



Summary of Judgment

Markiewicz v Crnjac [2021] VSCA 290

25 October 2021

For reasons explained in its detailed judgment, the Court of Appeal found that a tenant of residential premises who was unable to pay a substantial proportion of her rent during the COVID-19 pandemic was protected against eviction based on the arrears. However, the Court also found that the statutory protection against her eviction based on those arrears expires on 25 October 2021 (coincidentally the same day the Court's decision was handed down).

In April 2020, in response to the economic impact of the COVID-19 pandemic, Parliament introduced pt 16 into the *Residential Tenancies Act 1997* ('RTA'). The newly inserted s 542 provided that where a tenant or landlord would otherwise be in breach of the lease, they were taken not to be in breach if the failure to comply was because of a 'COVID-19 reason' (as defined). Part 16 operated from 29 March 2020 to 28 March 2021 (the '**Emergency Period**'). Although pt 16 was repealed on 28 March 2021, reg 14 of the *COVID-19 Omnibus (Emergency Measures) Transitional Regulations 2021* provided that the protection conferred by s 542 for breaches of leases that occurred during the Emergency Period was to continue to have effect in relation to those breaches (but not subsequent breaches) until 25 October 2021 (the '**Transition Period**').

At the end of the Emergency Period and the beginning of the Transition Period, the legislature introduced further amendments to the RTA, including s 91ZM, which provides that a notice to vacate may be given where there has been an 'occasion of non-payment of rent', meaning that rent of a specified amount is 'owing'.

The tenant has occupied the rented premises since 2015. Until the COVID-19 pandemic, she had always paid the rent in accordance with the lease. However, during the Emergency Period, she lost almost all of her income and was only able to pay about half of the rent due. Her inability to pay the full rent due under the lease was for a COVID-19 reason, namely, ill health and her loss of income caused by the COVID-19 lockdowns and health directions.

During the Emergency Period, no steps were taken to evict the tenant or recover rental arrears. However, on 30 March 2021, two days after the end of the Emergency Period, the landlords gave the tenant a notice to vacate under the newly enacted s 91ZM of the RTA for failure to pay rent, and they applied to the Victorian Civil and Administrative Tribunal for a possession and other orders. The tenant resisted the

application for a possession order claiming that she did not have to pay the rental arrears as, when they occurred, she was deemed by s 542 not to be in breach of the lease.

The Tribunal held that for the purposes of a possession order under s 91ZM, s 542 of the RTA and reg 14 did not apply to arrears of rent once the Emergency Period had ended. The Tribunal did, however, conclude that s 542 and reg 14 afforded the tenant a defence to the landlords' claim for a compensatory or monetary order for the rent outstanding. Accordingly, the Tribunal made a possession order on 4 August 2021, which was to operate from 3 September 2021.

The tenant sought leave to appeal the decision of the Tribunal alleging error of law by the Tribunal and contending that the rental arrears were not and never would be owing for the purposes of s 91ZM. The Court of Appeal (Emerton and Sifris JJA and Macaulay AJA) granted leave to appeal and allowed the appeal.

The critical issue in the Court of Appeal was whether the tenant's failure to pay rent for a COVID-19 reason during the Emergency Period, although strictly a breach of the lease, was also to be taken, during the Transition Period, not to have been a breach, and whether, as a result, the rental arrears did not constitute rent 'owing' for the purpose s 91ZM at the time the notice to vacate was given.

The Court of Appeal held that despite her failure to pay the full amount of rent during the Emergency Period, the tenant was not in breach of the lease during the Emergency Period and that protection continued during the Transition Period so that no rent in the form of arrears was 'owing' during either Period. Enforcement measures for the rental arrears, including the making of a possession order, could not be taken during the Emergency Period and the Transition Period, because the non-payment of the rent during the Emergency Period was to be taken not to be a breach of the lease. As a result, for the duration of the Emergency and Transition Periods, the rental arrears were to be taken not to be owing.

Accordingly, there was no valid notice to vacate and the Tribunal had no power to make the possession order. The Tribunal's orders have been set aside.

However, the Court of Appeal was not persuaded that the moratorium on enforcement measures was intended to be a permanent feature of the emergency relief. A temporary loss, suspension or moratorium was clearly contemplated, but not the permanent extinguishment of property rights. Once the Transition Period ends on 25 October 2021, the rental arrears will be 'owing' and payable and subject to the procedure set out in s 91ZM (and related provisions).

NOTE: This summary is necessarily incomplete. It is not intended as a substitute for the Court's reasons or to be used in any later consideration of the Court's reasons. The only authoritative pronouncement of the Court's reasons and conclusions is that contained in the published reasons for judgment.