Civil and Administrative Tribunal

New South Wales

Case Name:	Graham O'Keefe v Integral Corporate Property Pty Ltd
Medium Neutral Citation:	[2020] NSWCATAP 76
Hearing Date(s):	15 April 2020
Date of Orders:	5 May 2020
Decision Date:	5 May 2020
Jurisdiction:	Appeal Panel
Before:	Dr R Dubler SC, Senior Member D Charles, Senior Member
Decision:	(1) Appeal is dismissed. (2) The operation of order 2 made on 28 January 2020 in matter number RT19/42303 is stayed for a period of one month and otherwise the stay of that order is lifted. (3) The previous stay order is conditional upon the appellant continuing to pay the respondent $3,100 per month whilst in occupation of the premises. (4) The Appeal Panel makes the following directions with respect to costs: (a) The respondent, if it seeks an order for costs, is to file and serve within 14 days of this decision submissions including as to whether the Tribunal should make an order dispensing with a hearing pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW); (b) The appellant is to file and serve any submissions in response within 14 days of receipt of the appellant's submissions including whether or not the Tribunal should make an order dispensing with a hearing on costs pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW); (c) The appellant is to file and serve any submissions in reply within seven days of receipt of the appellant's

	submissions.
Catchwords:	APPEAL – meaning of error of law – whether permitted to raise new issue on appeal RESIDENTIAL TENANCY – whether relationship between the parties comes within the definition of residential tenancy under the Residential Tenancies Act 2010 (NSW)
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Residential Tenancies Act 2010 (NSW) Residential Tenancies Regulation 2010 (NSW)
Cases Cited:	AHB v HSW Trustee and Guardian [2017] NSWCATAP 79 Collins v Urban [2014] NSWCATAP 17 Commissioner of Taxation v Crown Insurance Services Limited (2012) 207 FCR 247 Coulton v Holcombe [1986] HCA 33 Crown Melbourne Ltd v Cosmopolitan Hotel (VIC) Pty Ltd (2016) 260 CLR 1 Director-General, Department of Finance and Services v Porter [2014] NSWCATAP 6 Edwards v Commissioner for Fair Trading, Department of Finance, Services and Innovation [2019] NSWCATAP 208 House v R (1936) 55 CLR 499 Kostas v HIA Insurance Services Pty Ltd (2010) 241 CLR 390 Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24 Murray Irrigation Ltd [2014] NSWCATAP 69 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 Rogers v Vinoly [2016] NSWCATAP 2 Sharp Corporation of Australia Pty Ltd v Collector of Customs (1995) 59 FCR 6 Suttor v Gundowda Pty Ltd [1950] HCA
Texts Cited:	None cited
Category:	Principal judgment
Parties:	Graham O'Keefe (Appellant)

	Integral Corporate Property Pty Ltd (Respondent)
Representation:	Counsel: E Cohen (Appellant) D Allen (Respondent)
File Number(s):	AP 20/07489
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	28 January 2020
Before:	S Thode, Senior Member
File Number(s):	RT 19/42303

REASONS FOR DECISION

Introduction

1 The appellant is a discharged bankrupt. He presented his debtors petition and was made bankrupt on 5 October 2015. He was discharged from bankruptcy on 6 October 2018.

2 On 28 January 2020, the Tribunal ordered under the *Residential Tenancies Act 2010* (NSW) (the Act) that the residential tenancy agreement between the parties is terminated immediately and possession is to be given to the respondent.

3 The appellant, by his appeal to this Appeal Panel, seeks to overturn these orders on the basis that the Tribunal was wrong to find there existed a residential tenancy agreement and hence the Tribunal has no jurisdiction to make the orders it did.

4 In the alternative, the appellant seeks to contend that as he had been in possession of the premises in question for over 20 years the Tribunal did not

have power to make the orders it made by virtue of s 85(4) of the Act. This point was not made before the Tribunal at the time.

5 For the reasons which follow we have decided to dismiss the appeal.

Background

6 This is an internal appeal from the orders of the Tribunal made on 28 January 2020.

7 The respondent filed application RT 19/42303 seeking an order that an alleged tenancy between it and the appellant be terminated pursuant to s 85 of the Act, by reason of a 90 day (or 'no grounds') notice of termination having been served on the appellant.

8 The notice of termination dated 29 April 2019 nominating a vacate date of 9 August 2019, was served on the appellant by delivery into his letterbox on the premises on 28 April 2019. The appellant did not vacate the premises, being a residential lot at Glebe, NSW 2037 (the premises).

9 An application seeking orders for termination and possession was filed on 18 September 2019 but out of time; i.e. more than 30 days after the termination date permissible on the notice of termination: see Regulation 22(2) of the *Residential Tenancies Regulation 2010* (NSW). The Tribunal granted an extension of time pursuant to s 41 of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act). This aspect of the Tribunal's decision was not challenged on appeal.

10 The appellant denied that the parties entered into a residential tenancy agreement at the hearing before the Tribunal. He stated that the agreement entered into between the parties is not a residential tenancy agreement governed by the Act and that the Tribunal has no jurisdiction to hear and determine the issues between the parties.

Nature and scope of internal appeals

11 Internal appeals may be made as of right on a question of law, and otherwise with permission (that is, the "leave") of the Appeal Panel: s 80(2) NCAT Act.

12 In *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 the Appeal Panel set out at [13] a non-exclusive list of questions of law:

(1) Whether there has been a failure to provide proper reasons;

(2) Whether the Tribunal identified the wrong issue or asked the wrong question;

(3) Whether a wrong principle of law had been applied;

(4) Whether there was a failure to afford procedural fairness;

(5) Whether the Tribunal failed to take into account relevant (i.e., mandatory) considerations;

(6) Whether the Tribunal took into account an irrelevant consideration;

(7) Whether there was no evidence to support a finding of fact; and

(8) Whether the decision is so unreasonable that no reasonable decision-maker would make it.

13 In order to amount to an error of law, it must be demonstrated that there was no evidence to justify the conclusion of the Tribunal or, alternatively, that no reasonable tribunal could have come to the conclusion that it did: see *John Prendergast & Vanessa Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 at [13](7) and (8).

14 Further, in respect of whether or not the Tribunal failed to take into account a relevant (i.e., mandatory) consideration, the Appeal Panel in *Director-General, Department of Finance and Services v Porter* [2014] NSWCATAP 6 at [28] stated the following:

> "Whilst the question of weight is one for the Tribunal, the Tribunal will not have given adequate attention to a relevant consideration where its process is merely a formulaic reference: see *Azriel v NSW Land & Housing Corporation* [2006] NSWCA 372 at [49] per Basten JA (with Santow and Ipp JJA agreeing), instead what is required can be described as a proper, genuine and realistic consideration of the relevant consideration: *Bruce v Cole* (1998) 45 NSWLR 163 at 185-6 per Spigelman CJ. However, as Basten JA warned in *Azriel* at [51] referring to Spigelman CJ in *Bruce* at 186, assessing whether the decision-maker has given a proper, genuine and realistic consideration to a mandatory manner must be approached with caution, with care to avoid any impermissible reconsideration of the merits of the decision."

15 An alleged failure to give 'sufficient weight' to evidence does not identify a question of law: *AHB v HSW Trustee and Guardian [*2017] NSWCATAP 79; *House v R* (1936) 55 CLR 499. The correct approach is to set aside administrative decisions where the weight given to a factor is considered 'manifestly unreasonable', or where a finding or inference is made in the absence of supporting evidence: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24; *Kostas v HIA Insurance Services Pty Ltd*

(2010) 241 CLR 390*; Edwards v Commissioner for Fair Trading, Department of Finance, Services and Innovation* [2019] NSWCATAP 208 at ([70]-[75])

16 The Appeal Panel in *Rogers v Vinoly* [2016] NSWCATAP 2 said:

> "12. The Federal Court in *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287 (Pozzolanic) identified five general propositions in relation to the distinction between questions of law and fact. These were extracted by the High Court in *Collector of Customs v Agfa-Gevaert* (1996) 186 CLR 389 at 395 (Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ) (Agfa-Gevaert):
>
> > (1) The question whether a word or phrase in a statute is to be given its ordinary meaning or some technical or other meaning is a question of law. (22) *Jedko Game Co Pty Ltd v Collector or Customs (NSW)* (1987) 12 ALD 491; *Brutus v Cozens* [1973] AC 854.
> >
> > (2) The ordinary meaning of a word or its non-legal technical meaning is a question of fact. (23) *Life Insurance Co or Australia Ltd v Phillips* (1925) 36 CLR 60 at 78; *NSW Associated Blue-Metal Quarries Ltd v Federal Commissioner or Taxation* (1956) 94 CLR 509 at 512; *Neal v Department or Transport* (1980) 3 ALD 97 at 107-108; Jedko (1987) 12 ALD 491.
> >
> > (3) The meaning of a technical legal term is a question of law. (24) *Australian Gas Light Co v Valuer-General* (1940) 40 SR (NSW) 126 at 137-138; *Lombardo v Federal Commissioner or Taxation* (1979) 40 FLR 208 at 215.
> >
> > (4) The effect or construction of a term whose meaning or interpretation is established is a question of law. (25) *Life Insurance Co of Australia* (1925) 36 CLR 60 at 79.
> >
> > (5) The question whether facts fully found fall within the provision of a statutory enactment properly construed is generally a question of law: *Hope v Bathurst City Council* (1980) 144 CLR 1 at 7, per Mason J with whom Gibbs, Stephen, Murphy and Aickin JJ agreed; *Australian National Railways Commission v Collector of Customs (SA)* (1985) 8 FCR 264 at 277, per Sheppard and Burchett JJ.
> >
> > In *Pozzolanic,* the Full Court qualified the fifth proposition. The Court said that, when a statute uses words according to their ordinary meaning and it is reasonably open to hold that the facts of the case fall within those words, the question as to whether they do or do not is one of fact. *Pozzolanic* (1993) 43 FCR 280 at 288, citing *Hope* (1980) 144 CLR 1 at 8.
>
> 13. In relation to the fifth proposition, in *Sharp Corporation of Australia Pty Ltd v Collector of Customs* (1995) 59 FCR 6, Hill J noted at 16 as follows:
>
> > The rule that a question of fact is involved in determining whether facts fall within the meaning of a word once that meaning is ascertained, may cause confusion. The confusion comes about because there are actually two related rules, the distinction between which is not always readily apparent. The first of these rules is generally expressed as being that where the facts have been fully found or there is no dispute as to the facts and the question is whether those facts *necessarily* fall

> within the description of a word or phrase in a statute, that will be a question of law. This is the sixth proposition enunciated by [Jordan] CJ in the *Australian Gas Light Co* case. The rationale for this principle is clear enough. If only one meaning is open but a tribunal arrives at a different meaning, underlying the Tribunal's conclusion must be an error of principle, that is to say, an error of law.
>
> The second related principle is that where the facts found are capable of falling within or without the description used in the statute, the decision which side of the line they fall on will be a decision of fact and not law. Such a decision will generally involve weight being given to one or other element of the facts and so involve matters of degree.

17 The Full Federal Court in *Commissioner of Taxation v Crown Insurance Services Limited* (2012) 207 FCR 247 said at [39]:

> When the statute under consideration has no technical meaning, but is understood in its plain ordinary meaning, a question of law will arise if the facts found must necessarily have come within the statutory description, but only a question of fact will arise if the facts found are capable of coming within the statutory description. In that second case, no question of law arises because, as Hill J said at 16 in Sharp Corporation of Australia Pty Ltd v Collector of Customs, the decision "will generally involve weight being given to one or other element of the facts and so involve matters of degree". To put it another way, a choice between two conclusions open on a consideration of the facts is a question of fact.

18 The circumstances in which the Appeal Panel may grant leave to appeal from decisions made in the Consumer and Commercial Division are limited to those set out in cl 12(1) of Schedule 4 of the NCAT Act. In such cases, the Appeal Panel must be satisfied that the appellant may have suffered a substantial miscarriage of justice on the basis that:

(a) the decision of the Tribunal under appeal was not fair and equitable; or

(b) the decision of the Tribunal under appeal was against the weight of evidence; or

(c) significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).

19 In *Collins v Urban* [2014] NSWCATAP 17 (*Collins v Urban*), the Appeal Panel stated at [76] that a substantial miscarriage of justice for the purposes of cl 12(1) of Schedule 4 may have been suffered where:

> … there was a "significant possibility" or a "chance which was fairly open" that a different and more favourable result would have been achieved for the appellant had the relevant circumstance in para (a) or (b) not occurred or if the fresh evidence under para (c) had been before the Tribunal at first instance.

20 Even if an appellant from a decision of the Consumer and Commercial Division has satisfied the requirements of cl 12(1) of Schedule 4, the Appeal Panel must still consider whether it should exercise its discretion to grant leave to appeal under s 80(2)(b).

21 In *Collins v Urban*, the Appeal Panel stated at [84] that ordinarily it is appropriate to grant leave to appeal only in matters that involve:

> (a) issues of principle;
>
> (b) questions of public importance or matters of administration or policy which might have general application; or
>
> (c) an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand;
>
> (d) a factual error that was unreasonably arrived at and clearly mistaken; or
>
> (e) the Tribunal having gone about the fact finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed.

The Decision of the Tribunal

22 Relevantly, the Tribunal found as follows (we have inserted paragraph numbers for convenience):

> (1) The following facts appear not to be contentious. Insofar as they are denied I state the following facts by way of background only.
>
> (2) The parties have a complicated financial history which was only partially inevidence before me.
>
> (3) The respondent was the beneficial owner of the property at Glebe and has resided in it since 1977.
>
> (4) The property was transferred to a Mr Stone, who is not a party to any proceedings, in 2012. The respondent alleges that the director of the applicant, Mr Peterson, acted as his legal and financial advisor. This I understand to be denied. The respondent alleges that following the transfer of the property to Mr Stone, for an expressed consideration of $850,000, but no money was paid to Mr O'Keefe. After title passed to Mr Stone, the respondent understood Mr Stone to hold the property in trust for the respondent, the respondent being the sole beneficiary of such a trust, subject to the respondent paying all outgoings equivalent to any mortgage payments, and or strata levies.
>
> (5) Eventually the property was transferred to the applicant company of which Mr Peterson is a director, for consideration of $850,000. The respondent states in evidence that upon this second transfer Mr Peterson continued to advise him that the property would be held on trust for him, an allegation which I understand to be denied.

(6) It was the respondent's understanding that as long as he made payments equivalent to mortgage payments, strata levies and repairs he would remain in the property for life.

(7) It is his evidence that he made regular mortgage and levy payments, except when and if the respondent worked for Mr Peterson as an interior designer. From time to time the respondent would be relieved from paying the outgoings in lieu of wages. It is the evidence before me that the respondent made the last monthly payment of $3180 to a company "K&T Services Pty Ltd" of which Mr Peterson is a director. The company is not the registered mortgagor, the mortgagor is not a party to these proceedings and the respondent has not made any payments, being mortgage payments directly to a mortgagor and it is my view that s40 of the Act does not apply.

(8) Is it a residential tenancy?

(9) For there to be a residential tenancy agreement, the Tribunal must be satisfied that there was an intention to create a legal relationship which objectively assessed is a residential tenancy, rather than some other financial or domestic relationship that is not legally enforceable under the Act.

(10) The Tribunal must be satisfied that the essential terms of a residential tenancy exist with sufficient certainty. Such essential terms are: (i) the parties to the agreement; (ii) the premises in question; (iii) the duration of the tenancy; (iv) the rent, or mechanism for determining rent; and (v) the date of formation and commencement of the agreement (Anforth, Christensen and Adkins, Residential Tenancies Law and Practice NSW 7th ed (2017) Federation Press p 54).

(11) I am satisfied that the arrangement entered by the parties, bears all the elements of a residential tenancy agreement which was periodic.

(12) The premises were used as a residence.

(13) The respondent provided exclusive possession of the premises to the applicant in return for payment of rent, by way of regular quarterly strata levies and rent equivalent to the value of a mortgage payment, the last being$ 3180 paid to the landlord company on 30 December 2019.

(14) I accept the parties' evidence that the respondent had exclusive use of the premises during the term of the tenancy.

(15) The landlord did not enter the premises without prior notice or in the absence of the tenant.

(16) The parties agree that regular payments were made although neither party refers to the payment of "rent" in any written document and both parties agree that the respondent paid a sum equivalent or approximate to a mortgage payment to a company nominated by the landlord, as well as strata levies. There is an agreement that payments of levies are made quarterly, to the strata company including special levies which were payable from time to time. I am satisfied that these payments constituted periodic payments made "for value" within the meaning of s13 of the Act.

(17) The fact that the respondent alleges that a tenancy is not created by the agreement does not, assessed objectively, change the nature of the legal relationship between the parties.

(18) The landlord issued a termination notice which does not require a finding of a breach of the residential tenancy agreement (a 90 day notice). While the

> mere service of the notice is not indicative of the parties' understanding that they entered into a residential tenancy agreement, as found in these reasons, I am of the view that the facts establish a tenancy.
>
> (19) On balance I am satisfied the applicant has established, when assessed objectively and taking into account the conduct of both parties, the essential terms of a residential tenancy agreement exist and there was an intention to create a tenancy agreement. There is simply no evidence before me that would support the respondent's contention that he had a right of occupancy "for his lifetime". He has failed to explain, based on evidence, how he remained in the property, after title passed to the applicant. The only conclusion I can draw is that upon title passing to the applicant, the respondent paid value for exclusive occupation of the premises for a period of time, but not "for life". Accordingly, there is a residential tenancy agreement within the meaning of Section 13 of the RT Act.

Ground one of appeal

23 Ground one was to the effect that on the facts available to the Tribunal, the Tribunal erred in finding that there was a residential tenancy agreement between the parties. The appellant contended that on the facts there was no residential tenancy agreement, but a private agreement between the parties that was never intended by the appellant to constitute a residential tenancy agreement. This was said to constitute an error of law.

24 Accordingly, on the appellant's case the Tribunal had no jurisdiction to make the order that it did.

Appellant's submissions

25 Ms Cohen of Counsel appeared for the appellant.

26 The appellant, it was contended, did not just have the right of occupation of the premises, he had the rights and obligations of a beneficial owner of the premises. Ms Cohen contended that the agreement between the parties was one whereby the appellant was the beneficial owner of the premises and accordingly had the rights and obligations as owner of the premises. The appellant, Ms Cohen argued, could repair and renovate the residential premises as he wished.

27 Ms Cohen contended that the appellant had spent tens of thousands of dollars on charges such as strata levies, council rates and water charges since 2014 when the respondent became registered proprietor.

28 The appellant's counsel then submitted that the agreement between the parties was that the respondent would hold the residential premises on trust for the appellant provided that the appellant paid the normal outgoings of a beneficial owner such as rates, strata, levies, repairs, maintenance and mortgage payments. The appellant it was contended has acted upon this agreement and complied with all obligations of a beneficial owner.

29 Accordingly, so the argument went, the respondent was estopped from now asserting that the appellant is a tenant.

30 Ms Cohen further submitted that the bankruptcy of the appellant in 2015 had no effect on this alleged agreement; that the agreement continued from the date of bankruptcy until the date of the hearing before the Tribunal; and that the appellant is continuing to perform the agreement.

31 There is an obligation on the respondent, so Ms Cohen submitted, to continue to perform that agreement and allow the appellant to have the same rights to the property as the beneficial owner of the residential premises.

32 Next, Ms Cohen submitted that many of the obligations that a landlord would be required to meet had the agreement between the parties been a residential tenancy agreement had not been complied with. Ms Cohen referred to s14 of the Act and the obligation on the landlord to ensure that the residential tenancy agreement was put in writing. Ms Cohen submitted that the agreement was never put in writing. Ms Cohen submitted that there were no rent receipts ever given by the respondent and this was contrary to s 36 of the Act. Further, there were no rent records kept in accordance with s 37 of the Act by the respondent.

33 The appellant's counsel then submitted that the respondent, if there was a residential tenancy agreement, was also in breach of s 40 of the Act which specifically requires that charges in respect of rates and taxes must be paid for by a landlord; that the appellant had spent money on such amounts; and that the respondent was thereby in breach of s 40 of the Act.

34 A key submission in the appellant's case was that all of the failures to comply with the Act referred to by the appellant indicated that the correct finding was that there was no residential tenancy agreement in place.

Respondent's submissions

35 Mr Allen of Counsel appeared for the respondent.

36 He contended that ground one did not involve any question of law. He cited in support *Crown Melbourne Ltd v Cosmopolitan Hotel (VIC) Pty Ltd* (2016) 260 CLR 1 at [27] per French CJ, Kiefel and Bell JJ:

> [27] The tenants' submissions in this regard proceeded upon a misapprehension of what the authorities they relied upon actually say. It is certainly the case that the question as to what was actually agreed between the parties, which is to say the terms of the consensus reached, is a question of fact. That is what is meant by the reference in those cases to the "construction" of the contract. Questions as to the terms of any offer and any consensus reached, including the subject matter of any agreement, are questions of fact. But questions whether a statement has a quality which the law requires and whether, objectively, it could be said to be intended to be contractually binding are questions of law.

37 Mr Allen contended the findings of the Tribunal that there existed a residential tenancy agreement was open on the facts and no error of law arises.

38 Nextly, the respondent's counsel argued it was plainly incompatible with the bankruptcy of the appellant that it could be contended the respondent held the premises on trust for the appellant who was the real beneficial owner of the premises. Any such interest in the premises which pre-dates the appellant's bankruptcy would pass to the Trustee in bankruptcy.

39 Finally, Mr Allen submitted that the alleged instances of failure to comply with the Act do not demonstrate any error of law in the conclusions reached by the Tribunal. At their highest they merely indicate possible breaches of the Act not that there was no residential tenancy agreement or that it was not open to the Tribunal to so find. Mr Allen submitted that at times the appellant paid the respondent for levies and taxes and the like which was then paid by the respondent to the relevant authorities. There was no illegality in such an arrangement as there was no prohibition under the Act for a tenant to pay rent by reference to or calculated by the amounts owing for such matters.

Consideration

40 We substantially agree with the submissions of the respondent.

41 Section 13 of the Act relevantly provides as follows:

> **13 Agreements that are residential tenancy agreements**
>
> (1) A residential tenancy agreement is an agreement under which a person grants to another person for value a right of occupation of residential premises for the purpose of use as a residence.
>
> (2) A residential tenancy agreement may be express or implied and may be oral or in writing, or partly oral and partly in writing.
>
> (3) An agreement may be a residential tenancy agreement for the purposes of this Act even though:
>
> a. it doesnot grant a right of exclusive occupation, or
>
> b. it grants the right to occupy residential premises together with the letting goods of provision of services or facilities.

42 In respect of the allegation that the respondent through its officer Mr Petersen held the property on trust for the appellant, it was accepted by Ms Cohen that the effect of the appellant's bankruptcy, until that bankruptcy is annulled, was that there cannot in fact be any actual trust of the property in favour of the appellant. As a matter of property law the appellant cannot have an interest in the property that dates from prior to his discharge of bankruptcy.

43 We note that the Tribunal referred to this claim as follows:

> (5) …The respondent states in evidence upon this second transfer Mr Peterson continued to advise him that the property would be held on trust for him, an allegation which I understand to be denied.
>
> (6) It was the respondent's understanding that as long as he made payments equivalent to mortgage payments, strata levies and repairs, he would remain in the property for life.
>
> …
>
> (19) On balance I am satisfied the applicant has established, when assessed objectively and taking into account the conduct of both parties, the essential terms of a residential tenancy agreement exist and there was an intention to create a tenancy agreement. There is simply no evidence before me that would support the respondent's contention that he had a right of occupancy "for his lifetime". He has failed to explain, based on evidence, how he remained in the property, after title passed to the applicant. The only conclusion I can draw is that upon title passing to the applicant, the respondent paid value for exclusive occupation of the premises for a period of time, but not "for life". Accordingly, there is a residential tenancy agreement within the meaning of Section 13 of the RT Act.

44 In our view this conclusion as to the consensus reached between the parties was plainly open on the evidence. It could not be said that there was no evidence to justify the conclusion of the Tribunal or, alternatively, that no reasonable tribunal could have come to the conclusion that it did. Accordingly, no error of law has been demonstrated in the conclusion reached.

45 We also agree with Mr Allen's submission that the examples of noncompliance with the Act do not demonstrate any incompatibility with the finding of the Tribunal that there existed a residential tenancy agreement.

46 Accordingly, we reject this ground of appeal.

Ground two of the appeal

47 Ground two was to the effect that if it was found there existed a residential tenancy agreement then the Act does not apply by reason of the provisions of s 85 (4) of the Act in that the appellant had been in continual possession of the premises for a period of 20 years or more.

Appellant's submissions

48 The appellant referred to s 85(4) of the Act which is to the following effect:

> (1) This section does not apply to a residential tenancy agreement if the tenant has been in continual possession of the same residential premises for a period of 20 years or more.

49 Ms Cohen contended that the Tribunal in its reasons for decision noted that the "respondent was the beneficial owner of the property and had resided in it since 1977".

50 Ms Cohen accepted that s 85(4) of the Act was not relied upon before the Tribunal but that this should not prevent it being raised on appeal because there is now a finding that the residential tenancy agreement existed. Accordingly, Ms Cohen submitted, the case was not one in which there was a tactical decision not to raise the point at first instance and to keep it in reserve for the appeal. The point is raised on appeal, so Ms Cohen contended, as a result of the decision at first instance.

Respondent's submissions

51 Mr Allen contended that the appellant should not be permitted to raise this point for the first time on appeal. He contended that the issue of the continual

possession of the premises by the appellant for a period of 20 years or more was contentious anl if the point had been raised before the Tribunal, the respondent would have challenged it, including by evidence.

52 The respondent's counsel referred the Appeal Panel to a deed of settlement between the parties which suggested there could have been a contention raised as to the issue of continual possession.

53 Further Mr Allen contended that even if the Tribunal at first instance found that s 85(4) of the Act applied, application could, and would, have been made under an alternative provision, being s 94 of the Act, to seek an order of termination and possession in respect of a tenant that had a long term tenancy.

Consideration

54 As regards Ground 2 of the appeal, we agree with the submissions of the respondent's counsel.

55 We note that in the reasons of the Tribunal where it was stated that the appellant was the beneficial owner of the property in Glebe and has resided in it since 1977, this was said to be by way of "background only". It was not a contentious or disputed fact before the Tribunal.

56 In *Suttor v Gundowda Pty Ltd* [1950] HCA 35 at [9], see also *Coulton v Holcombe* [1986] 162 CLR 1 at [7], the High Court said:

> The circumstances in which an appellant court will entertain a point not raised in the court below are well established. Where a point is not taken in the court below and evidence could have been given there which by any possibility could have prevented the point from succeeding, it cannot be taken afterwards.

57 We accept that this principle applies here and thereby precludes the appellant from raising this ground of appeal. We accept that the question of the continual possession by the appellant of the premises could have been dealt with by evidence in the Tribunal at first instance which could have prevented the point from succeeding.

58 Accordingly, it is not available to the appellant to try to advance the argument as regards continual possession for the first time on this appeal. We reject this ground of appeal.

Disposition

59 The orders of the Appeal Panel will be as follows:

(1) Appeal is dismissed.

(2) The operation of order 2 made on 28 January 2020 in matter number RT19/42303 is stayed for a period of one month and otherwise the stay of that order is lifted.

(3) The previous stay order is conditional upon the appellant continuing to pay the respondent $3,100 per month whilst in occupation of the premises.

(4) The Appeal Panel makes the following directions with respect to costs:

(a) The respondent, if it seeks an order for costs, is to file and serve within 14 days of this decision submissions including as to whether the Tribunal should make an order dispensing with a hearing pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW);

(b) The appellant is to file and serve any submissions in response within 14 days of receipt of the appellant's submissions including whether or not the Tribunal should make an order dispensing with a hearing on costs pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW);

(c) The appellant is to file and serve any submissions in reply within seven days of receipt of the appellant's submissions.

****

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar