

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**RESIDENTIAL TENANCIES DIVISION**

**RESIDENTIAL TENANCIES LIST**

VCAT REFERENCE NO. R2020/6023

**CATCHWORDS**

Possession order; Leave for review by subtenant; section 120 VCAT Act; was the Tribunal order made in respect of whom the order was made

<b>APPLICANT</b>	Sean Warner
<b>RESPONDENT</b>	Hay Investments Group
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Member D. Calabro'
<b>HEARING TYPE</b>	Leave application
<b>DATE OF HEARING</b>	23 & 24 March 2020
<b>DATE OF ORDER</b>	24 March 2020
<b>DATE OF WRITTEN REASONS</b>	8 May 2020
<b>CITATION</b>	Warner v Hay Investments Group (Residential Tenancies) [2020] VCAT 553

**ORDER**

The applicant's application for leave to review the Tribunal's decision dated 6 March 2020 is dismissed, because he was not a person in respect of whom the Tribunal made an order and did not have a reasonable case in respect of the subject matter.

**MEMBER D. CALABRO'**

**APPEARANCES:**

For the Applicant

Sean Warner in person

For the Respondent

Ronan Atzmon, lawyer

D. Hay, director (on 24 March 2020)

## **REASONS**

- 1 Mr Warner (the applicant) applies to seek leave to review a possession order made by the Tribunal on 6 March 2020.
- 2 Hay Investments Group (the landlord) recovered possession of its rental property at 12 Pleasance Street, Bentleigh from Omri Shani (the tenant) for rent arrears, under sections 322(1) and 246 of the *Residential Tenancies Act 1997* (the RT Act).
- 3 The hearing was on 6 March 2020. The tenant attended and the landlord company was represented by Mr Atzmon, lawyer.
- 4 The Tribunal made a possession order. The tenant was ordered to vacate the rented premises on 6 March 2020 and the landlord was permitted to purchase a 14-day warrant of possession to enforce possession if the tenant did not leave the premises.
- 5 At the time the Tribunal granted the order for possession, the rental arrears were \$10612.08.
- 6 On 20 March 2020 the applicant applied to the Tribunal seeking leave to seek a review of the possession order.
- 7 I find that the applicant only became aware of the order when he found two redacted orders attached to the front door of the premises.
- 8 Given the current health restrictions, the hearing of the application was conducted by telephone on 23 April 2020. I granted a short adjournment to enable the applicant to obtain legal advice. The matter was adjourned by consent to 24 April 2020 for a further telephone hearing. Mr Hay, director of the landlord also joined the telephone hearing.
- 9 Mr Hay told the Tribunal that the property was sold in November 2019, contracts were signed on 22 November 2019 for vacant possession and settlement was to take place on 20 March 2020.
- 10 After hearing the evidence and submissions of the applicant and from the landlord's lawyer I gave oral reasons and made an order dismissing the application. The applicant then sought written reasons for my decision.
- 11 Below are my reasons for decision, they include my oral reasons and are extended for clarity.

## **THE APPLICANT'S CLAIMS**

- 12 The applicant told the Tribunal that he had been renting and living in the garage of the rented premises since July or October 2019 paying rent directly to Omri Shani. He did not know whether Shani was paying rent to the landlord.

- 13 He did not know anything about the notice to vacate for rent arrears until the redacted Tribunal's order was attached to the house of the rented premises.
- 14 At the hearing he requested time to leave the premises, however no agreement was reached with the lawyer for the landlord.
- 15 At the resumed hearing the applicant said that his lawyer had advised him that section 231 of the RT Act was relevant to his application.
- 16 Section 231 (1) of the RT Act states in part that
- (1) A person becomes the tenant of the landlord in respect of rented premises if
    - (a) the person is in possession of the premises under a tenancy agreement (a "sub-tenancy agreement") granted to him or her by a person who is a tenant of the rented premises under another tenancy agreement (the "head tenancy agreement") granted to him or her by the landlord; and
    - (b) the head tenancy agreement terminates or is terminated; and
    - (c) the sub-tenancy agreement does not terminate or is not terminated in accordance with this Act.
  - (2) The tenancy created under sub-section (1) is deemed to be under a tenancy agreement on the same terms, as far as applicable, as the terms of the sub-tenancy agreement...

## CONSIDERATION

- 17 The Tribunal considers section 231 does not apply in this case. However given the evidence before me I find that the sub-tenancy was terminated in accordance with the Act, that is rent arrears and therefore this section does not apply.
- 18 Section 120 of the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act) states in part.
- (1) A person in respect of whom an order is made may apply to the Tribunal for a review of the order if the person did not appear and was not represented at the hearing at which the order was made...
  - (4) The Tribunal may –
    - (a) hear and determine the application if it is satisfied that –
      - (i) the applicant had a reasonable excuse for not attending or being represented at the hearing; and
      - (ii) it is appropriate to hear and determine the application having regard to the matters specified in subsection (4A); ...

(4A) For the purposes of subsection (4)(a)(ii), the matters are –

- (a) whether the applicant had a reasonable case to argue in relation to the subject-matter of the order; and
- (b) any prejudice that may be caused to another party if the application was heard and determined...

- 19 I am satisfied that the applicant applied for a review within 14 days of becoming aware of the Tribunal's order and he had a reasonable excuse for not attending or being represented at the hearing. This being said the Tribunal must also consider the following in respect of the application.
- 20 I am not satisfied that the applicant is a person *in respect of whom an order is made* (my emphasis) and may apply to the Tribunal for a review.
- 21 I am not satisfied that the applicant was a person against whom the order was made. I am satisfied on the evidence, being the order dated 6 March 2020, that the Tribunal handed down an order for possession to the landlord and it was made against the tenant Omri Shani, who attended the hearing.
- 22 The VCAT Act states the Tribunal must be satisfied that the applicant applied for a review was a person in respect of whom an order was made. This is not the case here.
- 23 The order for possession made by this Tribunal on 6 March 2020 is not made in respect of Mr Warner; it was made in respect of Omri Shani who did attend the hearing.
- 24 The Tribunal notes the decision of *Lillas & Loel Lawyers Pty Ltd v Celona* [2014] VSCA 19, in particular Priest JA [at 42] that an application may be made under s120 "only if an order was made; the order was made at a hearing; and the person against whom the order was made did not appear and was not represented at the hearing." [See also *Pizer's Annotated VCAT ACT 6<sup>th</sup> edition Emrys Nekvapil* at page 718].
- 25 Secondly, even if the applicant is entitled for a review he does not have a reasonable case to argue against the possession order for rent arrears when the rent arrears are in excess of \$10,000.
- 26 The applicant's application for leave to review the Tribunal's decision dated 6 March 2020 is dismissed, as he was not a person in respect of whom the Tribunal made an order and did not have a reasonable case in respect of the subject matter.

**MEMBER D. CALABRO'**