Civil and Administrative Tribunal

New South Wales

Case Name:	Seymour v Wu
Medium Neutral Citation:	[2021] NSWCATAP 289
Hearing Date(s):	14 September 2021
Date of Orders:	14 September 2021
Decision Date:	27 September 2021
Jurisdiction:	Appeal Panel
Before:	G Curtin SC, Senior Member G Sarginson, Senior Member
Decision:	(1) Appeal dismissed.
Catchwords:	LEASES AND TENANCIES — Residential Tenancies Act 2010 (NSW) — termination — by landlord – authority of agent – landlord a foreign resident – subsequent District Court proceedings between the same parties – no question of principles
Legislation Cited:	Civil and Administrative Tribunal Act 2013 NSW, ss 36, Sch 4 cl 5(3) Residential Tenancies Act 2010 (NSW), s 82(2) Strata Schemes Management Act 2015 (NSW), s 106
Cases Cited:	Attorney General for New South Wales v Gatsby [2018] NSWCA 254 Burns v Corbett [2018] HCA 15; [2018] 265 CLR 304 Chatfield and Another v Elmstone Resthouse Ltd [1975] 2 NZLR 269 Collins v Urban [2014] NSWCATAP 17 Coulton v Holcombe (1986) 162 CLR 1; [1986] HCA 33 Debonair Nominees Pty Ltd v J & K Berry Nominees Pty Ltd [2000] SASC 244; (2000) 77 SASR 261 Gynch v Polish Club Ltd [2015] HCA 23; (2015) 255 CLR 414

	House v The King (1936) 55 CLR 499; [1936] HCA 40 Kings v Chand [2019] NSWCATAP 180 Lawrence v Gunner; Gunner v Lawrence [2015] NSWSC 944 Lolly Pops (Harbourside) Pty Ltd v Werncog Pty Ltd, NSWSC, unreported, 1 July 1998; (1998) 9 BPR 16,361 Mendonca v Legal Services Commissioner [2020] NSWCA 84 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69
Texts Cited:	Halsbury's Laws of Australia, online edition, at [245-3090]
Category:	Principal judgment
Parties:	Michael Thomas Seymour (Appellant) Zichao Wu (Respondent)
Representation:	Appellant in person Di Wu (Managing Agent for the Respondent)
File Number(s):	2021/00197102
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	29 June 2021
Before:	D Charles, Senior Member
File Number(s):	RT 21/00502; RT 21/01276

REASONS FOR DECISION

1 This is an appeal by a tenant (Mr Seymour) from two proceedings in the Tribunal arising out of Mr Seymour's failure to pay rent for premises leased to him by Mr Wu (the landlord).

2 In proceedings RT 21/01276 Mr Wu sought orders for the termination of the residential tenancy agreement which had been entered into between the parties and for rental arrears. The termination notice issued for that purpose was based on Mr Seymour's non-payment of rent.

3 In proceedings RT 21/00502 Mr Seymour sought orders to set aside Mr Wu's termination notice or, alternatively, that both Tribunal proceedings be transferred to the District Court of NSW. The reason for the transfer application was that Mr Seymour desired to join both Tribunal proceedings to proceedings he had subsequently commenced against Mr Wu in that Court on 4 March 2021.

4 At the commencement of the hearing of the appeal Mr Seymour applied for an adjournment. We declined to grant that adjournment and said we would provide reasons subsequently. Those reasons appear below.

5 At the conclusion of Mr Seymour's oral submissions on the appeal we were not satisfied there existed any ground of appeal and made an order at that time dismissing the appeal. We said we would deliver reasons subsequently and these are those reasons.

Background

6 The background to the parties' dispute was comprehensively set out by the Tribunal in its reasons. What follows is a summary of that background taken from those reasons.

7 The parties entered into residential tenancy agreements dated 20 May 2011 (the 2011 Agreement) and 22 May 2014 (the 2014 Agreement) for premises at Castle Hill, NSW. The agreements were for fixed 12-month terms and were regulated by the *Residential Tenancies Act 2010* (NSW) ("RTA").

8 The premises consist of a unit in a multi-unit apartment block.

9 The 2014 Agreement became a periodic tenancy on and from 4 June 2015, with rent starting at $460 per week, rising to $530 per week, $550 per week, and finally $580 per week at various points in time subject to evidence being provided by Mr Wu of the service of the relevant rent increase notices.

10 The Tribunal found that Mr Seymour had not paid all the rent owing under that tenancy. The Tribunal said that the evidence disclosed that Mr Seymour was paid up to 7 October 2020 (with a credit of $180), but there were:

> "… substantial rent arrears to be calculated by the landlord pursuant to directions for further evidence on the issue of rent arrears only up to the Tribunal's jurisdictional limit of $15,000 …"

11 We infer from that finding that the Tribunal was satisfied on the evidence that there had been no, or negligible, rent paid by Mr Seymour between 7 October 2020 and the hearing before the Tribunal on 29 June 2021. If that were the case, the period being approximately 38 weeks, the outstanding rent would have been somewhere in the order of $17,000 - $20,000 depending upon the validity of any rent increases.

12 Mr Wu's agent had not come to the Tribunal prepared to prove the amount of rent outstanding. The Tribunal said:

> "5. … In the course of giving sworn evidence at today's hearing, it became apparent that Mr Wudi on behalf of the landlord did not have all relevant material for calculation of the rent arrears, but particularly in circumstances where the tenant was disputing whether the tenant had been served with rent increase notices: see s 41 of the RT Act. Accordingly, Mr Wudi decided not to press for orders today for rent arrears and he also conceded that the rent arrears claimed could not exceed the Tribunal's jurisdictional limit of $15,000.00 if he wished to continue a claim for rent arrears in the Tribunal. Accordingly directions are made for an exchange of documents on that issue only; i.e. to facilitate a hearing on the issue of rent arrears at a later date to be fixed by the Divisional Registrar."

13 Nevertheless, the Tribunal said it was in a position to determine the remaining issues in the two proceedings and proceeded to do so. The Tribunal said:

> "6. The tenant's application was to seek an order of the Tribunal to set aside the Notice of Termination dated 10 December 2020 relied upon by the landlord in the landlord's case for termination and possession orders under the RT Act. The tenant argued that the Notice was invalid on various grounds (considered below) and in the alternative that the landlord's proceeding must be transferred to the District Court of NSW where on 4 March 2021 the tenant brought proceedings seeking damages for breaches of the landlord's obligations under s 52 and s 63 of the RT Act to provide premises fit for habitation and in a reasonable state of repair.
>
> 7. For the following reasons I decline to make any orders in the tenant's application which is dismissed. However, I am satisfied on the available evidence that I can I make orders for termination and possession in the landlord's application."

14 The Tribunal made the following findings of fact:

(1) The non-payment termination notice dated 10 December 2020 complied with the formal requirements of the RTA and provided sufficient time to comply in accordance with the provisions of that Act.

(2) The termination notice was served in accordance with s 223 of the RTA and Mr Seymour had not vacated the premises.

(3) The grounds set out in the notice of termination had been established in that the rent had remained unpaid for not less than 14 days on the day the notice of termination was served.

(4) The landlord’s application was brought within 30 days of the termination date specified in the termination notice.

(5) Mr Seymour had not paid all the rent owing and there were substantial rent arrears to be calculated pursuant to directions for further evidence on the issue of rent arrears only up to the Tribunal's jurisdictional limit of $15,000.

(6) Mr Wu relied on the rent to meet his obligations to pay a mortgage, rates and other expenses and outgoings of the premises, and the failure to pay rent on time caused him hardship.

(7) Nothing was put as to Mr Seymour’s circumstances which provided a reasonable explanation for not paying rent.

(8) The Tribunal was satisfied that the non-payment of rent justified the termination of the tenancy.

15 The Tribunal made a termination order under s 87 of the RTA. No order was made under s 89(5) of the RTA. The date of vacant possession was suspended until 28 July 2021.

16 Mr Seymour advanced a number of grounds before the Tribunal in support of his application and in opposition to Mr Wu’s application. They were not always clearly expressed, but may be summarised as follows:

(1) Mr Wu was not an Australian citizen and may not have had FIRB approval to purchase the premises.

(2) Mr Wu’s real estate managing agent had no authority to:

    (a) sign the termination notice; and

    (b) commence proceedings on Mr Wu’s behalf in the Tribunal.

(3) Mr Seymour was entitled not to pay his rent because he had commenced proceedings against Mr Wu for personal injury (and other) damages in the District Court, he would succeed in those proceedings, and therefore the result would be that Mr Wu would owe him money (above and beyond any rental arrears).

(4) The District Court of NSW was a more appropriate place for the parties’ disputes to be determined.

17 The Tribunal dismissed all of Mr Seymour's arguments. The Tribunal said:

> "9. Dealing with the tenant's particular arguments as to the invalidity of the Notice of Termination, I make the following findings of fact and law:
>
> > (1) Whether or not the landlord is an Australian citizen, or whether or not, the landlord had Commonwealth Government approval to purchase the residential tenancy premises before the commencement of the 2011 Agreement does not affect the landlord's standing to make the application to terminate the tenancy under the RT Act on the grounds of non-payment of rent.
> >
> > (2) The Notice of Termination was signed by Vincent Hsieh (Mr Hsieh) as the landlord's agent.
> >
> > (3) The landlord's proceedings were brought by the application lodged with the Tribunal on 12 January 2021 and signed by Mr Hsieh on behalf of the landlord.
> >
> > (4) At all material times during December 2020 and January 2021, Mr Hsieh was a Property Manager employed by The Property Investors Alliance Pty Ltd (the Agent).
> >
> > (5) The Agent was authorised to sign Notices under the parties' residential tenancy agreement including termination notices and to bring Tribunal proceedings: see sub-clauses 9(g), 9(h) and 9(i) of the Managing Agency Agreement dated 4 March 2011.
> >
> > (6) In the circumstances, the Agent was authorised to sign the Notice of Termination and to bring the Tribunal proceedings on behalf of the landlord.
> >
> > (7) The tenant filed proceedings in the District Court subsequent to the Tribunal proceedings.
> >
> > (8) In the circumstances, the District Court does not have the jurisdiction to hear and determine the landlord's application for orders of termination and possession: see clause 5(3) of Schedule 4 of the *Civil and Administrative Tribunal Act 2013* NSW and there is no other discretionary basis for the Tribunal to transfer the landlord's application to the Tribunal (i.e. file no RT 21/01276) to the District Court of NSW.
>
> 10. As regards the tenant's District Court of NSW proceedings, it is a claim for damages (including personal injury losses) due to various repair issues and an alleged failure by the landlord to provide facility and amenity in the premises.
>
> 11. The tenant's contention is that if his claim in the District Court of NSW is successful, the landlord would not be entitled to rent arrears and also would not be able to pursue, as the landlord does today, orders for termination and possession.
>
> 12. In my view, the tenant's contention is misconceived. The obligation upon a tenant to pay rent (see clause 3.1 of the 2011 and 2014 Agreements) arises quite separately from the obligation of the landlord to maintain the premises fit for habitation (RT Act, s 52) and in a reasonable state of repair (RT Act, s 63 and s 65). The unilateral withholding of any amount of agreed rent is not a remedy available to a tenant. The only way rent is reduced, absent some further agreement between the parties, is by order of the Tribunal or by a court

> of competent jurisdiction. The obligation to pay rent at a particular level continues until changed by one of these means. If the tenant is successful in any application to the Tribunal, he may be awarded a sum of money but there is no automatic entitlement to set off against the rent arrears.
>
> 13. The landlord seeks vacant possession as soon as possible. I have taken into consideration the tenant 's personal circumstances and allowed a period of up to 4 weeks from tomorrow (i.e. up until 28 July 2021) for him to provide vacant possession to the landlord."

The Appeal

18 Mr Seymour is not legally trained, although he said he had obtained a law degree many years earlier. His documents did not set out his grounds of appeal in any discrete way. The typewritten document attached to his Notice of Appeal which was headed "Ground of Appeal" was 16 pages long, contained 75 numbered paragraphs together with a small number of unnumbered paragraphs.

19 With no disrespect to Mr Seymour, his document titled Grounds of Appeal was unstructured and somewhat repetitive and discursive. It also referred to matters irrelevant to an appeal.

20 It is accepted in the Tribunal that it may be difficult for self-represented appellants to clearly express their grounds of appeal, and it should not be overlooked that, differently to courts, Tribunal litigants are not permitted to be legally represented in cases such as the present without a grant of leave. The complexities of the modern law can be difficult for trained lawyers let alone non-legally trained people, as may be the practical aspects of preparing and arguing their cases and appeals in a legal environment replete with jargon and unfamiliar concepts. The Tribunal's self-represented litigants also bear the additional strains of being parties to litigation the outcome of which is frequently very important to them even though they may not rank highly in courts' and tribunals' hierarchy of importance based on the amount in dispute.

21 In such circumstances, and having regard to the guiding principle set out in s 36 of the *Civil and Administrative Tribunal Act 2013* (NSW), it is accepted in the Tribunal that it is appropriate for an Appeal Panel to review an appellant's stated grounds of appeal, the material provided, and the decision of the Tribunal at first instance to examine whether it is possible to discern grounds

that may either raise a question of law or a basis for leave to appeal (*Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 at [12]).

22 However, there are limits to that principle, and we should not overlook the constrained resources of the Tribunal and the statutory injunction that the practice and procedure of the Tribunal should be implemented so as to facilitate the resolution of the issues between the parties in such a way that the cost to the parties and the Tribunal is proportionate to the importance and complexity of the subject-matter of the proceedings.

23 As McCallum JA (with whom Basten and Leeming JJA agreed) recently observed, a court is not required to undertake a partisan analysis of lengthy, unstructured assertions and misconceptions with a view to ensuring that a self-represented litigant has not missed some arguable point - *Mendonca v Legal Services Commissioner* [2020] NSWCA 84 at [21].

24 Even in the Tribunal, where litigants are ordinarily not permitted legal representation, that principle has some application.

25 As is often the case, it is a matter of finding an appropriate balance between those competing considerations.

26 We have examined Mr Seymour's material to attempt to discern whether there is a basis for him to legitimately complain that the Tribunal fell into some error which requires correction by us, but we have not undertaken a partisan analysis of that material with a view to ensuring that Mr Seymour has not missed some arguable point. To do so would be disproportionate to the importance and complexity of the subject-matter of the proceedings.

27 Our examination of Mr Seymour's Grounds of Appeal, which also performs as his written submissions, suggest to us that Mr Seymour's substantive complaints about the Tribunal's decision were:

(1) The Tribunal erred in failing to hold that the existence of the District Court proceedings justified Mr Seymour's non-payment of rent.

(2) The Tribunal erred in failing to transfer the Tribunal proceedings to the District Court.

(3) The Tribunal erred in finding that Mr Wu's real estate agent was authorised to issue the termination notice and to commence proceedings in the Tribunal.

(4) The Tribunal erred in making the orders it did because Mr Wu was a resident of China.

(5) The Tribunal erred in failing to hold that problems with access to the premises justified Mr Seymour's non-payment of rent.

(6) The Tribunal erred in failing to hold that problems with drainage from his balcony, dampness, and water penetration into the premises, justified Mr Seymour's non-payment of rent.

28 We shall treat these as grounds of appeal. Grounds 1, 2, 5 and 6 may be considered together.

29 We should also note that Mr Seymour wished to argue that the Tribunal's finding about arrears of rent was wrong, and said he was not in arrears at all. He accepted that this argument was not raised by him before the Tribunal and, as it would depend on evidence, we did not allow it to be raised for the first time on appeal – see *Coulton v Holcobme* (1986) 162 CLR 1; [1986] HCA 33 at 560.

30 Before dealing with the Grounds of Appeal we shall first set out our reasons for refusing Mr Seymour's adjournment application.

No Adjournment

31 Mr Seymour had filed and served the material on which he relied for his appeal, and, for whatever reason, Mr Wu's agent did not receive it until late in the day. Mr Wu's agent filed and served some material in response, but at the time of the appeal that material had not found its way to either us or Mr Seymour.

32 Mr Seymour sought an adjournment on the basis he needed to see Mr Wu's material in order to properly respond to it.

33 We declined to grant the adjournment, at least at that stage, as we had read Mr Seymour's written submissions filed and served in advance of the appeal and had formed a preliminary view that his appeal lacked substance. As Mr Seymour was the appellant it was necessary for him to persuade us that the Tribunal had fallen into appellable error, and for that he did not need any material from Mr Wu.

34 We decided to hear Mr Seymour's oral submissions and then, if we were persuaded away from our preliminary view, the matter of an adjournment could be revisited.

35 As we were not so persuaded, and as we came to the view the appeal should be dismissed after hearing Mr Seymour's oral submissions, the matter of an adjournment did not need to be revisited.

36 We should also note that Mr Seymour applied for an adjournment because he said that he had forwarded all his material, including most particularly his written submissions, to the Tribunal and had not kept a copy for himself.

37 However, we considered the appeal could be fairly dealt with in the circumstances of the grounds of appeal raised and the material which had been filed by Mr Seymour in support of his appeal. We proceeded to ask questions of Mr Seymour in relation to each ground of appeal and we have considered the answers to those questions, together with the additional oral submissions made by Mr Seymour and Mr Seymour's extensive written submissions. Having done so we did not perceive any prejudice to have been occasioned to Mr Seymour and, given the significant arrears of rent and the prejudice to Mr Wu if there was to be a delay in the hearing of the appeal, decided that the interests of justice, applied to both parties, warranted a rejection of the application for adjournment on this ground.

38 Principles applicable to whether or not an adjournment should be granted were concisely set out in Touma v Colantuono [2021] NSWCATAP 152 at [56]-[59]. Such principles involve:

(1) matters should almost always proceed on the date fixed for hearing;

(2) an application for an adjournment should be seen as the exceptional rather than the ordinary course;

(3) where the adjournment is caused, at least in part, by the delay in the party seeking the adjournment, or non-compliance by that party with an extant order or procedural direction, adequate explanation is called for and its absence weighs heavily, and sometimes decisively, against the grant of the adjournment;

(4) the effect of any adjournment on the other party must be considered, including inconvenience and stress caused by the prolongation of litigation that a costs order would not compensate;

(5) if the refusal of the adjournment application denies procedural fairness to the party seeking the adjournment in the sense that the party is deprived from a reasonable opportunity to adequately present its case, the refusal to adjourn may be an error of law.

39 The refusal of the adjournment application did not deprive Mr Seymour from a reasonable opportunity to adequately present his case to the Appeal Panel. Mr Seymour had the opportunity to keep a copy of his written submissions and have them available to assist his oral arguments to the Appeal Panel at the hearing. We considered Mr Seymour's written submissions and materials filed in any event. Even if he did not have before him a copy of those materials whilst he was making oral submissions, we did not exclude any of the materials he relied upon and took all of them into account.

Grounds 1, 2, 5 and 6

40 Mr Seymour said that the Tribunal erred in failing to hold that the existence of the District Court proceedings justified Mr Seymour's non-payment of rent and that the Tribunal erred in failing to transfer the Tribunal proceedings to the District Court.

41 Mr Seymour could not provide us with any statutory provision or binding or persuasive authority why the existence of the District Court proceedings justified his non-payment of rent.

42 In the District Court proceedings, filed on 4 March 2021 and without any apparent professional legal assistance, Mr Seymour sued Mr Wu for:

(1) matters which are the responsibility of the body corporate (for the complex in which this unit was situated) under the *Strata Schemes Management Act 2015* (NSW) (in relation to aspects of the common property with which Mr Seymour is dissatisfied), and alleged personal injury occasioned to Mr Seymour in relation to those matters (having to access his unit by way of three flights of stairs because the lift was inoperative for a period of time in August and September 2014 and which allegedly aggravated Mr Seymour's right knee which caused or contributed to the need for a right knee replacement on 30 September 2014);

(2) alleged injury to his ankle in July, August, and September 2020 when the lift was out of order for about four weeks in July and August 2020 which may have caused or contributed to the need for right ankle replacement on 14 October 2020;

(3) inadequate drainage from his balcony, and water penetration into his unit after heavy rain (which, judging by the description in the District Court statement of claim, are more probably resulting from deficiencies with common property);

(4) increases in rent without service of the appropriate notice;

(5) excessive rent due to the water penetration issues referred to above;

(6) a declaration that the termination notice was not valid

43 The District Court Statement of Claim refers to ss 52, 63 and 65 of the RTA, amongst others, although the pleading is not always clear as to the precise allegations made in reliance upon those sections.

44 Be that is it may, as the Tribunal said, correctly in our view, the obligation upon a tenant to pay rent (see clause 3.1 of the 2014 Agreement) is separate from the obligation of the landlord to maintain the premises fit for habitation (RTA s 52) and in a reasonable state of repair (RTA s 63 and s 65), assuming Mr Seymour relies upon those sections.

45 The unilateral withholding of any amount of agreed rent is not a remedy available to a tenant unless the parties have agreed otherwise, there is a statutory abatement of rent, or an authorised deduction or abatement of the rent – Halsbury's Laws of Australia, online edition, at [245-3090]; *Chatfield and Another v Elmstone Resthouse Ltd* [1975] 2 NZLR 269; *Lolly Pops (Harbourside) Pty Ltd v Werncog Pty Ltd*, NSWSC, unreported, 1 July 1998; (1998) 9 BPR 16,361.

46 As Mullighan J said in *Debonair Nominees Pty Ltd v J & K Berry Nominees Pty Ltd* [2000] SASC 244; (2000) 77 SASR 261 at 271:

> "Liability to pay rent does not cease merely because the lessor has breached a covenant. The only deductions which can be made by the tenant are those authorised by statute or expressly permitted by the lease …"

47 Should there be, for example, a successful claim for rent and a successful counter claim for damages in the same court, one amount may be set-off against the other (Mr Seymour mentioned a set-off in his oral submissions), but this occurs when judgment on the claim and counter claim have been given, not before. In some courts a set-off may be pleaded as a defence, but that is almost always where both claims are liquidated, which is not the case in relation to Mr Seymour's claims.

48 The other difficulty in relation to Grounds 5 and 6 is that if Mr Seymour has any cause of action in relation to common property, that cause of action lies against the body corporate because responsibility for common property is given to the body corporate under the *Strata Schemes Management Act 2015* (NSW). For example, s 106 of that Act (expressly referred to in paragraph 2 of Mr Seymour's District Court Statement of Claim) says that an owners corporation for a strata scheme (not any unit holder) must properly maintain and keep in a state of good and serviceable repair the common property. A breach of that statutory obligation lies on the party bearing the responsibility for that obligation i.e. the owners corporation.

49 Mr Seymour says that he can maintain a cause of action against Mr Wu because Mr Wu is an owner of a lot in the strata scheme. But this is not so. No provision of the *Strata Schemes Management Act* provides a (statutory) cause of action like s 106 against any lot owner, and no such cause of action exists in the common law.

50 As for transferring the Tribunal proceedings to the District Court to be heard with the District Court proceedings, the Tribunal was correct to refuse to make that order.

51 Only the Tribunal can terminate a residential lease - *Lawrence v Gunner; Gunner v Lawrence* [2015] NSWSC 944 at [520]-[521] – which was one of the principal remedies sought by Mr Wu.

52 Further, again as the Tribunal correctly said, clause 5(3) of Schedule 4 of the *Civil and Administrative Tribunal Act 2013* NSW is applicable. That clause says:

> **Effect of application to Tribunal or court** If, at the time when an application was made to the Tribunal for the exercise of a Division function, no issue arising under the application was the subject of a dispute in proceedings pending before a court, a court has no jurisdiction to hear or determine such an issue.

53 This means that the District Court has no jurisdiction to hear and determine any issue which was the subject of an earlier application to the Tribunal (for the exercise of a Division function, which applied to this case). We are somewhat doubtful whether a subsequent transfer to the District Court would be allowable

since that clause speaks to the point in time when an application is commenced in the Tribunal.

54 Mr Seymour submitted it be fairer to have all matters determined by the District Court and would avoid duplication. We do not agree. We have already mentioned jurisdiction above, and that will obviate any duplication in that matters over which the Tribunal has jurisdiction will be decided by it, and the different matters raised in the District Court will be decided by it. Other than some matters not in dispute, such as the residential tenancy agreement, we do not see any overlapping disputes of fact or law between the issues in the two jurisdictions. Further, given the claims and counter claims are independent, delaying Mr Wu's claims would not be fair to him.

55 Whether that be correct or not, the Tribunal exercised its discretion not to transfer the proceedings, and no error of the kind required [*House v The King* (1936) 55 CLR 499; [1936] HCA 40] has been identified or appears to us to exist.

56 Grounds 1, 2, 5 and 6 are dismissed.

Ground 3

57 Mr Seymour submitted that the Tribunal erred in finding that Mr Wu's real estate agent was authorised to issue the termination notice and to commence proceedings in the Tribunal. Mr Seymour said that the management agency agreement in evidence, in terms, authorised the agent in relation to the Tribunal's predecessor, the Consumer Trader and Tenancy Tribunal ("CTTT"), but not the Tribunal.

58 We do not accept this submission.

59 Clause 1 of the management agency agreement appointed and authorised the agent and the agent's employees from time to time, the right to let and manage the premises in accordance with the agreement. Clause 9 said that the agent was authorised and directed on behalf of Mr Wu to:

> "(g) respond to any application by tenants and represent (Mr Wu) before the (CTTT);
>
> (h) exercise (Mr Wu's) right to enforce or terminate Tenancy Agreements including the service of notices as necessary;"

60 To the right of those (and other) clauses on the document were the words "Yes" and "No" allowing for agents and landlords to quickly indicate which authorities in cl 9 (and other clauses) was agreed to or not as the case may be. The copy provided to us is not the best copy, but it appears the word "Yes" was ticked to the right of sub-clauses 9(g) and (h).

61 In terms, cl 9(h) is not confined to the CTTT, and so, even on Mr Seymour's argument, there was no confining of authority to the agent in relation to enforcing, terminating Tenancy Agreements, or serving notices. Terminating would include commencing proceedings in the Tribunal, s 82(2) of the RTA says that notices may be signed by a landlord's agent and the Tribunal has power to grant leave to any other person to appear at a hearing if satisfied that it is appropriate for that person to appear at the hearing.

62 As for the latter, managing agents are routinely granted leave to appear for landlords in the Tribunal. The NCAT's Consumer and Commercial Division Guideline August 2019 says that the Tribunal will usually grant leave to a person to represent a party where the party is a landlord of residential premises which is the subject of the proceedings, and the proposed representative is the managing agent of the property.

63 In our view the Tribunal was correct in concluding that Mr Wu's real estate agent was authorised to issue the termination notice and to commence proceedings in the Tribunal. The agency agreement was not confined as submitted by Mr Seymour.

Ground 4

64 Mr Seymour said that The Tribunal erred in making the orders it did because Mr Wu was a resident of China. He also suggested Mr Wu did not have FIRB approval to purchase the premises.

65 As to the latter, there was no evidence of a lack of FIRB approval, or even whether FIRB approval was required, albeit it was accepted that at least now, Mr Wu was resident in China. No breach of any specific statutory provision was identified. As Mr Seymour had not established those matters the ground may be dismissed.

66 Even had FIRB approval been required, and not obtained, the question would be whether that illegality (if it could be called such) invalidated the contract (the residential tenancy agreement) between the parties. We doubt it would because the natural implication of Mr Seymour's argument is that he could continue to live in the premises rent free and without Mr Wu being able to evict him. There are only limited circumstances in which a contract is void or unenforceable because it contravenes a statutory prohibition or is furtherance of an illegal purpose (*Gynch v Polish Club Ltd* [2015] HCA 23; (2015) 255 CLR 414 at [35]) and the issue of whether breach of a statutory provision by a landlord renders a residential tenancy agreement void or unenforceable in whole or part has been considered by the Appeal Panel of the Tribunal in *Kings v Chand* [2019] NSWCATAP 180. We do not regard the issues raised by Mr Seymour regarding the overseas residence of the landlord of FIRB approval as matters which cause the residential tenancy agreement between the parties to be void or unenforceable, in whole or part.

67 The fact that Mr Wu is a resident of China is irrelevant to jurisdiction. The RTA applies to residential tenancy agreements, Mr Seymour is a resident of and was served in NSW, the residential premises is in NSW, the residential tenancy agreement was entered into in NSW. Jurisdiction is not excluded by in *Burns v Corbett* [2018] HCA 15; [2018] 265 CLR 304 and *Attorney General for New South Wales v Gatsby* [2018] NSWCA 254 because the dispute is *not* between residents of different states and the Tribunal is given jurisdiction to make orders for the payment of money and to terminate tenancies per s 187 of the RTA.

68 For those reasons we dismiss Ground 4.

Leave to Appeal

69 In the Notice of Appeal filed by Mr Seymour dated 7 July 2021, he clearly stated that he was not seeking leave to appeal on an error other than an error of law (i.e. errors to which Sch 4 Cl 12 of the *Civil and Administrative Tribunal Act 2013* (NSW) applies).

70 Accordingly, it is unnecessary to make an order refusing Mr Seymour leave to appeal on the basis he may have suffered a substantial miscarriage of justice

because (i) the decision was not fair and equitable; (ii) the decision was against the weight of evidence; or (iii) significant new evidence is now available that was not reasonably available at the time of the hearing.

71 In any event, had Mr Seymour sought leave to appeal, we would not have been satisfied that leave should be granted, applying the principles set out in *Collins v Urban* [2014] NSWCATAP 17 at [66]-[84].

Orders

72 For all of those reasons we made our order dismissing the appeal at the conclusion of Mr Seymour's oral submissions on the appeal on 14 September 2021.

****

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

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