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VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

RESIDENTIAL TENANCIES LIST

VCAT REFERENCE NO. R2014/26078

CATCHWORDS

APPLICANT

RESPONDENT

Asian Pacific Property Investment Pty Ltd
(ACN. 78936204)

SUBJECT PREMISES

Preston

WHERE HELD

Melbourne

BEFORE

J Kefford, Member

HEARING TYPE

Hearing

DATE OF HEARING

8 July 2014

DATE OF ORDER

8 July 2014

DATE OF REASONS

24 July 2014

CITATION

ORDER

Direct registrar to amend the header to this order to remove the reference to tenant and landlord because the operation or otherwise of the Residential Tenancies Act 1997 has always been a threshold question in all proceedings between the parties.

The Applicant's application for review is granted and the order dated 20 June 2014 in application R201424967 is set aside.

The Tribunal finds as follows:

The premises, known as _____, comprise a room in a complex known as Rydges Hotel and Sleep-and-Go.

The agreement entered into between the parties on or about 8 December 2013 is expressed as a Licence Agreement.

The rights and obligations of the parties to the Licence Agreement are consistent with the creation of a licence and not a lease or tenancy.

The Respondent has proved that the agreement between the parties is a licence and that the Residential Tenancies Act 1997 does not apply to the agreement (s.507).

The provisions of s.20 are not relevant as, although the Respondent conducts a business in licensed premises in the nature of a hotel or motel, the agreement between the parties is not a tenancy agreement.

The Tribunal orders that it has no jurisdiction under the Residential Tenancies Act 1997 and the application is struck out.

The orders dated 20 June 2014 in R201426078 and 12 June 2014 in R201424967 are set aside. Direct the registrar to provide a copy of this order to the police informing the police of the setting aside of the said injunctive orders.

The Tribunal further notes that the applicant withdrew application R201423532 in a document dated 10 June 2014 but commenced a second proceeding, R201424967, without first seeking the leave of the Tribunal.

The Applicant is prohibited from commencing any further application in the Residential Tenancies List of this Tribunal unless and until this order is set aside by order of the Supreme Court.

The Respondent does not seek an order for costs today but reserves the right to do so on notice to the Applicant.

Written Reasons to be provided in due course.

J Kefford
Member



APPEARANCES:

For Applicant

In person

For Respondents

In-house Solicitor for Respondent;
, Residence Sales Manager

REASONS

- 1 The application before me on 8 July 2014 was, firstly, a review of order dated 20 June 2014 in application R2014/24967 (which dismissed [redacted]'s application, with costs, for non appearance) and, secondly, a rehearing of [redacted]'s original application R2014/24967 dated 12 June 2014 which claimed "A restraining order/injunction under the Residential Tenancies Act to prevent the landlord from evicting me from the property".
- 2 I granted [redacted]'s review and set aside the said order (as amended) dated 20 June 2014.
- 3 Given the history of the proceedings and the nature of the claim, I granted leave to the Respondent to be represented by a professional advocate.
- 4 The request of the Applicant to grant a further adjournment was opposed by the Respondent and denied. The Applicant submitted that his appeal to the Supreme Court should be first determined. The Respondent submitted that it was experiencing time and cost consequences due to the delay. I accepted the Respondent's submission. In addition, VCAT was yet to make a substantive decision that could be the subject of an appeal.
- 5 The Respondent submitted that the contract between the parties was not an agreement subject to the Residential Tenancies Act 1997 (the Act).
- 6 The onus of proving that the Act does not apply to the contract between the parties lies on the Respondent: s507.
- 7 At my request, [redacted] described the location of the premises. She stated that the complex situate at [redacted] is known as Rydges Hotel and Sleep-and-Go Hotel. (Elsewhere in documents filed, the complex is called Bell City.) It comprises in excess of 800 rooms, food outlets and serviced offices. The rooms vary from budget to 4½ star rated rooms. There are 7 levels to the complex. Room [redacted] is on the 3rd floor. It is an open-plan studio of 30m² with a queen-sized bed, ensuite and kitchenette. The room is serviced daily if occupied at the daily rate. If occupied at the rate of a 28 night stay, the room is serviced less frequently. Entry is via a swipe card. Housekeeping has use of a swipe card. There is a master swipe card.
- 8 [redacted] stated that there are no occupants in the Rydges Hotel and Sleep-and-Go Hotel complex who are tenants or residents under the Act.
- 9 The Applicant raised the following as establishing that he was a tenant under the Act:
 - The premises are called Rydges Residences.
 - Hotel guests don't stay for the length of time he has.

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see b)

- The Applicant believed he was signing a rental agreement on 8 December 2013. He was not given a copy but believed that the form did not state that it was a licence agreement. The agreement had the hallmarks of a residential tenancy agreement.
- He was told his length of stay was flexible.
- He has exclusive occupancy of room
- Servicing of the room and maintenance were carried out at the Applicant's convenience and in his presence.
- The Applicant was offered a car park which would not be offered to a short-term guest.
- The Applicant received fewer loyalty points than a hotel guest.
- He was not given a daily mini-bar refill.

10 The Respondent raised the following in establishing that the Applicant was a licensee and not a tenant or resident under the Act:

See
C)

- The complex in which room [] is located is a hotel development.
- The Respondent provides accommodation services to hotel guests.
- The Applicant entered into a licence agreement on 8 December 2013 at the commencement of his stay.
- The Applicant produced a United Kingdom driving licence as proof of identity, thereby portraying him as a visitor to Victoria.
- The Applicant opted for a 28 night stay. The rate was set at \$140 per night but adjusted according to the length of stay.
- The Short Stay Handbook and the Licence Agreement contain the terms and conditions of the occupancy.
- From 28 March 2014 the weekly rental rate was adjusted to \$499.00. The Applicant signed a document headed Rate Adjustment to Licence Agreement.
- The Applicant did not have exclusive occupancy of the room. The Respondent had the right to enter the room for purposes consistent with the operation of a hotel.
- The Respondent could and did on occasion, cancel the entry swipe card to the room without notice to the Applicant.

11 The Respondent provided a copy of the decision of the High Court in *Radaich v Smith* 101 CLR 209 to the Tribunal and the Applicant. That decision held that the decisive factor in determining whether a document creates a lease as opposed to a licence is whether the right conferred was to exclusive possession. The Respondent submitted that the agreement between the parties did not confer any right to exclusive occupancy of room

[redacted]. The Respondent retained the right to require the Applicant to change rooms whether or not it had exercised that right.

12 The Tribunal notes that the Respondent's invoice to the Applicant indicates that GST is charged. No GST is payable in relation to rent for residential premises.

13 The Tribunal accepted the evidence for and submissions of the Respondent. The Tribunal was satisfied that the Respondent was conducting the business of providing hotel accommodation and that this was made clear to the Applicant at the outset of the contract between the parties. The terms of the agreement between the parties were consistent with the creation of a licence to occupy room [redacted]. The terms of the agreement were inconsistent with either party having rights and duties under the Residential Tenancies Act.

14 The Tribunal considered whether s.20 of the Residential Tenancies Act applied. This section is as follows:

20 Hotels and motels

(1) Subject to subsections (2) and (3), this Act does not apply to a tenancy agreement or a room if the rented premises or room are situated in a motel or in premises licensed under the *Liquor Control Reform Act 1998*.

(2) This Act applies to a tenancy agreement for rented premises situated in a motel or licensed premises if the tenancy is for a fixed term exceeding 60 days.

(3) Subject to section 94(1), the rooming house provisions apply to a room in a motel or licensed premises if a person—

(a) occupies the room as his or her only or main residence; and

(b) has so occupied any room in that rooming house for at least 60 consecutive days since the commencement of this section.

15 The Applicant occupied Room [redacted] for at least 60 consecutive days. However, for the reasons detailed above, the Tribunal found that the agreement between the parties was a licence, not a lease or tenancy. It was not put to the Tribunal that the Applicant was a resident in relation to a room in a rooming house. But I will deal with that issue for the sake of completeness. In my opinion, the Applicant was not a resident under the Residential Tenancies Act for the following reasons:

- The Applicant produced a UK driver's licence. He did not disclose to the Respondent that he sought a room as his "only or main residence" so as to obtain the "agreement" or otherwise of the Respondent (see definition (a) of "resident").
- Room [redacted] appears to be a self-contained apartment which is excluded from the definition of "room".

- The Applicant did not have exclusive occupancy of Room []
- The agreement between the Applicant and Respondent was a Licence Agreement.

16 Accordingly the Application was struck out and the injunctive orders set aside.

17 The Tribunal expressed concern that the Applicant, when aggrieved by an order of the Tribunal, had commenced fresh proceedings based on the same facts and circumstances. The Respondent had been put to considerable inconvenience and expense to appear before the Tribunal. The Tribunal therefore required the Applicant to succeed in his application for leave to appeal to the Supreme Court before initiating any further application in the Residential Tenancies List.

18 The Respondent's right to seek costs was reserved.

J Kefford
Member
24 July 2014



28 July 2014

To whom it may concern,

When reading the written reason from the Tribunal please take in to account the following:

a) Point 4 of the reasons say that I had requested an adjournment. I did not. I requested that we await the determination of the proceedings at the Supreme Court, as s.448 of the residential tenancies act prohibits the Tribunal from proceeding unless civil proceedings are discontinued. So it wasn't so much a stay or an adjournment I was requesting. I had requested a stay pursuant to s.50 (3), s.50 (4)(a), and s.149 (1) of the VCAT act, but this was with reference to the operation of Member Wiseman's orders of 20 June 2014 and 27 June 2014 with regards to costs awarded against me.

I mentioned this at the hearing on the 08 July 2014, and member Kefford asked me if costs were a concern and dismissed my concerns saying that there was no "dollar figure" put in place at that point.

I said that in addition to this I was appealing Member Liden's decision (order) of 10 June 2014. (<https://jade.barnet.com.au/Jade.html#article=253712>) Member Kefford dismissed this saying that the matter had not been decided at VCAT and denied my request that proceedings await the outcome of a Supreme Court decision. The Supreme Court proceedings were filed based on the outcome of the decision by member Liden, that is the consequences arising directly as a result, namely, the landlord (respondent) issuing a 'notice to vacate', then moving my goods from the room the next day, as the interim restraining order was no longer in effect.

b) point 8 - Member Kefford asked the witness Ms XXXXX XXXXX, Residences Sales Manager at Rydges Residences if there were any tenants there at Rydges Residences. This particular hearing is about the two parties, Ms XXXXX could not possibly say if all the residents at Rydges residents are tenants or licencee's. This would entail looking at each of their contracts. Furthermore, we are only dealing with the agreement between Rydges Residences and myself. This is not dependent on what the terms of agreement between Rydges residences and other tenants/licencees' are.

c) point 10 - The part where it says “the applicant produced a United Kingdom driving licence as proof of identity, thereby portraying him as a visitor to Victoria” was not mentioned by the respondent at the hearing or in any of the documents submitted to the Tribunal by the respondent.

The part “the rate was set at \$140 per night but adjusted according to the length of stay” did not emerge from the respondent. I mentioned that the daily rate was around \$ 140 per night, when Member Kefford interrupted me while I was attempting to cite a case (String v Gilandos Pty Ltd– I did manage to cite this before the hearing finished, but there was constant interruptions from Member Kefford when I was speaking throughout the hearing), and asked me what the daily rate that “the hotel” was charging.

The part “the short stay handbook and the licence agreement contain the terms and conditions of the occupancy”. I was not handed a short stay handbook or a licence agreement at the beginning, that is how come I was urged to sign an agreement on the 02 June 2014 with clauses that I could not agree to.

The document signed on 28 March 2014 was titled “rate adjustment to licence agreement”. This is just the title. The content of the form was not analysed at the hearing, nor was the tenancy agreement that I was compelled to sign, but did not. When I had showed member Kefford the latter agreement she simply read-out the title for the record and handed me back the agreement.

The part “the respondent could and did on occasion, cancel the entry swipe card to the room without notice to the applicant”. This was not discussed at the hearing on the 08 July 2014.

However, at the hearing on the 17 June 2014, the respondent's lawyer said to the Tribunal that the swipe card's became defective just like any other hotels' swipe card if they were kept near a magnetic field. e.g. mobile phone.

What was discussed at the hearing on the 08 July 2014 was how the respondent had cancelled the swipe card on the premise that my rental account was overdue, when in fact it had not. The member asked the legal representative of the respondent about this, and he said that there had been an issue with the account, due to the rent level change on 28 March 2014 (from \$549 per week to \$499 per week) and it had been “sorted-out” since then. However, I mentioned that in

April 2014 access to the room was disabled due to this mistaken notion that the account was overdue when in fact it had not.

d) part 12 - This part about GST was never part of the proceedings.

e) part 15 - I did not put to the Tribunal that Rydges Residences is a rooming house because obviously it is not one. The sections and rules that apply to rooming houses and caravan parks would not be relevant for this case.

The drivers licence produced was a form of identification. It would have been somewhat out of place to mention that I was intending to use the room as my "only or main residence" at any point. I doubt any of the residents at Rydges have said that their room is NOT their "only or main resident".

"self-contained" apartments apply only to the part about rooming houses'.

f) part 17 - The proceedings ref: R2014/24967 on the 12 June 2014 determined that the facts and circumstances were different from the previous proceeding ref: R2014/23532 on the 11 June 2014. That is how come proceedings were instituted at the Supreme Court with regards to the order by Member Liden on 10 June 2014. I was always advised to lodge a fresh application on both 11 June 2014 and 20 June 2014. The Tribunal only started expressing concern about this aspect once I had begun the proceedings at the Supreme Court with regards to both apprehended and actual bias.