORDS

Application under *Residential Tenancies Act 1997* (Vic) section 344 – whether former renter occupying without consent, having resumed occupation after execution of warrant of possession.

APPLICANTS	XYS and HDG
RESPONDENT	VGC
WHERE HELD	Melbourne (by teleconference)
BEFORE	Senior Member Dr. A Treble
HEARING TYPE	Hearing
DATE OF HEARING	8 May 2024
DATE OF ORDER	10 May 2024
CITATION	XYS and HDG v VGC (Residential Tenancies) [2024] VCAT 445

ORDERS

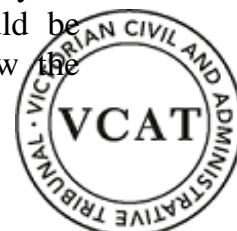
UNDER THE *OPEN COURTS ACT 2013*

VCAT finds:

1. Having had regard to the presumption in favour of disclosure contained in section 4 of the *Open Courts Act 2013* (Vic) and to the nature of the evidence and the proceedings in this case, a proceeding suppression order ought to be made on the ground that the order is necessary to protect the safety of the respondent. Material on file indicates that the respondent is a person affected by family violence.

VCAT orders under section 17 of the *Open Courts Act 2013* (Vic) that:

1. The applicants are to be known only as YYS and HDG and the respondent as VGC. The publication of a report of this proceeding, to the extent that it would disclose the actual name or identity or address of the parties, or the publication of any information derived from this proceeding which could reasonably be expected to enable such identification, is prohibited.
2. This order applies throughout Australia on the basis that the name of the proceeding is published in the Tribunal Law List and Tribunal reasons for decision for final orders are published on AustLii. Those materials may be accessed throughout Australia. The privacy of the respondent would be breached if persons living outside Victoria know or come to know the respondent's identity.



3. This order operates until the death of the respondent.
4. In addition, pursuant to section 146(4)(b) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), no person other than a party to the proceeding or a legal advisor to a party may inspect the file in this proceeding, or in the related proceeding labelled R2023/21417, without permission from the Tribunal.

UNDER THE *RESIDENTIAL TENANCIES ACT 1997*

VCAT finds:

1. The premises have been rented premises under a residential rental agreement within the period of 12 months before the date of the application.
2. There are reasonable grounds for believing that the premises are occupied solely by a person (not being a renter under a residential rental agreement) who entered into or remained in occupation of the premises without licence or consent.
3. The applicant is a person who is entitled to possession of the premises.

VCAT orders:

1. The applicant is entitled to a possession order.
2. The principal registrar shall issue without delay a warrant of possession against all persons for the time being occupying the premises to be executed within 14 days after the date of issue.

Dr. A. Treble
Acting Senior Member

APPEARANCES:

The Applicant	Ms S Tinkler, Maddocks Lawyers Ms A Williams, Estate Agent
The Respondent	Mr Gray of counsel instructed by Tenants Victoria



REASONS

BACKGROUND

- 1 This application has resulted from a series of unfortunate mishaps.
- 2 By way of background, the applicants (XYS and HDG) and the respondent (VGC) were parties to a residential rental agreement commencing on 16 March 2022, in respect of rented premises in Wallan. In a related application R2023/21417, VCAT made orders on 19 October 2023 that the respondent must vacate the premises by 18 November 2023 and must pay the applicant rent arrears totalling \$8,260.79.
- 3 The respondent did not comply with VCAT's order requiring her to vacate. As a result, the applicants purchased a warrant of possession that was issued by VCAT on 6 December 2023. That warrant directed the police to return possession of the premises to the applicant by executing the warrant within 14 days.
- 4 The respondent then lodged an appeal with the Supreme Court. On 13 December 2023, VCAT made orders temporarily prohibiting the execution of the warrant pending a further hearing, and extending the time for its execution, if the prohibition was lifted.
- 5 On the same day, the Supreme Court adjourned the appeal sine die with liberty to apply.¹ It appears that the Supreme Court made no orders about the warrant.
- 6 A further VCAT hearing took place on 20 December 2023 to consider a further stay on the execution of the warrant. The hearing was attended by the applicants' agent Ms Williams and the respondent. According to the evidence given by Ms Williams and the respondent at the hearing on 20 December 2023, the Supreme Court adjourned the matter "because a hearing had been relisted in VCAT, it was really a VCAT matter" and the Supreme Court was unable to make any orders until VCAT had "reheard" the case.
- 7 On 20 December 2023, VCAT issued written orders confirming the prohibition of the warrant ordered by VCAT on 13 December 2023 "until further order of VCAT or subject to order of the Supreme Court of Victoria". The time for execution of the warrant was extended to 16 February 2024.
- 8 At the hearing on 3 May 2024, Ms Williams said that these orders did not reflect the oral orders made by the VCAT member on 20 December 2023.
- 9 I have since listened to the audio recording of the 20 December 2023 proceeding which confirms that the written orders made *later that day* do not reflect the oral orders made during the hearing. The written orders were clearly incorrect. The VCAT member, during and at the conclusion of the hearing, stated numerous times that VCAT would make stay orders that would only be in effect for 28 days. Ms Williams confirmed with the

¹ This information was recorded in the submissions of the parties. No copies of those orders were made available to the Tribunal. Adjournment sine die means "without assigning a day for a further meeting or hearing". To adjourn sine die is to adjourn it for an indefinite period.



member that the warrant could be executed at the end of the 28 days if the appeal failed to return to the Supreme Court. The respondent was also advised at this hearing by the member that it was up to her to approach the Supreme Court for a further stay within the 28 day time frame, and she said she understood these instructions. It appears however that the respondent did not seek to have the matter returned to the Supreme Court.

- 10 VCAT's case management system shows that the respondent then contacted VCAT on 29 January 2024 because the warrant was being executed. A VCAT customer service officer spoke to the police. According to notes on the case management system, the police confirmed they had been given the go ahead to execute the warrant of possession by the Supreme Court and the respondent was advised to contact the Court. No reference was made to the orders of 20 December 2023 in those notes. The warrant was executed by the police that day.
- 11 However, having subsequently come to the belief that the warrant of possession should perhaps not have been executed because of the written stay orders made by VCAT on 20 December 2023, the agent and the applicants then allowed the respondent to resume occupation of the premises on 31 January 2024. The respondent has remained in the premises since that date.
- 12 It is the status of this subsequent arrangement that is now at issue.

THE HEARING ON 3 MAY 2024

- 13 Correspondence provided by the applicants shows that Ms Williams made efforts to have VCAT correct the orders of 20 December 2023, to no avail. The applicants then issued a notice to vacate dated 27 March 2024 to the respondent on the basis that rent was paid to 10 October 2023 with \$240 on credit and that there was rent owed of \$9,192.86.
- 14 The matter came before me on 3 May 2024 as an application for possession under section 91ZM of the *Residential Tenancies Act 1997* ('the RT Act'). On behalf of the applicants, Ms Tinkler argued that the rental agreement that commenced in 2022 was still in effect, that the rental provider was entitled to give a notice to vacate based on the rent owed under that agreement, and to seek a possession order. Mr Gray, on behalf of the respondent, submitted that section 334 of the RT Act had the effect of ending the initial rental agreement that commenced in 2022, with a new rental agreement commencing on 31 January 2024. Further, as the notice to vacate dated 27 March 2024 overstated the rent owed from 31 January 2024, it was therefore invalid.²
- 15 I found that the execution of the warrant by the police on 29 January 2024 returned possession of the rented premises to the applicant and ended the rental agreement. Section 334 of the RT Act provides that if a possession order is made in respect of rented premises, the residential rental agreement terminates at the end of the day before the day on which possession of the rented premises is delivered up to the residential rental provider. The

² See *Lui v Tang* [2022] VSC 243 (18 May 2022).



Tribunal's view has consistently been that section 334 has effect once a warrant is executed, despite any stay order that is in place.

- 16 On 3 May 2024, the parties agreed that the application should be amended to be an application under section 344 of the RT Act, on the basis that the respondent was occupying the rented premises without the rental provider's consent. The matter was adjourned to 8 May 2024, to enable the parties to prepare for a hearing on that basis. On 6 May 2024, the rental provider gave a formal written notification by email confirming that consent to remain at the premises had been withdrawn.

THE HEARING ON 8 MAY 2024

- 17 At the hearing on 8 May 2024, Ms Tinkler submitted, on behalf of the applicants, that no new rental agreement was created on 31 January 2024 when the respondent was allowed to re-enter the premises. Further, the respondent no longer had consent to remain.
- 18 Ms Williams gave evidence that when the respondent was allowed to re-enter the premises on 31 January 2024, they had a conversion in which she told the respondent she believed the warrant was properly executed and that the orders of VCAT were incorrect. She told the respondent she could reoccupy the property on a temporary basis while it was sorted out. She also said she would give the respondent an opportunity to find alternative accommodation and they could come to an agreement about that. Ms Williams continued to communicate with the respondent regarding a vacate date. For example, during an inspection of 22 April 2024 she told the respondent she needed to vacate and they could come to an agreement about the date. However, Ms Williams also said, in answer to questions from Mr Gray, that she treated the respondent as if the rental agreement commencing in 2022 was still on foot because it was not evident that rental agreement had ended until the hearing of 3 May 2024.
- 19 The respondent also gave evidence in response and said that during her discussions with the agents she told them she wanted to stay, but they said it was with lawyers and out of their hands. She did not understand that she was supposed to leave.
- 20 Ms Tinkler indicated that Ms Williams had tried to get the 20 December 2023 orders rectified, but when this was not possible, she issued the notice to vacate dated 27 March 2024, in an effort to get the matter back before the Tribunal.
- 21 Mr Gray, on behalf of the respondent, re-iterated the submission made at the earlier hearing that a new rental agreement was created on 31 January 2024. In summary, it was submitted that the respondent had been granted exclusive possession of the rented premises on 31 January 2024, that the applicants' agent had issued a notice of entry on the basis that the respondent was a renter with exclusive possession, that the applicants had continued to demand payment of rent, and that the applicants had retained the bond. In addition, the respondent had made one payment of rent in February of \$800. These



matters pointed to a new rental agreement having come into existence, which could be implied from the above circumstances.

- 22 The submission relied on two cases *Janauskas v Director of Housing* [2014] VSC 650 (*'Janauskas'*) and *Commissioner for Social Housing v Pesi* [2015] ACAT 58 (*'Pesi'*).
- 23 In *Janauskas*, the Supreme Court was considering whether a renter had sublet rented premises and the requirements for a valid lease. The Court confirmed that a lease, as opposed to a licence, is characterised by a grant of exclusive possession. One does not look to the intention of the parties as to the legal consequences of their agreement but to the rights and duties they have in fact created. Thus, even if parties refer to their arrangement for occupation of premises as a licence, if exclusive possession is granted, the law regards the arrangement as a lease. Emerton J also stated that the commencement date for a lease may be inferred having regard to the circumstances of the agreement and/or the language used by the parties in reaching the agreement.
- 24 In *Pesi*, a matter heard in the ACT Civil and Administrative Tribunal, a rental agreement terminated by force of a self-executing order. Although the relevant legislation enabled the rental provider to apply for a warrant of eviction, that did not occur. The Tribunal stated that in those circumstances it may be that a new tenancy agreement arises by implication from the conduct of the parties. The Tribunal stated:

Where the parties are in a continuing relationship which involves exchange of documents and other correspondence, it may be possible to state that the parties are in a contractual relationship, but difficult to genuinely label any particular action as an offer or acceptance. It may be more sensible to ask whether, in the circumstances, it can be shown that each party has assented to the contract...

Whether a new tenancy has arisen by implication from the conduct of the parties is a question of fact, to be determined on a case-by-case basis. In making such a determination the Tribunal would have regard to the amount of time that has passed since the tenancy terminated on the breach by the tenant and the conduct of the parties, including but not limited to:

- (a) correspondence between the parties;
- (b) the demanding of rent;
- (c) the payment of rent;
- (d) the exercise by the lessor of rights arising under a residential tenancy agreement, such as routine inspections, or market rent increases;
- (e) the meeting by the lessor of obligations, such as repairs to the premises...

If the Tribunal determines that a new tenancy has arisen by implication from the conduct of the parties, then if the tenant breaches the new agreement by failing to pay rent, the lessor is obliged to serve a valid notice to remedy and a



valid notice to vacate upon the tenant, before making an application to ACAT for termination and possession...

The effluxion of time and conduct inconsistent with an intention on the part of the lessor to make such an application for a warrant may be matters legitimately taken into account by the Tribunal in determining that, in all the circumstances, the relationship between the applicant and the respondent is now governed by a new residential tenancy agreement that has arisen by implication from the conduct of the parties.

- 25 These cases indicate that a rental agreement may arise by implication. It is to be determined on a case-by-case basis, taking into account the conduct of the parties and other matters, whether the facts give rise to a contractual arrangement and, if so, whether that contractual arrangement is a lease.
- 26 In *Pesi*, the Tribunal regarded the effluxion of time since efforts were made to enforce possession as a relevant factor in determining whether a *new* rental agreement could be implied following the termination of a previous agreement, where the occupant remained in possession.
- 27 In this matter, Ms Williams gave evidence that the respondent was allowed to re-enter the property on 31 January 2024 while the issue of the incorrect order was clarified and to give the respondent more time to find other accommodation. An email dated 27 March 2024 tends to support this account as it states “I have tried to contact you multiple times over the last couple of weeks however you have failed to get back to me. You had a verbal agreement with Amylee regarding a mutually agreed vacate period...”
- 28 The agent then wrote and telephoned VCAT on multiple occasions from 31 January 2024 onwards, seeking to have the orders of 20 December 2023 corrected. Eventually on 15 March 2024, a VCAT customer service officer advised the agent that the applicants might wish to start the process again by issuing a notice to vacate which is then what occurred.
- 29 The evidence clearly indicates that the agent and the applicants were of the mistaken belief that the rental agreement that commenced on 16 March 2022 would continue in effect if the execution of the warrant had occurred in contravention of VCAT’s stay order. They were unable to get the VCAT order rectified. Their actions showed that they then treated the 2022 rental agreement as ongoing, because they issued another notice to vacate based on the rental arrears said to be owed under that rental agreement, and did not make a claim for bond. Their notice of entry was also issued under the misapprehension that the rental agreement commencing in 2022 was still in effect. They treated the respondent as if she had exclusive possession for the same reason.
- 30 Despite this, the agent and the applicants have consistently made it clear, in their discussions with the respondent and by their actions, that they did not want the respondent to continue in possession but were unsure of their legal position. That factor makes this case somewhat different from both *Janauskas*, where there was a contractual agreement for occupation by a sub-



renter, but the nature of that agreement was in dispute and *Pesi*, where the rental provider had clear legal rights to apply for a warrant but failed to exercise them.

- 31 A contract requires a meeting of the minds, and there is no evidence before me that either party agreed to commence a *new* rental agreement commencing on 31 January 2024. Posing the question “*whether, in the circumstances, it can be shown that each party assented to the contract*”³ I cannot conclude on the facts of this case that each party assented to commence a new rental agreement. Further, in my view, it defies logic to think that the applicants would agree to commence a new rental agreement with a former renter who owed a significant sum in rent as at January 2024,⁴ had failed to pay rent for many months in 2023,⁵ and who had failed to comply with a payment plan order of VCAT.⁶ Neither the parties, nor a reasonable observer, would consider that such an agreement could be implied from the unfortunate set of circumstances in which the parties to the case have found themselves.
- 32 Moreover, I do not consider that the payment of one amount of \$800 in February 2024 by the respondent is indicative of a new rental agreement having commenced. The respondent had been ordered by VCAT to pay \$8,260.79 to the applicant on 19 October 2023 and the payment of \$800 was of course credited to the arrears she owed under that VCAT order, not to rent owed post 31 January 2024.
- 33 I find from the evidence before me that it has been clear throughout that, rather than wanting to enter into a new agreement, the applicants wanted the respondent to leave the premises.
- 34 Given my ruling on 3 May 2024, that the rental agreement had terminated with the execution of the warrant, both parties’ legal representatives agreed that the appropriate course was to amend the application to be an application under section 344 of the Act, on the basis that the respondent was occupying the rented premises without consent. Despite this, the respondent continues to assert there is a new rental agreement in existence, a proposition which I consider is contrary to the realities of the situation.
- 35 In summary, I am unable to find that there is a rental agreement on foot, the old agreement having terminated, and no new rental agreement having been negotiated or agreed. Nor was such an agreement able to be reasonably implied from the facts of this case. There was no consideration moving from the respondent, as she has paid nothing in respect of the period of rent owed from 31 January 2024 to the present date. The respondent was allowed back into the rented premises while VCAT orders were clarified and under a mistaken belief that the rental agreement that commenced in 2022 may not have terminated. The applicant has since made it clear that consent to remain

³ *Pesi*, paragraph 16.

⁴ The agent’s rental ledger shows rent was paid to 29 September 2023 as at 31 January 2024.

⁵ The agent’s rental ledger shows no payment of rent from 8 May 2023 to 11 October 2023.

⁶ Order of VCAT in R2023/21417 on 14 September 2023.



at the rented premises is revoked, having formally given such an indication at the last hearing on 3 May 2024 following my ruling and on 6 May 2024 in writing.

- 36 Section 344 of the RT Act provides that a person who claims to be entitled to possession of premises may apply to the Tribunal for a possession order if the premises have been rented premises at any time within the last 12 months before the date of application, and the applicant alleges that the premises are occupied solely by a person (not being a renter under a rental agreement) who entered into *or remained* in occupation without the applicant's licence or consent.
- 37 Section 345 provides that the Tribunal must make a possession order for the premises if the Tribunal is satisfied that the applicant under section 344 is entitled to possession of the premises; and there are reasonable grounds for believing that a person is occupying the premises without licence or consent.
- 38 Although the initial application in this case was made on 12 April 2024, I have a discretion to abridge time under section 126 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) and the *Victorian Civil and Administrative Tribunal Rules 2018* (Vic), Rule 4.25, on my own initiative and intend to do so in this case, as I consider it is appropriate in the circumstances of this matter. The parties have unfortunately found themselves in uncertain territory, a situation that has arisen because of the error in the VCAT orders of 20 December 2023 and the decision by the police to execute the warrant, despite the written orders from that date.
- 39 I will abridge time so that this application, now amended to be an application under section 344 of the RT Act, is to be regarded as having been lodged on 3 May 2024. That is the date on which the applicant and agent became aware that the former rental agreement had terminated on 29 January 2024, and they were therefore in a position to formally withdraw their consent to the respondent's continued occupation and make application under section 344.
- 40 I am satisfied that the applicant is entitled to possession of the premises. The VCAT possession order dated 19 October 2023 made that clear. Moreover, the oral orders made on 20 December 2023 entitled the applicant to take steps to execute the warrant of possession after the expiration of 28 days. The respondent was granted a temporary right to reoccupy premises on 31 January 2024 whilst the orders of VCAT were clarified. Consent to remain has been withdrawn. There are reasonable grounds for believing that the respondent is now occupying the premises without licence or consent.
- 41 In those circumstances I must make a possession order which directs the principal registrar to issue without delay a warrant of possession against all persons for the time being occupying the premises.

Dr. A. Treble
Senior Member

