

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

RESIDENTIAL TENANCIES DIVISION

RESIDENTIAL TENANCIES LIST

VCAT REFERENCE NO. R2024/7108

CATCHWORDS

Application by a renter to challenge the validity of a notice to vacate given by the residential rental provider to carry out renovations at the rented premises – mandatory requirement for the notice to be accompanied by mandatory documents approved by the Director of Consumer Affairs – issue arising from the requirement to have a building permit for renovations attached to the notice to vacate even if one is not required – notice invalid.

Sections 91ZX, 91ZS, 91ZZO, 91ZZS, 322 and 486A of the *Residential Tenancies Act 1997* (Vic).

APPLICANT	Chelsea Lazar
RESPONDENT	Lingyan Zhang
BEFORE	K Campana, Senior Member
HEARING VENUE	Melbourne
HEARING TYPE	Final Hearing
DATE OF HEARING	15 April 2024
DATE OF SUBMISSIONS	17 May 2024
DATE OF ORDER	19 June 2024
DATE OF REASONS	25 June 2024
CITATION	Lazar v Zhang (Residential Tenancies) [2024] VCAT 589

ORDER

For the written reasons provided, the Tribunal orders and declares that the notice to vacate dated 1 February 2024 is invalid and cannot support an application by the residential rental provider for possession.

K. Campana
Senior Member

APPEARANCES:

For Applicant	In person Corinah Batt, solicitor, Victoria Legal Aid
For Respondent	Meagan Dolzer, agent, Barry Plant Brea Nicolaides, agent, Barry Plant



REASONS

- 1 This case concerns an application to challenge the validity of a notice to vacate for repairs to be carried out to the rented premises. In particular, an issue arises with the mandatory documents required to accompany such a notice.
- 2 Chelsea Lazar ('Renter') has been given a notice to vacate ('NTV') the Brunswick property she is renting ('rented premises') so that Lingyan Zhang ('Rental Provider') can carry out renovations, before she and her family move in.
- 3 The Renter has made application to challenge the validity of the NTV and says it cannot support an application to the Tribunal for possession.
- 4 Before considering the NTV, and the accompanying documents, it is important to understand the statutory framework under the *Residential Tenancies Act 1997 (Vic)* ('RT Act') governing that notice.

Statutory framework

- 5 A residential rental provider may give a renter a notice to vacate if they intend on carrying out repairs or renovations to the property, they have the necessary approvals, and the work cannot be done with the renter living there:

Section 91ZX Repairs

- (1) A residential rental provider may give a renter a notice to vacate rented premises if—
 - (a) the residential rental provider intends to repair, renovate or reconstruct the premises-
 - (i) in the case of a building owned by a residential rental provider containing 5 or more rented premises, immediately after the last renter vacates; or
 - (ii) in any other case, immediately after the termination date; and
 - (b) the residential rental provider has obtained all necessary permits and consents to carry out the work; and
 - (c) the work cannot be properly carried out unless the renter vacates the rented premises.
- (2) The notice must specify a termination date that is not less than 60 days after the date on which the notice is given.

Note

See section 91ZZO regarding requirements for accompanying documentary evidence.

- 6 Any notice to vacate must comply with section 91ZZO of the *RT Act* to be valid:



Section 91ZZO Form of notice to vacate

A notice to vacate given under this Division is not valid unless-

- (a) it is in the relevant prescribed form; and
- (b) it is addressed to the renter; and
- (c) it is signed by the person giving the notice or by that person's agent; and
- (d) it specifies the reason or reasons for giving the notice; and
- (e) in the case of a notice to vacate given under section 91ZW, **91ZX**, 91ZY, 91ZZ, 91ZZA, 91ZZB or 91ZZC, it is accompanied by documentary evidence, as approved by the Director from time to time, which supports the reason for giving the notice; and

Note

See section 486A

- (f) it specifies the termination date which is the date by which compliance is required.

- 7 The documents required to accompany a notice to vacate given under section 91ZX, are those that are approved by the Director of Consumer Affairs Victoria:

Section 486A Director may approve documentary evidence

- (1) For the purposes of sections 91ZZO(e), 142ZT(e), 206AZI(e) and 498ZX(1)(h), (ha) and (k), the Director, from time to time, may approve documentary evidence which supports the reason for giving a notice to vacate under a section referred to in each of those sections.
- (2) The Director must publish the approval of documentary evidence as soon as practicable after it is approved-
 - (a) in the Government Gazette; and
 - (b) on an Internet site maintained by the Director.

- 8 For a notice to vacate under section 91ZX, the Director approved documents that are currently published on the CAV website are as follows:

Both of the following:

- Photographic proof that repairs are required; and
- Contract with, or quotation from, a suitably qualified tradesperson for carrying out planned repairs stating:
 1. the nature of the repairs required,
 2. the reasons why the premises need to be vacated by the renter in order to carry out the repairs, and
 3. an estimate of the length of time it will take to complete the repairs.

Or the following:



- Building permit for repairs or renovation.
- 9 Within 30 days of receiving a notice to vacate, a renter can challenge its validity by lodging an application with the Tribunal:

Section 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.
- 10 On such an application, the Tribunal can make a determination about the validity of the notice:

Section 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.
 - (3) Nothing in subsection (2) affects the operation of section 479.
- 11 The issue to be determined in this case is whether the NTV given to the Renter is valid by reference to the documents that were required to accompany the notice and those that were actually attached.

This NTV and the Challenge

- 12 On 1 February 2024, the Renter was given the NTV by email, with a termination date of 2 April 2024.
- 13 The NTV was given under section 91ZX of the *RT Act* and stated the grounds as following:

Section 91ZX Repair, Renovation or Reconstruction

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 Residential Rental provider is providing the renter of (address) 60 days notice to vacate the property on or before the 2nd April 2024. When the renter vacates and the Residential Rental Provider



has possession of the property she will proceed with renovating/demolishing the wall in the second bedroom to create a bigger bedroom and small study space. The Residential Renter (*sic*) Provider has engaged and gotten a quote from a qualified carpenter to carry out these works and has confirmed the property is required to be vacant during this time to ensure the health and safety of the renter. The estimated time frame for the renovations to be completed is 3 weeks. Once the works have been carried out the Residential Renter (*sic*) Provider will then proceed with moving back into the property with her family for her own personal reasons.

14 The following documents were attached to the NTV:

Quote of scope of works to be completed

Signed Affidavit from carpenter and Residential Rental Provider

Photographs of wall

Floorplan

15 The Quote attached provided a detail of the scope of the works to be carried out by the carpenter and stated that it was subject to determining if the wall was non-structural:¹

Demo of existing wall and new opening – removal and dispose of rubbish – framing of new wall – Framing of existing ceiling if needed – Install of door and jam – Install of new door furniture – Plaster new walls and patch ceiling – Skirting and architraves installed.

Quote does not include removal or relocation of any services (electrical or plumbing) can be organised at additional costs if needed. Quote does not include paint (can be organised at additional cost).

Quote subject to wall being non structural, variations to be discussed if structural.

Works to be done while property is vacant due to safety of client or resident. (Dust and demolition work will be messy).

Approximate duration of work will take around 3 weeks.

16 The affidavit sworn by the carpenter says that he was first contacted by the Rental Provider on 16 October 2023 and was told that the property had 3 bedrooms, but two of the rooms were very small and she wanted to remove and relocate the wall between the two smaller rooms to create a bedroom and a separate study.² He says he was provided with a floor plan of the home and subsequently attended the rented premises on 31 October 2023 to

¹ Quote from Same Carson sated 21 November 2023.

² Affidavit of Sam Carsen sworn on 24 January 2024.



carry out an inspection. The carpenter says that while he was there the Renter told him she had some significant health issues.

17 The affidavit provided an opinion as to whether the wall that would be removed was structural and why the Renter needed to vacate for the works to be done:

8 I inspected the wall between the two smaller bedrooms. Based on the dimensions of the (*rented premises*) (particularly its narrow width in terms of its length) and using my professional experience, I did not believe that the wall was load bearing. There is a slim possibility that the wall could be wall bearing, but I could not confirm this at the time, as there did not appear to be a manhole or access to the ceiling that would enable me to perform the necessary inspections to confirm this.

9 The only way I can confirm whether the wall is load bearing or not, is by cutting a hole into the ceiling and then inspecting the ceiling space above the wall in question. I was unable to do this at the time, as it would be a serious safety risk for the tenant, particularly given her health issues. I was also only permitted less than 30 minutes to inspect the (*rented premises*) and would not have been able to cut a hole in the ceiling within this timeframe.

10 After the inspection, I informed (*the Rental Provider*) that the wall did not appear to be load bearing and that I would provide a quote on this basis.

12 I informed (*the Rental Provider*) that I could only perform the works with no one living at the (*rented premises*), as the (*rented premises*) would not be safe for habitation for the duration of the Works.

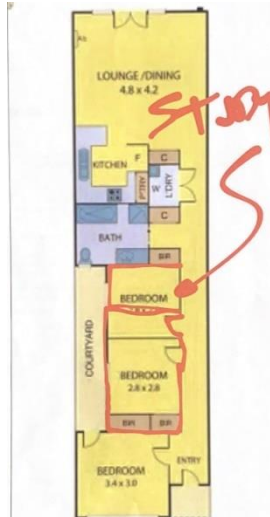
13 To perform the Works, I would first need to demolish the existing wall and make large cuts to the ceiling. This could expose any occupants to:

- (a) dust, fumes and other toxic substances;
- (b) falling debris;
- (c) live wires that could lead to electric shock; and
- (d) building equipment, loose scaffolding and other building tools/materials that could cause potential harm when falling from a height or as a fall/trip hazard.

14 In light of the (*Renter's*) poor health, it is even more important that she not be habiting the (*rented premises*) whilst any of the Works are carried out.

18 The floorplan was attached to the affidavit of the carpenter:





- 19 The affidavit of the Rental Provider that accompanied the NTV provides background information that is relevant to a consideration of why she wants to ultimately move into the rented premises and why the renovation is necessary before that can happen.
- 20 Three pictures were attached to the NTV. The pictures are of the outer walls of each of the two middle bedrooms and are not of the wall that is being removed to change the size of those bedrooms.
- 21 On 29 February 2024, the Renter made application to challenge the validity of the NTV on two grounds:
 - (a) that it was not accompanied by the mandatory documents required by the *RT Act* and Director, and
 - (b) that a fixed term agreement should be implied and that the termination date in the NTV was a date before the end of that implied fixed term of 6 November 2024.
- 22 At the hearing of this matter on 15 April 2024, I indicated to the parties that I considered the offer by the agent for the Rental Provider of a new fixed term period simply an “invitation to treat” and that it was conditional on the Rental Provider’s approval which was never given. The Renter was given an opportunity to pursue this argument in written submissions. She has not done so and that challenge is dismissed.
- 23 At the conclusion of the hearing, I made directions for the parties to provide written submissions on the documents that accompanied the NTV and whether they complied with the mandatory requirement such that the notice was valid.

Was the NTV accompanied by the Director approved mandatory documents?

- 24 The specification of works detailed in the NTV and the accompanying documents are in the nature of renovations. They are not repairs, with no suggestion that the wall between the two middle bedrooms that is going to be demolished, is in need of maintenance or is not in good repair.

- 25 Yet the documents that did accompany the NTV were similar to those that the Director requires be provided if the nature of the works are for *repairs*:

Director approved documents for repairs	Documents attached to the NTV
<i>Photographic proof that <u>repairs</u> are required</i>	Three photographs of walls in the room, albeit not the wall that was going to be demolished, and a floor plan showing the wall to be removed and the new wall to be constructed
<i>Contract with, or quotation from, a suitably qualified tradesperson for carrying out planned <u>repairs</u> stating (1) the nature of the <u>repairs</u> required, (2) the reasons why the premises need to be vacated by the renter in order to carry out the <u>repairs</u>, and (3) an estimate of the length of time it will take to complete the <u>repairs</u>.</i>	The quote from the carpenter and the further explanations provided in the affidavits of the carpenter and the Rental Provider

- 26 It is unnecessary for me to determine whether the documents accompanying the NTV expressly meet the requirements of the Director and provide all the information necessary as the works to be carried out to the rented premises are not repairs. There was no need for the Rental Provider to provide these sorts of documents.
- 27 What was required however was the Director approved document for a renovation which was a *building permit*.
- 28 The publication of the Director approved documents to accompany a notice to vacate for renovations, in the Gazette and the CAV website, does not provide any conditions on the circumstances under which a building permit has to accompany the documents, but says that one must be attached.
- 29 It is a mandatory requirement under section 91ZZO(e) of the *RT Act* that for a notice to vacate for renovation to be valid, it must be accompanied by a building permit.
- 30 The Director could have repeated the words in section 91ZX of the *RT Act* and said that the provision of the permit is conditional on one being *necessary* before works can be undertaken. They did not.
- 31 As the NTV is not accompanied by the mandatory documents approved by the Director, being a building permit for renovations, it is invalid and cannot support an application for possession.



Concluding remarks

- 32 I note that the Rental Provider has lodged an application for possession in proceeding R2024/13142. On the basis of the findings above that the notice to vacate supporting that application is invalid, the Rental Provider should immediately withdraw that application.
- 33 I make one final note on the need to obtain a building permit before issuing a notice to vacate for repairs or renovations under section 91ZX of the *RT Act*. Without a tradesperson, in this case, having examined the roof cavity to determine with certainty if the wall is load bearing, and as such whether a building permit is required for any structural work, a Tribunal is highly unlikely to be satisfied that the owner has all the necessary permits and consents required, to give a notice for these works. A proper assessment of the need for any additional approvals (such as a surveyor approval for the works to be undertaken in the form of a building permit) is imperative before any such notice is given under section 91ZX.

K. Campana
Senior Member

