Signed by AustLII

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

RESIDENTIAL TENANCIES DIVISION

RESIDENTIAL TENANCIES LIST VCAT REFERENCE NO. R2023/14647

CATCHWORDS

Application for possession for rental provider's intellectually disabled daughter to move in – renter challenge to validity of the notice on basis that grounds are not genuine, that notice was retaliatory because the renter exercised her rights, and the actions of the rental provider and agent mean it is not reasonable and proportionate to make a possession order – breakdown of relationship, animosity and numerous proceedings involving the parties – determination that possession is reasonable and proportionate taking into account the interests of, and impact on the parties of a possession order.

Sections 91ZZA, 91ZZO, 322, 330, 330A and 486A of the *Residential Tenancies Act 1997* (Vic).

APPLICANT	David Sharpe
RESPONDENT	Lena Anderson
BEFORE	K Campana, Senior Member
HEARING VENUE	Melbourne
HEARING TYPE	Final Hearing
DATE OF HEARING	25 October 2023 and 15 March 2024
DATE OF ORDER	26 April 2024
CITATION	Sharpe v Anderson (Residential Tenancies) [2024] VCAT 381

ORDERS

For the written reasons provided, the Tribunal orders that:

1. The renter must vacate the rented premises by 3 May 2024.
2. At the request of the person who obtained the possession order and on payment of the prescribed fee the principal registrar of VCAT must issue a warrant of possession to be executed within 14 days after the date of issue. This request may be made after 3 May 2024 and no later than 26 October 2024.

Warning to the renter: If you fail to vacate the rented premises by 3 May 2024 the residential rental provider can request the principal registrar to issue a warrant of possession. You may then be forcibly vacated from the rented premises by a police officer or an authorised person carrying out a warrant of possession.

K. Campana
Senior Member

Retrieved from AustLII on 01 March 2025 at 09:39:23

Verify version

Signed by AustLII

APPEARANCES:

For Applicant	Ms Leanne Birch, Agent, Ray White Real Estate
For Respondent	In person

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

REASONS

1 A father's hope to provide stable supported accommodation well into the future for his disabled adult daughter is the motivation for this application for possession of a rental property in country Victoria.

2 However, a fractious relationship has now developed between the parties with claims by the respondent that the applicant is not genuine and is driven by a desire to have her evicted, so that he can continue to thwart his responsibilities under the law.

3 For the reasons that follow, I am satisfied that the grounds provided by the applicant are genuine and that it is reasonable and proportionate for a possession order to be made.

OVERVIEW OF APPLICATION AND EVIDENCE PRESENTED

4 David Sharpe ('Rental Provider') has made an application to the Tribunal for possession of his Benalla investment property ('rented premises'), so that his intellectually disabled adult daughter ('Daughter')[1] can move in.

5 Lena Anderson ('Renter') opposes the application and claims the Rental Provider's motives in trying to evict her are retaliatory because she raised complaints about the state of the property, an incorrect rental ledger and an attempt to increase the rent.

6 The application for possession is grounded on a notice to vacate (dated 3 March 2023) being given under section 91ZZA of the *Residential Tenancies Act 1997* (Vic) ('*RT Act*') because either a rental provider, a close family member of the rental provider or a dependent is wanting to move into the rented premises. The notice that was given, that supports the current application, was the third notice to vacate that has been given for the Daughter to move in. A fourth notice to vacate has also been given to the Renter for rent arrears.

7 Before considering the validity of the notice to vacate, and whether a possession order is reasonable and proportionate, taking into account the interests of, and impact on, both the Rental Provider and the Renter, it is important to understand the context of this application and the history of the rental agreement up to the date of the final hearing on 15 March 2024.

8 The Renter's challenge to possession being granted is centred on what she says is the conduct of both the Rental Provider and the various agents that have acted on the provider's behalf from Ray White Benalla. She claims that she is being asked to vacate, not because the Daughter is going to move in, but because the Renter has raised issues with the Rental Provider's compliance with the *RT Act*.

[1] Due to the sensitive and private nature of the evidence presented about the Rental Provider's daughter's disability and many of the allegations made, I have removed any reference to her name in documents or the evidence.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

9 The matter was heard over two days, with a five month interval in between, and concluded almost ten months after the application was first lodged.

10 At the hearing before me, in addition to the evidence directly provided by the parties for those two days, references were made to material filed at the Tribunal in this, and other proceedings, involving this rental agreement. At the hearing, the Renter read out and referenced events contained in her Amended Statement of Claim, lodged 25 February 2024 in the Federal Circuit and Family Court of Australia in proceeding MLG1697 of 2023 ('FC Proceeding'). I have therefore also considered evidence given in other proceedings, including the transcript of a Supreme Court Appeal ('SC Appeal').

11 While it is not for the Tribunal sitting in a high volume summary list, to search its records for any and all material that may, or may not be relevant, to a proceeding, I have in this case, reviewed the voluminous number of documents on all the other files and have considered them, if and only to the extent, that they are relevant to the matters to be taken into account in this application for possession. Where it has been possible to summarise the position or evidence of the parties I have done so. However, in light of some criticism of there being inaccuracies or inconsistencies in the evidence that was given or statements made in other proceedings and the indication from the Renter that she is likely to appeal if a possession order is made, the inclusion of direct quotes has become largely unavoidable.

12 With a number of proceedings still to be determined at the time of the hearing, it is also important to note that I have not considered any subsequent findings of fact or decision made,[2] and have not made any findings about the evidence in the claims for possession for rent, repairs, or various compensation claims, unless expressly stated and only to the extent that the same is directly relevant to the matters I am required to take into account in these proceedings.

13 The following is taken from the parties' own account and recollection of events in both documents and from the oral evidence at hearing, and from a review of contemporaneous documents supporting those events.

HISTORY OF RENTAL AGREEMENT

14 The rented premises is a two-bedroom, one bathroom weatherboard house in Benalla that was purchased by the Rental Provider in 2017. He says he bought the house as an investment property with the intention that one day his daughter would move into it, but that it would be rented out in the meantime.

15 In early June 2020, the Renter says she viewed the rented premises on-line, and on 18 June 2020 attended the property while it was undergoing repairs and maintenance by the Rental Provider.

[2] Orders have been made in the Renter's repair application and the Rental Provider's application for possession for rent arrears, after the date of the hearing.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

16 The Renter says she was told by the agent that the Rental Provider was looking for someone willing to lease the property immediately and to allow him to attend once a week to continue with the repairs and clean up so he had some rental income coming in. The exact nature of the works to be carried out on these weekly visits is uncertain.[3]

17 The Renter moved into the rented premises on an initial twelve-month fixed term period, commencing on 26 June 2020 with rent of $330 payable weekly.

18 Initially the parties were on good terms, with the Rental Provider attending the rented premises on a Monday.[4] However, within a few weeks the Rental Provider advised he could not commit to regular Monday attendances and hoped to carry out the repairs by mutual agreement.[5]

19 The Renter raised maintenance issues with the Rental Provider and questioned requests for payment of the rent in the first six months of her moving into the rented premises. The agents apologised for an accounting error on the Renter's ledger, advised that this would not impact any future tenancy reference checks, and the Rental Provider attended the premises to replace the veranda.[6]

20 In December 2020, the Renter says she discovered that the evaporative cooling unit had been decommissioned prior to her moving in and could not be used. She says the unit played a large part in her decision to move into the premises and meant that during summer she could not use the second bedroom or third bedroom/study.

21 In April and May 2021, the Renter complained about the operation of the split system and the agents arranged for the unit to be inspected and cleaned.[7] The Renter says the split system still did not operate efficiently and she was told it needed to be replaced. A work order was raised by the agency and the invoice subsequently provided says the unit is undersized for the space and the outdoor unit is leaking water on the new deck.[8] The invoice does not make any recommendation or opinion about it needing to be replaced.

22 In early June 2021, with the Rental Provider being diagnosed with cancer, and recommendations being made by specialists for the Daughter to have more independence, the decision was made for the Daughter to move from the farm into private accommodation in Benalla. On the basis of requests being made for NDIS funding to assist with the Daughter's relocation and expenses, the Rental Provider's wife signed a rental agreement on her

---

[3] Neither the Renter, the Rental Provider or agent gave any details of what works were to be carried out under this agreement.
[4] Paragraph 1 of the Particulars of claim filed in R2022/33199.
[5] Amended Statement of Claim filed by the Renter in proceeding MLG1697 of 2023.
[6] Paragraphs 9 to 14 of the document headed Appendix C – Particulars R2022_33199 lodged 16.12.2022.
[7] Ibid, at paragraphs 15 to 18.
[8] Page 88 of document titled *10. Affidavit – Sharnie Symes – Supreme Court S ECI 202301259 (sealed) - EFD_20231020090607*.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

behalf for a fixed term period from 8 June 2021 to 7 June 2022, with rent of $370 per week being charged.

23 On 25 June 2021, the Rental Provider and Renter entered into a further fixed term agreement for the rented premises, for a period of six months commencing on 26 June 2021. The frequency of the payment of rent was converted to fortnightly at the Renter's request.

24 On 8 September 2021, the parties agreed to a rent reduction for a four-week period from $330 per week to $250 per week, with the Renter then able to access the rent relief grant being offered during the Covid-19 lockdowns.[9]

25 Despite the agreement, the agent for the Rental Provider appears to have not applied the rent reduction to the ledger, and correspondence was sent to the Renter on 23 September 2021 advising that there were arrears of rent owed.

26 After receiving several more emails and texts claiming the account was in arrears, the Renter says she emailed the agent the following:[10]

> .. the rent grant has obviously not been paid so I will email through another rent reduction request to cover another month to stop these reminder emails, but this time I will not agree to the grant being used as a top up. These emails are only damaging for the landlord.

27 Throughout October 2021 and early November 2021, the Renter and the Rental Provider's agent emailed back and forth in relation to the rent, before the Renter received an email on 5 November 2021 from the agent providing confirmation that the rent relief grant had been approved, and would be credited against the rent arrears, but that there would still be a deficit.

28 The Renter says she then wrote to the agent on 8 November 2021, providing her own reconciliation and demanding the Rental Provider be given a copy of the email:[11]

> Further to the unacknowledged emails sent to you as a consequence of the dispute that arose on 5 October 2021, I hereby provide a full rent payment reconciliation in accordance with the rent agreements in place which disproves the rental arrears allegations made by (**[12]).
>
> I also lodge a formal complaint against (**) for providing false information, unlawful harassment for arrears not due, and unprofessional conduct.

---

[9] Rent Reduction Agreement at pages 56 and 57 of Document titled *10. Affidavit – Sharnie Symes – Supreme Court S ECI 202301259 (sealed)-EFD_20231020090607*.

[10] Page 33, paragraph 31 of Appendix D referenced in the Renter's written submissions dated 31 July 2023.

[11] Page 36, paragraph 40 of Appendix D referenced in the Renter's written submissions dated 31 July 2023.

[12] With the agent named no longer involved in this matter, her name has been removed as the same is not relevant to the matters I need to take into account in this proceeding.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

> * Appendix 1 provides the email trail resulting from the first false arrears notices I received from (**).
>
> * Appendix 2 provides the email trail resulting from the recent unlawful arrears notices and provides irrefutable evidence that (**) tried to frustrate my right to seek an extension to the reduced rent agreement to stop her harassment by blocking my emails. I note that I put off formally applying for the rent reduction agreement I was entitled to by law for several months significantly contributing to my own financial hardship during the COVID lockdowns.
>
> Needless to say, I will no longer be dealing with (**), nor will I be entering into any further correspondence on this subject; this pointless bullying has caused enough unnecessary stress and inconvenience. I have as such blocked all emails from (**)[13] and, as Leann Birch has refused my request to be provided with another agent, I will contact the owners directly for any urgent matters. I will keep my own rental records as the receipts issued by (**) have often been incorrect (an offence under s43 of the Act) and I do not intend to waste further time seeking to have your office correct them.
>
> As the owners are not responsible for the behaviour of your agents, I will consider repaying the rent reduced amount directly to the owners after my financial circumstances have stabilised as an act of goodwill, but only if I have peaceful enjoyment of the property from here on and do not suffer any further negative consequences as a result of Ray White's mismanagement – such as trouble recovering my bond or false information being provided to the renters database.
>
> You are required by law to provide a copy of this letter to the owners. I hope it encourages them to get a better agent.

29 The Renter says the agency confirmed on 16 November 2021 that the letter had been provided to the Rental Provider.[14] It is not clear if the Rental Provider had the correspondence or was aware of it before giving instructions to issue the first notice to vacate to the Renter.

30 On 15 November 2021, the Rental Provider sent the Renter a notice to vacate for the Daughter to move in ('1st NTV'), with a termination date of 22 January 2022, after the end of the fixed term period. The 1st NTV was accompanied by a statutory declaration sworn by the Rental Provider on 15 November 2021 which stated:

[13] The names of previous agents at the agency have been removed from these reasons, while the name of the agent who represented the Rental Provider at the hearing, Ms Birch, has remained.

[14] The claim is made in an email dated 14 March 2023 filed in proceeding R2023/6067 to VCAT and annexed as Appendix B in this proceeding and in paragraph 42 of Appendix D.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

> I will be placing my 27 year old daughter (*name deleted*) into my property situated at (*address deleted*[15]) to become a permanent resident. (*The Daughter*) has a intellectual disability.

31 The Rental Provider says the notice was sent in circumstances where his cancer treatment required him and his wife to be in Melbourne more often, limiting the support that could be given to his Daughter, whilst the private rental entered into by his Daughter was proving costly, with the requested NDIS funding package refused.

32 In response to the 1st NTV, the Renter emailed the agents on 22 November 2021 advising that she would vacate the rented premises:

> I confirm receipt of the Notice to Vacate and confirm I will be out of the property by the date directed and that I am lodging a formal complaint with Tenancy Victoria for the appalling treatment I have been subjected to by Ray White Benalla.

33 The Renter also requested repairs to the premises, including the shower, hot water tap and concrete driveway.

34 The Renter did not vacate as indicated and on 19 December 2021, wrote to the Rental Provider directly advising there was an issue with the validity of the 1st NTV because the statutory declaration attached did not comply with mandatory requirements:[16]

> I am forwarding you a copy of correspondence between your property agents, Leann Birch and Peter Symes of Ray White Benalla, and myself so that you are aware that they are engaging in illegal practices on your behalf as this is ultimately your responsibility.
>
> Leann Birch confirmed that you were sent a copy of my letter and reconciliation dated 8/11/2021 (pages 1-16) in her email dated 16/11/2021 (which was the day after you signed your statutory declaration (refer page 17). The only response I received to this reconciliation and letter was a Notice to Vacate, with a statutory declaration made by yourselves (refer pages 18-21). There was no attempt made to correct the record if it was wrong and this is an admission that my rental record is correct and that your rental agents had no legal right to put me into arrears on the rental register.
>
> As you can see on page 22, the statutory declaration is invalid as it does not comply with the Residential Tenancies Act 1997. When I drew this to the attention of your rental agents (page 22), their response was that they intend to evict me illegally anyway (page 23). Pages 24-27 is a record of my response to this threat.
>
> This dispute arose as a consequence of the rent relief grant but I had problems with your rental agent's record keeping previously,

[15] For privacy reasons the address of the rented premises has been excluded from these reasons.
[16] Page 108 of the document titled *Summary of Proofs R202314647-00_BBD_20240308160231*.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

> as outlined in my letter of 8.11.2021. They are required by law to keep accurate records that align with rental agreements.

35 The Renter then placed the Rental Provider on notice that he needed to take action against his agents, or would be held personally liable-

> In this letter, I had offered to pay the rent top up directly to you as a gesture of goodwill. This offer is now withdrawn and you will be fortunate if you do not end up with serious fines and a compensation claim against you should you allow your rental agents to continue along this path of illegal intimidation, threats, bullying and harassment.

36 The Rental Provider did not respond to the correspondence.

37 Between November 2021 and January 2022, the Renter and the agents corresponded over the validity of the 1st NTV, with the Renter confirming that she would not be leaving without an order of the Tribunal - "*I will not be vacating the property until all legal requirements are satisfied and the necessary orders are issued by VCAT.*"[17]

38 Around 21 January 2022, the Rental Provider withdrew the 1st NTV, as a result of the issue regarding its validity. He says for the next six months he focussed on his health and his recovery.

39 On 8 July 2022, the Rental Provider sent the Renter a Notice of Proposed Rent Increase. The notice stated the rent would increase by $20 a week, to $350 per week, commencing from 14 September 2022.

40 On 11 July 2022, the Renter advised she would be challenging the increase and would be applying to Consumer Affairs Victoria ('CAV') for a rental assessment[18] due to her belief that the increase was too high given the many repair issues she had experienced with the rented premises. However, the Renter did not have Consumer Affairs attend for an assessment, because she says they required a fee to do so.[19] The Renter has not been granted leave to challenge the notice at the Tribunal without a CAV report. The Renter says she is challenging the increase as part of her compensation claim[20] (although the same is not clear from the documents filed in that proceeding[21] and she has not sought leave under section 46(3) to challenge the notice without a CAV report).

---

[17] Email from the Renter to Ray White Benalla dated 17 December 2021 at paragraph 57 of the Affidavit at Appendix D.

[18] Email from Lena Anderson to Leann Birch dated 11 July 2022 at 15:12.

[19] Paragraph 67 of the Renter's written document titled Appendix D which says "*Consumer Affairs advised I would need to seek funding through Beyond Housing Wangaratta to get the on-site rental assessment required to assess the condition of the property. I declined due to the incorrect and misleading advice I was given by Beyond Housing Wangaratta in respect of the invalid Notice to Vacate in 2021.*"

[20] Transcript of proceedings from the Supreme Court Appeal on page 65.

[21] Application and document titled *VCAT Particulars_RW_GNC_20221216171231* filed in proceeding R2022/33199.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

41 On 31 August 2022, the Renter emailed the agents asking for repairs to be conducted at the rented premises and disputing the basis for the rent increase:

> I note that the market analysis you provided as justification for the rent increase was not independent and included houses that had upgraded kitchens and laundries so cannot be used as a reliable comparison. There are two-bedroom properties under $330 and I will argue that I only agreed to pay this rent in 2020 as I was promised there would be weekly repairs carried out to update the property, as already mentioned. Please advise when these repairs will be undertaken. I will not be paying the increased rent until the urgent repairs are completed.

42 The Renter also stated that the Rental Provider could not personally attend the premises to carry out any of those repairs as the Rental Provider "*has shown himself to be willing to lie under oath (and use his disabled daughter in his lie) so is dishonest and untrustworthy.*"

43 Also attached to the email was a list of repairs, including-

- a gas and electricity safety check,
- doors,
- exhaust fan in the kitchen,
- damp and mould in the house,
- unclean gutters,
- a split system heating and cooling unit,
- the driveway, and
- the need for a power-point in the back room.

44 On 5 September 2022, the agents sent a response to the Renter advising that trades had been engaged to carry out the identified repairs:[22]

> Joel Bate (Builder) will be in contact with you to arrange entry to repair the door handles and trim the doors, look at the leak (exhaust fan) and look at the concrete driveway.
>
> Daniel Symes (Electrician) will be in contact with you to arrange entry to replace the exhaust fan, electrical safety check and install a power point in the back room (you will need to direct him as to where you want it installed).
>
> Ian from Round the Track will be in contact to arrange access to clean the guttering.
>
> Quickgas from Wangaratta will be in contact with you to arrange entry to inspect and service the heater.

[22] Email sent from Leanne Birch to the Renter on 5 September 2022 as detailed in paragraph 71 of Appendix D.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

> I have left a message with a contractor to inspect for dampness and mould and will let you know once they have made contact.

45 A series of work orders was provided evidencing the engagement of trades and requests that were made, with text correspondence of attempts by one trade to arrange a suitable time with the renter, and invoices for works that were undertaken.[23]

46 On 26 October 2022, the Rental Provider issued the Renter with a second notice to vacate for the Daughter to move into the premises ('2nd NTV'). The notice had a termination date of 3 January 2023 and was accompanied by a statutory declaration from the Rental Provider dated 20 October 2022 which stated:

> I will be placing my daughter (**), who has an intellectual disability and is dependent on me into my property situated at (*address*) on a permanent basis. I understand that I must not re-let the premises to anyone other than (*the Daughter*) for use primarily as a residence before the end of 6 months after the date on which the notice was given unless approved by VCAT.

47 On 28 October 2022, the Renter says she contacted the agents and advised that she had not heard from the trades that had been promised in early September 2022, except for the builder who attended. She also claimed that she was being asked to leave only so that the Rental Provider didn't have to carry out repairs - "*It appears these irresponsible owners are now trying to evict me to avoid having to carry out these repairs, which is unacceptable and illegal.*"[24]

48 At this time the Renter was also given a third-party software link to pay her rent via direct transfer. The Renter says she refused:[25]

> … due to the risks involved in downloading unauthorised third-party software onto a device and as she believed the defendant was using it as a means to coerce her into implied acceptance of the invalid rent increase...

49 The agent provided the Renter with bank account details to enable her to pay the rent.

50 The Renter also advised the Rental Provider that if he wanted possession, his Daughter would be required to attend any future hearing:[26]

> Please advise the owners that *(the Daughter)* will be required to attend the hearing. As a Disability Support Worker I know you do not go from Yooralla to being able to live independently as it is her lack of independence that qualifies her for Yooralla assisted living.

---

[23] Pages 73 to 89 of document titled *10. Affidavit – Sharnie Symes – Supreme Court S ECI 202301259 (sealed)-EFD_20231020090607.*
[24] Paragraph 76 of the Renters document titled Appendix D.
[25] Paragraph 14(c) of the Renters Amended Statement of Claim lodged 25 February 2024 in the Federal Court.
[26] Email from Lena Anderson to Leann Birch dated 28 October 2022 at 10.28.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

> If this disabled young woman is being used by her parents to try to unlawfully evict me it will be reported to Yooralla and the NDIS as an abuse.

51 In correspondence of 6 November 2022, the Renter asserted that the agents were also using the Daughter to achieve their plan to have her evicted:[27]

> A fool can see you are seeking to establish the rent at $350 pw without an order and evict me with a false statement so you can increase the rent again for the next tenants – and all without having to carry out the costly repairs required to make the property safe…You appear to have no issue with stomping on peoples' legal rights, including the right *(the Daughter)* has not to be used in your diabolical little scheme. People with disabilities have prescribed rights under law to protect them from being exploited by others….I am seeking legal advice in respect of my rights to compensation for your negligence and mismanagement of my tenancy rights … this is now a matter for the court and I will not be arguing with you any longer.

52 By letter dated 11 November 2022, the Renter advised the agents that she would be seeking compensation against them for the companies breaches of the *RT Act* related to "*significant inconvenience*", by lodging proceedings in the Magistrates Court of Victoria.[28] She also claimed that she would take steps to have the Daughter attend the hearing and required a copy of the letter to be sent on to the Rental Provider:

> *(The Daughter)* will be subpoenaed to attend the hearing to prove statements made by the owner, David Thomas Sharpe (a former Victoria Police Officer), in his Statutory Declarations supporting the two Notices to Vacate were false and perjurious, after which a criminal complaint will be lodged with Victoria Police, and another with the Director of Consumer Affairs. I am advised that there are 'harsh penalties for rental providers who breach the Act', the hardest being up to $27,742.50 for each of the illegal evictions.

53 The Tribunal has not been made aware of any proceeding lodged in the Magistrates' Court of Victoria against the agents but was expressly directed during the hearing to a Federal Court Proceeding ('FC Proceeding') and the amended statement of claim filed in that proceeding.[29]

54 On 24 November 2022, the Renter lodged a claim for compensation in the Tribunal ('Compensation Application') against the Rental Provider for the amount of $8,436.54[30] comprising the following:

> 1. The Respondent pay the Applicant compensation for breach of s501[31] in the amount of $1490.00

---

[27] Email of 6 November 2022 from Lena Anderson to Leann Birch of Ray White Benalla.
[28] Letter from Lena Anderson to Peter Symes dated 11 November 2022.
[29] MLG 1697 of 2023, Federal Circuit and Family Court of Australia, between Plaintiff, Lena Anderson, and Defendant, Morgan Crest Pty Ltd, trading as Ray White Benalla.
[30] Proceeding R2022/33199. The Compensation Application has subsequently been amended by correspondence from the Renter dated 16 January 2024 to be $15,842.51.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

2. The Respondent pay the Applicant compensation for breach of s68[32] in the amount of $600

3. The Respondent pay the Applicant compensation for three breaches of s67[33] (also refer s91p[34]) in the amount of $6,007.14

4. The Respondent pay the Applicant compensation for breach of Minimum Standards[35] in the amount of $272.00

55 With the details of the application referencing a failure to carry out urgent repairs such as an electrical safety check, the matter was entered into the Tribunal case management system as an application seeking an urgent repair under section 73 of the *RT Act*.[36]

56 The Renter objected to the Tribunal's classification of her claim and clarified that she was seeking only compensation and did not want any urgent repairs orders:[37]

> You have no right to change it. If you are not going to hear the application as made you need to provide reasons. This time I will take it to the Supreme Court as your interference in my owners' corporation counter-claim cost me my home and put me in this situation. This is the subject of a Human Rights claim (see Anderson V Westpac Facebook page).
>
> I have rights under law to claim compensation. Some Registrar at VCAT is not going to deny me those rights.
>
> I will write to the Attorney-General and VCAT President next week to stop VCAT Registrars further manipulation with this claim.

57 The matter was referred to a Member and by order was re-classified as seeking compensation only and the Renter put on notice that "*a failure to seek a repair order may be a failure to mitigate loss and therefore can*

---

[31] Section 501 of the *RT Act* is a penalty provision and states that it is an offence to make a false representation in relation to a residential rental agreement or residency right.

[32] Section 68 of the *RT Act* is a duty provision applying to rental providers that they must ensure that the rented premises are provided and maintained in good repair and in a reasonably fit and suitable condition for occupation.

[33] Section 67 of the *RT Act* is the rental provider's obligation to take all reasonable steps to ensure that the renter has quiet enjoyment of the rented premises during the residential rental agreement.

[34] Section 91P of the *RT Act* is a penalty provision that makes it an offence for a rental provider or a person acting on their behalf to require, compel or attempt to compel a renter under a rental agreement to vacate the rented premises, except in accordance with the Act.

[35] Section 65A of the *RT Act* states that a rental provider must ensure that premises entered into by a renter on or after 29 March 2021 meet prescribed rental minimum standards on or before the renter enters into occupation. The *Rental Minimum Standards* are contained within Schedule 4 of the *Residential Tenancies Regulations 2021*.

[36] The case management system limits the section numbers being displayed, despite an application comprising multiple section numbers. As such, and in light of the obligation on the principal registrar to assist self-represented litigants, the application is allocated a section number by Tribunal staff that applies to the most urgent issue raised in the application and will be the section number that will appear on any confirmation of lodgement or notice of hearing. This section number can be modified during the course of the proceedings to reflect other matters being dealt with at the relevant time.

[37] Email from the Renter to VCAT dated 25 November 2022.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

reduce the amount of compensation award, see Ball v Gavin [2016] VCAT 286."[38]

58 The Compensation Application, like all bond and compensation claims lodged at the Tribunal prior to 1 October 2023, is being managed by the Backlog Recovery Program. It is yet to be listed for hearing, which has been a source of great frustration and angst for the Renter, who has repeatedly made requests for her claims to be heard before any possession hearing or at least concurrently with them.

59 On 4 January 2023, the Rental Provider made application for possession based on the 2nd NTV ('Initial 91ZZA Application') stating that he would like possession to allow the Daughter to "*reside in the premises on a permanent basis*".[39]

60 The Renter immediately wrote to the Tribunal asking for her Compensation Application to be heard with the Initial 91ZZA Application:

> I therefore seek the following orders: a) this application be joined to case R2022/33199/00 with Mr Sharpe as Respondent, and b) Mr Sharpe be directed to file a Response to that application.
>
> I give notice that I intend to appeal any orders that do not give full consideration to my rights under the *Residential Tenancies Act 1997* to the Supreme Court of Victoria.

61 A Member made an order the same day refusing the concurrent hearing request on the basis that the two applications raised different considerations.

62 On 7 January 2023, in an email to the Rental Provider's agent, the Renter advised she would be taking steps to stop the Daughter from moving into the rented premises:

> As you have failed to provide a response to the allegations repeated in the Particulars of Claim I emailed you on 16/12/22, I intend to send a copy of it and the VCAT possession application to Yooralla and the NDIS to alert them that David and Amanda Sharpe are proposing to remove (*the Daughter*) from Yooralla's care to live independently in a house that does not meet safety standards and is without adequate heating and cooling.
>
> If the application is dismissed, I will send David Sharpe's statutory declaration instead.
>
> (*The Daughter*) needs to be protected from her parents.

63 On 20 January 2023, in response to the Tribunal refusing the request for the Compensation Application and the Initial 91ZZA Application to be heard together, the Renter wrote to the agents advising that she would not be making any further payment of rent:[40]

---

[38] Order of the Tribunal in proceeding R2022/33199 dated 25 November 2022.
[39] Proceeding R2023/211.
[40] Email from Lena Anderson to Peter Symes of Ray White Benalla dated 20 January 2023 at 16.48.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

> I advise that rent payments for (*the rented premises*) will be put on hold until the resolution of the financial claim I lodged with VCAT in October 2022.
>
> As already advised, any possession or other orders produced by VCAT at the hearing on 14/2/23 that do not reflect my rights under law will be appealed to the Supreme Court.
>
> As VCAT refused to combine the two applications for the sake of efficiency, the owner will need to be prepared for several months of litigation as they separately move through the court system.

64 On 25 January 2023, the Rental Provider issued the Renter with a notice to vacate for rent arrears under section 91ZM of the *RT Act* ('3rd NTV'). That notice became the subject of an application for possession ('91ZM Application').[41]

65 The Initial 91ZZA Application, based on the 2nd NTV, was struck out at hearing on 3 March 2023 when the Tribunal determined that the notice was invalid as it *was not accompanied by the documentary evidence approved by the Director of Consumer Affairs Victoria, namely a statutory declaration in the prescribed form*. In essence, parts of the statutory declaration that provided the address of the Rental Provider, had been redacted when given to the Renter.

66 The Rental Provider immediately issued the notice to vacate that supports *this* application for possession for the Daughter to move into the rented premises ('4th NTV'), accompanied by an unredacted statutory declaration dated 3 March 2023 in effectively the same terms as the redacted statutory declaration that accompanied the 2nd NTV. The 4th NTV had a termination date of 10 May 2023.

67 The following day, on 4 March 2023, the Renter made application to the Tribunal for urgent and non-urgent repairs ('First Repairs Application').[42] The First Repairs Application detailed the repairs requested in August 2022 and that have been the subject of dispute over access since then:

> Urgent repairs (s73):
>
> - fix electrical wiring, provide electrical safety certificate
> - replace split system
> - replace kitchen exhaust fan
> - fix front & back door and put lock on laundry door
>
> Non-urgent repairs (s75):
>
> - remove jutting concrete from driveway
> - damp and mould check

[41] Proceeding R2023/6067.
[42] Proceeding R2023/7272.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

- install powerpoint in back room.

68 The Rental Provider's agent arranged for quotes associated with the electrical works to be done at the premises, raising a work order on 6 March 2023 asking the trades to contact the Renter directly for access.[43] When one trade contacted the Renter, she responded by text as follows:

> I'm waiting for orders from VCAT as I've already had people out to quote in Sept/Oct and nothing happened (except for being given a notice to vacate). I've just spent months fighting it so not going through that again. Should have orders this week and will be in touch then. Lena.

69 The agent claims that the Renter denied access to the tradesperson engaged to carry out works on the doors and locks at the property. A letter was provided by Viv Patterson who claims he attended the property on 7 March 2023 and "*the tenant answered the door and advised that she would not be allowing (*the agents*) in to do the repairs as she had issues with Ray White which was a VCAT issue*."

70 On 16 March 2023, the Renter sent correspondence to the Tribunal setting out her dissatisfaction with the way that VCAT had handled cases involving her. She objected to a number of Members having any future involvement in proceedings related to the rented premises.[44] The correspondence also took aim at the Rental Provider's plans to move his Daughter into the rented premises:

> I have also provided the three statutory declarations sworn by owner David Sharpe in respect to him claiming he is 'moving his intellectually disabled daughter into the property as she is dependent on him" to her disability carer and accommodation provider, In Life Independent Living and the NDIS, as her future NDIS funding will be impacted if the claim is true. If the claim is not true, then David Sharpe is breaching her basic human right to not have her disability exploited for his nefarious purposes.

71 On 21 March 2023, the Renter advised both the Tribunal and the agents for the Rental Provider that she would be challenging the 4th NTV:[45]

> **Attention: VCAT Registrar**
>
> I note for the record that I am challenging this fourth Notice to Vacate issued by Ray White Benalla on behalf of owner David Sharpe on 3 March 2023, again on the grounds that it is of no effect as it is made in retaliation for disputing arrears and requesting repairs, and that the statutory declaration

[43] QU-0141 Quote Request dated 6 March 2023 to Ferguson Air and Electrical for electrical wiring check and electrical safety certificate, Split systemservice – reported tripping and Exhaust fan check – reported leak and power tripping.
[44] Email from Lena Anderson to VCAT dated 16 March 2023.
[45] Email from Lena Anderson to renting@vcat.vic.gov.au and various addresses for Ray White employees dated 21 March 2023 and headed "Challenge to Notice to Vacate – Section 91ZZA Occupation by Residential Rental Provider or Family.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

> accompanying it contains false information – as has been reported to the Tribunal in communications relating to VCAT ref: 2022/33199, 2023/211, 2023/6067 and 2023/7272.

72 The Renter did not, and has not, made a separate application under section 91ZZS[46] of the *RT Act* challenging the validity of the notice to vacate supporting this proceeding, but has raised her defence and opposition to it, in all material before the Tribunal.[47]

73 The 91ZM Application came on for hearing in the 91ZM callover list on 24 March 2024, and in the absence of the Renter, a possession order was made.[48]

74 Despite the Renter's non-attendance at the possession hearing and her potential right to a review under section 120 of the *VCAT Act*, on 28 March 2023, the Renter lodged the SC Appeal against that decision.[49]

75 In the first week of April 2023, the dispute over access to the rented premises again flared, this time over a notice of entry[50] sent by the agents for a gas and electrical safety check. The Renter claimed the time was *not convenient* and the agent agreed to reschedule the date. When a subsequent date was proposed with the agent apologising for *the inconvenience*, the Renter saw red:[51]

> Ms Herd, being issued with illegal Notices to Vacate, spending months trying to get you lot to abide by the law, forced to defend myself against your lies in VCAT and now being forced to appeal to the Supreme Court is not "an inconvenience". This is was (*sic*) all the consequence of a bunch of hacks lying their way to help a greedy low-life save a few bucks through repeated criminal acts using his own defenceless disabled daughter. What fuckers you all are. I won't be satisfied until you're shut down.

76 The Renter concluded the email by placing further conditions on the trades being granted access:

> That time will suit and I will expect official certificates within two days of the inspection.

77 Over the next hour, emails went back and forth between the agents and the Renter about the provision of the compliance certificates, with the Renter

---

[46] Section 91ZZS of the *RT Act* enables a renter before, or at the hearing of an application for possession in respect of a notice to vacate given under section 91ZZA, to apply to the Tribunal to challenge that notice. Such an application must be made within 30 days after the notice to vacate is given.

[47] Despite the strict timelines on making such an application, and no extension of time being sought under section 126 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ('*VCAT Act*'), I have considered the matters raised as if the Renter had lodged her own application to challenge the notice for the sake of completeness.

[48] As part of the Tribunal's case management strategy to deal with listing delays following the Covid-19 lockdown, bulk listing and call-over hearings are being conducted for some application types.

[49] Notice of Appeal in proceeding S ECI 2023 01259 in Appendix G of the Renter's documents.

[50] Notice to Renter dated 4 April 2023 sent by registered post, with entry scheduled for 14 April 2023 at 8:00AM and notice also email on 5 April 2023 to the Renter.

[51] Email from Lena Anderson to Ray White real estate dated 5 April 2023.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

advising access would be denied and refusing to engage in any further discussion:[52]

> **Agent**: Thanks for your feedback Lena, I will go ahead and send a new notice of entry today for the inspection of the gas and electrical safety compliance to take place on the 21/04/2023 at 3:00pm. Certificates will be supplied once they are available.
>
> **Renter**: Entry is conditional on confirmation that I will get the certificates within two business days. I'm not opening the door for more tradesmen so you can use this process as a delay tactic to pretend you're complying with the RTA while you wait until you can apply for your next possession order. Been there done that.
>
> **Agent**: I can't give you confirmation that the certificates will be completed within two days. The trades are responsible for these certificates, I can only confirm that I will get them to you as soon as they have been supplied to me.
>
> **Renter**: Then we will have to reschedule to a date after the appeal so I can seek orders from the Supreme Court to ensure an orderly and lawful progression to compliance. I'm confident the court will understand why I do not trust the motivations of Ray White Benalla once it hears the evidence of all that you lot have subjected me to.
>
> **Renter**: Further to our previous emails, I hereby confirm that all further communications will be put on hold until the appeal currently underway in the Supreme Court has been heard… I will therefore not be granting entry to anyone, or responding to further emails, until the Supreme Court has made a decision as to how VCAT should proceed with the applications it is yet to hear, in order to prevent further illegal practices designed to deprive me of my rights under law.

78 The First Repairs Application was struck out on 21 April 2023 as the Renter failed to pay the application fee. The Renter has not sought waiver of the fee or reinstatement and it remains struck out.

79 With the various disputes at the Tribunal continuing, the SC Appeal having been lodged, no certainty about possession being returned and with financial pressure mounting, the Rental Provider says a decision was made for a new property to be found for the Daughter. On 10 May 2023, Mrs Sharpe entered into a new rental agreement for a four-bedroom home, with the Daughter sharing with another renter who also requires support, with rent payable between the two of $480 a week. The fixed term period of this rental agreement ends on 18 May 2024.

80 On 12 May 2023, the Rental Provider made application for possession based on the 4th NTV ('This 91ZZA Application').[53]

[52] Emails between Lena Anderson and various staff at Ray White real estate dated 5 April 2023.
[53] Proceeding R2023/14647.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

81 On 23 June 2023, the Renter sent the Rental Provider a breach of duty notice alleging amongst other things that the Rental Provider was in breach of section 67 of the *RT Act* in relation to his actions seeking possession for the Daughter to move into the rented premises:

> You issued a fourth Notice to Vacate on 3 March 2023 for the same reasons given in the first two Notices to Vacate referred to in a. and b. above and are seeking possession based on that Notice (VCAT ref: 2023/14647) but have repeatedly refused to provide evidence that would satisfy the evidentiary requirements of the application, as required under case law and outlined in my Submission on Authorities provided to this hearing and the hearing referred to in b. above.

82 The breach of duty notice required the Rental Provider to provide satisfactory evidence or withdraw This 91ZZA Application and pay $12,495 in compensation for all matters raised in the breach notice.

83 On 30 June 2023, the agents responded on behalf of the Rental Provider:[54]

> In regards to your breach notice, dated 23 June 2023, the owner believes that he is not in breach as a rental provider under the Residential Tenancies Act.
>
> Under instruction from the rental provider, we have made numerous attempts to enter the property and have works completed, including issuing a notice of entry in an effort to have such urgent works undertaken. Unfortunately, you have denied access and asked for unreasonable timeframes to provide the compliance reports (2 days) that cannot be guaranteed by us or the rental provider, as the timeframe of issuing such documentation is dependent on the contractor. We, of course, had requested the documents to be sent immediately.
>
> We have issued you all the evidence to support the Notices to Vacate, which were provided via the summary of proofs (attached) prior to all of the VCAT hearings and the affidavit (attached) for the current Supreme Court hearing.
>
> The Notice to Vacate, VCAT reference number R2023/6067 will not be revoked.
>
> Notice to Vacate, VCAT reference R2023/14647 will not be withdrawn and will proceed to the hearing scheduled at VCAT on 17th July 2023 at 3:00pm. You will be provided our Summary of Proofs 7 days prior to the hearing.
>
> Please find attached Notice of Entry to allow for the plumber, electrician and handyman to undertake the maintenance.
>
> Ferguson Air and Electrical – July 10th 10am

[54] Email from Sharni Symes to Lena Anderson dated 30 June 2023 at 15:54.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

> Viv Patterson Repairs and Maintenance – July 10th 11am
>
> QuickGas – July 10th 2:30pm
>
> The trades will contact you directly for access.
>
> As you are aware, you are required to pay your rent at $330 per week as ordered by the Supreme Court on 24th May 2023.

84 Three notices of entry were attached, one for each of the trades' attendances. In text correspondence that followed when the agent sought to confirm that the Renter would allow the electrical inspection, she responded:

> No, I didn't agree to that time and it's not convenient. It will have to be after 13/7 and the electrician will need to agree to me videoing the inspection for a court hearing. The gate will be locked on 10/7 so it will be a waste of time him coming then.[55]

85 Additionally, the Renter refused access for the other inspections advising that another time would be required after 13 July 2023 and that those tradespersons who attended needed to agree to be filmed. The Renter also refused access to the Quickgas representative saying - "*The gas has already been checked. Ray White are idiots.*"[56]

86 On 3 July 2023, the Renter lodged an application[57] seeking compensation based on the breach notice ('Breach Application') and this matter has been referred to the Backlog Recovery Program for listing management, along with the Compensation Application.[58]

87 The discussion over arranging repairs then continued. The agents for the Rental Provider advised that the trades would not attend on the rescheduled date of 13 July 2023 if they were going to be filmed, and encouraged the Renter to make a repairs application to the Tribunal to resolve the issue:[59]

> All contractors have explicitly expressed that they will not consent to being filmed and they are not to be filmed or recorded in any way whilst on the property. There is no legal requirement for the contractors to be filmed and doing so without their consent is a breach of their privacy. Should you wish to proceed with the date of 13 July and agree to not video or photograph the contractors at any stage, they will accommodate a time to ensure the works are undertaken. Should you decide to pursue this further, you are welcome to put this matter forward at the tribunal under an urgent repair application to ensure a date, time and reasonable conditions are prescribed.

---

[55] Screen shot of text message dated 7 July 2023.
[56] Screen shot of sms message on computer system from Quickgas, page 64 of 129 of document titled *Summary of Proofs R202314647-00_BBD_*
[57] Proceeding R2023/20091.
[58] Proceeding R2022/33199.
[59] Email from Sharni Symes, Ray White Benalla to Lena Anderson dated 6 July 2023.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

88 The Renter said she would not permit trades to attend without being videoed and suggested that any attendance to carry out repairs would have to wait for her applications to be heard:[60]

> There is no law that states I cannot video people attending my home and it is right and reasonable to do given this is a matter before the courts in which the facts are disputed. If they claim I intimidated them then I will absolutely not agree to them attending without agreeing to be videoed as this will open me to further false allegations. I have the texts to prove they are banal and non-threatening. Under the circumstances (it) will have to wait until my application is heard. I've waited almost a year already.

89 On 16 August 2023, the agent for the Rental Provider emailed the Renter advising of an inspection at the premises planned for between 10am and 12pm on 23 August 2023. On the date of the inspection at 11:53am, the Renter advised she would not be permitting access:

> I note that the notice to enter the property emailed below was not served correctly (refer attached) so entry will be refused.
>
> As the failure to comply with laws, rules, regulations and orders is a recurrent problem and goes to Ground 2 of my appeal, I am including MA Legal on this email.[61]

90 On 19 September 2023, judgement was handed down in the SC Appeal.[62] The Supreme Court granted the Renter leave to appeal the possession order made in the 91ZM Application on 24 March 2023,[63] setting-aside order 1 and 3 and remitting the matter back to VCAT. The Court dismissed the appeal in relation to the order that stated the Renter owed $3,880 in rent.

91 With the SC Appeal concluded, the dispute over access to carry out repairs continued. In October 2023, the agents advised the Renter that they had been unable to find suitably qualified trades who would consent to being filmed while working at the rented premises –

> We urge you to consent to have tradespeople access the property for the purpose of carrying out electrical and gas safety checks, without filming the tradespeople.[64]

92 The Renter refused to budge, maintaining her entitlement to film anyone who attended:

> Please ensure you provide the names of the electricians and plumbers who refuse to attend if the inspection is filmed in your Breach of Duty Notice so I can provide a list of names of those who have no problem with the inspection being filmed.

---

[60] Email from Lena Anderson to Sharni Symes of Ray White Benalla dated 6 July 2023.
[61] Document titled *12. Email 16.8.2023 and 23.8.2023_entry_EFD_20231020090607.*
[62] *Anderson v Sharpe* [2023] VSC 559.
[63] Proceeding R2023/6067.
[64] Email trail contained in document titled *13. Email 13.10.2023.*

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

> As stated repeatedly, ALL future attendances to the property in connection with my lease agreement will be filmed, as is my right under law (and just as your own inspections are).
>
> If a tradesperson refused to agree then it is clear they have bad intent.[65]

93 On 3 November 2023, the Renter lodged a further application for repairs ('Repair Application')[66]. In that application, she referenced the First Repairs Application that was struck out, and the items that have been the subject of the dispute over access –

> Orders under Section 73 (urgent repairs) of the Residential Tenancies Act 1997:
>
> Residential rental provider conduct urgent repairs as reported in the Tenants Repair Request Form dated 31.8.2022 and in application R2023/7272 (wrongly dismissed by the Tribunal):
>
> 1. Gas and electricity safety check (s68A, s68B);
> 2. Front, back and laundry doors – doors trimmed, door handles fitted and locks repaired (s70);
> 3. Exhaust fan in kitchen – leaks filthy water when it rains (68A);
> 4. Damp and mould check (Schedule 4, Rental minimum standards);
> 5. Replace inefficient split heating/cooling system (23 years old) (s69);
> 6. Remove jutting concrete in driveway (s68A);
> 7. Install power point in study as per condition report (s35).

94 The Repair Application came before the Tribunal on 6 December 2023 with the following orders made by consent:

> The residential rental provider must carry out the works specified in the renter's application subject to the following conditions (as agreed):
>
> The rental provider's agent will endeavour to have all works completed by suitably qualified tradespersons no later than 22 December 2023, with the exception of the concrete driveway (item 6 in the application), which will be rectified by 31 January 2024.
>
> When a work order is raised for a particular tradesperson, the agent will provide a copy of that work order to the renter via email. The work order will include the name of the tradesperson or company

[65] Email dated 13 October 2023 at 5:17pm from Lena Anderson to Sharni Symes of Ray White Benalla.
[66] Proceeding R2023/33450.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

attending and the qualification / area of expertise of that tradesperson or company.

The agent will also ask the tradesperson engaged whether that person gives express consent to an audio recording of Ms Anderson (but not the tradesperson) explaining the issue or repair requested at the start of the visit, with the audio to then be turned off for the remainder of the visit. The agent will notify Ms Anderson, at least 24 hours prior to the tradesperson's entry, whether or not the tradeperson agrees to such audio recording during the visit.

The tradesperson or agent will notify the renter of the date and time (or time frame) when they will attend to undertake the work, via text message.

If the above conditions are met, Ms Anderson must allow entry to the rented premises to the nominated tradesperson or company and take all such steps as are necessary to enable that person to complete the work, even if the tradesperson has refused the proposed audio recording.

Ms Anderson will make herself available to facilitate entry to the rented premises from 11 December 2023 onwards for a two-week period. Entry dates and times for the purposes of repairing the concrete driveway will be negotiated between the parties.

Ms Anderson may only make an audio recording of herself (but not the tradesperson) explaining the issue or repair requested at the start of the visit, with the audio recording to then be turned off for the remainder of the visit. This may only occur if the tradesperson gives express consent prior to the visit to such audio recording.

95 By correspondence to the agent, copied to the Tribunal, the Renter on 22 December 2023 requested copies of the reports provided by the tradespeople who had attended the premises. The Renter claimed there was an obligation for this information to be provided under the discovery obligations related to the FC Proceeding. The Renter also emailed VCAT on 15 January 2024 seeking urgent orders after she formed the view that the Rental Provider was not going to comply with the consent repair orders.[67]

96 However, at this time the Rental Provider did request another hearing of the Repairs Application claiming that the Renter was impeding his ability to comply with the repair order.

97 The further hearing of the Repairs Application was conducted over two days on 14 March 2024 and 25 March 2024. As the renewal had not concluded prior to the hearing of This 91ZZA Application on 15 March 2024, I have not taken it into account.

98 The FC Proceedings against the agents, Morgan Crest Pty Ltd, is scheduled for a final hearing commencing on 7 August 2024.

[67] Federal Court Amended Statement of Claim, paragraph 21(f), dated 25 February 2024.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

THIS 91ZZA APPLICATION

99 It is this history of the rental agreement that is relevant to the issue of whether or not the Rental Provider had genuine grounds to give the notice or whether he was motivated by a desire to end the rental agreement with the Renter. This 91ZZA Application also requires the Tribunal to consider the interest and impact on the parties, by reference to their actions on others, in the context of an application where the owner's family member is moving into the property.

100 An application for possession requires the Tribunal to consider the validity of the notice to vacate supporting the application (in this case the 4th NTV), and then whether a possession order **must** be made by reference to the matters under section 330 of the *RT Act* including whether it is reasonable and proportionate to make a possession order.

Is the 4th NTV valid?

101 A residential rental provider seeking to rely on a notice to vacate must prove that they had grounds to give the notice, in accordance with the relevant section of the *RT Act* relied on, and that sufficient notice of the termination date was provided. They must also establish that the notice to vacate contains certain mandatory requirements and that it was validly given.

102 The basis for the Rental Provider to give the Renter the 4th NTV is grounded in section 91ZZA of the *RT Act*:

> **91ZZA Premises to be occupied by residential rental provider or provider's family**
>
> (1) A residential rental provider may give a renter a notice to vacate rented premises if the premises are immediately after the termination date to be occupied-
>
> (a) by the residential rental provider; or
>
> (b) in the case of a residential rental provider who is an individual-
>
> (i) by the residential rental provider's partner, child, parent or partner's parent; or
>
> (ii) by another person who normally lives with the residential rental provider and is wholly or substantially dependent on the residential rental provider.
>
> (2) The notice must specify a termination date that is not less than 60 days after the date on which the notice is given.

103 The technical requirements of a notice to vacate are governed by section 91ZZO of the *RT Act* which provides that a notice is not valid unless-

(a) it is in the relevant prescribed form; and

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

(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[68] from time to time, which supports the reason for giving the notice; and

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

104 The Director must publish the documentary evidence mandated by section 91ZZO(e) and required to accompany a section 91ZZA notice:

> **Section 486A Director may approve documentary evidence**
>
> (1) For the purposes of sections 91ZZO(e), …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.

105 The approved documentary evidence relevant to a notice to vacate under section 91ZZA, contained in the Government Gazette,[69] and published on the Consumer Affairs Victoria website,[70] is as follows:

> A witnessed, statutory declaration signed by the rental provider, stating either:
>
> * they intend to reside in the rented premises, or
>
> * the name of the person who will occupy the rented premises, their relationship to the rental provider, and declaring whether the person is a dependent, and
>
> * that the rental provider understands that they must not re-let the premises to any person (other than the person named to be moving in to the rented premise sin the statutory declaration) for use primarily as a residence before the end of 6 months after the date on which notice was given, unless approved by VCAT.

[68] *The Director* is the Director of Consumer Affairs Victoria.
[69] Government Gazette No. S 142 dated 25 March 2021.
[70] http://www.consumer.vic.gov.au/housing/renting/moving-out-giving-notice-and-evictions/notice-to-vacate/giving-notice-to-a-renter.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

106 The 4th NTV was in the prescribed form,[71] was signed by an agent for the Rental Provider,[72] and was addressed to the Renter at the rented premises,[73] which was where it was sent by registered post on 3 March 2023.[74]

107 The notice provided a termination date of 10 May 2023,[75] which was more than 60 days after the notice was given to the Renter.[76]

108 The 4th NTV provided the following reasons for being given:

> **I am giving you this notice for the following reason:**
>
> Section 91ZZA Occupation by residential rental provider or family
>
> The premises are to be occupied by me, my partner, son, daughter, parent, partner's parent, or a person who normally lives with and is dependent on me immediately after the termination date.
>
> The rental provider's daughter (**) will be occupying the premises immediately after the termination date on this Notice to Vacate. (*The daughter*) will occupy the premises on a permanent basis. Under this Section of the Act, you are entitled to vacate the premise at any stage between the date on this Notice to Vacate and the termination date providing fourteen (14) days notice in return is *(sic)* provided in writing. The rental provider understands and acknowledges that they must not re-let the premises to a person other than the named for use primarily as a residence begore the end of six (6) months after the date on which this notice is given, unless approved by VCAT.

109 The 4th NTV sufficiently stated the reasons why the notice was being given[77] in that it identified the relevant section of the *RT Act* that provided the grounds, being section 91ZZA, and it identified the Daughter was moving in. As the person that was moving in was a close family member, being the residential rental provider's child under section 91ZZA(1)(b)(i), the Rental Provider did not have to establish that the Daughter was a dependent and the extent of that dependency.[78]

110 A statutory declaration sworn by the Rental Provider on 3 March 2023 accompanied the 4th NTV and stated:

> I will be placing my daughter (**) who has an intellectual disability and is dependent on me into my property situated at

---

[71] Section 91ZZO(a) of the *RT Act*. The prescribed form is contained in Schedule 1 of the *Residential Tenancies Regulations 2021* and is Form 6.
[72] Section 91ZZO(c) of the *RT Act*.
[73] Section 91ZZO(b) of the *RT Act*.
[74] Section 506(3) of the *RT Act* provides that a notice to vacate must be given in one of five different means, including by sending it by registered post to the rented premises. The stamped registered post slip has tracking number RPP44 63800 09400 41394 40603 attached.
[75] Section 91ZZO(f) of the *RT Act*.
[76] Section 91ZZA(2) of the *RT Act*.
[77] Section 91ZZO(d) of the *RT Act*.
[78] See *Jafarpourasr v Tancevski* [2018] VSC 497 at paragraphs 50 and 51 as it relates to the previous provision (section 319(d)) for reasons to be specified, where notices to vacate are given for a family member to move in (again under the previous provision of section 258 of the *RT Act*).

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

> (*address*) on a permanent basis. I understand that I must not re let the premises to anyone other than (*the Daughter*) for use primarily as a residence before the end of 6 months after the date on which the notice was given unless approved by VCAT.

111 The statutory declaration that accompanied the 4th NTV met the mandatory requirements of the Director in that:

(a) it named the person who would be moving into the rented premises – the Daughter,

(b) it described the relationship of the Daughter to the Rental Provider,

(c) it stated that the Daughter was dependent on the Rental Provider,[79] and

(d) it provided an acknowledgment that the rented premises could not be re-let before the end of the six month period commencing on the date the Renter was given the 4th NTV.

Failure to provide evidence and the impact on validity

112 The Renter submits that the Rental Provider has failed to "*meet the evidentiary requirements set by case law*"[80] and the notice is invalid for this reason. The Renter submits that the Supreme Court decision of *Jafarpourasr v Tancevski*[81] is authority for the proposition that the Rental Provider has to *establish the facts necessary to support his entitlement to terminate the tenancy* - when the entitlement is challenged.

113 This quote from paragraph 48 of the decision of *Jafarporuasr v Tancevski* has been taken somewhat out of context. Her Honour Associate Justice Daly was referring to the need for particulars for the reasons to be included in a notice to vacate, so that the recipient of the notice can determine whether the notice should be challenged.

114 However, analogous to this, and uncontroversial, is that an applicant in any proceeding, is required to prove their case and bears the burden of establishing their entitlement to make the application and obtain the orders they seek, whether or not the application is defended. Stronger evidence may well be required in circumstances where the evidence is challenged. In a possession application, the applicant must have a valid notice to vacate, and that necessarily includes establishing that they were entitled to give it.

115 At various times throughout these, and other proceedings, the Renter has challenged the "dependency" of the Daughter on the Rental Provider and claimed to require evidence to be submitted about the Daughter's disability, including NDIS funding. She once again references the decision of *Jafarpourasr v Tancevski*, without directing the Tribunal to any particular

---

[79] As noted earlier, dependency is not a requirement for a close family member of a residential rental provider under section 91ZZA(1)(b)(i) of the *RT Act*, but the Director requires the statutory declaration accompanying a notice to vacate to declare whether any person, other than the rental provider, is a dependent.

[80] Respondent's submission outlining defence to Notice to Vacate dated 31 July 2023.

[81] [2018] VSC 497.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

part of the decision and relies on it to say that the Rental Provider failed to provide evidence to support his statutory declaration.[82]

116 The decision of *Jafarpourasr v Tancevski* does not support the submissions of the Renter, and in fact rejects the proposition that documents must be provided with a notice to evidence the claims being made:

> …. I reject any contention that evidence should be submitted by a landlord in support of reasons for any notice to vacate. I do not consider that the scope of s 319(d) extends so far as to require, in effect, the landlord to identify the evidence which supports the assertion by the landlord that a family member falls within the terms of s 258(1)(b)(ii) of the RTA.[83]

117 The only requirement of a residential rental provider to provide a renter with documents when giving a notice to vacate, are those mandated by the Director.

118 The notice is not invalid because evidence was not provided with the notice or in support of claims in the statutory declaration that the Daughter was a dependent. Dependency is not a criteria for establishing the ground to give the 4th NTV and therefore evidence in support was not required and nor was it relevant.

119 There are obvious fair hearing principles that apply in relation to the provision of any evidence being relied on to the other side ahead of the hearing, and in this case, I am satisfied that all the documents relied on at the hearing on 15 March 2024 had been provided to the other party prior to hearing.

Claims that the 4th NTV was retaliatory and not genuine

120 The Renter claims the Rental Provider did not have grounds to give the 4th NTV, as he has never intended for his Daughter to move in, and his motivation is retaliation for the Renter asking for repairs, challenging the rent ledger and a bid to increase the rent.

121 The Renter submits that the 4th NTV is a continuation of a course of conduct by the Rental Provider, and his agents, that it is retaliatory and the primary purpose in her being asked to vacate is so that the Rental Provider (and the agents) do not have to comply with the law, in particular the obligations under the *RT Act*. The Renter claims that the 1st NTV was given at a time when she raised issues with the accuracy of the rent ledger, and then subsequent notices were given when there was a dispute about repairs, plans to increase the rent and a successful challenge made to the 2nd NTV.

---

[82] Respondent's submission on authorities filed in proceeding R2023/211 and referred to in This 91ZZA Application.

[83] Ibid at paragraph 51. Section 319(d) has been replaced by section 91ZZO(d) and section 91ZZA was formerly known as section 258 of the *RT Act*.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

122 The Renter's claim that retaliation, if proven, result in this type of notice being of no effect,[84] is misconceived. Retaliation is not a statutory defence impacting the effect of a notice to vacate given under section 91ZZA of the *RT Act*.

123 The Renter relies on the decision of *Hartley v Anderson*[85] to support her claims that a retaliatory notice is of no-effect:[86]

> The timing between these events allowed VCAT to infer a nexus between the exercise by the tenant of their rights under the Act and the issuing of the notice to vacate. The evidential burden then shifted to the landlord to satisfy VCAT that the notice to vacate was not issued in retaliation for the tenant's exercise of their rights. [Paras 30-31]
>
> As the landlord's evidence was both unsatisfactory and implausible, the landlord failed to satisfy VCAT that the notice to vacate had been issued for reasons that were inconsistent with retaliatory conduct. VCAT declared that the notice to vacate was of no effect. [Para 43]

124 *Hartley v Anderson* concerned a notice to vacate given under section 263, which was a "*no reason*" notice, and a provision which has since been repealed. Section 266(2), which rendered a section 263 notice, and a notice given at the end of a fixed term rental agreement under section 261, of no effect, if given in retaliation for a renter exercising their rights, has also been repealed. In its place,[87] and similar in operation, however is section 91ZZI(4) of the *RT Act* which states as follows:

> A notice under section 91ZZD, 91ZZDA, 91ZZEA or 91ZZEB is of no effect if it was given in response to-
>
> (a) the exercise, or proposed exercise, by the renter of a right under this Act; or
>
> (b) the renter making a report under section 72AA[88].

125 Retaliation, or the giving of a notice to vacate in response to the exercise of a right by a renter, does not render a notice given under section 91ZZA of *no effect*.

126 Such a notice however may be of *no effect* if the giving of the notice would constitute direct discrimination within the meaning of the *Equal Opportunity Act 2010* (Vic) ('*EO Act*') (see section 91ZZI(2) of the *RT*

---

[84] Email from Renter to the Tribunal and the agents dated 21 March 2023, and the *Respondents Submission Outlining Defence to Notice to Vacate* dated 31 July 2023.
[85] [2017] VCAT 212.
[86] Document titled "Respondent's submission on authorities for teleconference scheduled for Friday 3.3.23 at 11.30am" case number R2023/211, filed in This 91ZZA Application.
[87] In accordance with the introduction of the *Residential Tenancies Amendment Act 2018* (Vic), the *Residential Tenancies Act 1997* (Vic) was amended, and Part 6 of the Act repealed.
[88] Section 72AA of the *RT Act* relates to the obligation on a renter to report damage at the rented premises and the breakdown of facilities to the residential rental provider.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

Act). The Renter has not made any claim of *direct discrimination*,[89] as the same is defined by the *EO Act* and the evidence presented does not support any such claim.

127 However, claims of retaliation may be a basis for the proposition that a residential rental providers' intention to move a family member into the rented premises were not genuine and that they were motivated by a desire to have a renter move out, who was exercising their rights under the *RT Act*. In other words, such a claim of retaliation, if established by a renter, may invalidate a notice to vacate, as a rental provider may be found not to have proved the grounds to give the notice because it was in fact given for reasons other than those asserted.

128 As with any notice to vacate given under the *RT Act*, a residential rental provider has the burden of establishing the validity of the notice, and that includes the grounds for which it has been given.

129 If a renter challenges the validity of the notice, by suggesting that the grounds are not genuine, it is not for a rental provider to positively disprove what a renter is alleging. The burden then switches to a renter to establish that the grounds are not genuine.

130 In this case, the Rental Provider must first establish the grounds that he intended, at the time the notices to vacate were given, that he intended to have his Daughter move into the rented premises. The Renter must then prove that the Rental Provider did not intend to have the Daughter move in, and was only motivated to give her a notice to vacate in retaliation for the Renter asking for things to be done.

Rental Provider's Evidence about Daughter moving in

131 The Rental Provider and his wife gave evidence about their intentions for the rented premises, and their Daughter's accommodation needs.

132 The Rental Provider says it has been their[90] long term intention that the rented premises would always be for their Daughter, and that she would eventually move in, or inherit it. When the rented premises was first purchased in 2017, he says the short-term plan was that the property would be leased out as an investment.

133 The Rental Provider is a retired police officer and receives a part pension, while helping out at his wife's catering business. They live on a farm outside of Benalla, and up until 2021, the Daughter had lived at the farm with them. Their Daughter has an intellectual disability, requires fulltime support, and turns 30 this year.

---

[89] *Direct discrimination* under the EO Act is defined by section 8 which states that *(1) Direct discrimination occurs if a person treats, or proposes to treat, a person with an attribute unfavourably because of that attribute. (2) In determining whether a person directly discriminates it is irrelevant - (a) whether or not that person is aware of the discrimination or considers the treatment to be unfavourable; (b) whether or not the attribute is the only or dominant reason for the treatment, provided that it is a substantial reason.*

[90] The Rental Provider and his wife.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

134 The Rental Provider says the "long term plan" had always been to help his Daughter become more independent, as there would come a time when he and his wife would not be around to assist.

135 However, he says the plan to have the Daughter move out of home was brought forward, when in 2021 he was diagnosed with cancer and ended up in and out of hospital, and he and his wife were forced to spend a lot of time in Melbourne for treatment. He says that, on the advice of professionals, the decision was made for the Daughter to move out of the family home and into town.

136 The Rental Provider says that it was on the basis of professional advice about the Daughter needing to be independent (especially in light of the Rental Provider's medical condition), that he gave instructions to the agents to give the Renter the 1st NTV in November 2021, while a funding request for supported accommodation was pending.

137 The Rental Provider submitted a letter from Jo Wyatt, an occupational therapist dated 9 August 2023, about the steps taken in early September 2021 to obtain funding for supported accommodation for the Daughter:

> An OT housing report was completed on the 3/9/2021 requesting NDIS funding for SDA (Specialised Disability Accommodation) for an improved liveability built home. NDIA rejected this funding for (the Daughter) on the 30/6/2022, advising that (the daughter) does not meet criteria for an SDA response.

138 The Rental Provider says that after the 1st NTV was given, his condition deteriorated and, with the Renter refusing to vacate and issues associated with the validity of the 1st NTV, he didn't take any further steps towards having the Daughter move into the rented premises at that time.

139 The Rental Provider says that following the NDIA decision rejecting funding for supported accommodation, the decision was once again made to seek to have the Daughter move into the rented premises and instructions were given for the Renter to be given the 2nd NTV.

140 When the 2nd NTV was found to be invalid by the Tribunal because his home address was redacted, the Rental Provider says he immediately gave instructions to issue the 4th NTV.

141 The Rental Provider says he wants the rented premises for his Daughter to move in, so that she can have stable accommodation in an uncertain rental market. He says this is more important than ever, with the Daughter's current flatmate not suitable as it gives them greater flexibility with any future house share arrangement.

142 While the Daughter is renting another premises, and is currently in a fixed 12 month period, the agent provided a letter from the owner of that property advising that she is free to move out without penalty.[91]

[91] Email from Steven Sanders to Leann Birch dated 7 March 2024.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

143 The Rental Provider says that the intention is to have the Daughter move into the rented premises as soon as possible, with any urgent repairs to be carried out once vacant possession is returned. Any other works will be done while the Daughter is in the property.

Renter's claims of retaliation

144 The Renter alleges that the Rental Provider is using his Daughter as an excuse for the return of the rented premises and the real reason he wants the property is so that he doesn't need to carry out repairs or meet his other responsibilities under the *RT Act*. The Renter says every time she was given a notice to vacate for the Daughter moving in, it was at a time when she had raised the Rental Provider's, or agent's, non-compliance with the Act.

145 In earlier proceedings the Renter has suggested there was a connection between the timing of the 1st NTV in November 2021 and her written request for repairs in August 2022.[92] The timing does not support the Renter's contention of retaliation in relation to that notice. The written document on which the Renter relies as evidence of retaliation, is dated some nine months after the Rental Provider first indicated he wanted to move the Daughter into the rented premises. The claim of retaliation commencing in November 2021, on the basis of a written repair request, has no merit and is rejected.

146 With the Renter critical of the Tribunal *mis-categorising* her position or interfering with her defence, rather than summarise her submissions filed in This 91ZZA Application, I propose on quoting them directly. The written submissions succinctly detail the Renter's position, as she alleges that the NTV is *retaliatory and fails to meet the evidentiary requirements set by case law*:[93]

> a) The (*Renter*) refers to her email dated 21/3/2023 giving notice of her intention to challenge the Notice to Vacate as it was retaliatory and therefore of no effect.[94]
>
> b) The Notice to Vacate is the third in a series in which the (*Rental Provider*) has claimed he was moving his intellectually disabled daughter into the property;
>
> i. the first was issued on 15/11/2021, being a week after the (*Renter*) had written to the (*Rental Provider*) disputing the rent ledger.[95] In it, the required declaration in respect of not re-letting the property for six months was redacted, which the

[92] Renter's submissions dated 26 February 2023, filed in R2023/211, commencing at page 3, headed 'Retaliatory Eviction'.
[93] Document titled "Respondent's submission outlining defence to notice to vacate" dated 31 July 2023 which begins at paragraph 1. Point (b)(vii) removed to later in these reasons as the same relates to a matter to be considered under the section 330A of the *RT Act*.
[94] Renter footnote #1: Appendix A – Email dated 21/3/2023: Challenge to the Notice to Vacate.
[95] Renter footnote #2: Refer email 1/7/2023 (Respondent's evidence #3 – Retaliatory eviction 2021)

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

(*Renter*) alleges is evidence of the (*Rental Provider's*) true intent;[96]

ii. the second was issued on 26/10/2022,[97] in response to the dispute that arose after the (*Renter*) challenged the (*Rental Provider's*) right to increase the rent when repairs agreed to at the commencement of the tenancy had not been made, and after tradesmen quoted on the urgent repairs she had requested on 30/8/2022;[98]

iii. the third was issued directly following the hearing of the second (which was dismissed) on 3/3/2023 (R2023/211) for which the (*Renter*) provided the case law precedent of the Supreme Court in *Jafarpourasr v Tancevski* [2018] VSC 497 (4 September 2018), which puts the '*onus on the landlord to establish the facts necessary to support its entitlement to terminate the tenancy*" when the entitlement is challenged;[99]

iv. the (*Renter*) has challenged the (*Rental Provider's*) eviction notices as retaliatory since the first Notice to Vacate was issued in 2021, as described in her application to VCAT Ref: R2022/33199 and subsequent Particulars of Claim;[100]

v. the (*Rental Provider*) failed to satisfy the evidentiary requirements set by the Supreme Court precedent by providing the necessary information required to "establish the facts" in his Notice to Vacate dated 3/3/2023, which would necessarily include evidence that the property is a Specialist Disability Accommodation (SDA) enrolled dwelling (s3(1)(b);[101]

vi. the property does not meet the NDIS standards for Specialist Disability Accommodation[102], or comply with the RTA;[103]

147 The Rental Provider rejects suggestions that the notice was given in response to the Renter questioning the ledger or rent being charged, or asking for repairs, and says he has "*no interest in retaliation*."

148 The Rental Provider says that he has always been willing to carry out repairs needed at the rented premises:

> Throughout the *(Renter's)* tenancy, Ray White Benalla have forwarded requests for repairs and maintenance to be carried out at

[96] Renter footnote #3: Appendix B – Exhibits LAA-1 page 22: Notice to Vacate 15/11/2021
[97] Renter footnote #4: Appendix B – Exhibits LAA-1 page 26: Notice to Vacate 26/10/2022
[98] Renter footnote #5: Refer email 1/7/2023 (Respondent's evidence #4 – Retaliatory eviction 2022)
[99] Renter footnote #6: Appendix C – Submission on Authorities for hearing 3/3/2023 (Ref: 2023/211/00)
[100] Renter's footnote #7: Appendix D – Exhibits LAA-2 pages 16-43: Respondent's claim R2022/33199
[101] Renter's footnote #8: Appendix E – Email 13/7/2023 – Outline of Respondent's submission to hearing 17/7/2023
[102] Renter's footnote #9: Refer email 17/7/2023 – Respondent's evidence #19 – link to NDIS Standards
[103] Renter's footnote #10: Refer video evidence attached to emails dated 11/7/2023 – Respondent's evidence #7 to #18

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

> the property from time-to-time. Each request that was made was subsequently approved by me without delay or setoff.[104]
>
> I haven't had access to the premises ... if there is work that needs to be done … (the Daughter) would go in as soon as possible … there are no modifications that need to be done before she moves in.[105]

149 Under cross examination by the Renter, the Rental Provider's wife says that she and her husband have *never shirked their responsibility* in relation to the repairs and says that when they have full access to the rented premises they will be able to look at any repairs that need to be done.

150 The Rental Provider further says it is his intention for his Daughter to immediately move into the rented premises as quickly as she can as her current accommodation is not appropriate for a variety of reasons, including tensions associated with the other flatmate, the increasing costs and instability of housing and the current rental crisis.

151 The Rental Provider says that all action taken to seek possession of the rented premises for the Daughter has been on the advice of professionals engaged in her support that she needs to live independently. He says that he and his wife have looked at alternative properties in Benalla, but rent is *through the roof* and it would mean there is not as much control about who else may be living in the property.

152 The Renter asserts that the rented premises is not suitable for the Daughter who requires significant care. She claims that the Rental Provider had previously told her in January 2021 that the Daughter required fulltime care:[106]

> During the time he worked on the property replacing the veranda David told me about himself, that he was a former Detective in Wangaratta, and his family, including that his daughter (**) was severely disabled and in residential care at Yooralla.

153 The Rental Provider says that the Daughter is "*emotionally*" dependent on he and his wife, goes off to scope during the day and has full-time carers at her current private accommodation.

154 As a registered support worker for the NDIS,[107] the Renter says it is her view that funding and support will not continue to be provided to the Daughter if she moves into the rented premises –

> … InLife Independent Living provides NDIS-funded supports in approved accommodation, and of the strict conditions for such funding, including that the NDIS does not provide funding to accommodate participants in their parents' investment properties,

---

[104] Paragraph 11 of the Affidavit of Mr Sharpe sworn 1 August 2023 and filed I the Supreme Court Appeal S ECI 2023 01259.
[105] Evidence given at hearing by the Rental Provider under cross examination.
[106] Paragraph 14 of the document titled Appendix C – Particulars R2022_33199 lodged 16.12.2022.
[107] The Renter claims to have retrained as a support worker during Covid, but has not engaged in employment yet.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

and that the condition of the property does not meet NDIS standards.

155 The Rental Provider submitted letters from those engaged in his Daughter's care plan. He says that her current package of funding from the NDIS is not impacted by where she lives, as attested to by her occupational therapist, Jo Wyatt:

> As a result of this, (*the Daughter*) is required to live in mainstream housing and is not eligible for SDA funding. (*The Daughter*) has since moved into mainstream rental accommodation and is living with a flat mate. They both receive full-time care from a NDIS funded care agency. Given this, (*the Daughter's*) parents plan to move (*the Daughter*) into their own investment property to reduce the associated rental costs and to ensure that (*the Daughter*) has access to sustainable housing.[108]

156 The Daughter's support worker, Bronwyn Stanley, also provided the following statement:[109]

> 1. (*The Daughter*) is currently not eligible for SDA (Specialist disability accommodation) funded by NDIS at this point in her life. (As evidenced in Jo Wyatts letter).
>
> 2. (*The Daughter*) as an adult, is required to pay for all day to day living costs, including rent and utilities. NDIS does not fund these for (*the Daughter*). See https://www.ndis.gov.au/participants/home-and-living.
>
> 3. (*The Daughter*) has support from her mother Amanda and father David with decision making about her support services and where and with whom she chooses to live.
>
> 4. (*The Daughter*) and her family currently contribute 50% towards the total cost of the current rental agreement she has with Ray White Real Estate. She has the same rights as other tenants in Victoria.
>
> 5. Both (*the Daughter*) and her flatmate deserves privacy and confidentiality to be enforced, their personal situation has no bearing on this matter as (*the Daughter's*) NDIS plan is individualised to her needs for support, not to where or who she lives with. Should circumstances change, NDIS has processes for having those needs assessed and met.
>
> 6. (*The Daughter*) has entered into a lease agreement because the house at (*address*), supplied by her family, is not available due to this ongoing dispute.
>
> 7. (*The Daughter*) requires 24/7 care, by either NDIS providers or through support from her family, in order to fund this, an

[108] Document from Jo Wyatt, occupational therapist dated 9 August 2023.
[109] Email from Bronwyn Stanley to Amanda Sharpe dated 7 March 2024.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

> assessment was submitted to NDIS based on her needs, NDIS have deemed she can use her funding flexibly to meet her needs. This is irrespective of any supports that other people who she chooses (whether they have NDIS funds or not for their own needs) to live with have.
>
> 8. (*The Daughter*) has explored housing options that meet her current needs, including sharing with others. She is not bound to share with any one person and can pick and choose who she chooses to live with.
>
> 9. Regardless of where (*the Daughter*) chooses to live, she may use her NDIS funds to share with others, on her own or with family support at any time throughout her life.
>
> 10. (*The Daughter*) with support from her family is within her rights to break a lease agreement should her needs change, regardless of her disability, provided she gives appropriate notice.
>
> 11. (*The Daughter*) is on a limited income and requires support from her family. There will be a significant saving for (*the Daughter*) to move into her family house and share costs with others of her choosing.
>
> 12. It is reasonable that (*the Daughter*) having waited nearly two years for her family home to become available explored alternative solutions as a temporary measure until this matter could be resolved. As per Jo Wyatt (OT) letter, to reiterate, NDIS does not fund a rent contribution for (*the Daughter*), nor are they likely unless legislation changes in the future and the personal situation of her housemate has no bearing on this matter and they should be forwarded (*sic*) the same tenancy rights as afforded (*the Daughter*).

157 A quote from the NDIS website from the *Home and living* page was then provided by the Daughter's support worker:

> The NDIS can assist participants to live independently. Participants and their families can discuss their home and living goals as part of their planning conversation. A participant's plan will include the supports the NDIS will fund as well as the supports the participant will need to access through the housing system.
>
> Most participants will continue to access housing in the private market by owning or renting, or through social housing.
>
> NDIS participants are responsible for day-to-day living costs including rent, groceries, utilities, telephone or internet costs. This is the same for general household items such as a bed, fridge or cooking utensils. There are some limited circumstances where the NDIS may make a contribution to these costs.

158 The Rental Provider's wife says that they are trying to give the Daughter an independent future and that *"that is what we do as parents"*. She says the vision has always been for the Daughter to live in the rented premises. She

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

says the Daughter wants to live there and the move makes sense financially and emotionally as a family-

> She is currently paying $240 a week rent and she is not going to be paying as much rent (*at the rented premises*). It is something we are going to negotiate as a family and discuss. (*The current rent*) is $480 a fortnight, she pays $240 and pays all the bills herself , just a pension of $1200 a fortnight. She can't write, we are her next of kin, but there is nothing legal. She is emotionally very dependent on us. Seeing as how we have had such a brush with death with (*Mr Sharpe*), it is important to live out her life and set her up for the future. She won't be paying as much rent as she is paying now. At this stage it will probably be just the carers that will move in with her. She has an intellectual disability but can live independently with a carer and has different carers all the time. They sleep overnight with her. It would be another change for her and change is difficult. We learn from her and what is best for her.

159 On the basis of the evidence provided by the Rental Provider, his wife, and others engaged in the care and welfare of the Daughter, I am satisfied that the Rental Provider wants to move his Daughter into the rented premises and that he has proved the grounds under section 91ZZA.

160 I accept that the Rental Provider's plan for the rented premises has always been associated with accommodation for the Daughter and providing her with independence and that these plans were brought forward when he was diagnosed with cancer in 2021 and required extensive treatment.

161 The Renter has asserted that the Rental Provider does not intend to move the Daughter into the rented premises but is acting in a retaliatory manner. I reject that is the case for the reasons set out below.

162 The Renter has suggested that the timing of the 1st NTV in November 2021, after she had taken issue with the ledger and had raised a dispute over the rent relief grant, shows that the Rental Provider wanted her out in retaliation for raising concerns. She says that the 2nd NTV late October 2022 was after she raised the issue of repairs in August 2022, and then the 4th NTV was given after she successfully challenged the validity of the 2nd NTV.

163 Ms Birch, the agent for the Rental Provider, submits that there has never been any retaliation:

> Why would they persist for so long ... it baffles me. It is reasonable that they want to set their Daughter up for the future. It is about the Daughter and that is what it has always been about.
>
> The (Rental Provider's) intentions to move the daughter in from 2021 have been on the advice of coordinators that it was in her best interest. The issues associated with errors in the notices to vacate have been mistakes only, and arose with all the changes to the rules and regulations with the Amendment Act provisions. It was not intentional and certainly not trying to use it as a retaliatory means.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

164 There is no doubt that there has been a long and protracted history of issues being raised by the Renter throughout this rental agreement. However, I am not satisfied that the Rental Provider was motivated by retaliation, due to the considerable evidence provided to support the grounds for the notice:

(a) evidence given by the Rental Provider, and his wife, that they were acting on advice from professionals that the Daughter needed to start living independently,

(b) evidence from professionals supporting plans for the Daughter's independence,

(c) funding requests being made in September 2021 to the NDIS, two months prior to the issue of the 1st NTV, and a month before the dispute over the rent ledger,

(d) the Rental Provider's ill health and explanations provided about why there was a gap between the 1st NTV and the 2nd NTV associated with his treatment,

(e) the Rental Provider's recovery, costs associated with private rental, and the rejection of the NDIS funding bid in June 2022, being the reason for the timing of the 2nd NTV,

(f) there being a gap of some two months between the request for repairs in August 2022 and the issue of the 2nd NTV in October 2022,

(g) evidence from the Rental Provider and agent, supported by work orders to tradespersons, that the Rental Provider was, and has always been, willing to carry out any repairs to the rented premises, and

(h) the rectification of issues associated with the statutory requirements for notices to vacate being the reason for the timing of the 4th NTV.

165 The mere assertion by the Renter that the Rental Provider issued the 4th NTV (and the 1st NTV and 2nd NTV) in response to her exercising her rights under the *RT Act*, is not supported by the evidence presented. I am not satisfied that any of the notices given for the Rental Provider's daughter to move in under section 91ZZA were retaliatory.

166 I am satisfied that the Rental Provider gave the notices with a genuine intention and motivation to have the Daughter move in and therefore under section 91ZZA he was entitled to give the 4th NTV to the Renter.

167 The 4th NTV is valid and can support the application to the Tribunal for possession.

Must a Possession Order be made?

168 With a valid NTV having been given to the Renter, and the Renter having failed to vacate the rented premises by the termination date in the 4th NTV of 10 May 2023, the Rental Provider made application to the Tribunal for possession under section 322(1) of the RT Act on 12 May 2023.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

169 Under section 330(1) of the RT Act, as it applies to this application, the Tribunal must make a possession order requiring a renter to vacate the rented premises on the day specified in the order if the Tribunal is satisfied-

(a) that the rental provider was entitled to give the notice to vacate and the notice has not been withdrawn,

(b) that the renter is still in possession of the rented premises after the termination date specified in the notice to vacate, and

(c) that in the circumstances of the particular application, it is reasonable and proportionate having regard to section 330A, to make a possession order taking into account the interests of, and the impact on, each of the following in making the possession order-

(i) the residential rental provider, as the case requires;

(ii) the renter;

(iii) any co-tenants or co-site tenants or other residents;

(iv) any neighbours or any other person who may be, or who has been affected by, the acts or behaviour of the renter to whom the notice to vacate was given.

170 For the reason stated above, the Rental Provider was entitled to give the Renter the 4th NTV and this notice has not been withdrawn. The Renter remained in possession of the rented premises after the termination date in the 4th NTV.

171 Taking into account the interest and impact on the Renter and Rental Provider, the Tribunal **must** make a possession order, if satisfied of the relevant matters under section 330A that it is reasonable and proportionate to do so:

> **Section 330A What is reasonable and proportionate?**
>
> For the purposes of determining whether it is reasonable and proportionate to make a possession order, the Tribunal must have regard to the following-
>
> (a) …. (f) *(removed as not relevant)*
>
> (g) the effect of the conduct of the renter on others as a renter;
>
> (h) whether any other order or course of action is reasonably available instead of making a possession order;
>
> (i) as the case requires, the behaviour of the residential rental provider or the provider's agent;
>
> (j) any other matter the Tribunal considers relevant.

172 Each of the relevant matters in section 330A will be considered in turn.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

Section 330A(g): The effect of the conduct of the Renter on others as a renter

173 The Renter submits that her actions, or conduct, is not relevant to This 91ZZA Application, as it is not a notice given because she has breached the *RT Act*.

174 I do not accept that a renter's conduct in general is not a relevant consideration in determining whether or not it is reasonable and proportionate to make a possession order. There is no restriction on the type of conduct to be considered under section 330A(g), unlike the specific references to a renter's actions for "breach" under subsections (a) to (f). Additionally, a renter's conduct in relation to the rental agreement would be a matter that would be a relevant consideration under subsection (j) – "any other matter the Tribunal considers relevant".

175 There are two possible ways to interpret section 330A(g). The first is that it is the conduct of the Renter on "others as a renter", or it is the conduct of the Renter, "as a renter", on others generally. Either interpretation is relevant in this case and so it is not necessary to make any determination as to how the provision is to be specifically applied as the result is effectively the same.

176 Firstly to the considerations of section 330A(g), being that the conduct of a renter is considered only to the extent of the impact it is having on others as a renter. The Daughter is a renter, and so I take into account the conduct of the Renter in refusing to vacate the rented premises, and threats to report the Rental Provider to NDIS and other authorities if the Daughter moves in. These actions by the Renter are impacting the Rental Provider and his wife, which has a flow on effect on the Daughter as a renter.

177 Secondly to the alternative approach to section 330A(g) being a consideration of the Renter's conduct as a renter, on others. The dispute over access to the rented premises has had an impact on trades in particular (along with the agents), with efforts to arrange a suitable time for access, taking up significant time, and resourcing. This has a flow on effect of costing either the trades, agents or the Rental Provider directly due to the inconvenience. I take particular note of the Renter's refusal at last minute to allow trades to have access to the premises and making unreasonable demands to film them while working. Another fact relevant to this criteria is the way the Renter has drawn in the local community of Benalla into her dispute with social media posts about the agency and the Rental Provider.

178 The conduct of the Renter, in relation to the Daughter and in the alternative the conduct of this renter on trades, the agency, and the Benalla community generally, has had a significant flow on impact on the Rental Provider, and are all matters which support a possession order being made. It is important to note that the facts relevant to this criteria, on any analysis of the provision, have only been considered to the extent that they go beyond what would be considered reasonable of a Renter, in exercising their rights to raise complaints or require compliance with the *RT Act*.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

Section 330A(h): Whether any other order or course of action is reasonably available instead of making a possession order;

179 Section 330A(h) requires consideration to be given to any other course of action that may be available, rather than making a possession order.

180 Relevant to a case supported by a notice to vacate under section 91ZZA, is whether the person who is going to be moving in, in this case the Daughter, has alternate accommodation available.

181 The Daughter is currently in private accommodation. The Rental Provider and his wife have given evidence of the financial pressure being faced by them, and the Daughter, due to the cost of rentals in the private market and the limited funds received under the disability pension and NDIS. They have also provided evidence that the Renter's non-payment of rent is impacting their ability to contribute to the Daughter's rent. The Rental Provider says that at a time when he has retired and his wife is wanting to wind things down, their catering business has taken on more work in an attempt to source income to assist the Daughter's rent and expenses. The Rental Provider and wife say more control over the finances and expenses can be achieved by the Daughter moving into the rented premises.

182 The Rental Provider also gave evidence of the complexities associated with the Daughter's current share arrangement and a desire to have more flexibility and control over any future flatmate. The fixed term period for the Daughter's current rental agreement expires within a month, the Daughter can give notice that she is vacating, and the owner has said that he will allow that without "ramifications".

183 The Renter submits that the Daughter has current accommodation available to her, is in a fixed term lease and does not need to move.

184 I am not persuaded that the Daughter remaining in private accommodation is a course of action that is reasonable in the circumstances described above. While the Daughter has accommodation currently, it is not suitable or appropriate for her needs into the future.

185 The absence of any other accommodation in the private rental market being available to the Daughter that, unlike the rented premises, is secure, affordable and long term, supports a finding that it is reasonable and proportionate to make a possession order.

Section 330A(i): As the case requires, the behaviour of the residential rental provider or the provider's agent;

186 The Renter's defence to a possession order being made is centred on what she says are the inexcusable actions of the Rental Provider and his agents. It was this focus that consumed the majority of the submissions presented and evidence provided, with the Renter reading from her claim against the agents in the FC Proceeding at the hearing on 15 March 2023. Additionally, the Renter relies on the claims she has made in the Repairs Application, the Compensation Application and the Breach Application.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

187 On the other hand, while the Renter references all of these proceedings and the claims made within them, she submits that I can make no findings of fact in relation to any of those claims, including the 91ZM Application, that are the subject of dispute, and are relevant to the matters to be determined in those other proceedings.

188 I agree in part, that making findings of fact in This 91ZZA Application, may prejudice findings to be made by a decision maker in other unresolved proceedings or may contradict findings that could, or will, be made. However, there has to be some findings of fact, or an inability to make such a finding and reach the conclusion proposed, otherwise the Tribunal has not properly engaged in *active intellectual consideration*[110] of the interests of the parties and the impact of a possession order on them, by reference to the matters relevant to the criteria under section 330A of the *RT Act*.

189 What is clearly evidenced in these, and other proceedings, is that the perception that the Renter has that she has been wronged by the Rental Provider and agent has consumed her and has had a significant impact on her ability to focus on any matter outside the disputes arising from the rental agreement.

190 That is as far a conclusion as I can reach. Having examined all of the material before me and to which I have been referred, the facts and the history of the conduct of the parties as they have been presented in this case, do not support the Renter's claims that the actions of the agents and Rental Provider are in any way reprehensible or such as to persuade me that a possession order should not be made.

191 The Renter says that these proceedings and the history of dispute between the parties shows that the Rental Provider, and agents, only want possession of the rented premises so that they can get rid of the Renter. She says that the notices to vacate are just an excuse for the Rental Provider and agents to avoid their responsibilities under the *RT Act*, including but not limited to:

(a) carrying out repairs to maintain the rented premises,

(b) keeping an accurate rental ledger,

(c) providing the Renter with peace and quiet enjoyment of the rented premises (with specific reference to requests for the rent to be paid and for access to the rented premises),

(d) service of invalid notices to vacate, and

(e) charging too much for the rent, including the excessive rent being sought in the proposed notice of rent increase.

---

[110] *Hanson v Director of Housing* [2022] VSC 710 at paragraph 45 states: *As a consequence, it will not be sufficient for the Tribunal, in assessing whether a possession order is reasonable and proportionate, to make a cursory, dismissive or passing reference to the impact of the order on the renter. Rather, the Tribunal is required to give active intellectual consideration to that matter. Thus, in Gautham v Panwar, when considering a submission that the Tribunal had not taken into account a relevant consideration, Ginnane J observed that the Tribunal 'must actively engage with the mandatory considerations, and that engagement must be evidence in his or her reasoning'. The Director did not dispute that proposition and I agree with it.*

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

192 The Renter claims that the Rental Provider and agents have additionally breached the offence provisions of sections 502,[111] 503[112] and 504[113] of the *RT Act*[114] and that all of this has had a detrimental impact on her, including an inability to pay the rent:[115]

> … the breach for which the orders are made is a direct result of the conduct of the rental provider and his agents, who have spent two years trying to illegally evict me to avoid their obligations under the act to repair the property, in order, I allege, to exploit the current rental crisis and renters' desperation. Their conduct has had a devastating impact on my employment, income and health, and has deprived me of quiet enjoyment of the property for the past two years.

193 For the reasons already provided, I do not accept that any of the section 91ZZA notices to vacate were given either in retaliation for the Renter asking for repairs or changes to the rent ledger or because the Renter purported to exercise her rights, as she sees them, under the *RT Act*.

194 The Renter submits that she has been placed in a prejudiced position as a result of the conduct of the Rental Provider and his agents. In effect, she is referring to the dispute over the rent ledger during Covid as being responsible for her having a bad rental reference.

195 Despite assertions that the current rent ledger has been modified or changed by the agents and is other than a true reflection of the rent paid during the rental agreement, the Renter did not identify any part of the current ledger that is inaccurate. Any issue that was attached to the payment of the Rent Relief Grant was remedied shortly after the issue arose. If there is any part of the Renter's rent ledger that impacts on her ability to rent another property, then it can only be the fact that the Renter is close to 18 months' behind in the payment of rent and is withholding rent due to the other disputes related to the rental agreement.

196 Further, the evidence presented in this case does not support claims by the Renter that the Rental Provider, and the agents, are trying to avoid their obligation to carry out repairs at the rented premises. The material provided shows a lengthy dispute about what repairs are needed, miscommunication and dispute over times for access by trades and the Renter placing conditions on that access. The evidence supports a finding that there were delays by the Renter in making any application to the Tribunal for repair orders, that the Rental Provider encouraged such an application to be made to resolve the issue of access and when orders were made by consent for

---

[111] Section 502 of the *RT Act* states that is an offence to persuade a person not to exercise their rights or take proceedings.
[112] Section 503 of the *RT Act* states that it is an offence to aid, abet, counsel or procure commission of offence.
[113] Section 504 of the *RT Act* states that it is an offence to give false information.
[114] Renter's footnote #11: Appendix F – Supreme Court Submission dated 7/7/2023
[115] Paragraph 17 of the Renter's submissions dated 23 August 2023 filed in the SC Proceeding.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

repairs to be carried out, it was the Rental Provider who sought to renew the proceeding to resolve yet another dispute over access.

197 The Renter submits that the conduct engaged in by the agents, on behalf of the Rental Provider, relating to weekly contact for the payment of unpaid rent was aggressive and is a matter to be considered as to whether it is reasonable and proportionate to make a possession order. While many renters who are struggling to pay their rent or other expenses may find constant reminders about unpaid bills a source of harassment, these sorts of actions, when limited to requests for payment, are not a breach of any law that the Renter has identified. In fact, the agents' actions requesting that the rent be paid and kept up to date, and sending reminders by email, is consistent with usual practice across the real estate industry.

198 The Renter also says the agent's responsibility for serving several invalid notices to vacate should be considered in the context of their conduct in this proceeding. I disagree. The failure of the agent to recognise the error with the statutory declaration is not supportive of a finding that they have actively done anything wrong. With the residential tenancies industry coming to terms with the multitude of changes in the *RT Act*, the Tribunal has seen, and continues to see, an enormous number of errors in notices, including with the information required to be in the statutory declaration. In fact, the Renter herself takes aim at the rental advocacy support agency that she obtained advice from, as they had not picked up the issue. I accept the position of the agent that it was simply an error, there was no malice behind it, and as soon as it was realised, the notice was withdrawn. I draw no negative inference from the conduct of the agent related to errors in the 1st NTV or the redaction of the Rental Provider's address in the 2nd NTV.

199 For the reasons provided, I do not accept that the conduct of the Rental Provider or agents, when considered in the context of the history of numerous disputes relating to the rental agreement, is such as to support a conclusion that it is *not* reasonable and proportionate to make a possession order.

200 The Renter's perception of the Rental Provider's and agent's conduct, and the impact it is having on her while significant, does not in isolation, support either (a) a possession order being made, or (b) one not being made.

Section 330A(j): Any other matter the Tribunal considers relevant.

201 Finally, the Tribunal must give consideration to any other matter that is relevant to the interest of the parties and the impact of a possession order on both the Rental Provider and the Renter.

202 In particular, the matters fall into two categories:

A) the impact on the Rental Provider if this rental agreement continues, and

B) the impact on the Renter if a possession order is made.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

A) Continuation of the Rental Agreement

203 The impact of a continuation of this rental agreement on the Rental Provider necessarily requires a consideration of the Daughter's current accommodation, the conduct of the Renter and the fractious relationship that has developed between the Renter, Rental Provider and agent.

204 If there is any further delay in being able to regain possession of the premises, the Rental Provider says it will be devastating both emotionally and financially:

> We want to move on with our lives, and we are waiting and waiting. We have had so many matters before VCAT over a number of years, … its draining and taking its toll … (Daughter) is so excited, and keeps asking when she can move into the property.

205 The Rental Provider also says that the financial side of things is taking its toll and that he is of the view that the family will be better off should possession be returned. The Rental Provider references the Renter not paying the rent, the rising cost of private accommodation for the daughter, and the need for him to help out in his wife's business when he should be retired.

206 While the continuation of the rental agreement will cause pressure for the Rental Provider, he concedes that his Daughter will not be made homeless:[116]

> RENTER: You would agree that she won't be homeless as a result of the possession order being dismissed and if she doesn't get this property?
>
> RENTAL PROVIDER: No, she won't be homeless – but I have stated my concerns (about her current and future accommodation) to the Member.

207 The Renter's conduct during the rental agreement is having a significant impact on the Rental Provider. Evident at hearing is the clear exhaustion of the Rental Provider, his wife and the agent. They are broken by years of constant threats and demands by this Renter and difficulties they say they have had in trying to access the rented premises.

208 It would be remiss of me to not acknowledge that the protraction of the various disputes has, in part, been contributed to by delays in listing hearings and finalising decisions at VCAT. For this, neither the Rental Provider or the Renter is responsible. The delays flow from listing demands, resource pressures and dealing with significant backlogs.

209 The history of this matter as presented by all parties involved, shows that a renter that can be difficult to deal with, and at worst this Renter could be regarded as obstructionist, rude, unreasonable in her demands and litigious.

[116] Cross examination of the Rental Provider by the Renter at the hearing on 15 March 2023.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

210 The Rental Provider says the dispute over repairs in particular, has taken its toll, not to mention the Renter's personal attacks on him:

> A lot of detail has been put on Facebook by (*the Renter*) in relation to maintenance. Everytime I have been asked I have given the go ahead and the reason why the maintenance is not getting done is that I haven't been allowed access. The whole situation has become a joke … half of Benalla is talking about it.

211 The agent (Ms Birch) says that both her agency, the Rental Provider and the Daughter have been the subject of attack from the Renter:

> There has been slander on Facebook pages - directed at our agency and Mr Sharpe, and threats made to have (the Daughter's) funding shut. Threats to the ACCC, have a Federal Court case and other matters. I can keep going. I can give you pages of emails where there has been intimidation and abuse.

212 The Renter claims that she should not be punished and thrown into hardship because the relationship has broken down:

> Goodness me, if they can't afford to comply with the (RT Act), they should not be landlords. They think they are going to get around it by evicting renters … Well, it's not going to fly!

213 The Renter says that any breakdown in the relationship between her and the Rental Provider and agents, is of their doing:

> If it wasn't for the false arrears notices, there would have been no issue. I continued to pay the full rent up to January last year and it was only when VCAT scheduled their hearing before mine, and I was denied my natural rights under law, that this whole situation arose…
>
> I need orders that are legally sound, that will not prejudice the victim of this behaviour, that give consideration to the state of the premises, … and the rights of me as a renter.
>
> It seems to me that the Tribunal only considers the rental providers, yet the intention of the legislation is more about protection of renters against exactly this sort of treatment. It's intended to protect me and I am not going to allow (a possession order) to happen.

214 The Renter says further that the relationship between the parties, or any breakdown in that relationship is not relevant, and they don't need to have a relationship:

> They just need to conduct the management of the property under law and we won't have a problem. They are required to carry out repairs urgently, non urgent repairs within 14 days, keep proper rental records, all of the things they have breached. I don't need to have a relationship with them. …All of these proceedings in VCAT, I have had so much legal advice. I am an expert on these type of proceedings and my avenue for redress.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

215 I agree that a renter who raises legitimate claims and seeks to enforce their rights under the RT Act, either in the Tribunal or through direct communication with a rental provider or their agent, should not be punished or victimised for seeking redress.

216 But when issue is taken with how the parties communicate with one another, parties are restricted in the opportunities they have to comply with their obligations under the rental agreement, and the relationship denigrates to name calling, social media posts and threats to "not stop until justice is done", the relationship is clearly at an end.

217 The conduct of the Renter and the way she has gone about seeking to enforce her rights under the RT Act, the impact this is having on the Rental Provider and the time it is taking up for the agents, along with no expectation that the hostility between the parties will soon resolve, are matters that I consider support a finding that it is reasonable and proportionate to make a possession order.

B) The impact on the Renter if a possession order is made

218 The Renter submits that any possession order made ahead of a consideration of her outstanding claims at the Tribunal (the Repairs Application, Compensation Application and Breach Application (including the challenge to the proposed rent increase), would be prejudicial, discriminatory and a violation of her legal rights. I note the repairs application was decided (by consent) in December 2023, and no clear express application to challenge a rent increase has ever been lodged.

219 The Renter's claims in all the proceedings before the Tribunal relate either to allegations that the Rental Provider has breached his obligations under the *RT Act* or the proposed notice of rent increase is excessive, and she is entitled to compensation.

220 While the conduct of the Rental Provider and the agents is a mandatory consideration in determining whether it is reasonable and proportionate to make a possession order, these matters can be still be appraised without the Renter's pending claims having concluded.

221 The Victorian Supreme Court was not persuaded that the Renter's matters needed to be considered first, or even at the same time, as the 91ZM Application for possession:

> Ms Anderson seeks orders that the Tribunal be directed to schedule the hearing of her applications before any further applications by Mr Sharpe are heard. I am not prepared to make such an orders. The scheduling of proceedings is a matter for the Tribunal.[117]

222 In the SC Appeal, the Renter was seeking to offset any compensation awarded to her in her outstanding proceedings, against any rent owed. The Court indicated that the conclusion of these compensation matters was not

[117] *Anderson v Sharpe* [2023] VSC 559 at paragraph 55.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

required before a consideration of the application for possession based on rent arrears:[118]

> …. It might have formed the view, for example, that it was reasonable and proportionate to make a possession order even if Ms Anderson did have a claim to damages because in those circumstances the proper course would have been to continue to pay rent in the meantime. It might have reached these conclusions even if Ms Anderson might have had difficulty obtaining alternative premises.

223 I reject the assertion that the Renter has been prejudiced in This 91ZZA Application by not having had her matters at the Tribunal finalised. I have considered her evidence at great length, including any material filed in the other proceedings. Her claims about the conduct of the Rental Provider and his agents have been included in the history of the rental agreement at the beginning of these reasons.

224 I do however accept that the delay in having these matters finalised is having an impact on the mental and physical health of the Renter-

> With my condition stress causes chronic fatigue and I've lived under constant stress for the last two years, particularly when VCAT prioritised his application for possession over my application for repairs.[119]

225 The Renter also says that she would have been able to pay the rent had she been able to get a co-renter in to share the rent, but the failure of the Rental Provider to carry out repairs or install a power-point in the sunroom, meant that no-one wanted to move in. She also says that once her compensation matters are heard and determined, she will be able to find employment and be able to pay the rent:

> What I will say is that once I have stable and safe housing and once this property is repaired and I will be able to work and if it is then deemed to be paid every fortnight, this place should never had been rented out … at $330 a fortnight I would be prepared to pay. We need to address my losses and once my claim for compensation against both the rental provider and the agent has been heard, it will more than wipe out any rent debt and put me in the positive by several times what I owed them.

226 The Renter claims that she will be homeless if a possession order is made, as she has no doubt she will be given a bad rental reference, and has no other family or friends who she can move in with:

> I don't want to move again, I just moved to here from Beechworth. It is wrong and inhumane for them to require me to move with an invalid notice to vacate.

---

[118] Ibid at paragraph 50.
[119] Transcript of proceedings before the Supreme Court of Victoria, lines 7-10 on page 24.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

> I haven't applied for any (*other rental properties*) because the first notice is retaliatory. I have just had casual discussions in town and there is no point in applying. Ray White Benalla is so big, and the major agent in town.

227 The Renter says she has not looked at community or public housing options because she has two dogs to take care of, and has not looked into obtaining Centrelink to help pay the rent:

> No, I am not moving as it's an invalid notice. Why should I uplift my life. It cost a lot of money to relocate here and because I couldn't rent out the other room I used up all my savings and until this matter is clarified I don't have the funds and I am not going into another dodgy property. I am not going. I can't apply anyway because of the dogs. It's a moot point cause the application is invalid.

228 The Renter says that the dispute has taken over her life, and has escalated, meaning it is now more difficult and much harder for her to find another property. Not that the Renter has any intention of looking for another property as she says the notices are retaliatory and of no effect and a possession order cannot be made:

> I am waiting for VCAT to determine that I am entitled to reimbursement and its heard, as it's been delayed by the court and VCAT. I am not applying anywhere or taking action until we have decisions, legally sound decisions.

229 The Renter submits that she will be homeless if a possession order is made, and the blame for that should fall on the Rental Provider and his agents:[120]

> In a rental crisis such as the one we are currently experiencing there is no question I will be rendered homeless, particularly given the effect of the Respondent's agents mismanagement of the rental ledger, and the effect on my rental history.

230 While there is no crystal ball into the future, it is highly probable that the Renter will find it almost impossible to find private rental accommodation in the current rental market, where demand outweighs supply.

231 The Renter has to take some responsibility, if not the lion's share, for her inability to find alternative housing in the Benalla housing market. The Renter has gone on Facebook and criticised the Rental Provider and the agents. It does not take a lot of insight to expect that taking these steps may result in some backlash, and that future rental providers or agents would not be attracted to a renter who was aggressive in her approach and critical of the actions being taken.

232 There is also the issue of the rent not being paid. The Renter could have, and should have, paid the rent while her other matters resolved. Even if the Renter can establish that the Rental Provider, and his agents, are in breach of the RT Act, their breach does not justify or validate the Renter failing to

[120] Paragraph 21 of the Renter's submission dated 23 August 2023 and filed in the SC Appeal.

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

comply with such a fundamental term of the rental agreement as the payment of rent.

233 I accept that the prospect of the Renter being made homeless is a matter that will have a significant impact on the Renter. However, the Renter has played a major part in arriving at her current circumstances. The Renter's refusal to pay the rent and her aggressive and demanding nature when seeking repairs, would not make her an attractive candidate to a future residential rental provider. As such, the prospect of the Renter facing homelessness is only narrowly supportive of a finding that it is not reasonable and proportionate to make a possession order.

Conclusion on whether a possession order is reasonable and proportionate

234 A renter is entitled to have a residential rental provider comply with the *RT Act*, and in fact, they have every right to demand it. The *RT Act* provides various avenues in which a renter can enforce their rights, but a renter must also comply with their obligations under the Act.

235 If the Tribunal is satisfied that it is reasonable and proportionate that a possession order should be made, taking into account the interest of, and impact of a possession order on the parties, then a possession order must be made.

236 I have considered all of the mandatory criteria that is relevant to This 91ZZA Application – the effect of the conduct of the Renter on the Daughter as a renter (s330A(g)), whether any other course of action is reasonably available instead of making a possession order (s330A(h)), the behaviour and conduct of the Rental Provider and his agents (s330A(i)), the impact the Renter's conduct on the Rental Provider if the agreement was to continue, and the likelihood of the Renter being made homeless if a possession order is made (s330A(j)).

237 Taking into account the prospect that the Renter will be made homeless by a possession order being made, I am nevertheless satisfied that it is reasonable and proportionate, taking account of all those matters I have considered above, but in particular:

(a) the relationship of the parties having irretrievably broken down,

(b) there being no prospect of any future dispute between the parties, being resolved, other than at the Tribunal or in the Courts,

(c) the impact that the various disputes over compliance with the *RT Act* and the rental agreement are having on both the Renter and the Rental Provider,

(d) each parties' perception of the conduct of the other party being responsible for their current situation, both financially and emotionally, and

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version

Signed by AustLII

(e) that the Rental Provider had grounds to give the notice, that the rented premises is his property and that it will be used to provide long term and secure housing to the Daughter who is a vulnerable renter.

238 As the Rental Provider has satisfied all the criteria under section 330 of the *RT Act*, a possession order must be made.

Delay in Possession

239 While a possession order must be made, I have a discretion to delay the date by which the Renter must vacate the rented premises by no more than 30 days from the date of the order, under section 333 of the *RT Act*.

240 The Renter has indicated that she would appeal any decision made for possession, and she did not make any submissions or request any delay to the effect of any possession order made.

241 These are lengthy reasons, and the Renter will need time to not only absorb the information but consider whether there has been an error at law, entitling the Renter to seek leave to appeal.

242 The Renter will also need time to engage with supports and try and find alternative accommodation, if not temporary and emergency in the short term.

243 The Daughter has at least a few weeks to run on her rental agreement, and the delay in possession by one further week, should not cause too great a hardship to the Rental Provider's plans for her to move into the rented premises.

244 For these reasons, the vacate date will be delayed for seven days after the date of these reasons and order for possession.

245 Orders will be made accordingly.

K. Campana
Senior Member

Retrieved from AustLII on 01 March 2025 at 09:39:23 Verify version