

Eviction by Mortgagee

Background

An increasing number of tenants have come to the TUV for advice and assistance in respect of a "Final Notice" addressed to the Occupants issued by the Sheriff's Office that purports to require the tenants to vacate, invariably at very short notice.

A Final Notice issued by the Sheriff's Office of this kind may be issued as a result of orders for possession being made in the Supreme Court in favour of a mortgagee against a landlord who has defaulted on the mortgage. The mortgagee may instruct the Sheriff's Office to remove all persons from the premises, including any tenant if the property is not vacant on the termination date of the notice.

What is the issue?

As set out below, our view is that a notice issued by the Sheriff's Office in itself, (and in the absence of compliance with the relevant provisions of the *Residential Tenancies Act* (RTA) relating to the termination of a tenancy) may not constitute valid grounds for the termination of a tenancy.

That is, despite an order for possession made in the Supreme Court, if a mortgagee wishes to take possession of rented premises with a tenant still in possession, we consider that the mortgagee must comply with the termination provisions of the RTA in order to legally terminate the tenancy.

Section 216, in Part 6, Division 1 of the RTA states,

Despite any Act or law to the contrary, a tenancy agreement does not terminate and must not be terminated except in accordance with this Division or Part 7 or 8

Similarly, section 229(1) provides that,

A landlord or a person acting on behalf of a landlord must not, except in accordance with this Act-

- (a) require or compel or attempt to compel the tenant under the tenancy agreement to vacate the rented premises; or*
- (b) obtain or attempt to obtain possession of the rented premises by entering them, whether the entry is peaceable or not.*

Section 268 of the RTA (also in Part 6, Division 1) allows a mortgagee under a mortgage entered into before the tenancy agreement was entered into, to give a tenant 28 days notice to vacate the premises. However, if the tenancy agreement was entered into before the mortgage, a notice under section 268 by the mortgagee is invalid and cannot form the basis of an application for possession.

Similarly, section 42(2) of the Transfer of Land Act 1958 provides that,

... the land which is included in any folio of the Register or registered instrument shall be subject to-

- (e) *the interest (but excluding any option to purchase) of a tenant in possession of that land.*

Section 223 of the RTA provides as follows:

A tenancy agreement terminates if a mortgagee in respect of rented premises gives a notice to vacate under section 268 and-

- (a) *the tenant vacates the rented premises on or after the termination date specified in the notice; or*
- (b) *the tenancy agreement terminates in accordance with section 334.*

Section 334 of the RTA establishes that the date on which the tenancy agreement terminates. This is deemed to occur once VCAT has made a possession order in favour of a landlord or a mortgagee, and falls on the day immediately preceding the day that possession of the premises passes to the mortgagee.

In the case of the mortgagee, the possession order is made under sections 325 and 330 of the RTA. Once a possession order has been obtained, Division 4 of Part 7 of the RTA provides a procedure for enforcement of the order, by application to the principal registrar of VCAT for the issue of a warrant.

Here, sections 223 and 268 modify the common law position that a prior mortgagee is entitled to immediate possession without giving notice to the tenants. Section 268 requires the mortgagee to give the tenants at least 28 days notice to vacate; the intent of a section 268 notice is to prevent a mortgagee from evicting residential tenants without the tenants being given reasonable notice.

Section 216 makes it clear that a tenancy agreement that is not terminated in accordance with the RTA remains on foot or is otherwise unlawfully terminated. It would follow that a mortgagee who evicts a tenant without first serving a section 268 notice has not lawfully terminated the tenancy agreement, and has violated the tenant's rights to quiet enjoyment/exclusive occupation of the premises conferred by the tenancy agreement and section 67 of the RTA.

That is, a mortgagee wishing to obtain possession of rented premises against a tenant must first issue a notice pursuant to section 268 of the RTA and may then, if on the termination date of the notice the tenant has not vacated the property, apply to VCAT for a possession order.

In an application for compensation made in the Tribunal (VCAT Ref. R2006/36522) by tenants who vacated the rented premises upon receipt of a Final Notice issued by the Sheriff's Office, and who were not issued with a notice to vacate under section 268 of the RTA, Member Steele made the following remarks (at paragraph 20 of the written reasons for the decision):

The tenants were not obliged to vacate the rented premises when they did on 15 March 2006, as the agreement had not terminated in accordance with the Act (section 216). The tenants were entitled (under section 268 of the Act) to 28 days notice to vacate.

In addition, section 501(c) of the RTA provides that:

A person must not make, in relation to a tenancy agreement, a proposed tenancy agreement or a residency right, a false and fraudulent misrepresentation as to...

(c) a matter affecting a person's rights or duties under this Act or a tenancy agreement or proposed tenancy agreement.

If a mortgagee attempts to terminate the tenancy pursuant to a notice issued by the Sheriff's Office, without first issuing a notice to vacate under section 268 to the tenant, the mortgagee may have acted in breach of section 501(c) of the RTA. A breach of s 501 is a summary offence, that may incur a penalty of up to \$1000.

What should you do?

1. Section 446(a) of the RTA provides that:

The Tribunal has jurisdiction to hear and determine an application under this Act relating to-

(a) any matter arising in relation to a tenancy agreement or a proposed tenancy agreement of premises situated in Victoria.

2. Section 452 (1) of the RTA provides that:

A landlord or a tenant under a tenancy agreement may apply to the Tribunal if-

(a) a dispute has arisen under the tenancy agreement; or

(b) there has been a breach of the tenancy agreement or of the provisions of this Act relating to the tenancy agreement.

3. Section 452 is not limited to a dispute as between a landlord and a tenant. It simply defines the scope of potential applicants to the Tribunal. It follows that section 452(1) may form the basis of an application against a person who is not a party to the tenancy agreement, provided that sub-paragraphs (a) or (b) are satisfied.

4. The termination of the tenancy by the mortgagee without giving the required notice to the tenants pursuant to section 268 of the RTA constitutes a breach of a provision of the RT Act relating to the tenancy agreement, as this contravenes the prohibition in section 216 relating to the means for terminating a tenancy agreement.

5. The remedies that the Tribunal may grant include, at sections 472(1)(a) and 472(1)(f) of the RTA, to restrain any action in breach of a tenancy agreement or the provisions of the Act relating to a tenancy agreement, and to require the payment of compensation to any person.



6. An application can be made for an injunctive order against the mortgagee to prevent a proposed termination of the tenancy where the relevant provisions of the RT Act have not been followed, under section 472(1)(a) of the RT Act. If the tenancy has been unlawfully terminated, an application can be made for compensation against a mortgagee pursuant to section 472(1)(f). Such an application can be made in the Residential Tenancies List of

VCAT irrespective of whether the mortgagee has proceeded by way of warrant for possession issued out of the Supreme Court.

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 want advice about then you should contact us on **(03) 9411 1444**

Regards,
Tenants Union Legal Service

References:

Residential Tenancies Act 1996 [ss 67, 216, 223, 229, 325, 330, 334, 268, 446, 452, 472, 501]

Transfer of Land Act 1958 [s 42(2)(e)]

Memorandum of Advice from Cameron Maccauley SC

VCAT Orders R2006/36522