

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

RESIDENTIAL TENANCIES DIVISION

RESIDENTIAL TENANCIES LIST

VCAT REFERENCE NO. R2024/16365

CATCHWORDS

Application for possession – premises to be sold- notice to vacate under s.91ZZB of *Residential Tenancies Act 1997*- whether notice to vacate is compliant and valid.

APPLICANT	Nirita Pty Ltd (ACN 105 501 380)
RESPONDENT	Jonathan Botha
WHERE HELD	Melbourne
BEFORE	Member B Josephs
HEARING TYPE	Hearing
DATE OF HEARING	1 July 2024
DATE OF ORDER	1 July 2024
DATE OF REASONS	20 September 2024
CITATION	Nirita Pty Ltd v Botha (Residential Tenancies) [2024] VCAT 902

ORDER

VCAT finds:

- A. The grounds relied upon for the application have not been proved.
- B. A contract of sale prepared by an Australian Legal Practitioner was included in the notice to vacate given to the renter.
- C. The contract of sale formed part of the notice to vacate.
- D. Due to the “checking” of the box forming part of the Particular of Sale relating to “Lease” the notice to vacate was unclear as to whether the property was to be sold with vacant possession at the time the notice to vacate was given to the renter.
- E. The notice to vacate is non – compliant with the requirements of the *Residential Tenancies Act 1997* and as the application is based on the notice to vacate, the application has to be dismissed.

VCAT orders:

- 1 The application is dismissed.

B Josephs
Member



APPEARANCES:

For the applicant

Mr M. Mileo, director, with Mr L. Hardiman,
Property Manager and Mr. B. Graham, agent

For the respondent

Mr J. Botha, in person, and Mr W. Wheeler,
advocate



REASONS

INTRODUCTION

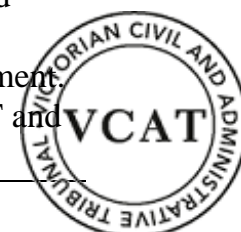
- 1 I made findings and an order with oral reasons at the end of the hearing.
- 2 The applicant subsequently requested written reasons.

BACKGROUND

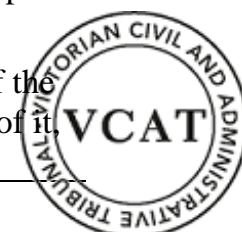
- 3 The agent for the residential rental provider sent a notice to vacate under s.91ZZB of the *Residential Tenancies Act 1997* (Vic) ('the Act') to the renter on 10 April 2024 with a termination date of 17 June 2024.
- 4 There are no disputes about service of the notice or calculation of the termination date.
- 5 An application seeking a possession order was sent to the renter on 23 May 2024. There is no dispute about service of the application.
- 6 The notice was expressed to be given under s.91ZZB (1) for the reason that the premises are to be sold or offered for sale with vacant possession immediately after the termination. The current fixed term tenancy was stated to expire on 17 June 2024. The evidence attached to the notice was stated to be a Contract of Sale of Land that had been prepared by the residential rental provider's legal practitioner.
- 7 The application recorded that the rental provider is seeking a possession order for the rented premises as they intended to sell the property with vacant possession immediately after the termination date.
- 8 The renter remains in possession of the rented premises.
- 9 The Act is prescriptive about the requirements for notices which must all accord with s.91ZZO, and often be accompanied by mandatory documentation. Section 91ZZO of the Act sets out requirements for the notice to be valid with s.91ZZO(e) providing that in the case of a notice given under s.91ZZB it is to be accompanied by documentary evidence, as approved by the Director of Consumer Affairs from time to time, which supports the reason for giving the notice.
- 10 The Director's website provides that where the reason for the giving of the notice is that the property is to be sold or put up for sale, and vacated immediately after the rental agreement ends, evidence that must be included with the notice is one of a contract of sale signed by the vendor and purchaser and dated or of a contract of engagement/authority to sell with a licensed estate agent or of a contract of sale prepared by a conveyancer or an Australian legal practitioner. The notice included the third document.

HEARING

- 11 The agent for the residential rental provider handed up documents relied upon in support of the application which included a summary of proofs prepared by the agent, the copy of the contract of sale and vendor statement. There was no dispute that these documents had also been sent to VCAT and to the renter prior to the hearing.



- 12 The summary of proofs, among other matters, by way of further background recorded that the renter had commenced occupation under the rental agreement on 5 December 2007 and reiterated that the rental provider is seeking a possession order for the rented premises as they intend to sell the property with vacant possession immediately after the termination date.
- 13 There was no dispute as to the printed form of the contract of sale or that it included details of the vendor’s legal practitioner or conveyancer.
- 14 However, Mr Wheeler submitted that despite the notice stating that the property is to be sold with vacant possession, this could not be confirmed to be the case as in the contract of sale included with the notice, in the Particulars of Sale, the section headed “Lease (general condition 5.1)” was indicated as applying. In this regard, a printed box had been ‘checked’ (by being ticked) before the wording “At settlement the purchaser is entitled to vacant possession of the property unless the box is checked, in which case the property is sold subject to*:” There was then provision for insertion of details of the lease or tenancy document although this part was not completed. General condition 5.1 relates to encumbrances to which the property being purchased by the purchaser is to be subject.
- 15 As to the sufficiency of the information contained in the notice, the principles to be applied when considering the requirements of notices to vacate have long been established. In the oft quoted case of *Smith v Director of Housing* [2005] VSC 46 (‘Smith’) the Supreme Court held that the information contained within the notice to vacate must be to such a degree that on reading the notice, the renter knows why it is being given and has enough information to contest the allegations. At [17], it was said:
- The requirement laid down in s.319 (d) is designed to require advice to be given to the tenant as to the reason the landlord demands possession with a sufficient degree of detail to enable her to understand the facts being alleged as a basis for terminating the tenancy. It requires no technical expression, particular formal verbal formula and no particular legal knowledge to answer the question “Why is this notice being given?” A basic facility for communication in plain English is enough.
- 16 Mr Wheeler further submitted that the renter after reading the notice was confused by the checking of the box relating to ‘Lease’ in the contract of sale and he informed the agent of his confusion.
- 17 It was not disputed by the agent or the residential rental provider that the renter had spoken to them about the confusion after having received the notice and well prior to the hearing, but they had decided to proceed with the hearing.
- 18 Indeed, the agent’s evidence was that the box under “Lease” had not been checked when they had received it from the legal practitioners but for some reason by someone whom they could not identify, the box was checked prior to the contract being included with the notice.
- 19 Mr Mileo submitted that it was apparent from the unequivocal nature of the notice itself, exclusive of the contract of sale which only formed a part of it,



and from his oral evidence that the property was intended to be sold with vacant possession and in accordance with s. 91ZZB. He contended that there should be a distinction between the notice itself and evidence that supports it.

- 20 Mr Wheeler maintained his position that the notice was not clear after regard is had to the contract, and in those circumstances the possession application should be dismissed.
- 21 I agreed with Mr Wheeler. The checking of the box under “Lease (general condition 5.1)” indicated that it applied under the contract. The prescriptive nature of the legislation, particularly with regard to the application under consideration is apparent from s.91ZZO. The notice and the contract of sale included with it must be considered as a whole. The contract is included with, and forms part of, the notice. In terms of s.91ZZO(e) the mandatory documentation does not support the reason for the giving of the notice. Further, as established in *Smith*, in considering the sufficiency and compliance of the notice, it has to be strictly interpreted and analysed at the time it was given to the renter.
- 22 Although there was no subsequent insertion of any details of any lease or tenancy document, I find that because of the checking of the box under ‘Lease’ in the Particular of Sale in the contract, it was unclear to the renter as to the basis of terminating the tenancy and did not establish that the property was to be sold with vacant possession.
- 23 Accordingly, the grounds relied upon for the application have not been proved and the notice is not compliant with the Act and is invalid. The application had to therefore be dismissed.

B Josephs
Member

