Civil and Administrative Tribunal

New South Wales

Case Name:	MacPherson v Chow
Medium Neutral Citation:	[2020] NSWCATAP 119
Hearing Date(s):	25 March 2020
Date of Orders:	23 June 2020
Decision Date:	23 June 2020
Jurisdiction:	Appeal Panel
Before:	A Suthers, Principal Member S Thode, Senior Member
Decision:	(1) Time for lodgement of the Notice of Appeal is extended to 6 January 2020. (2) Leave to appeal is refused. (3) The appeal is dismissed.
Catchwords:	APPEAL – Residential Tenancy – whether relevant evidence overlooked by Tribunal
Legislation Cited:	Civil and Administrative Tribunal Act 2013, s 80(2)(b), cl 12 of Sch 4 Residential Tenancies Act 2010 (NSW)
Cases Cited:	Bat Advocacy NSW Inc v Minster for Environment Protection, Heritage and the Arts (2011) LGERA 99 Collins v Urban [2014] NSWCATAP 17 Dranichnikov v Minister for Immigration and Multicultural Affairs [2003] HCA 26 Minister for Immigration and Multicultural Affairs v Jia (2001) 205 CLR 507 Tickner v Chapman [1995] FCAFC 1726 Torbey Investments Corporated Pty Ltd v Ferrara [2017] NSWCA 9
Texts Cited:	Nil

Category:	Principal judgment
Parties:	Alexander MacPherson (First Appellant) Mohd Fazzel Huzaine bin Mohd Zaki (Second Appellant) William Chow (First Respondent) Selina Chow(Second Respondent)
Representation:	Solicitors: First Appellant (Appellants) C Reid (Agent) (Respondents)
File Number(s):	AP 20/01050
Publication Restriction:	Nil
:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	19 December 2019
Before:	G Burton SC, Senior Member
File Number(s):	RT 19/41597

REASONS FOR DECISION

Summary

1 The appellants as tenants rented an upper floor unit in a multi-storey building in Sydney under a residential tenancy agreement from the respondent as landlord.

2 The tenancy, which commenced in 2013, continued until 6 February 2020 when the tenants delivered up possession. By late 2019, the rent was $830.00 per week.

3 During the tenancy the parties fell into dispute.

4 First, the tenants brought an application to the Tribunal on 24 June 2019, and determined on 4 September 2019, in respect of damages; a work order;

abatement of rent because the premises were said to be uninhabitable; repayment of rent said to have been excessive; urgent repairs and an order to allow the tenants to change the security lock to the premises. Apart from making orders for a change to the lock on the premises by consent, the Tribunal noted that the claims for damages and rent reduction were withdrawn, and dismissed the balance of the application (the Previous Decision).

5 Later, in August 2019, the landlords brought an application for termination of the tenancy due to alleged frequent non-payment of rent (RT 19/40721).

6 The tenants then brought further proceedings (RT 19/41597) under the *Residential Tenancies Act* 2010 (NSW) (the RTA) for:

(1) repairs under s 65(1) of the RTA;

(2) a refund of rent under the agreement on the basis that the rent was excessive for the last 12 months of the tenancy, to the extent of the entirety of the rent, under s 44(1)(b) of the RTA;

(3) an order that the landlord refund water charges billed to and paid by the tenant, where the water was said not to have been separately metered, under s 40(1)(f) of the RTA;

(4) an order that the landlord's application be declared to be retaliatory in nature and caused by the tenants' earlier application, referred to above, pursuant to ss 111, or 115 of the RTA; and

(5) an order to prevent the landlord entering any details about the tenant in any tenancy database under s 217 of the RTA.

7 The Tribunal dismissed both applications on 19 December 2019 (the Decision). The order dismissing the application made on behalf of the tenants was Order 2.

8 The tenants appeal from the Decision in respect of their application. As they subsequently vacated the premises, they have clarified the issues they seek to agitate in the appeal. They did so by letter dated 8 March 2020. The appeal now properly encompasses the remedy they sought under s 44(1)(b) of the RTA (whilst the appellants referred to s 41 of the RTA it is apparent that this is what was intended). The appellants also referred to now wanting orders under ss 47(4) and 187(1) of the RTA, but these do not properly arise in the appeal as they were not before the Tribunal in making the Decision and so we will not deal with those claims.

9 For the reasons set out below, we have decided to dismiss the appeal.

The Tribunal proceedings and reasons for the decision

10 The landlords gave the tenants a termination notice, dated 30 August 2019.

11 At that time, the allegation was that the rent was more than 14 days in arrears, in a total sum outstanding of $2,721.00.

12 By the time of the Decision, the rental arrears had been paid up to date. The Tribunal was satisfied that the tenancy ledger showed a mostly consistent pattern of fortnightly payments, prior to the tenants falling behind to the extent of $2,721.00 which came from a late payment and the tenants having made a previous underpayment to the extent of $231.00, as at the date of the termination notice.

13 On that basis, the Tribunal dismissed the landlord's application, for reasons which are unchallenged.

14 Having dismissed the landlord's application the Tribunal was satisfied that it did not need to deal with the allegation of the tenants that the landlord's application was retaliatory. Again, this aspect of the Decision is unchallenged.

15 The Tribunal then dealt with the tenants' allegations that the landlord had failed to maintain the property in a proper state of repair. The Tribunal referred to the Previous Decision, and formed the view that a number of issues complained of by the tenant in their application were of the same nature as those determined by the Previous Decision, in that the tenants had claimed in both proceedings issues regarding the structural integrity of the building, the fact that the premises have been subdivided; complaints about poor air quality; the effect of "wires embedded in the ground floor" and "structures embedded in the wall which faces the shower," together with complaints about "dust and mist" in the apartment. The tenants also apparently complained of noise from neighbours playing piano in both proceedings, along with raising several other issues.

16 At [23] of the reasons for the Decision, the Tribunal recorded its satisfaction that, having withdrawn their claims made for damages and rent reduction before the Tribunal was required to make the Previous Decision, claims about

similar issues under different sections of the RTA could be reinstituted by the tenants.

17 In dealing with the tenants' claims in its reasons for the Decision, the Tribunal made the following relevant findings:

(1) At [34], that the tenants had failed to provide evidence from anyone with relevant expertise as to the precise nature and degree of the alleged defects in the property which the tenants alleged that the landlords had failed to repair. The Tribunal referred to an "abundance of generalised material drawn from the Internet and other sources speaking of potential causes for potential problems, a self-conducted Internet derived air quality test, *a home inspection report that was not in evidence* but (from what the tenants' representative reported about it) was not of the required comprehensiveness and demonstrated expertise, and allegations based on the tenant representatives' probing." (emphasis added)

(2) In relation to the tenants' claim for a rent reduction for the previous 12 months due to loss of amenity for the issues complained of in relation to the alleged failure to repair and security issues, the Tribunal decided at [43] that this aspect of the claim should be dismissed due to the tenants' failure to provide probative evidence of the failure to repair and because "there [was] no evidence (photographic or otherwise) of the intrusions, such as evidence of forced entry or presence in the premises, beyond photos which are not sufficiently clear to establish a human presence on the relevant balcony and the lights being on when the tenants' representative said they were not used in the particular room."

(3) In respect of the allegations of loss of amenity due to the alleged noise intrusion caused by the tenants' neighbours' piano playing, the Tribunal found, at [45], that there was no demonstrated breach of by-laws of the strata unit complex at the times alleged by the tenants or other evidence, to suggest that the playing was beyond acceptable levels of noise for the time of day. Relevantly, the Tribunal also recorded that the by-laws were not in evidence.

18 For those reasons, the Tribunal dismissed the tenant's claims in respect of the issues relevant to the appeal.

Scope and nature of Internal Appeals

19 If the appellants can establish that the appeal raises an error on a question of law, the appeal may be prosecuted as of right: Civil and Administrative Tribunal Act 2013 (NSW) (the NCAT Act), s 80(2)(b).

20 If the appellants raise an error other than in respect of an error on a question of law they require permission (that is, "leave") to appeal: NCAT Act, s 80(2)(b).

21 As confirmed by the Appeal Panel in *Collins v Urban* [2014] NSWCATAP 17, leave to appeal is only usually granted in matters that involve:

(a) issues of principle;

(b) questions of public importance or matters of administration or policy which might have general application;

(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.

22 Where, as here, the appeal is from a decision made in the Consumer and Commercial Division, there is a further qualification to the possible grant of leave in that we may only do so if we are first satisfied that the terms of cl 12(1) of Sch 4 of the NCAT Act are made out, in 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).

23 We agree with the Appeal Panel in *Collins v Urban where it said,* at [76], that a substantial miscarriage of justice for the purposes of cl 12(1) of Sch 4 may have been suffered where:

> ... [T]here 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."

The grounds of the appeal

24 By the time of the hearing, the appellants had settled on five grounds of appeal, which the respondents acknowledged that they were prepared to meet.

The first two grounds were said by the tenants to raise errors on a question of law, and were as follows:

Ground One

(1) That the Tribunal failed to engage with evidence lodged by the appellants in the proceedings below that was important or critical to the proper determination of the issues before it, including a report from a building inspector and the by-laws of the strata scheme, such that the Tribunal constructively failed to exercise its jurisdiction;

Ground Two

(1) That "the landlord's agent made false statements to the Tribunal when submitting application RT 19/40721 which would appear to be designed to deliberately mislead the Tribunal and damage the reputation and character of the appellants. This refers to allegations of abuse and harassment which are supported by no evidence."

25 In respect of each of the other grounds, the tenants acknowledged that they required leave to appeal. Those grounds, which were responsive to the requirements of cl 12 of Sch 4 of the NCAT Act, were as follows

Ground Three

(1) That the decision was "not fair and equitable because the tenants have spent $6,517.10 on experts' reports, buying specialised equipment and providing a huge amount of evidence to prove [their] arguments. A significant portion of this has been discounted and not even looked at. The agent on the other hand, did not provide any evidence and in fact made false statements that were proven to be incorrect in the hearing. However, those statements including allegations of damage, which are false and not shown any evidence, have been used to influence the decision".

Ground Four

(1) That the decision was against the weight of the evidence. In this regard the tenant relied on the following evidence provided by them in the proceedings below, being:

(a) a home inspection report from "Jim's Building Inspections", authored by a G Tremlett (the home inspection report), dated 20 May 2020;

(b) air quality tests "conducted by independent laboratories";

(c) a CSIRO research report; and

(d) a report on indoor air quality authored by Sensiron;

Ground Five

(1) That significant new evidence was now available that was not available time of the hearing, being:

(a) Further bank statements showing rental payments;

(b) A medical report in respect of Mr MacPherson;

(c) A police report and event number which the appellants alleged prove that there had been illegal intrusion on the premises on 16 November 2019; and

(d) Results from a NATA accredited laboratory which the appellants claimed prove that there was chemical contamination of the premises.

26 Whilst we may decide to conduct a new hearing (NCAT Act, s 80(3)(a)), we were not satisfied that the grounds of appeal warranted it.

An appeal commenced out of time

27 The appeal was not commenced within time.

28 The Notice of Appeal records that the appellants received the Tribunal's reasons for decision on 19 December 2019. The Appeal was not lodged until 6 January 2020, some 4 days beyond the 14 days allowed for filing the notice in respect of a residential tenancy decision: Rule 25(4)(b) of the Civil and Administrative Tribunal Rules 2014.

29 However, no objection was raised by the respondents to us extending the time to lodge the Notice of Appeal and there was no prejudice to the respondents alleged. We were mindful of the time of year in which the time to appeal elapsed and the public holidays within that period. We decided to extend time for the appellants to lodge the notice to 6 January 2020.

Consideration

Ground One

30 At the hearing of the appeal, the respondent's representative agreed that the by-laws which governed the use of the premises were in fact in evidence before the Member when he made the Decision, and did not disagree with the appellants' assertion that the home inspection report was, likewise, in evidence.

31 Given that the Member specifically referred, in the reasons for the Decision, to not having either of those documents before him, the appellants' argument on this ground is readily understood if the documents were in evidence.

32 The Tribunal was required to engage with the relevant evidence in its totality. The Tribunal must engage in an active intellectual process, in which each relevant matter receives genuine consideration: *Bat Advocacy NSW Inc v Minster for Environment Protection, Heritage and the Arts* (2011) LGERA 99, [2011] FCAFC 59 at [44] (Emmett, McKerracher and Foster JJ), citing *Tickner v Chapman* [1995] FCAFC 1726; (1995) 57 FCR 451 at 462 and *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 at [105].

33 In *Torbey Investments Corporated Pty Ltd v Ferrara* [2017] NSWCA 9 at [65], the Court of Appeal (per Basten JA with whom McColl and Simpson JJA agreed) accepted that to ignore or overlook apparently credible and relevant information, which might support an essential step in the reasoning process if the claim were to be upheld, may amount to an error of law.

34 The Court referred, at [63], to the explanation of Gummow and Callinan JJ in *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; 77 ALJR 1088 at [24]-[25], that "[t]o fail to respond to a substantial, clearly articulated argument relying upon established facts" can amount to a constructive failure to exercise jurisdiction.

35 However, we must also bear in mind the comments of the High Court in *Stead*, ibid, that there is a qualification to the need to uphold an appeal and grant a new trial even if an error on a question of law is made out. At [9] the Court said:

> That qualification is that an appellate court will not order a new trial if it would inevitably result in the making of the same order as that made by the primary judge at the first trial. An order for a new trial in such a case would be a futility.

Were the documents in fact before the Tribunal and overlooked?

36 If the documents the appellants alleged were before the Tribunal below were, in fact, overlooked, Ground One has merit.

37 To address the claim for reduction of rent under s 44(1)(b) of the RTA, the Tribunal is guided by s 44 (5) to the following potentially relevant considerations:

(a) the general market level of rents for comparable premises in the locality or a similar locality,

(b) the landlord's outgoings under the residential tenancy agreement or proposed agreement,

(c) any fittings, appliances or other goods, services or facilities provided with the residential premises,

(d) the state of repair of the residential premises,

(e) the accommodation and amenities provided in the residential premises,

(f) any work done to the residential premises by or on behalf of the tenant,

(g) when the last increase occurred,

(h) any other matter it considers relevant (other than the income of the tenant or the tenant's ability to afford the rent increase or rent).

38 In summary, the opinion of the author of the home inspection report was that:

> [T]he property is in poor condition, compared to others of similar age and construction. There are several safety & health risks that should be addressed urgently. The factors dealing to this conclusion (sic) are documented in this report.

39 On that basis, the report would clearly have been relevant evidence in support of the application. It goes on to particularise the alleged hazards and items in a poor state of repair in the property and supports those particulars with photographic evidence. The report makes recommendations for repair of the premises in respect of several of the items documented as requiring attention.

40 If the Tribunal overlooked this evidence, its finding at [34] of the reasons that what the appellants' evidence did not "do was establish with relevant expertise on a comprehensive basis the precise nature and degree of any defect, the cause and what was required by way of remediation" was infected by its error.

41 The error if the Tribunal overlooked the by-laws would not have led to the appeal succeeding on this ground, however, as we are satisfied that this could have had no material bearing on the Decision. This is because what was in issue was whether the playing of the piano by the appellants' neighbours had materially affected the amenity of the premises let by the appellants, such that there should have been a reduction in rent.

42 Evidence which may have been relevant to this issue would include the appellants' ongoing complaints in this regard, which were well documented in the evidence relied upon by them, and evidence that the sound of the neighbours' piano playing was, on an objective standard, an intrusion on the

amenity reasonably expected by the appellants in their use of the premises, having regard to the amount of rent paid by the appellants and taking all other relevant issues into account.

43 Having reviewed the by-laws, which do not prohibit the use of pianos per se, we are not satisfied that reference to the by-laws could have affected the Decision.

44 In any event, though, we are not satisfied that either of these documents, or the less clearly particularised “reports from electricians” the appellant alleges were overlooked were in evidence before the Tribunal when it made the Decision. In order to make this finding, we have reviewed the file maintained by the Consumer and Commercial Division in RT 19/41597, including the retained documents submitted by the appellants in support of the application.

45 To ensure that nothing was overlooked due to administrative error in the Registry, we have also reviewed the file relating to the landlord’s contemporaneous application, RT 19/40721.

46 Neither the by-laws nor the home inspection report are contained in those files. Nor are there documents properly fitting the description of electricians reports.

47 That, combined with the Tribunal’s clear reference to the documents not being in evidence is sufficient to satisfy us that they were not overlooked.

48 Given that both documents were available to the appellants before the Previous Decision was made, it is entirely possible that the documents were relied on by the appellants in those proceedings. That is not, however, evidence of an error by the Tribunal in reaching the Decision.

49 Even unrepresented parties have an obligation to take care in the presentation of their case to the Tribunal. In respect of application RT 19/41597, the Tribunal gave the appellants clear directions, on 24 September 2019 that they were to file in those proceedings everything that was relied upon to support that application. It is apparent that this was not done.

50 The Tribunal cannot be said to have erred on a question of law by failing to have regard to evidence a party has not put before it.

51 This ground is not made out.

Ground Two

52 This ground does not, in fact, identify any error on the part of the Tribunal.

53 It simply reflects the appellants' dissatisfaction with the Decision and the asserted conduct of the respondent's representative, in a way not made out on the material before us. It relates only to the landlord's application, which was dismissed.

54 This ground has no merit.

Have the appellants demonstrated that they may have suffered a substantial miscarriage of justice on any of the bases set out in cl 12 of Sch 4 of the NCAT Act?

Was the Decision unfair or inequitable?

55 We are not satisfied that the Decision was unfair or inequitable. On the basis of the evidence before it, the Tribunal clearly considered and dealt with each aspect of the appellants' claims, making relevant findings which were open to it and applying the correct legal tests.

Was the decision against the weight of the evidence?

56 It is correct that the respondent relied on little evidence in defence of the appellants' application. However, the weight of the evidence does not simply refer to the volume of the evidence relied upon by a party. For the evidence to have weight, it must be probative. In the absence of the home inspection report, the description of the balance of the appellants' evidence by the Tribunal at [34] of the reasons as, an "abundance of generalised material drawn from the Internet and other sources speaking of potential causes for potential problems, a self-conducted Internet derived air quality test […] and allegations based on the tenant representatives' probing", was apt.

57 For the appellants to succeed in establishing that this limb of cl 12 is engaged they need to demonstrate that the evidence before the Tribunal, in its totality, preponderated so strongly against the conclusion found by the Tribunal at first instance that it can be said that the conclusion was not one that a reasonable tribunal member could reach: *Collins v Urban,* at [77].

58 That is not the case here.

Is there significant evidence that has arisen, not reasonably available at the time the proceedings under appeal were being dealt with, which might go to establishing whether a substantial miscarriage of justice may have occurred?

59 We are not satisfied that the evidence sought to be relied on for the first time in the appeal meets this description.

60 In that regard:

(1) The bank statements proffered related only to the landlord's application in RT 19/40721;

(2) The medical report in relation to Mr MacPherson said to evidence the effect of his occupation of the premises, refers only to depression caused by "domestic stressors, among other contributing factors" and is not probative in relation to the issues for determination, particularly given that we are not dealing with a claim under s 187 of the RTA;

(3) The police report and event number which the appellants allege prove that there had been illegal intrusion on the premises on 16 November 2019 is nothing more than evidence that the appellants complained of such intrusion and that the police investigated the issue as they were obliged to do; and

(4) The results from the NATA accredited laboratory, which the appellants claim proves that there was chemical contamination of the premises, indicates only that, on sampling apparently carried out by the appellants, there are various elements identified in the samples and the level to which they are present. The report provides no proper basis upon which that evidence, if given weight, could assist the Tribunal to determine whether there was any significance to the existence or prevalence of those elements in the samples; and

(5) The home inspection report was available to the appellants prior to the proceedings under appeal being determined.

61 As the precursory requirements of cl 12 are not made out, we may not grant leave to appeal. Grounds Three to Five must be dismissed.

Orders

62 Our Orders are as follows:

(1) Time for lodgement of the Notice of Appeal is extended to 6 January 2020.

(2) Leave to appeal is refused.

(3) The appeal is dismissed.

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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