Civil and Administrative Tribunal

New South Wales

Case Name:	Chen v NSW Land and Housing Corporation
Medium Neutral Citation:	[2020] NSWCATAP 238
Hearing Date(s):	22 July 2020
Date of Orders:	18 November 2020
Decision Date:	18 November 2020
Jurisdiction:	Appeal Panel
Before:	L Pearson, Principal Member S Thode, Senior Member
Decision:	(1) Leave to appeal is refused. (2) Appeal dismissed.
Catchwords:	APPEAL – residential tenancy – social housing – mould – expert report obtained by landlord – report not provided to tenant – production on appeal under summons – whether access should be granted – whether substantial new evidence not reasonably available – whether decision not fair and equitable
Legislation Cited:	Civil and Administrative Tribunal Act 2013 Civil and Administrative Tribunal Regulation 2013 Residential Tenancies Act 2010
Cases Cited:	Al-Daouk v Mr Pine Pty Ltd t/as Furnco Bankstown [2015] NSWCATAP 111 Collins v Urban [2014] NSWCATAP 17 Dixonbuild Pty Ltd v Adams [2020] NSWCATAP 190 Edwards v Commissioner for Fair Trading [2019] NSWCATAP 208 Jones v Dunkel (1959) 101 CLR 298 Owners - SP 76269 v Draybi Bros Pty Ltd [2014] NSWCATAP 29 Raissis v Anaz [2019] NSWCATAP 25

	TAG Aviation Pty Ltd v Kirk [2017] NSWCATAP 41 Thurston v Goway Travel Pty Limited [2020] NSWCATAP 140 ZND v ZNE [2020] NSWCATAP 34
Category:	Principal judgment
Parties:	Kathy Chen (Appellant) NSW Land and Housing Corporation (Respondent)
Representation:	Solicitors: Homeless Persons' Legal Service (Appellant) NSW Land & Housing (Respondent)
File Number(s):	AP 20/22306
Publication Restriction:	No
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	5 May 2020
Before:	S De Jersey, General Member
File Number(s):	SH 19/56871

REASONS FOR DECISION

1 Kathy Chen appeals against a decision made in the Consumer and Commercial Division of the Tribunal on 5 May 2020 to dismiss her application under the *Residential Tenancies Act 2010* (the RT Act) in relation to her tenancy of premises owned by the respondent NSW Land and Housing Corporation.

2 Ms Chen had occupied the premises under a residential tenancy agreement from 3 October 2014. In her application to the Tribunal lodged on 20 December 2019 she claimed that from about June 2019 she had experienced significant mould issues at the premises, and sought orders for:

(1) Compensation for the cost of temporary accommodation in the amount of $6,020.73;

(2) Compensation for the cost of purchase of mould-related items, $297.86;

(3) Compensation for loss of quiet enjoyment in the sum of $3,496;

(4) A work order to have the premises professionally cleaned, cavities in the building basement or ground floor to be repaired and other remedial repairs to prevent rising damp; and

(5) An order for rent reduction pursuant to s 45 of the RT Act as the premises were uninhabitable or an order that the rent is excessive in accordance with s 44(1)(b) of the RT Act.

3 The application was dismissed, the Tribunal not being satisfied at the civil standard of proof that the grounds required to make the orders had been established.

Tribunal proceedings and decision

4 The application to the Tribunal was lodged on 20 December 2019. At a conciliation group list hearing on 17 January 2020 directions were made for the parties to file and serve the documentary evidence on which they intended to rely, Ms Chen by 27 February 2020 and the respondent by 26 March 2020. Leave was granted for Ms Chen to be represented by the Homeless Persons' Legal Service. Direction 9 was:

> 9. The respondent will carry out an inspection of the property prior to 28 February 2020. The tenant will give access for this purpose upon being given 3 days notice by email with a copy of this notice also being sent to the tenant's legal adviser.

5 On 2 April 2020 the parties' legal representatives appeared by telephone and proposed that in the current environment of COVID-19 that the hearing proceed on the papers, without cross examination of any witness, but with a further opportunity for both parties to provide written submissions. Orders were made for the respondent to provide submissions by 8 April 2020, and Ms Chen by 15 April 2020, with any submissions in reply by 19 April 2020; and for Ms Chen to provide particulars of the amount of compensation claimed. Direction 6 was in the following terms:

> 6. The parties are directed to use best endeavours to try and agree a written set of facts and to have such statement of facts provided to the Tribunal by email no later than 19 April 2020.

6 The Tribunal noted that the hearing on the papers "will take place on a date after 19 April 2020 to allow for the receipt of the above submissions".

7 The parties were notified on 6 April 2020 that the hearing on the papers would be on Tuesday 5 May 2020.

8 On 15 April 2020 Ms Chen's representative requested leave to adduce further medical evidence in response to the written submissions of the respondent, and an adjustment to the timetable and vacation of the hearing date. The respondent did not consent to any variation of the orders and objected to any change in the timetable. On 20 April 2020 a Tribunal member extended the time for compliance with the directions for filing and service of submissions, including the date for provision of any agreed statement of facts which was extended to 4 May 2020.

9 The proceeding was determined on the papers, and reasons were provided with the orders on 5 May 2020.

The Appeal

10 This internal appeal may be brought as of right on a question of law or, with the leave of the Appeal Panel, on other grounds: s 80(2)(b) *Civil and Administrative Tribunal Act 2013* (NCAT Act). As the appeal is brought from a decision of the Consumer and Commercial Division of the Tribunal, by virtue of cl 12(1) of Sch 4 to the NCAT Act leave to appeal may only be granted under s 80(2)(b) if the Appeal Panel is satisfied the appellant may have suffered a substantial miscarriage of justice because:

> (a) the decision of the Tribunal under appeal was not fair and equitable, or
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> (b) the decision of the Tribunal under appeal was against the weight of evidence, or
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> (c) significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).

11 In *Collins v Urban* [2014] NSWCATAP 17 the meaning of "substantial miscarriage of justice" was summarised at [71] and [79] as follows:

> [71] …[I]t can be seen that the concept of a substantial miscarriage of justice refers to a failure in the way a matter was conducted or decided

> which deprived the appellant of a chance that was fairly open of achieving a better outcome than occurred…
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> …
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> [79] In order to show that a party has been deprived of a "significant possibility" or a "chance which was fairly open" of achieving a different and more favourable result … it will be generally be necessary for the party to explain what its case would have been and show that it was fairly arguable. If the party fails to do this, even if there has been a denial of procedural fairness, the Appeal Panel may conclude that it is not satisfied that any substantial miscarriage of justice may have occurred.

12 Even if an appellant from a decision of the Consumer and Commercial Division satisfies the requirements of cl 12(1) of Sch 4, the Appeal Panel must still consider whether it should exercise its discretion to grant leave to appeal under s 80(2)(b). As discussed in *Collins v Urban*, an appellant must demonstrate something more than that the Tribunal was arguably wrong. Leave is ordinarily granted only where the matter involves an issue of principle, questions of public importance, where the injustice is reasonably clear or where the Tribunal has gone about its fact finding process in such an unorthodox manner that it is likely to have produced an unfair result.

13 The Notice of Appeal was lodged on 18 May 2020, and identified the following grounds of appeal:

(1) There is significant new evidence in the form of a mould report in the possession of the Respondent. This report was not presented before the Tribunal and can be considered by the Appeal Panel if it is produced by the Respondent.

(2) The Tribunal erred in not giving sufficient consideration to the submission that an adverse inference consistent with the rule in *Jones v Dunkel* (1959) 101 CLR 298 be drawn against the Respondent in relation to the existence of mould, due to the Respondent's failure to present the mould report.

(3) The Tribunal erred in finding that the effect of the orders made by the Tribunal on 17 January 2020, in context, was that the Respondent was not required to provide an expert mould report to the Appellant.

14 Leave to appeal was sought, on the grounds that the decision was not fair and equitable, and significant new evidence is now available that was not reasonably available at the time of the hearing.

15 The respondent in its Reply to Appeal filed on 1 June 2020 contended that the grounds set out do not establish an error of law or fact.

The decision under appeal

16 The Tribunal noted that there was a residential tenancy agreement between the parties from October 2014, and that the appellant claimed that from about June 2019 she had experienced significant mould issues at the premises. The appellant had provided documents and a written statement, in which she claimed that she suffered from a range of medical conditions, providing medical certificates, and that her condition worsens when she is inside the premises. Following a complaint regarding mould made on 25 June 2019 the respondent inspected the premises in late July 2019, that inspection finding no evidence of mould. From June 2019 there was water damage to the walls of the back room bathroom and kitchen and dampness within the cupboards and walls, and mould growth on ceilings and walls. There was no extraction fan in the bathroom. She lodged many complaints in June, July, August September and December 2019. The appellant stated that due to mould in the premises she was rendered homeless during November 2016 to 2018, and from June 2019 onwards. She took up the respondent's offer of temporary accommodation in June-July 2019. She rejected an offer of a transfer property in July 2019 because there were visible signs of mould, water damage and maintenance issues. There were inspections by an officer of the respondent on 9 January 2020, and a property condition inspection by a contractor on 10 September 2019.

17 The appellant stated that the Mould Werx technician inspecting the premises on 30 January 2020 said he was only inspecting for visible mould. She had not seen the report, and did not have the financial capacity to engage an expert herself. She relied on three photographs.

18 The respondent relied on documents including witness statements of three officers including the officer who inspected the premises on 9 January 2020. The respondent's evidence and submissions were that the ingoing condition report did not state there was mould present. There was no mould present at an inspection on 27 May 2019, and an inspection on 10 September 2019 found

no signs of mould and dampness. The Tribunal referred to the witness statements of the respondent's officers. The Tribunal summarised the respondent's position to be that the appellant, who bore the onus of proof, had not provided evidence of any defect which would put a reasonable landlord on inquiry as to whether works or repair were needed; existence of an illness did not of itself prove the premises were uninhabitable; complaints of mould did not constitute evidence of mould; and the respondent had undertaken steps to relocate the appellant which she had unreasonably refused.

19 The Tribunal referred to the appellant's submissions in reply:

> 12. The tenant has provided submissions in reply dated 24 April 2020 to the landlord's submissions which I have read and taken into consideration. I note in the tenant's submission in reply she says she did not have the financial means to engage an expert but was instead relying on the landlord to commission a report and provide her with a copy. The tenant submits that this report was the subject of discussion at the conciliation hearing before the Tribunal on 17 January 2020 and the landlord was supposed to provide it. The tenant submits that the failure of the landlord to provide the report of Mouldwerks regarding the inspection which took place on 30 January 2020 ought to be a basis for the Tribunal to make the inference that the report of Mouldwerks would have been adverse to the position of the landlord in relation to the existence of mould.

20 The Tribunal decision was as follows:

> 13. Although I accept the tenant's submission that she did not have the financial means to engage an expert and she was relying on the discussion at the hearing on 17 January 2020 for the landlord to provide a report for the inspection on 30 January 2020, I note from the orders made on that day, that no specific order was made by the Tribunal for the landlord to provide such a report for the purposes of evidence at the formal hearing.
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> 14. The tenant as the applicant has the burden of establishing on the balance of probabilities the facts that underpin her compensation and rent reduction claims; namely that the premises have had a mould issue for the periods claimed, that the premises were uninhabitable for those periods, that the landlord was aware of the issues and failed to remedy them and that it was reasonable for the tenant in these circumstances to seek alternative accommodation.
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> 15. I find that there is sufficient evidence of the landlord (in the landlord's witness statements, inspection reports and photographs) to establish that there is a significant factual issue as to whether there was a damp or mould issue at the leased premises. One of the photos annexed to the report dated 10 September 2019 concerned me as

> possibly showing an issue. That photo is at page 159 of the landlord's documents and shows many black spots on a cupboard. It is unclear what these many spots are, but the tenant has not submitted that this photo represented mould. The landlord's report does not appear to clarify the spots either, perhaps it was a small insect infestation. In any event no issue or submission has been made that this photograph depicts mould and accordingly I do not factor it into my determination.
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> 16. The tenant bears the burden of proof to establish the factual matters on the balance of probabilities. In light of the landlord's denial of a mould problem, which denial is based on the inspections conducted in 2019, and the landlord's witness statements I am not satisfied on the tenant's own evidence of the condition of the premises that there is sufficient to establish there is a mould issue at the premises. I note that there are only 3 photos at tab 8 which are relied upon and they do not clearly show a mould issue.
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> 17. On the evidence before me I am not satisfied that there has been any breach by the landlord of its obligation to maintain the premises and accordingly the underlying basis of the application for compensation and rent reduction has not been established. Nor is there sufficient evidence to establish on the balance of probabilities that the premises are uninhabitable for the purposes of the remedy of a rent abatement under section 45 of the Act.
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> 18. In these circumstances, I find that the tenant has failed to discharge the onus of proof and the application is dismissed.

The Appeal hearing

21 Both parties provided written submissions in the appeal. The appellant provided copies of the documents before the Tribunal, including the parties' written submissions at first instance and the correspondence between the parties.

22 On 17 June 2020 a summons was issued at the request of Ms Chen's representative for production of "each third-party reports of testing for mould in [address redacted] on or after 30 January 2020". On 23 June 2020 the respondent produced a report by Mould Werx, dated 6 February 2020, of an inspection undertaken on its behalf on 30 January 2020. The respondent objected to the applicant having access to the document.

23 The first issue dealt with at the hearing of the appeal on 22 July 2020 was the objection to access to the report. The respondent opposed access, submitting that the document was not relevant in the appeal, and the issue should have been brought up at first instance; and that the report was based on an

inspection on 30 January 2020 whereas Ms Chen's issues related to June and July 2019.

24 Ms Chen's representative submitted that the key issues in the appeal are whether the contents of the report constitute "significant new evidence" sufficient to justify an appeal, whether the Tribunal at first instance erred in not requiring production of the report, or in not making an adverse inference against the respondent in respect of the contents of the report. Access should be determined in accordance with the usual principles that apply to access to documents produced in response to a summons. The appellant would suffer significant prejudice and the Appeal Panel processes would be frustrated if access were not granted. The material produced in response to the summons is not the subject of any special privilege preventing the appellant from accessing it.

25 The Appeal Panel determined to grant access to the document to the appellant, with reasons to be provided later. Those reasons are as follows. It was not in dispute that the document was the report of the inspection referred to in direction 9 made on 17 January 2020, that is, an inspection arranged by the respondent for the purposes of the Tribunal proceedings. The existence and contents of the document are relevant to the grounds on which leave to appeal is sought, namely the grounds under cl 12(1)(a) and (c) of Sch 4 to the NCAT Act. No privilege is claimed by the respondent in respect of the contents of the document. Access to the document would enable the appellant, as well as the respondent, to provide submissions of assistance to the Appeal Panel, in accordance with the requirements of the guiding principle in s 36(1) of the NCAT Act, and the obligations of the parties and their representatives under s 36(3) of the NCAT Act.

26 The hearing of the appeal was adjourned for a short period to allow the appellant to consider the report.

Appellant's submissions

27 The appellant relies on the application for leave to appeal on the grounds under cl 12(1)(a) and (c) in particular of Sch 4 to the NCAT Act, conceding that it is less clear whether there is a question of law.

28 Having had an opportunity to review the Mould Werx report, the appellant submits that it was prepared by mould specialists, and the observations made are highly relevant. There was an unhealthy level of mould infestation and remedial steps required. The report provides relevant evidence by an expert on the key points of the application to the Tribunal, and is accordingly significant evidence.

29 While conceding that the report was in existence at the time of the first instance determination, the appellant submits it was not reasonably available, and accordingly cl 12(1)(c) is satisfied. The appellant's representatives wrote to the respondent on 22 January 2020 stating the matters agreed to at the conciliation hearing on 17 January 2020, including that the respondent would serve the report as soon as practically possible and would meet following service of the report in an attempt to settle the matter. The respondent's representative responded on 14 February 2020 stating that those matters had not been agreed to. The appellant's representative wrote to the respondent on 24 February 2020 requesting confirmation as to whether it intended to serve a copy of the report, and if not, the reasons for not doing so. In that letter the appellant's representative referred to a second inspection scheduled for 17 February 2020, requesting confirmation whether that had taken place. The appellant's representative submitted that the parties were genuinely attempting to narrow the facts in issue, and were negotiating an agreed statement of facts as late as 4 May 2020.

30 The appellant accepted that the respondent disputes that there was an agreement on 17 January 2020 for the respondent to provide a copy of the report to the appellant.

31 The appellant does not contest that the Tribunal was entitled to determine the application on 5 May 2020, however submits it was required to fully inform itself on all the issues dealt with in the written submissions, and, knowing that an agreed statement of facts had not been received, ought to have exercised the power to call for production of the Mould Werx report.

32 In support of the submission that the Tribunal was on notice that the provision of the report was a live issue at first instance, the appellant referred to her

submissions in reply dated 24 April 2020. At paras 11-13 of those submissions the appellant stated that for financial reasons she was not able to commission an expert to test for mould; and referred to the agreement on 17 January 2020 that the respondent would serve a copy of the report of the inspection of 30 January 2020 and the appellant's expectation that given the relevance of the Mould Werx report to the issues the subject of the dispute it would have been included in the respondent's materials. While the respondent denied the presence of mould multiple times, it did not use the Mould Werx report as a basis for that conclusion. The appellant had submitted that the failure to include a copy of the report in its materials or otherwise present evidence of the Mould Werx findings fell within the scope of the rule in *Jones v Dunkel*; and while the rules of evidence are not binding the Tribunal can apply the principles of that rule, and the Tribunal should make an inference consistent with that rule adverse to the respondent in relation to the existence of mould issue.

33 The appellant submitted that in all the circumstances, it was reasonable for the appellant as at 4 May 2020 not to have gone to the step of applying for a summons in the first instance proceedings.

34 The appellant's oral submissions were supported by detailed written submissions in the appeal. Those submissions accept that consistent with the Appeal Panel decisions in *Raissis v Anaz* [2019] NSWCATAP 25 and *ZND v ZNE* [2020] NSWCATAP 34, s 38(6)(a) of the NCAT Act, which provides that the Tribunal "is to ensure that all relevant material is disclosed to the Tribunal so as to enable it to determine all of the relevant facts in issue in proceedings", does not impose an unqualified duty to investigate whether all relevant material has been disclosed to the Tribunal. However, those decisions can be distinguished as the facts in both cases related to material that was either of questionable relevance or had not been brought to the attention of the Tribunal. The appellant submits that s 38(6)(a) should be read consistent with the decisions in *TAG Aviation Pty Ltd v Kirk* [2017] NSWCATAP 41 and *Edwards v Commissioner for Fair Trading* [2019] NSWCATAP 208, such that the Tribunal is required to ensure that all relevant material is disclosed where the Tribunal has sound reason to conclude that all relevant material has not been disclosed to the Tribunal.

35 The appellant submitted that while the Tribunal is not bound by the rules of evidence, and is not required to apply the rule in *Jones v Dunkel*, it should have exercised its discretion to do so, to ensure a just resolution of the dispute. The Tribunal was aware of the resource disparity between the parties, and the respondent as a NSW government entity is bound by the NSW Government Model Litigant Policy which states that it should not take advantage of a claimant who lacks the resources to litigate a legitimate claim. The rule in *Jones v Dunkel* is applicable because the respondent did not adduce the mould report and the absence of that report was unexplained; the appellant had requested a copy of the report, and while no specific order was made for the respondent to provide the report, the order requiring an inspection carried with it a requirement that the results of the inspection would be filed and served.

36 The appellant further relied on cl 12(1)(a) of Sch 4, while acknowledging that that was subsidiary to the primary reliance on cl 12(1)(c).

37 The appellant submitted that the decision was not fair and equitable, on the grounds that she is a social housing tenant rendered homeless as a result of the condition of the premises and cannot afford to commission an expert report; the existence of the lease for the premises means she cannot obtain alternative temporary emergency accommodation; she relied on statements made by a representative of the respondent on 17 January 2020 that the respondent intended to inspect and conduct testing for the presence of mould, and it is obvious that an order requiring inspection must have carried with it a requirement that the results of that inspection would be filed and served; the parties were in the midst of negotiating the terms of the agreed statement of facts ordered by the Tribunal when the Tribunal determined the matter; and as a result the appellant did not have an opportunity to seek further formal production of the report once it was known that the presence of mould was a real matter at issue between the parties.

38 The appellant submitted that she suffered a miscarriage of justice as there was a chance that was fairly open that she would have achieved a more favourable outcome if her evidence had been considered in light of the disparity of

resources between the parties, and if the Tribunal had compelled the production of the report in accordance with its power under s 38(6) of the NCAT Act.

Respondent's submissions

39 The respondent's representative commented on the Mould Werx report that it indicated there was mould in distinct areas namely the refrigerator, cupboards and bathroom basin, however it was not significant. The report was based on an inspection in 2020 however the appellant had not lived there since July 2019. The appellant was able to request the issue of a summons in the Consumer and Commercial Division, and should have availed herself of that opportunity.

40 The respondent submitted that the hearing was not conditional on there being an agreed statement of facts, which in any event were due on 4 May 2020. There was no agreement as to the outcome of the conciliation on 17 January 2020. The respondent submits that the report was "available" some time before the hearing in the Tribunal. The Appeal Panel decisions in *Raissis v Anaz* [2019] NSWCATAP 25 and *ZND v ZNE* [2020] NSWCATAP 34 are not distinguishable, and to require otherwise would place a stricture on the Tribunal and impose on it the role the parties have, especially so where a party is legally represented. To impose an obligation under s 38(6)(a) of the NCAT Act would effectively convert the Tribunal into the role of fact searcher as well as fact finder.

41 The respondent submitted that any disparity in resources could have been overcome by seeking the issue of a summons. There was no order for the landlord to provide the report, and it was open to the appellant to seek such an order. Clause 3.3 of the Model Litigant Policy states that "The State or agency is not prevented from acting firmly and properly to protect its interests. The obligation does not prevent all legitimate steps being taken in pursuing litigation or from testing or defending claims made".

42 The respondent contends that the fact that the appellant chose not to seek the production of the report does not mean that there has been a substantial miscarriage of justice. The appellant could have issued a summons seeking

production of the report, a process within her means, and the appellant should not be granted leave to appeal.

Consideration

43 The Appeal Panel notes that direction 9 made on 17 January 2020 did not in terms require the respondent to provide to the appellant, or to the Tribunal, any report from the inspection of the premises which it was to undertake. In the absence of any sound recording or transcript of any discussion between the parties and the Tribunal member of the orders made on that date, the Appeal Panel is not able to resolve the dispute between the parties as to what if anything was agreed. The appellant's representative concedes that the respondent's representative in the appeal was not the representative who appeared on 17 January 2020.

44 The respondent has not disputed that the parties were in negotiation as to an agreed statement of facts as at 4 May 2020. The Appeal Panel notes that even if there were continuing discussions as at that date, direction 6 made on 2 April 2020 did not in terms require the parties to provide such a document, but rather to use their best endeavours to do so.

45 There is no dispute that the appellant could, pursuant to s 48 of the NCAT Act, have applied to the Registrar for the issue of a summons to require the respondent produce the Mould Werx report in the proceedings in the Consumer and Commercial Division. Any dispute as to whether such a summons should issue, or concerning access orders, would have been resolved in accordance with the provisions of the Civil and Administrative Tribunal Regulation 2013 and the NCAT Procedural Direction 2: Summonses.

46 Section 38 of the NCAT Act provides for the procedure of the Tribunal, relevantly:

> **38 Procedure of Tribunal generally**
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> (1) The Tribunal may determine its own procedure in relation to any matter for which this Act or the procedural rules do not otherwise make provision.
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> (2) The Tribunal is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice.

…

(4) The Tribunal is to act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.

(5) The Tribunal is to take such measures as are reasonably practicable—

(a) to ensure that the parties to the proceedings before it understand the nature of the proceedings, and

(b) if requested to do so—to explain to the parties any aspect of the procedure of the Tribunal, or any decision or ruling made by the Tribunal, that relates to the proceedings, and

(c) to ensure that the parties have a reasonable opportunity to be heard or otherwise have their submissions considered in the proceedings.

(6) The Tribunal—

(a) is to ensure that all relevant material is disclosed to the Tribunal so as to enable it to determine all of the relevant facts in issue in any proceedings, and

…

47 There is no dispute that in addition to the possible issue of a summons, the Tribunal had power to require the respondent to provide a copy of the report to the appellant and to the Tribunal.

48 The appellant submits that the Tribunal was aware of the existence of the Mould Werx report, as acknowledged in para [12] of the reasons, and that while s 38(6)(a) of the NCAT Act does not impose an unqualified duty to investigate whether all relevant material has been disclosed, the Tribunal is required to ensure all relevant material is disclosed to the Tribunal where the Tribunal has sound reason to conclude that all relevant material has not been disclosed to the Tribunal.

49 The appellant has provided in her appeal documents copies of the correspondence with the respondent referred to in para [29] above. There is no indication that any request was made to the Tribunal to make an order requiring the respondent to provide a copy of the report to the appellant, either at the hearing on 17 January 2020, or subsequently.

50 As acknowledged by the appellant, both *Raissis v Anaz* and *ZND v ZNE* have construed s 38(6)(a) as giving the Tribunal a power that is permissive in nature. The discussion in *TAG Aviation Pty Ltd v Kirk* was in the context of whether, having determined that the decision at first instance had to be set aside, all the evidence required for a proper re-determination of the issues was before the Appeal Panel for it to re-determine the matter. The discussion in *Edwards v Commissioner for Fair Trading* was in the context of consideration of the obligation of an agency to disclose to the Tribunal and the applicant in administrative review proceedings all the material it held that it considered relevant to the issues to be determined. Neither provides a qualification to the principle confirmed in *Raissis v Anaz* and *ZND v ZNE*. In circumstances where the issue was framed in terms of a *Jones v Dunkel* submission, and there was no reference to s 38(6)(a), or request for the Tribunal to either issue a summons or to direct the respondent to provide the report to the appellant, there is in the view of the Appeal Panel no basis on which it would be appropriate to elevate the permissive power in s 38(6)(a) so as to require the Tribunal to have directed production of the document.

51 There is no dispute that having advised the parties that the matter was listed for hearing on the papers on 5 May 2020, with no variation to that date being made as part of the orders made on 20 April 2020 extending time for compliance with the Tribunal directions, the Tribunal was entitled to consider the documentary evidence provided by the parties and determine the matter on 5 May 2020. Those documents did not include any agreed statement of facts, or a copy of the Mould Werx report of the inspection undertaken on 30 January 2020. The evidence included witness statements by the appellant and by officers of the respondent, and relevantly a property condition report of an inspection on 10 September 2019 which included the photographs to which the Tribunal referred in its reasons.

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

52 The appellant relies on cl 12(1)(c) in support of the application for leave to appeal. That requires, first, that the evidence on which the appellant seeks to rely is “significant new evidence” that has arisen “(being evidence that was not

reasonably available at the time the proceedings under appeal were being dealt with)".

53 The issues for determination were summarised by the Tribunal at para [14] of the reasons, namely whether the premises had a mould issue for the periods claimed, whether the premises were uninhabitable for those periods, whether the landlord was aware of the issues and failed to remedy them, and whether it was reasonable for the tenant in those circumstances to seek alternative accommodation.

54 The Mould Werx report is a report prepared by a firm providing specialist mould services, and records the results of an inspection including humidity and moisture readings, and visual observations referenced by photographs. The report notes internal humidity levels above the recommended level; inadequate air intake and circulation and absence of a bathroom exhaust fan; visible efflorescence on a wall between the bathroom and a bedroom; visible mould contamination on the refrigerator, kitchen cupboard and in the bathroom; and an unacceptable moisture content reading on the wall around the shower and bathtub taps. The report includes recommendations for remediation to maintain a healthy living environment.

55 The Appeal Panel is satisfied that the evidence in the report can be described as "significant". It was relevant to the issues to be determined, and provided technical expert evidence to be considered along with the other evidence, including that of previous inspections by and on behalf of the respondent and the appellant's evidence.

56 The issue is whether it can be said that the report is evidence that "has arisen (being evidence that was not reasonably available…)" at the time. If the word "arisen" requires that the evidence not have been in existence at the time of the first instance proceedings, that is not the case here. The report was provided to the respondent on 6 February 2020, and accordingly was in existence at the time by which the respondent was to file and serve its evidence and submissions, and at the time of the Tribunal determination.

57 Even if cl 12(1)(c) applies to a report in existence at the time, the issue is whether it was "reasonably available".

58 In *Al-Daouk v Mr Pine Pty Ltd t/as Furnco Bankstown* [2015] NSWCATAP 111 an Appeal Panel considered the term "not reasonably available":

> 19. There is little judicial guidance available on what the phrase "not reasonably available" means, and how it should be interpreted. We have found two authorities. In *James Burke v ABL Group Pty Limited t/as Authentic Bricklaying (NSW) (under external administration)* [2013] NSWDC 212 Judge Letherbarrow SC of the District Court of New South Wales noted at [25] that neither party could refer him to any authorities and stated at [26]:
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> > It is clear that the phrase in the context of the legislation that it is used poses a question of fact and degree for the Court to determine, in my view, upon a consideration of all the circumstances. Pursuant to s33 of the *Interpretation Act, 1987*, I am also required to take a purposive approach when interpreting this phrase. I have already referred to the objects of the legislation.
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> 20. In *Ortlipp v Employers Mutual NSW Limited as agent for the Workers Compensation Nominal Insurer* [2014] NSWDC 157 Judge Taylor SC, also of the District Court of NSW, stated at [47]:
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> > Further, in deciding what is "reasonably available" the legislation should be construed in a way that is fair and just if that construction is available (see *Certain Lloyd's Underwriters v Cross* [2012] HCA 56; (2012) 248 CLR 378 at [24], referred to in *Deputy Commissioner of Taxation v Zammitt* [2014] NSWCA 104 at [67]).
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> 21. The expression being considered by the District Court in each of the cases of *James Burke* and *Ortlipp* referred to the expression "not reasonably available to the party" as that expression is used in s 318 of the *Workplace Injury Management and Workers Compensation Act 1998* (WIM Act)".
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> 22. In the present case cl 12(1)(c) of Sch 4 of the NCAT Act requires the Tribunal to consider if "significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were dealt with)."
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> 23. Unlike the WIM Act, the expression "reasonably available" is not qualified by the words "to the party". This difference suggests that the test of whether evidence is reasonably available is not to be considered by reference to any subjective explanation from the party seeking leave but, rather, by applying an objective test and considering whether the evidence in question was unavailable because no person could have reasonably obtained the evidence. For example, in *Owners SP 76269 v Draybi Bros* [2014] NSWCATAP 20 at [114] the Appeal Panel refused leave because, although the appellant may not have been aware of the evidence (being an email), it could have obtained the evidence by summons. In *Prestige Auto Centre Pty Ltd v Apurva Mishra* [2014]

NSWCATAP 81 at [17] the Appeal Panel granted leave because the respondent to the appeal had fraudulently altered evidence. The party seeking leave under cl 12(1)(c) could not reasonably have had available to them the evidence that the report in question had been fraudulently altered at the time the proceedings were being dealt with by the Tribunal. That fact was not known to the appellant at the time of the hearing and could not reasonably be known due to fraud.

24. Each of these cases illustrates that something more than a party's incapacity to procure evidence is necessary to satisfy the requirements of cl 12(1)(c).

25. Further, to grant leave simply on the basis of whether a party had been unsuccessful in their attempt to obtain evidence would allow any party who has a personal excuse for not providing evidence otherwise reasonably available an opportunity to seek leave to appeal any decision of the Tribunal. Such an outcome would not promote finalisation of the real issues in dispute in a just, quick and cheap manner, as an opposing party would be liable to face a successful appeal and a rehearing merely because of the personal circumstances of the person who failed to procure necessary evidence.

26. In our opinion the intent of cl 12 of Sch 4 of the NCAT Act is to impose additional limitations on a party's entitlement to seek leave to appeal under s 80(2) of the NCAT Act from a decision of the Consumer and Commercial Division.

27. In the present case Mrs Al-Doauk took a number of steps to obtain evidence of the type now sought to be relied upon. However, the issue is whether, objectively, the evidence has arisen since the hearing and was "not reasonably available" at the time of the hearing.

28. There is no feature of the evidence or the witness who provided the evidence to suggest it could not have been obtained at an earlier time and was not, in that sense, reasonably available. There is no evidence to suggest Mr Mack could not have provided the evidence if approached at an earlier time, at or before the hearing. Perhaps Mrs Al-Daouk's husband could have made enquiries of his patients earlier; perhaps Mrs Al-Daouk could have sought an adjournment of the hearing date so as to allow her more time to seek the report. These are rhetorical considerations, but having considered the evidence sought to be adduced, the only circumstances relied upon by the appellant to show such evidence was not reasonably available is that:

> (a) Mrs Al-Daouk did not know of and did not find Mr Mack until after the hearing; and
>
> (b) other prospective witnesses were approached but declined to help.

29. Neither circumstance would be sufficient to establish that the evidence was not reasonably available at the time of the hearing. Accordingly, we consider that leave to appeal should not be granted to Mrs Al-Daouk.

59 The approach identified in *Al-Daouk* at para [23], namely that the test is an objective one, has been consistently applied by the Appeal Panel: see, most recently, *Thurston v Goway Travel Pty Limited* [2020] NSWCATAP 140; *Dixonbuild Pty Ltd v Adams* [2020] NSWCATAP 190.

60 The appellant's representative submitted that they had requested the respondent to provide a copy of the report. However, the documents to which the Appeal Panel was taken in argument do not include any correspondence confirming a request in terms that the report be provided. The letter from the appellant's representatives to the respondent of 22 January 2020 is in terms that assumed the report would be provided. On 14 February 2020 the respondent's representative informed the appellant's representative that that had not been agreed to by the respondent. In the letter of 24 February 2020 the appellant's representatives requested confirmation of whether the respondent intended to serve a copy of the report, with a request for reasons if the respondent did not intend to do so.

61 The appellant's written submissions dated 27 February 2020, which identify the evidence as to the presence of mould on which the appellant was relying, did not refer to the report of the 30 January 2020 inspection. The appellant's request for leave to provide further medical evidence and for an extension of the timetable made by letter of 15 April 2020 did not refer to the mould issue. The first mention of the report in the documents before the Tribunal was in the appellant's submissions in reply, dated 24 April 2020, when the submission was made that the appellant expected that the report would have been included in the respondent's materials, and urged the Tribunal to make an inference consistent with the rule in *Jones v Dunkel* adverse to the respondent on the existence of mould issue.

62 As at 24 April 2020 the appellant's representatives were aware that the Mould Werx report was not included in the evidence that would be before the Tribunal. The report would have been available to the appellant if it had been sought by summons issued at any time prior to the hearing of the proceedings on 5 May 2020. As the Appeal Panel commented in *Owners - SP 76269 v Draybi Bros Pty Ltd* [2014] NSWCATAP 29,

> 114…..Issuing a summons is not an unreasonable step to require a party to take to obtain documents that may be relevant to its proceedings in the Tribunal. Thus, it should be concluded that this evidence was reasonably available at the time of the hearing.

63 In those proceedings the appellant was, as is the case in this appeal, legally represented. It is not necessary or appropriate to consider whether the same approach might be adopted for a party to proceedings in the Tribunal who is not legally represented.

64 The Appeal Panel is not satisfied that the new evidence, in the form of the Mould Werx report, was not "reasonably available" at the time of the proceedings at first instance. While it may be accepted that the appellant's representatives were attempting to negotiate an agreed statement of facts, that would not have precluded an application for the issue of a summons to obtain the report if the respondent was refusing to provide it. Clause 12(1)(c) of Sch 4 to the NCAT Act does not apply.

Whether the decision was not fair and equitable

65 The grounds on which the appellant contends that the decision was not fair and equitable are the circumstances of the appellant as a social housing tenant, her reliance on statements made at the conciliation group list hearing on 17 January 2020, and that the parties were in the midst of negotiating an agreed statement of facts when the Tribunal determined the matter. The appellant submitted that the decision to dismiss the matter on the basis of insufficient evidence of mould was not fair and equitable, in light of circumstances where the appellant did not have the financial means to arrange for an expert mould report, the respondent had not disclosed the mould report it had commissioned, and the matter was determined on the papers while the parties were attempting to negotiate by consent the factual matters in dispute.

66 The appellant's written submissions dated 27 February 2020 identify the evidence on which the appellant to establish the presence of mould. Those submissions do not refer to the report of the inspection on 30 January 2020. That inspection, and the proceedings on 17 January 2020, are referred to in the written submissions in reply dated 24 April 2020. At paragraph 13 of those submissions, the appellant stated that she expected that the report would be

included in the respondent's materials, and submitted that the failure to present a copy of the report in its materials or otherwise fell within the scope of the "rule" in *Jones v Dunkel*, and submitted that the Tribunal should make an inference consistent with that rule adverse to the respondent in relation to the existence of mould issue.

67 The Tribunal Member acknowledged the submission in para [12] of her reasons (see above at para [19]). The appellant submitted that the Tribunal erred in not giving sufficient consideration to that submission.

68 It is not clear how, even if the appellant had expected that the report would have been included in the respondent's evidence, its absence, or the absence of other evidence as to the findings of the inspection of 30 January 2020 would warrant an inference consistent with *Jones v Dunkel*., or how the Tribunal erred in not drawing that inference.

69 In *Owners - SP 76269 v Draybi Bros Pty Ltd* the Appeal Panel considered a submission that a decision in home building proceedings was not fair and equitable based on the Tribunal's failure to draw an adverse inference against the respondent builder's case because the respondent did not call its foreman for the building work on the strata development. The Appeal Panel commented:

> 94. The inference which may be drawn against a party which fails to call a witness under the rule in *Jones v Dunkel* is to some extent a matter of common sense and experience. Even though the Tribunal is not bound by the rules of evidence, the Tribunal may draw such an inference where the circumstances of the case render it appropriate. In the present case, as the passage from Windeyer J's judgment referred to above [*Jones v Dunkel* (1958) 101 CLR 298 at, for example, 321 (.8) per Windeyer J citing Wigmore, *Evidence* (3rd Ed 1940).] makes clear, the inference that might have been drawn was that Mr Diab's evidence would not have helped the respondent's case. It could not be inferred from the failure to call Mr Diab that the respondent attended the site after 10 November 2005 to do work other than work to remedy any defect that did not affect practical completion, in the absence of other evidence that supported such a conclusion. The absence of a witness cannot be used to make up any deficiency in the evidence - *Jones v Dunkel* (1958) 101 CLR 298 at 312 (.6) per Menzies J.

70 The Appeal Panel accepts that the tender of the report was to be expected by the appellant, and that the report would have elucidated whether there was mould in the premises, and that the absence of the report was unexplained.

However, the rule does not require that an inference be drawn, and is simply available where the appropriate circumstances exist. The Appeal Panel is not persuaded that the Tribunal erred in not drawing the inference that the provision of the report would not have assisted the respondent.

71 The Appeal Panel does not consider that any of the factors on which the appellant relies, particularly in circumstances in which she was legally represented, warrant a conclusion that the decision was not fair and equitable. The appellant had the opportunity to provide all the evidence both as to the presence of mould and the habitability of the premises on which she intended to rely; that evidence was considered by the Tribunal member; and there was no contention that she had been denied procedural fairness. Even if such a conclusion could be drawn, the Appeal Panel is not persuaded that it could be said that the appellant may have been deprived of a "significant possibility" or a "chance which was fairly open" of achieving a different and more favourable result. Leave should not be granted under cl 12(1)(a) of Sch 4 to the NCAT Act.

Conclusion

72 The Appeal Panel concludes that the grounds on which leave to appeal may be granted under cl 12(1)(a) or (c) of Sch 4 to the NCAT Act are not made out. The appellant does not rely on any errors on questions of law. Leave to appeal should be refused, and the appeal dismissed.

73 While that conclusion disposes of this appeal, the Appeal Panel notes, and accepts, that it is open to the respondent to rely on cl 3.3 of the Model Litigant Policy, and to test and defend a claim, and that in these proceedings the appellant had been granted leave for legal representation by the Tribunal below. The Appeal Panel has some concerns, however, as to the approach adopted by the respondent as social housing landlord in these proceedings, in not providing a copy of, and resisting access being granted to, a report commissioned by it. The Appeal Panel notes that the conclusion reached in the circumstances of this matter is not intended to be read so as to preclude adoption of a proactive and facilitative approach, consistent with the obligations imposed on parties to proceedings in the Tribunal and their representatives under s 36(3) of the NCAT Act.

74 The orders of the Appeal Panel are:

(1) Leave to appeal is refused.

(2) Appeal 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