

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**RESIDENTIAL TENANCIES DIVISION**

**RESIDENTIAL TENANCIES LIST**

VCAT REFERENCE NO. R2024/7355

**CATCHWORDS**

Rent arrears s91ZM; sub renters, s91G, s91R considered but not applied, sub rental agreement not terminated by the head renter giving a notice of intention to vacate by the head renter. Application for possession on the basis of rent arrears struck out.

<b>APPLICANTS</b>	Xinjian Chen and Yuejuan Diao
<b>RESPONDENTS</b>	North East Link Project Jasmine Nikfar Vafa Nikfar Nazanin Shams
<b>WHERE HELD</b>	Hearing by Telephone
<b>BEFORE</b>	Deputy President L. Warren
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	9 May 2024 and 17 May 2024
<b>DATE OF ORDER</b>	14 August 2024
<b>CITATION</b>	Chen v North East Link Project (Residential Tenancies) [2024] VCAT 777

**ORDER**

1. The proceeding is struck out.

**L. Warren**  
**Deputy President**



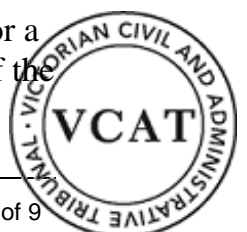
**APPEARANCES:**

For Applicants	Ms R Zoumboulis, Property Manager
For First Named Respondent	Mr N Patel, Principal Lawyer
For the Second Named Respondent	No appearance
For the Third Named Respondent	Ms A Nabaglo, Tenants Victoria
For the Fourth Named Respondent	In person



## REASONS

- 1 This proceeding is an application by the residential rental providers, Xinjian Chen and Yuejuan Diao (“the RRP”), seeking an order for possession of the rented premises for unpaid rent pursuant to section 91ZM of the *Residential Tenancies Act 1997* (“the RT Act”).
- 2 The first named respondent, North East Link Project (“NELP”), is the renter of the rented premises under a residential rental agreement dated 30 July 2021 (“the Rental Agreement”). The Rental Agreement provided for a 12 month fixed term tenancy that commenced on 5 August 2021. The Rental Agreement reverted to a periodic tenancy upon expiration of the initial fixed term.
- 3 The second, third and fourth respondents (collectively referred to as “the Sub Renters”) are renters under a residential sub-rental agreement dated 31 July 2021 (“the Sub-Rental Agreement”). The Sub Rental Agreement was for a fixed term that commenced on 5 August 2021 and expired by the effluxion of time on 3 August 2022. The Sub-Rental Agreement became a periodic tenancy upon the expiration of the fixed term period.
- 4 The Sub Renters remain in occupation of the rented premises.
- 5 NELP has never occupied the rented premises.
- 6 The RRP gave NELP a notice to vacate dated 8 February 2024 (“the NTV”). The NTV was also given to the Sub Renters at the same time.
- 7 The termination date stated in the NTV was 1 March 2024.
- 8 As vacant possession of the rented premises was not returned to the RRP on 1 March 2024, the RRP lodged an application with the Tribunal under section 91ZM of the RT Act on 5 March 2024.
- 9 This proceeding was first scheduled for a hearing on 14 March 2024. The hearing on that date was adjourned, and the matter was re-scheduled for a hearing on 29 April 2024. The matter was further adjourned to 9 May 2024 to be heard in conjunction with a related Tribunal matter. On 9 May 2024 this matter was adjourned to 17 May 2024 to be heard by me.
- 10 At the hearing on 17 May 2024, Vafa Nikfar (third named respondent) was represented by a lawyer, Ms Nabaglo. Ms Nabaglo made submissions in relation to the operation of sections 91G and 91R of the RT Act and their impact on the Rental Agreement and the Sub-Rental Agreement. Ms Zoumboulis (property manager representing the RRP) and Mr Patel, lawyer (representing NELP) strenuously opposed the submissions made by Ms Nabaglo.
- 11 It was agreed by all parties that I would determine as a preliminary question the impact of sections 91G and 91R on this proceeding based on the written submissions. If the determination of the preliminary question did not dispose of the proceeding, then I would direct that the matter be listed for a further hearing as soon as possible. Alternatively, if the determination of the



preliminary question disposed of the proceeding then I would make orders accordingly.

- 12 Subsequent to the hearing on 17 May 2024 closing I noted there was a decision in a related proceeding R2024/4875 and have noted the findings made by a Senior Member of this Tribunal. These findings included findings in relation to the impact of sections 91G and 91R of the RT Act on the Rental Agreement.
- 13 To ensure fairness to all parties I made orders on 17 May 2024 to enable all parties to make written submissions in relation to the operation of sections 91G, 91R and 473 of the RT Act and also whether findings made in the related proceeding gave rise to a *res judicata* (a matter has been determined by a court of Tribunal and may not be pursued further by the same parties) that would bind the Tribunal in this proceeding.

### **The Rental Agreements**

- 14 The Rental Agreement provided for an initial rental of \$6,518.00 per calendar month.
- 15 The Sub-Rental Agreement provided for the Sub Renters to pay nil rent. There was no requirement for the Sub Renters to pay any bond.
- 16 The Rental Agreement and Sub-Rental Agreement were entered into one day apart. The Sub-Rental Agreement has not been executed by the RRP. However, the Rental Agreement contains a provision whereby the RRP agreed to NELP entering into a sub-lease agreement with the Sub Renters and that NELP was responsible for payment of the rent and the bond.
- 17 In the written submissions provided by NELP states:
  1. a) ...
  - b) ...
  - c) The parties agreed to enter into the Head Tenancy and Subtenancy as a temporary arrangement in order to enable the Second Respondents to find alternative accommodation;
  - d) The rent payable under the Head Tenancy was \$6518. The rent payable under the Subtenancy was set at nil to provide the Second Respondents with sufficient resources and time to find alternative accommodation.
- 17 Having regard to the evidence and submissions I find, that the RRP consented to and was aware of the terms of the Sub-Rental Agreement, and in particular the provision for nil rent to be paid by the Sub Renters. My view on this is reinforced by the clause in the Rental Agreement referred to above wherein the RRP acknowledged that NELP was responsible for payment of the rent and the bond.
- 18 The Sub-Rental Agreement contains a provision that states that the Sub Renters acknowledge that if the Rental Agreement is terminated for any reason, then the Sub-Rental Agreement will end at the same time.



## **Have the Rental Agreement and Sub-Rental Agreement been terminated by the Parties?**

- 19 On 22 December 2023, NELP gave the RRP a Notice of Intention to Vacate (“the NITV”). The NITV stated that the Rental Agreement would terminate on 19 January 2024.
- 20 On the same date NELP sent to the Sub Renters by email a copy of the NITV, a Notice to Vacate (“the NELP NTV”) and a letter dated 22 December 2023 addressed to them.
- 21 This letter stated as NELP had given the RRP the NITV that would end the Rental Agreement on 19 January 2024 that the Sub-Rental Agreement would also end on the same date.
- 22 The NELP NTV is stated to have been given under section 91G of the RT Act as NELP had given the RRP a notice of intention to vacate. The notice states that in reliance on special conditions 3, 12, 38 and 40 of the Sub-Rental Agreement that the Sub-Rental Agreement “has ended” and requiring the Sub Renters to vacate the rented premises by 19 January 2024.
- 23 I must have regard to Section 91B of the RT Act that states:
- Despite any Act or law to the contrary, a residential rental agreement does not terminate and must not be terminated except in accordance with this Division or Part 7 or 8.
- 24 Section 91Z of the RT Act provides that a renter may give a residential rental provider a notice of intention to vacate, and that any such notice must specify a termination date that is not less than 28 days after the date on which it has been given.
- 25 As set out above, NELP gave the RRP the NITV by email on 22 December 2023. The NITV is deemed to have been received by the RRP on 23 December 2023. The 28-day notice period required by section 91Z would therefore have expired on 19 January 2024, making 20 January 2024 the earliest possible date that the Rental Agreement could have been terminated by this process.
- 26 As the NITV specified 19 January 2024 as the termination date, it did not give the RRP the required 28 days’ notice and as such was invalid and did not bring the Rental Agreement to an end.
- 27 Noting again the provisions of section 91B, the letter from NELP to the Sub Renters dated 22 December 2023 could not and did not bring the Sub-Rental Agreement to an end.
- 28 The NELP NTV states that it was given under section 91G of the RT Act.
- 29 Section 91G provides as follows:
- A residential rental agreement terminates if-
- (a) The renter is not in possession of the rented premises because the renter has sub-let them; and



- (b) The residential rental provider or the renter gives a notice to vacate or a notice of intention to vacate the rented premises under this Division; and
- (c) The period (if any) between the date on which the notice is given and the termination date specified in the notice has expired.

30 For the reasons set out above I find that the NITV was invalid.

31 I also find that the NELP NTV was also invalid.

32 Although section 91G refers to a renter giving a notice to vacate, any such notice to vacate must be given for a valid reason as set out in the RT Act.

33 Subdivision 1 of Division 9 of the RT Act sets out how a residential rental agreement can be terminated. Subdivision 1 sets out a number of grounds upon which a notice to vacate can be given. Essentially, there must be a valid reason for giving a notice to vacate. If a notice to vacate is purported to have been given for a reason not contained in Subdivision 1 of Division 9 of the RT Act, any such notice to vacate will be invalid and as such ineffective.

34 The reason set out in the NELP NTV for the giving of the notice reads as follows:

The head tenancy entered into by the Rental Provider with the head landlord (Head Tenancy) has been terminated pursuant to section 91Z of the Residential Tenancies Act 1997 (Vic)(Act) and will end on 19 January 2024.

Special Condition 3 of the sub-tenancy agreement dated 31 July 2021 between the parties (Sub Tenancy) states that the sub-tenancy will come to an end at the same time as the head tenancy is terminated.

Pursuant to section 91G of the Act, the Rental Provider provides notice that the Sub Tenancy is terminated as the Rental Provider has provided the head landlord with a notice to vacate the rented premises on 19 January 2024.

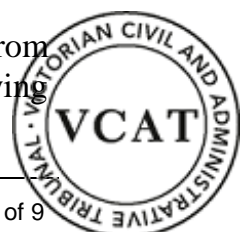
Pursuant to special conditions 12, 38 and 40 of the Sub Tenancy Rental Provider confirms that the Sub Tenancy has ended and that it requires the Renter to provide vacant possession of the rented premises by 19 January 2024.

35 The reason set out in the NELP NTV does not accord with any of the reasons for giving a notice to vacate set out in Subdivision 1 of Division 9 of the RT Act. Accordingly, I find the NELP NTV is invalid.

36 I also find that section 91G of the RT Act was not enlivened by the actions of NELP on 22 December 2023 and the Sub-Rental Agreement was not bought to an end on 19 January 2024.

### **The RRP's Notice to Vacate**

37 It appears from the evidence heard at the hearing on 17 May 2024 and from the subsequent written submissions of the parties, that NELP ceased paying

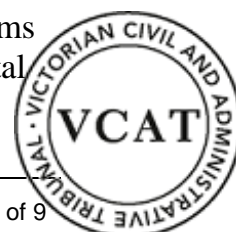


rent as from 19 January 2024 being the date that it considered the Rental Agreement had come to an end.

- 38 On 8 February 2024 the RRP gave a notice to vacate to NELP (“the RRP NTV”). The RRP NTV was given by registered post and is deemed to have been received by NELP on 15 February 2024. The RRP NTV states the termination date as 1 March 2024.
- 39 The RRP NTV states that it was given under section 91ZM of the RT Act on the grounds that as of 8 February 2024 NELP owed the RRP not less than 14 days rent. I am satisfied that the RRP NTV appears to be valid. NELP has not made any submission to suggest that the notice to vacate given to it was not valid.
- 40 I am satisfied that the RRP NTV has enlivened section 91G of the RT Act; NELP as the renter was not in possession of the rented premises, the RRP as residential rental provider gave NELP a (valid) notice to vacate and the period between the date on which the notice was given to NELP and the termination date specified in the notice to vacate has expired.
- 41 The effect of the RRP NTV was to terminate the Rental Agreement on 1 March 2024.
- 42 Section 91R of the RT Act provides as follows:

**91R New residential rental agreement created where head residential rental agreement terminated**

- (1) A person becomes the renter of the residential rental provider in respect of rented premises if—
- (a) the person is in possession of the premises under a residential rental agreement (a *sub-residential rental agreement*) granted to that person by a person who is a renter of the premises under another residential rental agreement (the *head residential rental agreement*) granted to the person who is the head renter by the residential rental provider; and
  - (b) the head residential rental agreement terminates or is terminated; and
  - (c) the sub-residential rental agreement does not terminate or is not terminated in accordance with this Act.
- (2) The residential rental agreement created under subsection (1) is deemed to be a residential rental agreement on the same terms, as far as applicable, as the terms of the sub-residential rental agreement.
- (3) Subsection (1) applies whether or not this Act applied at any time to the head residential rental agreement.
- 43 With the Rental Agreement having terminated under section 91G by reason of the giving of the RRP NTV, section 91R operates to create a new tenancy agreement directly between the RRP and the Sub Renters. Pursuant to section 91R(2) the new rental agreement created is upon the same terms and conditions as the Sub-Rental Agreement. Importantly, the Sub-Rental Agreement provides for nil rent to be paid by the Sub Renters.





- 44 In their written submissions, both the RRP and NELP submit that such an outcome is unfair to the RRP. Both submit that section 473 of the RT Act enables the Tribunal to make an order to prevent such a scenario from arising.
- 45 The RRP submits firstly that the Tribunal can make an order under section 473 to import a market rent into the newly created rental agreement between the RRP and the Sub-Renters. Alternatively, the RRP submits that under section 473 the Tribunal could make a possession order.
- 46 NELP submits that section 473 would enable the Tribunal to make a possession order.
- 45 Section 473 of the RT Act (insofar as is relevant) reads as follows:

**473 Powers of Tribunal where 2 or more residential rental agreements affect same premises**

- (1) If there are 2 or more residential rental agreements in respect of the same premises and the rights of the residential rental provider and renter under any of the agreements are prejudicially affected by the application of this Act to 2 or more of the agreements, the Tribunal may make any orders it thinks fit—
- (a) to give effect to the rights under this Act of the renter in possession under a residential rental agreement; and
- (b) subject to that first order, to give effect to the rights under this Act of each renter and each residential rental provider of the premises.
- 46 Having considered the submissions of both the RRP and NELP, I do not accept their respective submissions in relation to the applicability of section 473 to the fact scenario in this proceeding. It must follow (for reasons below) that if section 473 is not applicable to the fact scenario in this proceeding, then their submissions as to the orders the Tribunal could make under section 473 must also be rejected.
- 47 There were two residential rental agreements in place in respect of the same rented premises. The rights of the residential rental provider and the renter are arguably prejudicially affected by the application of the RT Act. Certainly, that could be said of the RRP's rights in relation to section 91R. However, section 473(1)(a) provides that the Tribunal may make any order it thinks fit to give effect to the rights under the RT Act of the *renter in possession* (emphasis added). The renters in possession in this proceeding are the Sub Renters. Therefore, in my opinion I am only able to make any order I think fit if it gives effect to the rights of the Sub Renters under the rental agreement. The relevant rental agreement is the Sub-Tenancy Agreement. To make an order as submitted by the RRP to impose a market rent on the Sub Renters, or to make a possession order as submitted by the RRP and NELP would not in my opinion be giving effect to the rights of the Sub Renters under the Sub-Tenancy Agreement.
- 48 The operation of section 91R was considered by the Tribunal in *Spiteri v Vincent Care Community Housing* [2023] VCAT 1286. This case involved a sub tenancy rental agreement where the sub renter was paying a rebated or reduced rent. By reason of the operation of sections 91G and 91R a new





residential rental agreement was created directly between the residential rental provider and the sub renter. At paragraphs 24 to 27 the Tribunal said:

- 24 The New Rental Agreement between the Owners and Occupiers which came into effect on 3 September 2023, is on the same terms and conditions as the sub-rental agreement that was in place between the Head Renter and the Occupier.
- 25 It is my view that this New Rental Agreement superseded (replaced or took the place of) the agreement between the Head Renter and Occupier, such that there is now just one rental agreement governing occupation of the rented premises.
- 26 This conclusion is in accordance with the general principles related to superseding agreements and gives purpose and effect to the intention of sections 91G and 91R. It resolves any issues that may arise from the written authority to sublet being revoked on termination of the head rental agreement and any competing interests and conflict from two concurrent rental agreements.
- 27 The RT Act provides express power to resolve inconsistencies between numerous rental agreements for the one property, however the same is unnecessary with the above practical approach.

### **Conclusion**

- 49 NELP was not in possession of the rented premises on 15 February 2024 when the RRP NTV was given. Nor was it in possession on the termination date of 1 March 2024. Due to the operation of section 91G of the RT Act the Rental Agreement terminated on midnight on 1 March 2024.
- 50 On 5 March 2024, the RRP made an application for a possession order based on the RRP NTV.
- 51 As the Rental Agreement had already terminated and NELP was not in possession of the rented premises on 5 March 2024, the RRP had no entitlement to make the application for possession on 5 March 2024. As such, the only order that the Tribunal can make in this proceeding is to strike out the RRP's application.
- 51 In my orders made following the hearing on 17 May 2024 I also sought written submissions from the parties as to whether the findings made in the related proceeding gave rise to a res judicata. Taking into account the conclusions I have reached above; it is no longer necessary for me to consider and determine that question.

**L. Warren**  
**Deputy President**

