

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

RESIDENTIAL TENANCIES DIVISION

RESIDENTIAL TENANCIES LIST

VCAT REFERENCE NO. R2024/20525

CATCHWORDS

Challenge to the validity of a notice to vacate served on grounds of intention to repair, renovate or reconstruct immediately after termination date, requirement for the notice to be accompanied by mandatory documents approved by the Director of Consumer Affairs—*Residential Tenancies Act 1997* (Vic) ss.91ZZS, 91ZZT, 91ZX, 91ZZO, 486A; *Smith v Director of Housing* [2005] VSC 46; *Thorp v Hughes* (Residential Tenancies) [2023] VCAT 495; *Perri v Bertolusso* (Residential Tenancies) [2022] VCAT 126; *Mane v Guo* (Residential Tenancies) [2021] VCAT 752; *Lazar v Zhang* (Residential Tenancies) [2024] VCAT 589; *Jafarpourasr v Tancevski* [2018] VSC 497.

APPLICANT	Allan Raymond
RESPONDENT	Empire Street Corporation Pty Ltd
WHERE HELD	Melbourne
BEFORE	D Bignell, Member
HEARING TYPE	Final Hearing
DATE OF HEARING	14 August 2024
DATE OF ORDER	14 August 2024
DATE OF REASONS	26 September 2024
CITATION	Raymond v Empire Street Corporation Pty Ltd (Residential Tenancies) [2024] VCAT 932

ORDER

VCAT finds:

1. The residential rental provider gave the renter a notice to vacate under the following section of the *Residential Tenancies Act 1997*:
91ZX - Repair, renovate or reconstruct the premises
2. The notice to vacate is dated 28 May 2024.
3. The renter has applied to the Tribunal within 30 days after the date on which the notice to vacate was given, challenging the validity of the notice.
4. The notice to vacate is not valid because it was not accompanied by the documentary evidence approved by the Director of Consumer Affairs Victoria.

VCAT orders and declares:

The notice to vacate is not valid.

D Bignell
Member



APPEARANCES:

For the applicant

B O'Hanlon, solicitor Victoria Legal Aid

For the respondent

M Narayanan, agent

A Karlis, agent



REASONS

BACKGROUND

1. On 28 May 2024, the respondent rental provider, Empire Street Corporation Pty Ltd, gave the applicant renter, Allan Raymond, a notice to vacate the rented premises (the “Notice”), by 4 August 2024. The Notice was given under s.91ZX of the *Residential Tenancies Act 1997* (Vic) (the “Act”) on the ground that the rental provider intended to repair, renovate or reconstruct the rented premises immediately after the termination date.
2. By application dated 26 June 2024, Mr Raymond sought to challenge the validity of the Notice pursuant to s.91ZZS on the basis that it was not accompanied by the evidentiary material prescribed by s.91ZZO of the Act and published by the Director of Consumer Affairs (the “Director”) in accordance with s.486A of the Act.¹
3. The renter’s solicitor requested written reasons at the time of my notifying the parties of my decision to uphold the challenge to the validity of the Notice.

LAW

4. An outline of the relevant laws relating to notices to vacate served under section 91ZX follows.
5. A rental provider may give a renter a notice to vacate if they intend to carry out repairs or renovations to the rented premises, they have the necessary approvals, and the work cannot be done unless the renter vacates:

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

¹ Within 30 days of receiving a notice to vacate, a renter may apply to the Tribunal to challenge the validity of a notice under section 91ZZS(2). Section 91ZZT empowers the Tribunal to make a determination about the validity of the notice.



See section 91ZZO regarding requirements for accompanying documentary evidence.

6. A notice to vacate must comply with section 91ZZO of the Act to be valid:

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 which, in accordance with section 91ZZO(e), must accompany a notice to vacate given under s.91ZX, are those which are approved by the Director of Consumer Affairs Victoria under s.486A:

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. In Victoria Government Gazette No. S 142, on 25 March 2021 the Director published the approval of documentary evidence as required when issuing a notice to vacate under a number of sections, including s.91ZX, effective from 29 March 2021.²

² In Victoria Government Gazette No. S 377, 8 July 2021 the Director, under s.486A of the Act, gave notice of a revision and approval of documentary evidence required for use when issuing a notice to vacate for other provisions of the Act, none of which relate to this proceeding.



9. A valid notice to vacate is required for the Tribunal to have the power to make a possession order. The Tribunal has no power to confer jurisdiction upon itself by proposing to amend a notice to vacate to render it valid.³ Where a notice has not been accompanied by the required documentation at the time of service, providing a renter with the documentation at a later stage does not cure the defect.⁴
10. The approach taken by the Tribunal as to whether the documents accompanying a notice to vacate may be said to meet the requirements of the evidence required, is typically narrow.⁵ This accords with the decision of Bongiorno J in *Smith v Director of Housing*,⁶ which concerned the cognate provision of s.91ZZO in an earlier version of the Act. Although *Smith* did not specifically address the content of documents accompanying a notice to vacate (as these were not required under the law as it then stood), it emphasised the need for a rental provider to satisfy legal requirements, when seeking to invoke a summary remedy:
- ... [T]he purpose of s.319 ... is to lay a proper basis for the pursuit by a landlord of a very summary method of terminating a tenancy and thus extinguishing the rights of the tenant. It is incumbent upon a landlord who seeks to avail himself of such a summary remedy to comply strictly with the law so as to ensure that by resorting to such a remedy he is neither deliberately nor accidentally trampling on the rights of the person against whom the remedy is being sought.⁷
11. In *Jafarpourasr v Tancevski*, Daly AsJ held that the decision in *Smith v Director of Housing* should apply “to all notices to vacate where (s.319 specifies that) reasons must be provided”,⁸ and stated that “the degree of particularity required in a notice to vacate will vary according to the circumstances”.⁹ While declining to introduce guidelines covering the level of particulars a notice should contain in order to be found to enclose sufficient detail, the court held:
- in cases where there might be genuine debate about whether there is a need to vacate the relevant property, such as where repairs and/or renovations are planned, more detail would be required.¹⁰
12. It is in keeping with this proposal for a higher degree of detail in certain types of notices, such as those grounded on intended repairs and/or renovations, that the documents which must accompany a notice to vacate

³ *Smith v Director of Housing* [2005] VSC 46, [20]-[24]

⁴ *Thorp v Hughes* (Residential Tenancies) [2023] VCAT 495

⁵ See, for example, *Perri v Bertolusso* (Residential Tenancies) [2022] VCAT 126, [11]-[14]; *Mane v Guo* (Residential Tenancies) [2021] VCAT 752, [30]; *Lazar v Zhang* (Residential Tenancies) [2024] VCAT 589, [27] to [31]

⁶ *Smith v Director of Housing* [2005] VSC 46

⁷ [20]

⁸ *Jafarpourasr v Tancevski* [2018] VSC 497, [48]

⁹ [49]

¹⁰ [50]



under s.91ZX, as nominated by the Director and currently published on the CAV website, are comprehensive:

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:
 - the nature of the repairs required,
 - the reasons why the premises need to be vacated by the renter in order to carry out the repairs, and
 - an estimate of the length of time it will take to complete the repairs.

Or the following:

- building permit for repairs or renovation.

13. There are therefore two options with respect to the accompanying documentation for a notice to vacate under s.91ZX.
14. The first option requires both photographic proof of repairs being required, and a contract with, or quotation from, a suitably qualified tradesperson for the proposed repairs, containing the requisite information.
15. The second option available is a building permit for repairs or renovation.

EVIDENCE

16. Prior to the commencement of the hearing, I assessed the Notice to check whether it appeared to comply with the legislative requirements, and whether, on its face, it may have been accompanied by the required documents.
17. In the section outlining the reason for the giving of the Notice, the rental provider had entered the 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.

RRP would like to Renovate with Vacant possession here is the list of times [sic] need to be fixed

Bathroom Tiling Repairs

Toilet Plumbing issue

Flooring Needs to be done

Complete kitchen re make'

Whole Unit painting

18. Elsewhere in the Notice, the documentary evidence attached to the notice had been identified by the rental provider as "Quote for Renovate".



19. The quote submitted in evidence (the “Quote”) listed proposed works costing \$27,500.00, which more or less reflected those set out in the Notice:
 - Bathroom tiling repairs
 - Toilet plumbing issue (Plumber needs to be called for this)
 - Flooring needs to be redone.
 - Complete Kitchen renovation
 - House needs to be repainted
20. Following the itemised list in the Quote was the entry: “WORKS CAN ONLY COMMENCE ONCE HOUSE IS EMPTY AND VACANT”.
21. A threshold issue thus emerged as to whether the Notice was invalid by reference to the documents that were required to accompany it, and those which appeared to have been omitted, or were deficient in some respect.
22. In response to questioning at the outset of the hearing, the agent appearing for the rental provider confirmed that save for the Quote, no other documents including any photographic evidence, or building permit, had accompanied the Notice when it was posted.

VALIDITY OF THE NOTICE TO VACATE

23. In *Lazar v Zhang*,¹¹ Senior Member Campana drew a distinction between the documents required in relation to notices to vacate where renovations are envisaged, and those required in relation to repairs.¹² The proceeding concerned a notice to vacate issued under s.91ZX with the stated purpose of ‘renovating/demolishing the wall in the second bedroom’.¹³ The notice to vacate was supported by photos and a quote but not a building permit. Senior Member Campana found that as the works proposed were in the nature of renovations, a building permit should have accompanied service of the notice to vacate. As a building permit had not been provided, the notice to vacate was invalid.¹⁴
24. The distinction drawn in *Lazar* is consistent with the different obligations associated with either type of works. Although the Act and subordinate statutory instruments contain a host of references to “repairs” and impose myriad duties upon rental providers in their regard, no such onus applies with respect to renovations.
25. Renovations (which may be desirable, but not obligatory), are optional for a rental provider, in the absence of a reparative factor giving rise to necessity, for instance, to ensure a premises meets minimum standards.
26. Where repairs are necessary and of such nature and extent as to warrant the premises being vacated, a rental provider may rely on either of the options outlined above for providing documentary evidence so as to comply with their obligation to maintain the premises in a good state of repair.

¹¹ *Lazar v Zhang* (Residential Tenancies) [2024] VCAT 589

¹² [24] - [29]

¹³ [13]

¹⁴ [24] - [30]



27. Following the reasoning in *Lazar*, where there are proposed works in the nature of renovations, the rental provider may only rely on the second of the options outlined above for providing documentary evidence and must ensure a building permit accompanies a notice to vacate. This interpretation would suggest that renovation works which lack a reparative element, and which do not require a building permit but are nonetheless so significant as to require that the premises be vacated, may not suffice to ground a valid notice to vacate.
28. In some circumstances, works might be categorised as both repairs and renovations, as is arguable in this case. Where there is any doubt – irrespective of the labelling – the Tribunal will need to be satisfied as to whether the works represent renovations, or repairs required to bring the premises to the necessary standards.
29. In this case that consideration is not required because neither of the options with respect to the documentation required by the Director to accompany a notice to vacate has been satisfied, and the Notice will not be able to be relied upon.
30. If the intended works bore the nature of repairs, the Notice does not satisfy the first option, due to its having been unaccompanied by the photographic evidence required by the Director, (quite aside from the deficiencies in the content of the quote regarding the anticipated duration of the works, and the failure to give reasons supporting the opinion that the premises would need to be vacated).
31. Additionally, the second option available for meeting the Director’s requirements regarding s.91ZX repair notices has not been satisfied, due to the Notice having been unaccompanied by a building permit.
32. In the alternative, were the works to be considered renovations, the Notice is invalid, again due to its having been unaccompanied by a building permit.
33. Irrespective of which categorisation might be more apt, the Notice was invalid as neither of the options with respect to the requisite documentary evidence required under s.91ZZO for a notice to vacate under s.91ZX, was met.
34. Accordingly, the challenge to the validity of the Notice was upheld, and an order made to this effect.

D Bignell
Member

