

RESIDENTIAL TENANCIES & AIRBNB – NO BREACH OF LEASE

[Swan v Uecker \(Residential Tenancies\)\[2016\] VCAT 483 \(24 March 2016\)](#) is believed to be the first decision in Victoria regarding Airbnb.

The Landlord (Catherine Swan) sought to remove the Tenants (Barbara Uecker and Michael Greaves) from rented premises in Fitzroy Street St Kilda (“the rented premises”) which was the subject of a 12 month fixed Residential Tenancy Agreement. The Tenants entered into an Airbnb Agreement for use of the rented premises.

The Landlord sought to obtain a possession order and bring the fixed term tenancy agreement to an end. The Landlord argued that the use of the rented premises by the Tenant as an Airbnb amounted to sub-letting without the Landlord’s consent. The Tenants argued that they are not sub-letting the rented premises, but merely licensing part of it.

Interestingly, the Tenants, with the agreement of the Landlord, entered a special condition into the Residential Lease that stated:-

“For the term of this lease the following terms apply (1) occupy means permanently residing at the address”

At the centre of the dispute was the difference between a Lease and a Licence. Both the [Residential Tenancies Act](#) and the Lease prohibited sub-letting or the assignment of the Lease without the Landlord’s prior consent.

The Tenants produced an agreement with Airbnb which indicated that the Airbnb arrangements were merely a “Licence” for the “guest”. Further, the Tenants indicated that there were a number of stays by guests but none exceeded 5 days at any one time.

In order for the Lease or the Residential Tenancies Act to have been breached there needed to be a Lease by way of sub-letting between the Tenant and the guest. A Lease granted exclusive possession to the guest of the rented premises. If the guest had not been provided with exclusive possession but merely shared part or all of the rented premises then it constituted a Licence and not a Lease. If it were not a Lease then there could not be a breach of the Residential Tenancies Act and the Lease.

The Tribunal Member stated:-

“45. Taking into account-

- (i) the express words contained in the Airbnb agreement that the use of the rented premises by Airbnb by guests was a licence,*
- (ii) the short term stays by the guests, the payment platform, the terms of arrival and departure and the terms of use of the rented premises,*
- (iii) the tenants retention of the rented premises as their principal residence before, during and after, each of the Airbnb guests and*
- (iv) the ability of the tenants to access the rented premises during each Airbnb stay and make a guest who overstays leave the property;*

I find that the Airbnb guests did not have exclusive possession of the rented premises.

46. Without an entitlement to an exclusive possession, I am satisfied that the nature of the legal relationship between the tenants and Airbnb guests was not a tenancy. In my view, this was not a lease but a licence to occupy.

47. As the tenants did not enter into a tenancy with any of the Airbnb guests they cannot be said to have assigned or sub-let their tenancy agreement with the landlord.

CONCLUSION

48. Without an assignment or sub-letting of the rented premises, the Landlord has not proved the grounds to enable her to serve the NTV (Notice to Vacate) and as such the NTV (Notice to Vacate) is invalid.

49. Without a valid Notice to Vacate there is no basis to make an application for a possession order. The application must therefore be struck out.”

It would appear that Tenants may be able to rely on this decision to host Airbnb guests in a manner consistent with the decision. Alternatively, Landlords may need to add special conditions to a Residential Tenancy Agreement if they wish to prohibit Airbnb guests in their property. No doubt this will not be the last case involving Airbnb activities in rented premises.

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N.B. This decision was appealed successfully to the Victorian Supreme Court (see our Article "[The AirBnB Case – The Victorian Supreme Court](#)" dated 21 June 2016)

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