

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

RESIDENTIAL TENANCIES DIVISION

RESIDENTIAL TENANCIES LIST

VCAT REFERENCE NO. R2023/21228 & R2023/35095

CATCHWORDS

Death of a sole renter – dispute over the status of the sister as next of kin – application for possession for the rented premises being occupied without licence or consent – application for creation of a residential rental agreement.

Sections 91N, 91S, 91T and 344 of the *Residential Tenancies Act 1997* (Vic).

APPLICANT	Leanne Craig
(in proceeding R2023/21228)	
RESPONDENT	Homes Victoria
(in proceeding R2023/21228)	
BEFORE	K Campana, Senior Member
HEARING VENUE	Melbourne
HEARING TYPE	Final Hearing
DATE OF HEARING	12 April 2024
DATE OF ORDER	26 June 2024
CITATION	Craig v Homes Victoria (Residential Tenancies) [2024] VCAT 588

ORDER IN R2023/21228

For the written reasons provided, the Tribunal orders that:

1. The residential rental provider must enter into a residential rental agreement with the applicant before 5 July 2024.
2. The residential rental agreement will be on the same terms and conditions as the residential rental agreement between the residential rental provider and the former renter.

ORDER IN R2023/35095

For the written reasons provided, the Tribunal orders that the application is dismissed.

K. Campana
Senior Member

APPEARANCES:

For Applicant
(in proceeding R2023/21228)

In person
Mika Koulibaly, Justice Connect

For Respondent
(in proceeding R2023/21228)

Carla Da Betta, Homes Victoria

REASONS

- 1 A public housing rental agreement is to be created for Leanne Craig ('Occupant') at a three-bedroom property in Melbourne's north ('rented premises'), with the new agreement having a negligible impact on the overall Homes Victoria ('Rental Provider') wait list.
- 2 The Occupant has resided at the rented premises for the past 3 years and has had an association with the former home of her sister ('Former Renter') for the past 17 years.
- 3 Following the Former Renter's death in May 2023, the Occupant has battled to be recognised by the Rental Provider as either the Former Renter's next of kin or a resident of the rented premises.
- 4 For the reasons that follow, I am satisfied that the Occupant is entitled to have a residential rental agreement created in her name for the rented premises, and the application by the Rental Provider for possession will be dismissed.

Background

- 5 The Former Renter and her partner moved into the rented premises in 2012.
- 6 In 2019, the Former Renter temporarily moved out of the rented premises and into accommodation with the Occupant. The Former Renter's partner and their children, now 17, 13 and 9, remained in the property.
- 7 With Homes Victoria then providing alternative housing to the Former Renter's partner and their children, the rental agreement for the rented premises was transferred into the name of the Former Renter only, and she and the Occupant moved back into the property.
- 8 The Occupant was not named as a renter on the rental agreement, and the Rental Provider claims that it had no knowledge of her residing at the rented premises. The Occupant says that she believed the Former Renter had placed her on the agreement or at least she was recognised as a resident for the purposes of the rent.
- 9 In the years that the Occupant has been living at the rented premises she has been making regular payments to the Former Renter for "*Board and lodgings*" and contributing to other household expenses. She has been using funds from a Transport Accident Commission payout, following a serious vehicle accident in 2007 which killed her partner. These funds have now been depleted. The Occupant is in receipt of the disability pension.
- 10 The Former Renter died on 28 May 2023 at the age of 42, after sustaining multiple injuries in a motor vehicle accident. The Occupant is named as the "informant" on the Death Certificate.
- 11 On 21 June 2023 the Rental Provider claims that it was first advised that the Former Renter had passed away by police. However, at the same time, it was delivering a housing application and contact details of Haven Home

safe in the local area to the rented premises, and that was the reason for the visit.¹

- 12 Then on 29 June 2023, the Rental Provider made application ('Termination Proceeding') to terminate the rental agreement with the Former Renter claiming that there was no next of kin, in accordance with section 91N(4) of the *Residential Tenancies Act 1997* (Vic) ('*RT Act*').²
- 13 The same housing officer attended the rented premises again on 6 July 2023 and says that a male and female came to the door and advised they were just cleaning up and would be out of the house in a few days. The male was said to be the Former Renter's brother. He was staying at the rented premises with the Occupant and she says he became unwell and died shortly afterwards at the age of 49.
- 14 On 11 July 2023 the Occupant made application to the Tribunal to create a rental agreement ('Creation Proceeding').³
- 15 On 13 July 2023 at the first return hearing in the Termination Proceeding, the Rental Provider said it had provided the Occupant with details to contact Haven Home Safe if she was requiring emergency accommodation. Directions were made for the Termination Proceeding and the Creation Proceeding to be heard together.
- 16 With the Occupant identifying herself as the next of kin, the Rental Provider was encouraged to withdraw the Termination Proceeding and follow the legislative pathway for ending the rental agreement with the Former Renter by serving a notice to vacate under section 91N of the *RT Act*. The Rental Provider did not do so, and on 27 October 2023 the Termination Proceeding was struck out and the following findings made:

1. Ms Leanne Craig having identified herself as the sister of the deceased renter, and being the closest blood relative of the deceased, she is the "next of kin" for the purposes of section 91N(3) of the *Residential Tenancies Act 1997*.
2. The rental provider must give the next of kin notice to vacate in accordance with the provisions of the Act under s.91N(3) in order to terminate the rental agreement with the deceased. As advised, there is no time frame for the notice period required under the Act and the same can be immediate as at the date it is given. A date must however be provided.
3. After giving such a notice, and after the termination date, the correct procedure then to obtain possession of the premises is to make a new application under section 344 of the *Residential Tenancies Act 1997*. Any such application is required to reference the occupant's application under section 91S being R2023/21228 which is struck out today with a

¹ Statutory Declaration of Bernadette Cahill dated 18 July 2023.

² Proceeding R2023/19681.

³ Proceeding R2023/21228.

right of reinstatement on the application being lodged by Homes Victoria for possession.

- 17 On 22 November 2023, the Rental Provider made application for possession under section 344 of the *RT Act* ('Possession Proceeding')⁴ and the Creation Proceeding was re-enlivened.
- 18 Ultimately the Possession Proceeding and the Creation Proceeding came on for hearing before me on 12 April 2024.

The Creation Proceeding

- 19 Under section 91S of the *RT Act*, a person who has been residing in rented premises as that person's principal place of residence, and who is not a party to a residential rental agreement applying to those premises, may make application to the Tribunal for an order to create a rental agreement, if the renter has died and there is no surviving renter.
- 20 Evidence from the Occupant which included TAC Funds in Court statements, Centrelink statements and utility bills, established that she has been residing at the rented premises, as her principal place of residence since 2021 and that the Former Renter had died in May 2023.
- 21 As such, I am satisfied that the Occupant was entitled to apply for the Creation Proceeding.
- 22 On such an application under section 91S, the Tribunal may make an order requiring the Rental Provider to enter into a residential rental agreement with the Occupant, if satisfied of each of the following three criteria set out under section 91T of the *RT Act*:
 - (a) the Occupant could reasonably be expected to comply with the duties of a renter under a residential rental agreement to which this Act applies; and
 - (b) the Occupant would be likely to suffer severe hardship if they were compelled to leave the premises; and
 - (c) the hardship suffered by the Occupant would be greater than any hardship that the Rental Provider would suffer if the order were made.
- 23 There is no definition of 'hardship' in the *RT Act*, but it is accepted that it includes a consideration of *any appreciable detriment*, whether financial, personal or otherwise.⁵ Each case must depend on its own facts, and this includes, for this Rental Provider, a consideration of the administration of its public housing waiting list and any adverse effect upon it.⁶
- 24 Each of the three mandatory criteria will be considered.

⁴ Proceeding R2023/35095.

⁵ *F.G. O'Brien Ltd v Elliot* [1965] NSW 1473.

⁶ *Cosic v Director of Housing* [2007] VSC 486.

(a) Compliance with a rental agreement?

- 25 The Occupant has been living in the rented premises for approximately 4 years and during that time there has been no incident raised directly with her relating to any non-compliance with the duties of a renter under a rental agreement. The Rental Provider claimed to have had complaints from neighbours recently but did not have any specifics of what had occurred or when.
- 26 The Occupant had consistently paid rent to the Former Renter and contributed to the upkeep of the home in other ways. She is also now in receipt of a disability support pension and is committed to ensure she has long term housing. The Rental Provider has already accepted that the Occupant qualifies for public housing and she has been placed on the priority list for single accommodation.
- 27 Based on the evidence of a long connection with the rented premises and consistent payments towards the rent, I am satisfied that the Occupant could reasonably be expected to comply with the duties of a renter under a residential rental agreement to which the *RT Act* applies.

(b) Severe hardship if compelled to leave the premises?

- 28 The Occupant says the rented premises provides an important part of her recovery from trauma and to get her health back on track.
- 29 As a result of the car accident in 2007, in which the Occupant lost her partner, she suffers post-traumatic stress disorder. She suffers chronic depression, anxiety and has significant nerve damage. She says she has turned to alcohol and drugs in the past.
- 30 The Occupant says the last twelve months has been significantly hard when she lost her sister also in a car accident and then her brother within the following month. The Former Renter's death is the subject of a coronial inquest.
- 31 The Occupant says she feels a real connection to her family by being at the rented premises and she has moved into the Former Renter's room. She says her nieces also come to visit from a nearby suburb and stay with her at the house.
- 32 The Occupant says her physical condition is at the point where she needs 24-hour care and for that reason a one bedroom property is too small for her. She says a friend has moved in to help her and is providing that support while she waits for approval for carer assistance. The Occupant says her friend and carer stays in the second bedroom of the house while the nieces often sleep over in the third bedroom.
- 33 The Occupant provided a letter from a lawyer in support of her application which includes the following statement:⁷

⁷ Letter from Adrian Lewin of Emma Turnbull Lawyers Pty Ltd dated 24 October 2023.

I have known Ms Craig for over 10 years now. I have been in regular contact over this time...Throughout the time I have known Ms Craig, she has long been troubled by an inability to access stable housing which has been very destabilising for her. The previous tenant of (address) was her sister who passed away recently, which understandably was incredibly traumatic for Ms Craig, particularly when it coincided with the very recent passing of her brother. I raise this as it is my belief that her sister's connection to that property will only motivate Ms Craig to respect and maintain the property of her sister.

- 34 The Occupant says she has no alternative accommodation and the Rental Provider says it cannot provide any indication of when a one bedroom property may become available for the Occupant.
- 35 The Occupant was very emotional during the hearing and it was clearly evident that she has been through periods of significant trauma in her life and still bears the scars, both emotionally and physically. She has a connection to this property, which has been her sister and nieces home for 17 years and her home for the past four. I also accept that if she is required to leave the rented premises she will be homeless and it is probable that she will spiral into significant depression and more than likely will return to drugs or alcohol.
- 36 On the basis of the significant trauma that the Occupant has endured, the emotional connection she has to the rented premises and the part that plays in her recovery, I am satisfied that the Occupant is likely to suffer severe hardship if compelled to leave the rented premises.

(c) Occupant hardship greater than Rental Provider?

- 37 When comparing the Rental Provider's hardship to that of the Occupant, it is considered in the context of the impact a rental agreement being created will have on the management of the public housing waiting list.
- 38 The Occupant has been approved for priority housing for single accommodation, but in an area associated with an agency that assisted her with her initial application on the other side of Melbourne.
- 39 The need for all types of public housing accommodation is at high demand. The Occupant has been on the priority public waiting list for almost a year and there is no indication of when a property may become available.
- 40 While it is accepted that the accommodation of the rented premises is different and more suited to accommodating a family, the impact on those on the wait list cannot be taken into account, and only the general management of the waiting list by the Rental Provider can be considered.⁸

⁸ *Cosic v Director of Housing* [2007] VSC 486 at paragraph 39 analysed section 233 which is now section 91S: "Howsoever the expression "hardship" might be defined, it is clear that it is a hardship experienced by the tenant and by the landlord respectively, not anyone else. At this level (i.e. satisfying the pre-conditions laid down by s 233(1)(a), (b) and (c)), the Tribunal is bound to look solely at those individual hardships. So it follows that, just as a Tribunal cannot have regard to any vicarious hardship suffered by persons other than the applicant, it cannot have regard to hardship suffered by those on the Director's

- 41 Evidence was provided that there are close to 8000 applicants currently on the three-bedroom waiting list. It is unknown how many applicants are on the one-bedroom waiting list as no evidence was provided.
- 42 Additionally, there was no data or statistical evidence of how the waiting list, or its management, would be impacted by allocating a three bedroom property to a priority one bedroom applicant.
- 43 If there is any hardship to the Rental Provider's administration of its housing list, I consider the same to be inconsequential on the wait list overall, with a rental agreement for the Occupant resulting in her removal from the one bedroom wait list.
- 44 I am satisfied that the severe hardship to the Occupant outweighs the hardship to the Rental Provider in the management of its wait list, if indeed there is any impact.

Conclusion

- 45 The Occupant has been living at the rented premises for a significant number of years and has a familial connection with the property spanning a decade. She is in receipt of a disability pension, regularly paid money for being able to stay at the premises and otherwise has shown compliance with the obligations of a renter under a residential rental agreement the subject of the *RT Act*. There is no evidence to suggest otherwise.
- 46 The Occupant also has ties to the local community, both with supports she is receiving from agencies and her live-in friend engaged in her care, but also from family that is connected to the rented premises. She not only receives, but also provides support to three young children, who all share the grief and pain associated with losing the Former Renter in tragic circumstances. The Occupant feels a sense of responsibility to help her nieces in their recovery, while they also provide assistance to her. The Occupant has nowhere else to go and will be homeless if a rental agreement is not created.
- 47 The Occupant's hardship is severe and significantly outweighs any hardship to the Rental Provider.
- 48 With the three pre-conditions having been satisfied, the Tribunal retains a residual discretion as to whether or not a residential rental agreement should be created.
- 49 In addition to all the matters raised above, I also take into account the *Charter of Human Rights and Responsibilities Act 2008* (Vic) and the rights to home and the Rental Provider's policy of creating long term housing for families. In public housing it is my understanding that if household numbers change, which is often the case when children grow and leave the

waiting list. That is not to say that in a case involving the Director where an applicant enlivens the discretion by satisfying sub-sections (a) to (c) of s 233, that the issue of those who had waited their turn for months, perhaps years, on a waiting list, would not be a valid consideration in terms of whether the exercise the discretion.

family home, there is no requirement on the parent renters to transfer to smaller public housing accommodation. The familial connection with that home remains and the rental agreement continues in place.

- 50 As noted above, given that the Renter requires 24-hour care and in light of the important emotional support she provides to her nieces who might not be able to stay with her on a regular basis in a one bedroom property, single accommodation may not be suitable for her.
- 51 The current home provides the Former Renter's children with a space to feel close to their mum, and also provides enough space for the Occupant to have full time care so that she can focus on her recovery. She is well down that road and stable accommodation is the foundation for that success.
- 52 It is in these circumstances that it is appropriate that the discretion is exercised in favour of the Occupant and a rental agreement be created.
- 53 I am advised that such an agreement can happen almost immediately and as such I shall make orders requiring the Rental Provider to enter into a residential rental agreement with the Occupant within 7 days of the date of this order.

Possession Proceeding

- 54 With a rental agreement being created between the Rental Provider and the Occupant, the Occupant is no longer occupying the rented premises without licence or consent and Homes Victoria is not entitled to possession.
- 55 The application for a possession order under section 344 of the *RT Act* will be dismissed.

K. Campana
Senior Member