practice note

Residential Tenancies Practice Note #07/001

Jurisdiction of VCAT: Service of Notices to Vacate

Background

The decision of the Supreme Court in 'Pavletic' raised the issue of the validity of Notices to Vacate that are served at the same time or after an Application is made to VCAT and the issue of the jurisdiction of the VCAT to hear such matters. In 'Pavletic' the Court found that in the case where an application for possession precedes the date the notice to vacate can be deemed given to the tenant, the tenant may have a defence to the application.

The argument proceeds as follows: under s. 506 (3) of the RT Act a notice to vacate must be given in one of 3 ways- personal service, by registered post or in the manner ordered by the Tribunal. By analogy with s. 141 of the VCAT Act, landlords rely on an item of registered post to be deemed served or given to the tenant 2 business days after the day it was posted.

Under s.322(1) of the RT Act allows a landlord to apply for a possession order

> "…*if the landlord has given the tenant a notice to vacate the premises*..."

At s.326 (1), an application under s.322

> "…*may be made at any time after the notice to vacate is given*…"

Section 446 of the RT Act provides that the Tribunal has jurisdiction to hear and determine applications made "under this Act". For an application to be made 'under the Act' pursuant to s 322(1), it must be preceded by the giving of a valid notice to vacate. Therefore, for an application to be valid, it can only be made after effective service of the supporting notice to vacate- that is, at least 2 business days after the notice has been sent, if it has been served by registered mail.

What is the issue?

Since the decision of 'Pavletic', the Tribunal has invariably, - but not always- dismissed applications for possession that have been lodged prior to the date that the notice to vacate can be deemed given, (for example when the notice and the application are created using the VCAT online service, and issued on the same day). The findings of 'Pavletic' in relation to the timing of an application were made by way of obiter. That is, an observation made 'by the way' on a legal question and that is not binding as a precedent.

The decision of the Supreme Court in 'Smith' confirmed that a failure to issue a valid notice to vacate deprives the Tribunal of jurisdiction to hear an application for possession based on the issue of such a notice. The Court also found that a defective notice to vacate cannot be cured by invoking section 127(1) of the VCAT Act to amend it.

The recent decision of the Supreme Court in 'Bundy' has confirmed the principles applied in both the 'Pavletic' and 'Smith' cases. In the 'Bundy' case the Court ruled that,

> *"…for a valid application for a possession order to be made by the landlord under s. 322(1) a Notice to Vacate served on the resident tenant must precede such an application." [Paragraph 10]*

The decision has confirmed that section 126 of the VCAT Act cannot be invoked to overcome an otherwise defective application. Section 126 allows the Tribunal to extend or abridge time limits, and, at s. 126(2)(b),

> *" …waive compliance with any procedural requirement, other than a time limit that the Tribunal does not have power to extend or abridge."*

The Court found that the procedural requirements referred to at s.126 are those which arise after the commencement of a proceeding. In the case where an application has not been preceded by the giving of a valid notice to vacate, the application is not validly before the Tribunal. Accordingly, the Tribunal lacks jurisdiction to hear the matter and as such, the proceeding cannot commence. The Court referred to the Smith ruling and reiterated that

> *" …the Tribunal cannot make an amendment which seeks to give the Tribunal jurisdiction where none previously existed." [Paragraph 17]*

What should you do?

1. Any application made by a landlord under s.322 (1) of the Residential Tenancies Act should be scrutinised to ensure that a valid notice to vacate relating to the application was properly given to the tenant before the application was made.

2. If this is not the case, submissions should be made that the application is defective and that the Tribunal lacks jurisdiction to hear it.

3. In addition, submissions should also be made that the Tribunal cannot amend the application so as to give itself jurisdiction, and that the application must be struck out accordingly.

4. In all of the above reference should be made to the Supreme Court decisions of 'Pavletic', 'Smith' and 'Bundy'.

This Practice Note is a guide only and should not be used as a substitute for professional legal advice If you have a question about this Practice Note or a specific case you are require advice about then you should contact us on **(03) 9411 1444**

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References

1. Director of Housing v Mirjana Pavletic [2002] VSC 438
2. Director of Housing v Alice May Smith [2005] VSC 436
3. Bundy v Alberts and Alberts [2006] VSC 7877
4. RT Act 1997, ss. 446, 506, 322, 326
5. VCAT Act 1998, ss. 126, 127, 141
6. Tenants Union of Victoria, Adviser Memos #11, #22, #36