Civil and Administrative Tribunal

New South Wales

Case Name:	Lewis v Matuck
Medium Neutral Citation:	[2021] NSWCATAP 214
Hearing Date(s):	2 July 2021
Date of Orders:	14 July 2021
Decision Date:	14 July 2021
Jurisdiction:	Appeal Panel
Before:	G Curtin SC, Senior Member S Goodman SC, Senior Member
Decision:	(1) Appeal upheld in part. (2) Order 1 made by the Tribunal on 28 April 2021 is confirmed. (3) Order 2 made by the Tribunal on 28 April 2021 is varied to substitute the sum of $125 for the sum of $1,500. (4) Orders 3 and 4 made by the Tribunal on 28 April 2021 are confirmed. (5) If any party desires to make an application for costs of the appeal: (a) that party is to so inform the other party within 14 days of the date of these reasons; (b) the applicant for costs is to lodge with the Appeal Panel and serve on the respondent to the costs application any written submissions of no more than five pages on or before 14 days from the date of these reasons; (c) the respondent to any costs application is to lodge with the Appeal Panel and serve on the applicant for costs any written submissions of no more than five pages on or before 28 days from the date of these reasons; (d) any reply submissions limited to three pages are to

	be lodged with the Appeal Panel and served on the other party within 35 days of the date of these reasons; (e) the parties are to indicate in their submissions whether they consent to an order dispensing with an oral hearing of the costs application, and if they do not consent, include submissions of no more than one page as to why an oral hearing should be conducted rather than the application being determined on the papers.
Catchwords:	LEASES AND TENANCIES – obligation to leave the residential premises as nearly as possible in the same condition, fair wear and tear excepted as existed at the commencement of the tenancy - obligation to leave the residential premises in a reasonable state of cleanliness - damage to premises – lack of evidence of damage – no question of principle INSURANCE - subrogation - insured and uninsured losses – partial indemnity by the insurer provides no defence to the wrongdoer
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW), s 80(2)(b), Sch 4 cl 12
Cases Cited:	Al-Daouk v Mr Pine Pty Ltd t/as Furnco Bankstown [2015] NSWCATAP 111 Nufarm Australia Ltd v Dow AgroSciences Australia Ltd (No 2) [2011] FCA 757; 282 ALR 24
Texts Cited:	Derrington and Ashton, The Law of Liability Insurance, 3rd ed, LexisNexis Butterworths, Australia, 2013 at [13-278]
Category:	Principal judgment
Parties:	Angela Lewis (Appellant) Bernardo Matuck (Respondent)
Representation:	Appellant (Self Represented) Respondent (Self Represented)
File Number(s):	2021/00132777
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 April 2021
Before:	P French, General Member
File Number(s):	RT 20/38861; RT 20/49213

REASONS FOR DECISION

1 This is an appeal by a Landlord from a decision of the Tribunal dismissing claims made by her against her former Tenant for outstanding rent and damage to the rented premises.

Background

2 There were two applications before the Tribunal. They were described by the Tribunal as follows:

> "2. The first application in time has been made by Angela Lewis (landlord). She applies orders pursuant to sections 33, 51, 187(1)(c) and (d) and 190 of the *Residential Tenancies Act 2010* (RT Act) that would require Bernardo Matuck (the tenant) to pay her $2,425.00 in compensation for rent arrears she claims was owed up to the end of the tenancy and $20,495.00 in compensation for damage and loss she contends she suffered due to various alleged breaches by the tenant of his obligations to her under the residential tenancy agreement. The landlord also applies for an order that will require the tenant to pay her costs of the proceedings. This application was made to the Tribunal on 12 September 2020 (the landlord's application).
>
> 3. The second application in time is an application by the tenant for an order pursuant to section 44(1)(b) of the RT Act that would reduce the rent payable for the premises during the period 9 June 2020 up to the end of the tenancy, which was either 17 July 2020 or 25 July 2020 (the landlord and tenant contend for different dates) due to the landlord's alleged withdrawal of a cooktop facility provided with the residential premises. The tenant also applies for an order under section 175 of the RT Act in relation to his rental bond. This application was made to the Tribunal on 24 November 2020 (the tenant's application)."

3 The Tribunal dismissed the Tenant's application, and no appeal has been brought in relation to that order.

4 The Tribunal found that the Landlord had established that she was entitled to be compensated $300 for the cost of repairing the kitchen kickboard and an

additional $500 for the cost of repairing or replacing the carpet in bedroom no. 1. The balance of the Landlord's application was dismissed. As the Landlord had already claimed the bond of $2,300 but was found by the Tribunal to only be entitled to $800, the Tribunal ordered the Landlord to pay the Tenant the difference between those two sums being $1,500.

5 The Landlord also sought costs of the proceedings. The Tribunal made no order as to costs as the Tribunal considered there were no special circumstances justifying an award of costs. There is no appeal from that costs decision.

6 The Landlord appeals from the dismissal of the balance of her claims.

7 In a cogent and detailed decision, the Tribunal described the background to the parties' disputes, which we gratefully adopt, as follows:

> "8. The dispute arises from a residential tenancy agreement that was made on or about 27 August 2016 in respect of a two bedroom apartment in a residential block and strata plan located in Bondi. The agreement was a fixed term agreement of 12 months duration which was expressed to commence on 27 August 2016 and end on 26 August 2017. The tenancy continued on a periodic basis after the lapse of that fixed term. On or about 13 December 2019, the parties entered into a further fixed term agreement for a period of five months in respect of the period 25 December 2019 to 25 May 2020. The rent payable under this agreement was $1050 per fortnight.
>
> 9. By notice dated 27 April 2020 the landlord issued the tenant with an End-of-Fixed-Term Termination Notice which purported to require the tenant to return possession of the premises on 25 May 2020. On the same date the landlord applied to the Tribunal for an order terminating the tenancy under section 87 of the RT Act on the ground of non-payment of rent. The tenant did not give up possession of the premises in response to the termination notice, and the Tribunal dismissed the termination application on 2 July 2020 on the basis that it did not have jurisdiction to entertain it (the termination notice was not given under section 87, and a minimum notice period of 90 days was required at that time for a section 84 notice due to the impact of the COVID-19 Pandemic).
>
> 10. It appears that the tenancy subsequently ended on the basis of an End-of-Periodic Agreement termination notice served by the tenant on the landlord. That notice is not in evidence. There is a dispute between the parties as to when possession of the premises was returned to the landlord. The tenant contends it was on 17 July 2020. The landlord contends it was 25 July 2020.
>
> 11. ...
>
> 12. At the start of the tenancy a Condition Report for the premises was prepared by the landlord and signed by both parties. That condition was subsequently amended on 27 February 2018, and again on 12 December 2019, to note work that had been carried out at the premises by the landlord.

> The Condition Report was signed and dated again by both parties at the time. On 12 December 2019 the following comment was entered into the section of the Condition Report headed "Landlord's promise to undertake work":
>
> > Windows to be fixed in January 2020. Cost to fix is currently disagreed on. Agree to go to Tribunal.
>
> 13. A similar comment was handwritten into the "additional terms" box in the second fixed term agreement that was signed on or about 13 December 2019:
>
> > Require tribunal hearing on damage/costs associated with windows if not otherwise agreed. Tenant to fix all outstanding damage/repair at end of tenancy. (see Condition Report).
>
> 14. There was no final joint inspection of the premises at the end of the tenancy and there is no agreed end-of-tenancy Condition Report."

8 The Condition Report referred to in those paragraphs is important to the Landlord's appeal and it is convenient to say something about it at this point.

9 The copy of the Condition Report provided to us appears to be a different version to that provided to the Tribunal. In addition, the copy provided to us has other difficulties relating to its comprehensibility. For those reasons, which we will now expand upon, we cannot place any reliance on the copy of the Condition Report provided to us.

10 The Condition Report is generally in the form provided in Schedule 2 of the Residential Tenancies Regulation (NSW) as in force at the commencement of the tenancy.

11 In the Condition Report are four large columns. The first refers to varying rooms and various items in each room. The next two are devoted to "Condition of the premises at START of tenancy". The second large column is for the "Landlord/Agent Comments". There are then two small columns under the heading "Tenant Agrees" with "Y" and "N" boxes on every line allowing the Tenant to indicate by marking the appropriate box whether he agrees or disagrees with the Landlord's comments. The third large column follows, it being headed "Tenants Comments", allowing for the Tenant's comments in relation to the various items at the start of the tenancy. The fourth large column is headed "Condition of premises at END of tenancy".

12 The Landlord informed us that when the Condition Report was first completed at the commencement of the tenancy, the handwriting and signatures were in black ink. After an inspection of the premises on or about 27 February 2018

comments were added in red ink to the same document (and there are signatures and handwritten February 2018 dates in red ink on the copy provided to us), and after a further inspection of the premises on or about 12 December 2019 comments were added in green ink.

13 In relation to comments added in 2018 and 2019 the Tribunal said at [12]:

> "That condition (report) was subsequently amended on 27 February 2018, and again on 12 December 2019, to note work that had been carried out at the premises by the landlord."

14 As we read that sentence, the Tribunal was saying that both the February 2018 and December 2019 comments were noting work done by the Landlord. In the copy provided to us some distinguishable, red handwriting could be described as comments to that effect, such as "Painted Feb 2018". But some could not be so described, for example "Scratched / cuts".

15 We are unable to say whether the Tribunal's finding that the entries were noting work done in February 2018 and December 2019 was in error or was based on other evidence given to the Tribunal (such as the oral evidence of one or both parties). The Landlord only provided us with a fraction of the documents provided to the Tribunal and no sound recording or transcript of the oral evidence.

16 In this appeal the Landlord submitted that the Tribunal erred in not applying some of the comments in the Condition Report to the correct date. For example, she submitted that the Tribunal read some comments in red ink as being applicable at the start of the tenancy whereas they were applicable at a later point in time, namely 27 February 2018.

17 But there are other significant problems with this copy of the Condition Report which prevent us from being able to place any reliance upon it on this appeal.

18 First, such is the poor resolution of the copy provided to us that on many pages the colour of the ink used for the handwriting is not able to be identified. That is, we are unable to discern whether the ink is black, red or green. On the copy provided to us no green ink is distinguishable at all. On some pages we can distinguish some red ink, but on other pages the colour of the ink used for the

handwriting is not able to be identified, all or parts of it could be black, red or green.

19 Second, the poor resolution of the copy provided is such that much of the handwriting is unreadable.

20 Third, some of the red handwriting is in the column headed “Condition of premises at END of tenancy”, a fact which does not seem consistent with the Landlord’s explanation that all the red writing was affixed at an inspection during the tenancy. We do not know whether this was explained in oral evidence although the Tribunal did find that there was no final joint inspection of the premises at the end of the tenancy and there was no agreed end-of-tenancy Condition Report.

21 Fourth, there is no date of 12 December 2019 on the copy provided to us, although it appears the copy provided to the Tribunal contained this date (referred to by the Tribunal at [12] of its reasons) and no further signatures of the parties appear on our copy (other than those affixed at the start of the tenancy and in February 2018) although those further signatures did appear on the Tribunal’s copy (see [12] of the Tribunal’s reasons).

22 Fifth, we cannot see the comment

> “Windows to be fixed in January 2020. Cost to fix is currently disagreed on. Agree to go to Tribunal.”

that the Tribunal said appeared in the box on the last page of the Condition Report titled “Landlord's promise to undertake work”. On our copy no such words appear in that box.

23 In the copy provided to us the following words appear in that box (and no others):

> “Fix leak in lounge ceiling ASAP.
>
> Completed. Ceiling replaced Feb 2018.
>
> Main bedroom and lounge room painted.”

24 The first line in that quote was in black or blue ink. The remaining two lines were in red ink.

25 A different version of the Condition Report appears in the Tenant's material provided on the appeal. It is a poor, black and white copy, with not every page provided showing a complete page of whatever was copied. However, what is apparent from that copy is that there are approximately fifteen additional comments in the fourth column (headed "Condition of premises at END of tenancy)".

26 The few of those comments that are readable could not be described as work that had been carried out at the premises by the landlord. Rather, they appear to be the usual type of comments made about damaged items at the end of a tenancy, such as "(indistinguishable) scratches on door", "working", "damaged", "cupboard veneer (?) split", "scratches on bench tops + cracks".

27 Given the differences between what we see on the copy provided to us and the description of what appeared on the copy provided to the Tribunal, it appears to us that we have not been provided with the same version of the document which was provided to the Tribunal. The Tenant's version is of very limited assistance.

28 The Landlord also failed to provide us with most of the documentary material that had been provided to the Tribunal by the parties. The Tribunal described the documentary evidence provided to it as follows:

> "The parties have filed several bundles of evidence and submissions in relation to both applications either in response to directions issued by the Registrar or Tribunal, or at their own behest. The landlord's bundles (dated respectively, 21 September 2020, 6 November 2020, 15 January 2021 and 26 March 2021) were admitted into evidence and marked Exhibits A1-4). The tenant's bundles (dated respectively, 2 December 2020, 2 February 2021 and 5 March 2021) were admitted into evidence and marked Exhibits R1-3."

29 We were not provided with those bundles by either party despite the Appeal Panel's direction given to the parties on 26 May 2021 that:

> "2. The Appellant is to lodge with the Tribunal and give to the Respondent by 15 June 2021:
>
> (a) All the evidence given to the Tribunal below on which it is intended to rely;
>
> (b) Any evidence not provided to the Tribunal in making the decision under appeal, on which it is intended to seek leave to rely;
>
> (c) The Appellant's written submissions in support of the appeal; and

(d) The sound recording or transcript of the hearing at first instance, if oral reasons were given and/or what happened at the hearing is being relied on and a typed copy of the relevant parts.

3. The Respondent is to lodge with the Tribunal and give to the Appellant by 29 June 2021:

(a) All the evidence provided to the Tribunal below on which it is intended to rely;

(b) If appropriate in response to (b) above, any evidence not provided to the Tribunal in making the decision under appeal, on which it is intended to seek leave to rely;

(c) The Respondent's written submissions in opposition to the appeal; and

(d) The sound recording or transcript of the hearing at first instance, if that has not already been provided and the Respondent is relying on what happened at the hearing and a typed copy of the relevant parts.

…

6. NOTES:

(1) If a party does not lodge with the Appeal Panel and give to the other parties documents, sound recordings and submissions as directed above, that party may not be allowed to rely on those documents, sound recordings and submissions at the hearing of the appeal.

…

(4) If a party wishes to rely on a sound recording of a hearing, the party must identify for the Appeal Panel which parts of the sound recording are relied in their written submissions.

30 As mentioned earlier, we were also not provided with a copy of the sound recording of the hearing before the Tribunal, or a transcript of the relevant parts relied on. Therefore, we do not know what oral evidence was given

31 At the commencement of the appeal, we drew to the Landlord's attention the poor resolution of the copy of the Condition Report she had provided for the appeal, the absence of most of the documentary evidence provided to the Tribunal and the absence of a sound recording and/or transcript. We drew to the Landlord's attention that on an appeal we were confined to consideration of the evidence given to the Tribunal (except for significant new evidence, being evidence that was not reasonably available at the time of the hearing before the Tribunal), and that if we were not provided with the evidence provided to the Tribunal then we could not consider any of her submissions or grounds of appeal if they depended on, or were affected by, that evidence.

32 Having drawn those matters to the Landlord's attention, she was asked whether she wished to proceed with her appeal that day, to which she answered in the affirmative.

33 In our opinion it would be unsafe for us to rely on the copy of the Condition Report provided to us on this appeal as it is not the same version of the document provided to the Tribunal. The provision of the Tenant's version does not cure this problem. In our opinion it would also be unsafe to rely upon the copy provided in the absence of a sound recording or transcript, and in the absence of much documentary material, some of which may have been relevant to the content of the Condition Report at the relevant points in time, and the resolution of disputed questions of fact as to the state and condition of various aspects of the premises.

34 We shall now return to the matters raised on the appeal by the Landlord. The issues in this appeal are best dealt with by reference to the items claimed by the Landlord to have been erroneously dismissed by the Tribunal.

Rent

35 The claim for rent is not dependent on the Condition Report and can be properly considered on this appeal.

36 That claim for rent was described by the Tribunal as follows:

> "21. The landlord's claim for unpaid rent is unorthodox. She seeks to recover from the tenant what she claims was a short-fall in what her landlord insurer paid her on a claim for unpaid rent for the period 27 March 2020 to 25 July 2020. In this respect it is submitted on the basis of bare assertion only that a claim for $6,875.00 in unpaid rent was made to the insurer and a payout of $4,450.00 was received from the insurer.

37 With due respect to the Tribunal, we see nothing unorthodox in the Landlord's claim for rent. Her claim was that the Tenant owed $6,875 for rent, she had received from her insurer $4,450 in relation to that unpaid rent (taking into account the excess payable) and she was claiming the difference between those two sums from the Tenant, namely $2,425.

38 The Tribunal's reasons for rejecting this claim were:

> "24. First, I am not satisfied that the landlord has any remaining legal entitlement to pursue the tenant for unpaid rent. The unpaid rent has been the subject of an insurance claim, and in the usual course, the insurer will now

> hold a right of subrogation to pursue the tenant for the subject matter of the claim. The landlord will have forfeited to the insurer her right to pursue the tenant as a term of the payment of her claim.
>
> 25. Leaving that issue to one side, even if the landlord retains a right to pursue the tenant for the short-fall in the insurance payment received from the rent owed (and assuming for present purposes that such a loss was a foreseeable consequence of the tenant's failure to pay all rent due), that loss has not been proved. The landlord has submitted no documentary evidence of the insurance claim she made or the payment she received. Her case has been conducted on the basis of bare assertion only which is insufficient to discharge her onus of proof.
>
> 26. I note that there is also a dispute between the parties as to the date the tenant returned possession of the premises to the landlord. The tenant contends he did so on 17 July 2020 whereas the landlord contends it was on 25 July 2020. There was considerable argument about this in submissions and in the oral hearing including in relation to what rent was left owing as a result. However, as this element of the landlord's claim is for compensation for a short-fall between rent owed and her insurance payout, and as the period to which the payout relates apparently runs to 25 July 2020, resolution of this dispute cannot affect the outcome in relation to this element of the claim.
>
> 27. For the foregoing reasons this element of the claim must be dismissed."

39 In our opinion the Tribunal erred in holding that, because the insurer had paid part of the Landlord's claim (to the extent of the indemnity provided in the policy) the Landlord had forfeited her right to pursue the Tenant for the balance owing.

40 The right of subrogation is a right (for the insurer) to step into another's (the insured's) shoes, and provides for various rights and obligations between insurer and insured. It does not, however, prevent an insured bringing a claim against a wrongdoer in the sense that such a claim could be successfully defended by the wrongdoer asserting that the insured had been indemnified, in whole or in part, by an insurer.

41 As it is put in Derrington and Ashton, *The Law of Liability Insurance*, 3rd ed, LexisNexis Butterworths, Australia, 2013 at [13-278], the right of subrogation is concerned solely with the mutual rights of the insurer and the insured, it imposes no liabilities and confers no rights on strangers to the insurance contract.

42 Of course, the insured (the Landlord) may have had a contractual obligation to the insurer to include in her claim against the Tenant the amount paid to her by the insurer, and if she received some or all of that amount she would then hold

that amount in trust for the insurer, but those are matters between her and her insurer. The fact she had been partly indemnified by her insurer did not provide a defence to the Tenant. Therefore, in our view and in that respect the Tribunal erred in applying incorrect legal principles.

43 Paragraph [25] of the Tribunal's reasons are, with no disrespect to the Tribunal, also problematic. The Tribunal said that the Landlord's loss had not been proved, but that "loss" was said to be the shortfall between the rent owed and the amount paid by the insurer. It was not proved, said the Tribunal, because the Landlord had only "asserted" the insurance claim and the amount she received, and had provided no documentary evidence.

44 We consider the better view is that the Landlord had proved the total amount of unpaid rent (which is set out in the extract from the rent ledger provided to us, being the relevant pages taken from the more extensive ledger provided to the Tribunal).

45 That extract proved the total outstanding rent owed to the Landlord as at 25 July 2020 was $6,875. In substance, the Landlord admitted a credit to the tenant of $4,450. In that sense we do not consider the Landlord's claim to have been an "assertion". The outstanding rent was proved, the credit the Landlord was willing to grant the Tenant (possibly in breach of her contractual obligations to her insurer) was an admission. Therefore, in our view the Tribunal failed to properly exercise its jurisdiction because the relevant facts were clearly established and the reasons show the Tribunal acted on a wrong basis in important respects - Nufarm Australia Ltd v Dow AgroSciences Australia Ltd (No 2) [2011] FCA 757; 282 ALR 24 at [102]–[103].

46 One further matter about the rent needs addressing. As recorded by the Tribunal the parties were in dispute as to when the tenancy ended. The Landlord said it was 25 July 2020 and the Tenant said it was on 17 July 2020.

47 The Landlord has not provided any of the evidence which was provided to the Tribunal by which we might be able to decide this question of fact (it being more appropriate that we decide this issue rather than remitting the matter to the Tribunal). That being so, and as the Landlord bore the onus of proof, we will only hold the Tenant liable for rent to the date he contended for, namely 17

July 2020. Accordingly, as the rent ledger provided said that rent of $6,875 was owed up until 24 July 2020, we shall deduct from that sum seven days rent (being $1,050). The result is that the Tenant owed outstanding rent of $5,825, the Landlord's claim was limited to the amount exceeding the insurance payout of $4,450, the net result being that the Landlord's claim for rent of $1,375 ($5,825 - $4,450) succeeds.

48 That amount ($1,375) needs to be deducted from the $1,500 the Tribunal ordered the Landlord to pay the Tenant. That results in an amount owing by the Landlord to the Tenant of $125.

The Allegedly Damaged Items

49 The Landlord had sought from the Tribunal compensation for the cost of:

(1) repairing and repainting the interior of the premises;
(2) cleaning and rubbish removal;
(3) carpet replacement;
(4) blind replacement;
(5) replacing the kitchen benchtop;
(6) replacing the kitchen cabinetry;
(7) window repairs;
(8) replacing ceiling fans and lights;
(9) replacing a bathroom storage box;
(10) replacing bathroom accessories.

50 Other than $300 for the cost of repairing the kitchen kickboard and an additional $500 for the cost of repairing or replacing the carpet in bedroom no. 1, the Tribunal dismissed those claims.

51 Fundamentally, the Tribunal dismissed the claims for want of evidence.

52 For example, take the claim for repairing and repainting the interior of the premises. The Tribunal reasoned as follows.

53 First, the Tribunal referred to the Condition Report and various entries therein which, it is apparent, the Tribunal did not find to be of any persuasive value.

54 Next, the Tribunal referred to photographs tendered by the Landlord. The photographs were of no evidential value. The Tribunal said this about those

photographs (in comments largely repeated in substance in relation to photographs tendered by the Landlord in support of her other claims):

> "30. … Photographs of the alleged damage are submitted in support of these contentions. There are two versions of these photographs. In the documents filed on 15 January 2021 they are black-and white images of approximately 5 x 6cm and smaller. In the documents filed on 26 March 2021 they are colour images of approximately 3 x 4cm and smaller. With the possible exception of a photograph of an entrance hall wall, which may depict a plaster tear (although it may also be a photocopy defect), **it is impossible to make out anything sensible from these poor quality images**."
>
> (Our emphasis)

55 That appeared to be the extent of the evidence tendered in support of the claim for damage requiring repair and repainting.

56 The Tribunal noted that the Tenant denied the allegation and said, correctly, that the Landlord bore the onus of proof.

57 The Tribunal then held:

> "32. The landlord bears the onus of proving a breach by the tenant of his obligations with respect to the condition of the walls. That onus cannot be discharged on the basis of mere assertion. It falls to the landlord to put probative evidence before the Tribunal to persuade it that a breach has occurred. In this case, the objective evidence relied upon by the landlord is of very limited probative value. It is incapable of discharging her onus of proof."

58 Similar reasoning appears in the Tribunal's reasons in respect of the other items for which compensation was sought and which we have listed earlier in these reasons. In relation to some of those items the Landlord's claim also failed because she failed to provide evidence of the cost of repair.

59 We have already mentioned the Condition Report and why we cannot rely upon it on this appeal. In addition to that the photographs referred to by the Tribunal were not provided to us. In those circumstances the Landlord's appeal in relation to these items must fail because she has not provided us with the relevant evidence which was provided to the Tribunal.

60 On the appeal she did seek to tender what she said were higher quality photographs to those she provided the Tribunal, but we reject the tender of these higher quality photographs because they do not satisfy the test set out in cl 12 of Schedule 4 of the *Civil and Administrative Tribunal Act 2013* (NSW) (the "NCAT Act"), namely, they are not significant new evidence that was not

reasonably available to the Landlord at the time of the hearing. “Not reasonably available” means unavailable (on an objective test) because no person could have reasonably obtained the evidence - *Al-Daouk v Mr Pine Pty Ltd t/as Furnco Bankstown* [2015] NSWCATAP 111 at [23].

61 In addition to the relevant evidence not being provided to us, there are, with no disrespect to the Landlord who is not legally trained or legally represented, no discernible grounds of appeal.

62 In the Tribunal a party may appeal as of right on any question of law, or with the leave of the Appeal Panel, on any other grounds – s 80(2)(b) of the NCAT Act.

63 No question of law is raised by the Landlord, nor can we discern any. Nor can we see any other grounds. In relation to the other grounds, we also do not consider that we should grant leave to appeal on any other ground in the absence of most of the documentary evidence provided to the Tribunal and the absence of a copy of the sound recording or transcript. To proceed in the absence of that material, would be unsafe.

64 In the Landlord’s Notice of Appeal and submissions she makes several generalised assertions about the Tribunal’s decision and conduct, none of which amount to errors or which cannot be considered because of her failure to provide us with the evidence provided to the Tribunal.

65 For example, the Landlord submits that the Tribunal did not take into account all of the evidence but did not identify the evidence she said was not taken into account and did not provide that evidence to us.

66 She complained that the Tribunal did not consider the evidence she provided in digital format even though she knew at the time that the Tribunal would only accept evidence in hard copy.

67 She complained that the Tribunal did not request further evidence from her to support her claims, but she misunderstands the role of the Tribunal. The Tribunal is the independent umpire tasked with deciding the disputes between the parties in an impartial way, it is not there to advise one party or the other, in

a partisan way, what evidence they should provide and to then adjourn a hearing to allow them to do so.

68 She makes several other complaints in her written submissions, many of which refer to evidence given to the Tribunal. But she did not provide a copy of this evidence to us as she was directed to do on 26 May 2021 if she wished to rely on that evidence on the appeal, and as we do not have that evidence, we cannot consider it.

69 In all those circumstances we dismiss that part of the Landlord's appeal concerning the items listed at [42] above.

Lost Rent

70 The Landlord has also made a claim for lost rent she said she suffered by reason of being allegedly unable to rent her premises for four weeks after the tenancy ended for the purpose of effecting repairs.

71 In relation to this claim the Tribunal said:

> "109. With the exception of the damage to the kitchen kickboard and the bedroom 1 carpet the landlord has failed to prove the tenant caused or permitted the extensive damage to the premises she claims. The replacement of the kickboard and carpet could not reasonably have taken more than a few days to arrange. There is therefore no causal connection between the breaches that have been proved and the delay in reletting the premises.
>
> 110. In any event the landlord has submitted no evidence to establish what the changeover period from one tenancy to another was at the material time for similar premises in the locality. Without such evidence it is not possible for the Tribunal to know if a four week delay is unusual or typical. As a general principle, there is usually a period of vacancy between the end of one tenancy

72 As we have not upheld the Landlord's appeal in relation to any other items of repair then there is no basis to disturb the Tribunal's finding in relation to the lost rent claim.

Use of Premises by Tenant

73 The Landlord complained that the Tribunal did not consider that the Tenant had, during the tenancy, caused a nuisance, interfered with the reasonable peace, comfort and privacy of neighbours and permitted more people to reside in the premises than was permitted by the tenancy agreements.

74 However, none of those matters sound in damages. Someone in the Landlord's position does not receive an award of damages from the Tribunal unless the Tenant breaches an obligation owed to the Landlord and the Landlord suffers damage because of that breach.

75 As the Landlord did not suffer any damage in relation to these complaints the Tribunal was right to ignore them.

Costs

76 The Landlord sought costs of the appeal.

77 She has been successful on her appeal, but only to the extent of $1,375.

78 In those circumstances the Landlord would need to prove that special circumstances exist which would warrant an award of costs, and that we should exercise our discretion to make that award – s 60 of the NCAT Act.

79 No special circumstances are apparent to us. And, of course, the Tenant may make an application that his costs be paid. Although, in relation to both parties, costs would seem to be limited to disbursements for photocopying and the like. No costs are payable for the parties' time spent on the proceedings.

80 However, have not heard from the parties and so shall make directions for any costs applications one or both of the parties seeks such an order.

Orders

81 We make the following orders:

(1) Appeal upheld in part.

(2) Order 1 made by the Tribunal on 28 April 2021 is confirmed.

(3) Order 2 made by the Tribunal on 28 April 2021 is varied to substitute the sum of $125 for the sum of $1,500.

(4) Orders 3 and 4 made by the Tribunal on 28 April 2021 are confirmed.

(5) If any party desires to make an application for costs of the appeal:

(a) that party is to so inform the other party within 14 days of the date of these reasons;

(b) the applicant for costs is to lodge with the Appeal Panel and serve on the respondent to the costs application any written submissions of no more than five pages on or before 14 days from the date of these reasons;

(c) the respondent to any costs application is to lodge with the Appeal Panel and serve on the applicant for costs any written submissions of no more than five pages on or before 28 days from the date of these reasons;

(d) any reply submissions limited to three pages are to be lodged with the Appeal Panel and served on the other party within 35 days of the date of these reasons;

(e) the parties are to indicate in their submissions whether they consent to an order dispensing with an oral hearing of the costs application, and if they do not consent, include submissions of no more than one page as to why an oral hearing should be conducted rather than the application being determined on the papers.

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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