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AN APPEAL FROM VCAT TO THE VICTORIAN SUPREME COURT IS NOT AUTOMATIC

The AirBnB case, Swan V Uecker (2016) VSC 313 (10 June 2016) (to see our Article "The AirBnB Case – Victorian Supreme Court Published 21 June 2016" click here), received considerable media publicity. However, there was little reporting that the case actually involved an application by the Landlord (Swan) for leave to appeal the VCAT decision, Swan V Uecker (Residential Tenancies 2016) VCAT 483 (to see our Article "Residential Tenancies & AirBnB – No Breach of Lease" published 11 April 2016 click here), to the Supreme Court.

His Honour Dr Clyde Croft stated [para 5]:-

> *"In the interests of expedition and economy in terms of time and cost, this proceeding was heard as a combined or "rolled up" application for leave to appeal the Tribunal decision and, if leave were to be granted, the hearing of the appeal itself."*

In other words an appeal from a VCAT decision to the Victorian Supreme Court is not an automatic right.

His Honour then provided a comprehensive review of the principles and authorities with respect to appeals from VCAT.

Section 148(1) of the VCAT Act provides:-

> *"A party to a proceeding may appeal on a question of law from an order of the Tribunal in the proceeding—*
>
> *(a) if the Tribunal was constituted for the purpose of making the order by the President or a Vice President, whether with or without others, to the Court of Appeal with leave of the Court of Appeal; or*
>
> *(b) in any other case, to the Trial Division of the Supreme Court with leave of the Trial Division."*

Accordingly, an appeal from VCAT must:-

1. be on a question of law; **and**

2. have the Court gives leave to appeal.

His Honour then stated [para 6]:-

> *"The legislative policy underlying these provisions is that "VCAT decisions should not generally be disturbed where cases have been decided in that forum other than on questions of law and where there is something about the decision bearing upon the question of law which warrants a grant of leave to appeal." It follows that "this Court is not entitled to enter into the fact finding exercise which the legislature has deliberately entrusted to a specialist tribunal."*

The Court then cited Victorian Authority that the section:-

> *"also confers a discretion about whether to grant leave which an applicant must persuade the Court to exercise in its favour. What must be shown will depend upon the particular case bearing in mind the statutory criteria being a grant of leave and not special leave. It will ordinarily be necessary (in addition to a clearly articulated question of law) for an applicant to make out a prima facie case and in an appropriate case it may be necessary for the applicant to show that the question upon which leave is sought has public or general importance."*

Accordingly, the Court found that leave should be granted as the matter involved a question of law. It was expedient in terms of costs for the parties and the matter was clearly in the public interest given the publicity generated by the VCAT decision.

The Court then found that the AirBnB arrangements undertaken by the Tenant constituted a sublease of the apartment and therefore a breach of the lease between the Tenants (Uecker and Greaves) and the Landlord (Swan). The Court overturned the VCAT decision and ordered that the Landlord "be granted a possession order in a form which complies with the requirements of the act." The question of costs was reserved to allow the parties to make submissions on the issue.

Accordingly, the case demonstrates that there is no automatic right to appeal a VCAT decision. Further, VCAT is generally considered a "no costs" jurisdiction whereby costs are not awarded against the losing party except for exceptional circumstances whereas in the Supreme Court jurisdiction costs will ordinarily be awarded against the losing party.

Date Published: 1 July 2016

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