

## THE AIRBNB CASE – VICTORIAN SUPREME COURT

The Supreme Court of Victoria in [Swan V Uecker \(2016\) VSC 313 \(10 June 2016\)](#) ruled that the arrangement provided to AirBnB guests in these circumstances amounted to a sublease by the Tenants (Uecker and Greaves). Subleasing by the Tenants was prohibited by the Lease between the Landlord (Swan) and the Tenants. The Supreme Court in finding the arrangements constituted a sublease overturned the earlier VCAT decision that found the arrangement was not a sublease but a mere licence. VCAT found that the Tenants had not breached their lease with the Landlord.

However, the Victorian Supreme Court did find that the arrangement in these circumstances constituted a sublease and therefore the Tenants were in breach of their lease with the Landlord (Swan).

In our view the judgement of his Honour Dr Clyde Croft, also a highly regarded author on Tenancies, provided a clear and comprehensive review of the law in reaching his conclusion that in these circumstances the AirBnB arrangement constituted a sublease and therefore breached the lease with the Landlord.

### Facts

1. The Tenant leased, for a 12 month period from the Landlord, a 2 bedroom apartment in St Kilda (“the Apartment”).
2. The Tenants advertised on the AirBnB website 2 options for the use of the Apartment, namely:-
  - 2.1. “You will have use of the entire 2 bedroom apartment, its bathroom, kitchen, lounge room and balcony.” [para 20]; or
  - 2.2. “You will have access to and be able to share with me my bright bathroom and my lounge room with adjoining open air terrace... Though my kitchen is not available for guests to cook in, I am happy to make room in the fridge for a few essentials, medications etc which you need to keep cold.” [para 21]
3. VCAT found that the Apartment had been used either as a whole or in part by AirBnB guests. The Tribunal also found that the Landlord did not consent to the Apartment being used in this way.

4. It was agreed that this judgement only referred to those instances when the whole of the Apartment (rather than just 1 bedroom) was subject to the AirBnB occupancy.
5. The Tenants argued that under the terms of the AirBnB Agreement the granting of occupancy to AirBnB guests was a mere licence to occupy and not a sublease of the Apartment.
6. The Landlord argued that the granting of “exclusive possession” of the Apartment to an AirBnB guest(s) constituted a sublease of the Apartment and therefore was in direct breach of the Lease Agreement between the Tenant and the Landlord.

### **Decision**

The Court found that, based on Australian authorities and the objective construction of the circumstances surrounding the occupancy that in fact the AirBnB arrangements in these circumstances constituted a sublease and therefore was in breach of the lease agreement between the Tenant and the Landlord. The court also overturned VCAT’s decision on the following points:-

1. There was no evidence or other material before the Tribunal to support the finding that the Tenants were able to access the Apartment during each AirBnB stay.
2. It was not relevant to a finding by VCAT that there was a mere licence simply because the Tenant could ask the AirBnB guests to leave if they overstayed.
3. The fact that the Apartment was the Tenant’s principal place of residence did not preclude a finding that a sublease had been granted by the Tenant to the AirBnB guest.

There has been considerable media speculation as to the meaning of this decision. We were contacted by media to comment on the case when it was first known that the Landlord was going to appeal the VCAT decision. The media speculation focused incorrectly on the AirBnB arrangements rather than the legal position between the Landlord and the Tenant and the rights and obligations of the Tenant in the lease with the Landlord. His Honour concluded his judgement by stating the following at [para 80]:-

*“Finally, by way of conclusion having regard to the public interest in these proceedings it may be helpful to set out part of my concluding remarks at the hearing of this appeal:*

*First, this is not a case on the merits of AirBnB arrangements. Neither is it a case in whether or not AirBnB arrangements might be said to be “illegal” –*

*either in some particular or some general, non-legal sense. Rather it is a case on appeal which raises for determination- directly or indirectly – the legal character of this particular AirBnB arrangement and any consequences this characterisation may have in the context of the terms of the lease of the apartment concerned.*

*Secondly, the context provided by the terms of the particular apartment lease are important. Although this apartment lease is a residential lease, many commercial leases restrict the tenant from sub-leasing, assigning the lease, granting any licence to occupy all or part of the leased premises or otherwise parting with possession without the landlord’s prior consent. Broad terms such as this would prevent, for example, sub-letting or licensing without the landlord’s consent and would avoid the need- as in the present case – to characterise the nature of the same arrangement like the AirBnB arrangement for occupation of the whole of the leased premises as a sub-lease or a licence.”*

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