Lease or licence to occupy

WORDS BY ANDREW PERSIJN, SENIOR ASSOCIATE, CARTER NEWELL LAWYERS

The introduction of online home sharing platforms, such as AirBnB, has resulted in increasing uncertainty regarding whether tenants utilising such platforms are entering into a sub-lease arrangement with their guests or simply granting the guests a licence to occupy the property.

Property managers will be aware that pursuant to section 283(2) of the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) (**RTRA Act**), a tenant may transfer all or a part of their interest under their tenancy agreement, or sublet a property, only if the lessor agrees in writing or the transfer or subletting is made under an order of a tribunal.

In the recent decision of *Swan v Uecker* [2016] VSC 313, the Supreme Court of Victoria, in its appellate jurisdiction, considered whether a listing on AirBnB was a lease or a licence to occupy.

Facts

Ms Swan (**the Applicant**) is the owner of a two-bedroom apartment in St Kilda, which she leased to Ms Uecker and Mr Greaves (**the Respondents**) pursuant to a residential tenancy agreement for a term from 20 August 2015 to 19 August 2016 (**Lease**). Shortly after the Lease was entered into, the Applicant discovered that the Respondents had made the apartment available for guests to hire through AirBnB.

The AirBnB listing for the apartment offered an option for guests to utilise the entire apartment at a rate of $200 per night, with a minimum stay of three nights and a maximum stay of five. Alternatively, guests could use one bedroom only at a rate of $102 per night. For the purpose of the appeal, only the AirBnB agreement for the use of the entire apartment is relevant. The AirBnB listing for the entire Apartment included the following:

> ***"Guest Access***
>
> *You will have use of the entire 2 bedroom apartment, its bathroom, kitchen loungeroom and balcony...*
>
> ***House Rules***
>
> *Since this is my home and I am leaving to allow you to have it all to yourself, I simply ask that you observe the normal courtesies such as being considerate about noise for the neighbour's [sic] sake and being careful with my TV, stereo and kitchen amenities".*[1]

In mid-January 2016, the Applicant served a Notice to Vacate on the Respondents on the basis that they had assigned or sublet or purported to assign or sublet the whole or any part of the apartment without the Applicant's consent in breach of section 253(1) *Residential Tenancies Act 1997* (Vic) (**the Act**).

The Respondents failed to vacate the apartment and the Applicant applied to the Victorian Civil and Administrative Tribunal (**the Tribunal**) for a possession order.

The Tribunal's decision

The Applicant argued before the Tribunal that the effect of the agreement between the Respondents and AirBnB guests was to grant those individuals *"exclusive possession"* of the apartment in circumstances where the guests took the whole apartment for their occupancy. The Respondents denied the Applicant's allegation and maintained that the agreement between them and AirBnB guests for the whole apartment did not mean that the guests were granted "exclusive possession" of the apartment.

The Tribunal considered the following provisions of the AirBnB agreement listed on the AirBnB website:

> *"Guests agree that a confirmed reservation is* ***merely a licence*** *granted by the Host to the Guest to enter and use the listing for the limited duration of the confirmed reservation and in accordance with the Guest's agreement with the Host. Guests further agree to leave the Accommodation no later than the checkout time that the Host specifies in the Listing or such other time as mutually agreed upon between the Host and Guest. If a Guest stays past the agreed checkout time without the Host's consent, they no longer have a license to stay in the Listing and the Host is entitled to make the Guest leave"*[2]

Taking into account the express use of the word 'licence' in the AirBnB agreement, the short term stays by guests, the online payment platform through the AirBnB website, the terms of arrival and departure and use of the apartment, the Respondents' retention of the apartment as their principal residence, and the ability of the Respondents to access the apartment during each AirBnB stay, the Tribunal determined that the AirBnB guests did not have *"exclusive possession"* of the apartment.

Accordingly, the Tribunal was satisfied that the nature of the legal relationship between the Respondents and AirBnB guests was not a lease but a licence to occupy.

The Applicant subsequently appealed the decision of the Tribunal to the Supreme Court of Victoria.

The Appeal

The Applicant contended that the Tribunal erred in respect of three questions of law.

1. Whether there was evidence or other material to support the finding that the Respondents were able to access the apartment

during each AirBnB stay.

2. In determining whether a person has exclusive possession of a premises, whether it is relevant to consider whether that person can be made to leave the premises if they overstay the agreed period of stay.
3. In determining whether a person has exclusive possession of a premises, whether it is relevant to consider whether the premises is a person's principal place of residence.

Did the AirBnB guests have *"exclusive possession"* of the Apartment?

The Court considered a number of authorities regarding the characterisation of leases and licences and stated that it is well accepted that, as a matter of law, the test to apply to distinguish between a lease and a licence is whether *"exclusive possession"* has been was granted.[3]

In *Lewis v Bell*[4], Mahoney JA said:[5]

> *"But there are cases in which it is not clear from the terms of the grant, construed in the light of the agreement and its context, what it is being granted by them. In such cases, it is necessary to determine what is granted by looking at other aspects of the transaction...*
>
> *In deciding, in such cases, whether what has been granted is the right to exclusive possession, the court, in the process of construction, has in practice looked, inter alia, to two things: the nature of the rights which, in terms, have been granted; and the intention of the parties".*

The Court stated that the intention of the parties is to be determined objectively on the basis of the terms of the particular agreement being considered and having regard to surrounding circumstances.[6]

The Respondents submitted, amongst other things, that guests did not have *"exclusive possession"* of the apartment and that the arrangement was analogous to a hotel stay where the host retains responsibility and stays are for a relatively short time.

The Court stated that this method of characterisation was misconceived and *"the characterisation of an agreement such as the AirBnB agreement as a lease or a licence depends upon the proper construction of that agreement – looking to substance and not form – and having regard to relevant surrounding circumstances".*[7]

Croft J added:

> *"I am of the view that the hotel room analogy is not appropriate in the present circumstances. The evidence and the provisions of the AirBnB Agreement indicate, in my view, that although the occupancy granted to the AirBnB guests was, in this case, for a relatively short time, the quality of that occupancy is not akin to that of a "lodger" or an hotel guest. Rather, it was the possession – exclusive possession – that would be expected of residential accommodation generally. In the present circumstances, it is no different from the nature of the occupancy – the exclusive possession – granted to the tenants, the Respondents, under the Lease from the Applicant. They have, by means of the AirBnB Agreement, effectively and practically passed that occupation, with all its qualities, to their AirBnB guests for the agreed period under the AirBnB Agreement".*[8]

The questions of law

As to question 1, the Court decided there was no evidence or other material to support the Tribunal's finding that the Respondents were able to access the apartment during each AirBnB stay. The Court found that it would be entirely inconsistent with the nature and purpose of the AirBnB agreement if the Respondents were able to access the apartment.

As to question 2, the Court decided that whether the Respondents were able to make an overstaying guest leave the apartment was not relevant to the question of whether the AirBnB guests were in exclusive possession of the apartment during their stay. The Respondents submission that the language used in the AirBnB agreement as to the host's power to make guests leave is consistent with the right of a licensor, and not a lessor, was not accepted.

As to question 3, the Court found that whether the Respondents retain the apartment as their principal residence is irrelevant to determining whether the AirBnB guests had exclusive possession. The Respondents submission that the fact they retained the apartment as their principal residence prevented the AirBnB guests from excluding them from the apartment was not accepted.

The Court concluded that the AirBnB agreement for occupation of the entire apartment is properly characterised as a lease between the Respondents and the AirBnB guests and that entering into the AirBnB agreement is, having regard to the Lease, a sub-lease.

Accordingly, the Court allowed the Applicant's appeal, set aside the order of the Tribunal and granted the Applicant a possession order in accordance with the Act.

Conclusion

It is not yet clear what implications this decision by the Supreme Court of Victoria will have in Queensland.

It is important to remember that a tenant entering into a home sharing agreement, such as those offered by AirBnB, will not automatically amount to the creation of a sub-lease arrangement. As stated in the decision, *"the characterisation of an agreement such as the AirBnB agreement as a lease or a licence depends upon the proper construction of that agreement – looking to substance and not form – and having regard to relevant surrounding circumstances".*

If a PM becomes aware that a tenant has listed a property on AirBnB, without the approval of their lessor client, they should immediately notify the lessor client.

Further, if PM are concerned they should ask the REIQ Property Management Support Service, on 07 3249 7312.

---

1 [2016] VSC 313 at [20].

2 *Swan v Uecker (Residential Tenancies)* [2016] VCAT 483 (24 March 2016) [41] – [46] (Tribunal's emphasis).

3 *Radaich v Smith* (1959) 101 CLR 209; *KJRR Pty Ltd v Commissioner of State Revenue* [1999] VSCA 2; *Lewis v Bell* (1985) 1 NSWLR 731; *Rental Bond Board v Bayman Development Pty Ltd* (1985) BDR [97237]. See also *Janusauskas v Director of Housing* [2014] VSC 650, referred to in *Swan v Uecker (Residential Tenancies)* [2016] VCAT 483 (24 March 2016) [37] – [38].

4 (1985) 1 NSWLR 731.

5 (1985) 1 NSWLR 731 at 734-5.

6 See *National Outdoor Advertising Pty Ltd v Wavon Pty Ltd* (1988) 4 BPR 97,322.

7 [2016] VSC 313 at [40].

8 [2016] VSC 313 at [46].