Civil and Administrative Tribunal

New South Wales

Case Name:	Freeman-Vagg v Oldstream Pty Ltd
Medium Neutral Citation:	[2022] NSWCATAP 198
Hearing Date(s):	31 January 2022
Date of Orders:	15 June 2022
Decision Date:	15 June 2022
Jurisdiction:	Appeal Panel
Before:	C Fougere, Principal Member G Curtin SC, Senior Member
Decision:	In Appeal 2021/00283619: 1. Appeal dismissed. 2. The appellant is to pay the respondent's costs of the appeal on the ordinary basis. In Appeal 2021/00353172: 1. Appeal dismissed. 2. The appellant is to pay the respondent's costs of the appeal on the ordinary basis.
Catchwords:	LEASES AND TENANCIES — retail leases — unconscionable and other misconduct alleged against the lessor – no errors in findings of fact – no question of principle COSTS — party/party — orders against non-parties — personal costs orders against legal practitioners – power of NSW Civil and Administrative Tribunal to make costs orders against non-parties - power of NSW Civil and Administrative Tribunal to make costs orders against legal practitioners – principles to apply to applications for costs against non-parties - principles to apply to applications for costs against legal practitioners

Legislation Cited:	Australian Consumer Law (NSW) Civil and Administrative Tribunal Act 2013 (NSW), s 60(4)(a), Sch 4 cl 12(1)(c) Civil Procedure Act 2005 (NSW), ss 98, 99 District Court Act 1973 (NSW), s 148B Fair Trading Act 1987 (NSW) Retail Leases Act 1994 (NSW)
Cases Cited:	1735 Pty Ltd v Chief Commissioner of State Revenue; 1735 Pty Ltd atf Bares Family Trust v Chief Commissioner of State Revenue (Costs) [2021] NSWCATAD 134 Abed v Cosgrove trading as Alison Arts; Cosgrove v Abed [2018] NSWCATAP 4 Chief Commissioner of State Revenue (Costs) [2021] NSWCATAD 134 Allen v TriCare (Hastings) Ltd [2017] NSWCATAP 25 Amir Ashrafinia v Mohammad Reza Ashrafinia; Parvaneh Karami Fakhrabadi v Mohammad Reza Ashrafinia [2012] NSWSC 500 Australian Federation of Islamic Councils Inc v Farrell [2016] NSWCA 256 Collier v Country Women's Association of New South Wales [2018] NSWCA 36 Diaspora Holdings Pty Ltd v The Owners – Strata Plan No. 68608 [2018] NSWCATCD 52 Fox v Percy (2003) 214 CLR 118; [2003] HCA 22 FPM Constructions v Council of the City of Blue Mountains [2005] NSWCA 340 John v Rees [1970] Ch 345 Knight v FP Special Assets Ltd (1992) 174 CLR 178; [1992] HCA 28 Lam v Steve Jarvin Motors Pty Ltd [2016] NSWCATAP 186 Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705; [2001] NSWCA 305 McInnes v Rheem Australia Pty Limited [2021] NSWCA 89 Mendonca v Tonna [2017] NSWCATAP 176 Minister for Immigration and Citizenship v Li (2013) 249 CLR 332; [2013] HCA 2013 Plaintiff S4/2014 v Minister for Immigration and Border Protection (2014) 253 CLR 219; [2014] HCA 34 Pollard v RRR Corporation Pty Ltd [2009] NSWCA 110

	Preston v Diaspora Holdings Pty Ltd; Diaspora Holdings Pty Ltd v Owners Corporation of Strata Plan 68608 [2019] NSWSC 651 Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28 Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82; [2000] HCA 57 Sydney Water Corporation v Caruso and Ors [2009] NSWCA 391 The Owners Strata Plan No. 84751 v Karimbla Construction Services Pty Ltd [2016] NSWCATAP 145 Thompson v Chapman [2016] NSWCATAP 6 Webb v Flight Centre Travel Group Limited [2021] NSWCATCD 31
Texts Cited:	Cross on Evidence, LexisNexis, online edition M McHugh AO QC, ‘Preparing and arguing an appeal’, NSW Bar Association Bar News, Winter 2010 NSW Judicial Commission, Civil Trials Benchbook, online edition
Category:	Principal judgment
Parties:	Sarah Freeman-Vagg (Appellant) Oldstream Pty Ltd (Respondent)
Representation:	Counsel: G Tsang (Respondent) Solicitors: Mosman LNS Legal Service (Appellant) Baron & Associates (Respondent)
File Number(s):	2021/00283619; 2021/00353172
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	NSW Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	6 September 2021; 18 November 2021

Before:	L Wilson, Senior Member
File Number(s):	COM 20/07370; COM 20/31056; COM 20/44840

REASONS FOR DECISION

1 These are our reasons for deciding two appeals, being an appeal from the Tribunal’s principal decision, and an appeal from the Tribunal’s subsequent decision on costs, which arise out of various disputes between the parties as lessee (appellant) and lessor (respondent) of commercial premises situated at Potts Point, NSW.

2 For the reasons that follow both appeals should be dismissed with costs.

Background

3 On 15 March 2019, the parties entered into a 12-month retail lease for the premises. Those premises consisted of a ground floor area in a block of serviced apartments, with that ground floor area being designed for use as a café or restaurant or similar. A number of restaurants had operated from that ground floor area before the appellant’s lease, and, after the appellant vacated, the area was used at various times as a bakery, donut shop and bar.

4 In December 2019, the appellant ceased paying rent due under the lease.

5 On 15 February 2020, the appellant commenced proceedings against the respondent (the “first proceedings” - COM 20/07370) asserting she was not required to pay the rent arrears owing under the lease and that the respondent had breached the lease and should pay her compensation for those breaches. The appellant was not legally represented at that hearing.

6 On 27 February 2020, the appellant vacated the premises.

7 On 17 July 2020, the respondent commenced proceedings against the appellant (the “second proceedings” - COM 20/31056) for rent arrears owing under the lease.

8 On 26 August 2020, the first proceedings were heard. At the conclusion of the hearing the appellant withdrew her claim. The respondent sought costs and that costs application was adjourned to be determined on a subsequent date.

9 On 21 October 2020, the appellant commenced further proceedings against the respondent (the “third proceedings” - COM 20/44840) again asserting she was not required to pay the rent arrears owing under the lease and that the respondent had breached the lease and should pay her compensation for those breaches.

10 On 28 April 2021, the second and third proceedings were heard by the Tribunal, with written submissions being subsequently received from the parties. Both parties were legally represented at that hearing. The Senior Member of the Tribunal who heard those proceedings was the same Senior Member who had heard the first proceedings. No objection was taken at this hearing to the Tribunal being so constituted.

11 On 6 September 2021, the Tribunal published its decision in respect of the second and third proceedings (the “principal decision”). In short, the respondent was successful in both proceedings, with the Tribunal determining the respondent was entitled to the arrears of rent and all claims for compensation by the appellant being dismissed. The appellant was ordered to pay the respondent $3,646.36 together with an order that the respondent was entitled to the whole of the security bond. The principal decision is the subject of the first appeal, numbered 2021/00283619 (the “principal appeal”).

12 The respondent made applications for costs in the second and third proceedings. In addition, and in the third proceedings, the respondent sought a costs order against the appellant’s solicitor.

13 On 5 October 2021, the appellant lodged the principal appeal.

14 On 18 November 2021, the Tribunal published a single set of reasons in which its decisions in relation to the various costs applications made in the first, second and third proceedings were set out together with the Tribunal’s reasons for those decisions (the “costs decision”). The costs decision is the subject of the second appeal, numbered 2021/00353172 (the “costs appeal”). This costs appeal is, in essence, three appeals, being an appeal from the costs decision made in each of the first, second and third proceedings.

15 In these reasons we shall deal with the principal appeal and the costs appeal separately and in that order. We shall then deal with the costs of these appeals.

The Principal Appeal

The Grounds of Appeal in the Principal Appeal

16 In relation to drafting grounds of appeal former High Court judge, the Hon Michael McHugh AO QC, in *Preparing and arguing an appeal*, NSW Bar Association Bar News, Winter 2010, at 85-92, wrote:

> "The cardinal rule for drafting a notice of appeal is to be selective. If the appeal notice contains too many grounds, the best points are likely to be hidden in a thicket of weak points. The notice of appeal should identify only those errors of ultimate fact or law which affected the result, and the fewer the better. As Justice Branson has explained (*Sydneywide Distributors Pty Ltd & Anor v Red Bull Australia Pty Ltd & Anor* (2002) 55 IPR 354 at 355-356):
>
> > 'Not every grievance entertained by a party, or its legal advisors, in respect of the factual findings or legal reasoning of the primary judge will constitute a ground of appeal. Findings as to subordinate or basic facts will rarely, if ever, found a ground of appeal. Even were the Full Court to be persuaded that different factual findings of this kind should have been made, this would not of itself lead to the judgment, or part of the judgment, being set-aside or varied. This result would be achieved, if at all, only if the Full Court were persuaded that an ultimate fact in issue has been wrongly determined. The same applies with respect to steps in the primary judge's process of legal reasoning. Although alleged errors with respect to findings as to subordinate or basic facts, and as to steps in the process of legal reasoning leading to an ultimate conclusion of law, may be relied upon to support a ground of appeal, they do not themselves constitute a ground of appeal.'"

17 The grounds of appeal do not follow that advice.

18 The grounds of appeal extend to 28 pages, contain (on their face) 17 separate grounds of appeal, with each ground containing numerous sub-paragraphs (one ground contains 33 such sub-paragraphs). They are discursive, disjointed and describe a host of grievances and a multitude of subordinate and basic facts. They do not, or at least not in any clear fashion, isolate the errors of ultimate fact or law said to be erroneous and which allegedly affected the result of the case. Many grounds and paragraphs do not state any recognised appellable error, whether raising a question of law or otherwise.

19 Doing the best we can in understanding the grounds of appeal, aided to a degree by the more focused oral submissions, the appellant's grounds of

appeal were these (keeping as much as possible to the appellant's terminology):

(1) The Tribunal erred in law for breach of procedural fairness and bias (at [12], [17], [18]-[22] and [97] of the principal decision) by finding the Court Book lacked efficacy and professionalism.

(2) The Tribunal erred in law for failing to consider relevant considerations and in (wrongly) considering irrelevant considerations in its summary of "Facts" at [31]-[62] of the principal decision.

(3) The Tribunal denied the appellant procedural fairness in failing to consider relevant factors and excluding expert evidence.

(4) The decision was unreasonable within the meaning of *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 2013 in finding the Court Book was unprofessional.

(5) The decision was unreasonable (per *Li* and at [102]-[104] and [115] of the principal decision) in finding the appellant did not provide any evidence of unconscionable and deceptive conduct by the respondent.

(6) The Tribunal erred in law (at [75]-[87], [108] and [110] of the principal decision) in finding there was no jurisdiction to consider the alleged breaches of the Australian Consumer Law (the "ACL").

(7) The Tribunal erred in law (at [114] of the principal decision) by wrongly deciding the application of the adverse inference in *Jones v Dunkel*.

(8) The Tribunal erred in law by finding (at [38], [53]-[60], [116], [122] and [125] of the principal decision) that the appellant was not a witness of credit.

(9) The principal decision was unreasonable (per *Li*) by not finding that the preponderance of evidence showed that the respondent was guilty of unconscionable and deceptive conduct under the *Retail Leases Act 1994* (NSW) (the "RLA").

(10) The Tribunal erred in law by failing to consider a relevant factor in respect of its RLA and ACL claims, namely the mis-description of the dimensions of the premises.

(11) The Tribunal erred in law (at [119] and [128]-[131] of the principal decision) by failing to consider relevant factors and unreasonableness (sic) as to the cause of the appellant's proposed sub-tenants not proceeding with the proposed sub-leases.

(12) The Tribunal erred in law for breach of procedural fairness for bias against the appellant and her solicitor.

(13) The Tribunal erred in law (at [63] of the principal decision) by failing to consider s 62B of the RLA in its summary of legislative framework.

(14) The Tribunal erred in law for breach of procedural fairness (at [72]-[73] of the principal decision) by stating that it would not consider any evidence that the parties did not take the Tribunal to in submissions.

(15) The Tribunal erred in law (at [137]-[139] of the principal decision) by not finding unconscionable conduct (under the RLA) and not finding a major failure (under the ACL).

(16) The Tribunal erred in law in failing to consider certain alleged relevant factors (namely bushfire smoke and the Covid-19 pandemic).

(17) (This ground related to the costs appeal and will be dealt with later in these reasons).

20 Grounds 1, 4, 10, 13 and 14 will be considered together, followed by our consideration of the remaining grounds.

21 Before turning to the grounds of appeal, we must first deal with an application to lead evidence on this appeal which was not led before the Tribunal.

Fresh Evidence

22 The appellant, without objection, read an affidavit of the appellant's solicitor affirmed on 5 October 2021 and tendered the documents attached to that affidavit (although they were not attached as either annexures or exhibits).

23 To the extent the affidavit contained some evidence of subordinate facts arguably relevant to the underlying disputes and which was not tendered to the Tribunal, we reject that evidence because the appellant did not establish that that evidence was not reasonably available to the appellant at the time of the hearing before the Tribunal as required by cl 12(1)(c) of Sch 4 of the *Civil and Administrative Tribunal Act 2013* (NSW) (the "NCAT Act).

24 To the extent the affidavit contained orders made by the Tribunal at directions hearings, correspondence between the parties and the like, all said to be relevant to ground 1, that evidence is rejected because ground 1 must fail for the reasons given later below.

25 To the extent the affidavit attached audio recordings of various attendances before the Tribunal, those sound recordings were admitted although we did not find them to contain any relevant information.

26 To the extent the affidavit attached the expert evidence tendered by the appellant (attached to submissions delivered on a day subsequent to the

hearing day), we admitted that evidence in order to understand the appellant's ground of appeal concerning that expert evidence.

The Tribunal's Decision

27 The evidence before the Tribunal consisted of what was called a "Court Book" of about 1,000 pages, plus the oral evidence of three witnesses (the appellant and her expert Mr Boer, and the evidence of Mr May for the respondent). The hearing took about one day. The Tribunal was subsequently provided with a sound recording of that day's hearing (but not a transcript) together with further written submissions.

28 The Tribunal summarised the issues in dispute between the parties at [14]-[23] of the principal decision. The appellant does not take issue with the accuracy of that summary.

29 The Tribunal said that the respondent's rent arrears claim was straightforward and found that the arrears owing, after deduction of the bond, were in the sum of $3,646.36. There is no appeal from the finding that rent arrears were prima facie owing, nor with the calculation of the amount. The appellant's case rested on her counter claims advanced in the first and third proceedings.

30 At [23] of the principal decision the Tribunal set out the following summary of the appellant's case at the hearing:

> "The lessee claimed (what is set out below is as her solicitor described her claim):
>
> (1) Compensation under s.10(1) or s.62E of the Retail Leases Act 1994 for misrepresentations within the meaning of s.62D of the Act and unconscionable (sic) in 628 and ss.18, 29, 30(1)(e), 60, 61 and 267(4) of the Australian Consumer Law that:
>
> > (a) The retail lease premises would be cleaned at the expense of the lessor;
> >
> > (b) The lessee's financial obligations under the lease would be limited to the payment of rent and utilities;
> >
> > (c) The kitchen equipment in the premises was in good working order and fit to be used for the purposes of a food catering business;
> >
> > (d) The premises are approved as a licensed restaurant and that accordingly food may be served and delivered.
>
> (2) Compensation for engaging in unconscionable conduct in contravention of s.628 of the Act by:

(a) Providing keys to be premises two weeks late and failing to waive the charging of rent for that period;

(b) Providing the lessee inadequate time to review the lease;

(c) Refusing to clean kitchen equipment at the lessor's expense;

(d) Refusing to reduce or suspend the charging of rent;

(e) Refusing to delay the commencement date for the charging of rent to a date when the lessee was ready to commence trading.

(3) The lease was void for being unlawful - unconscionable under s.62B, deceptive under s.62O, false characteristic of the land under s.30(1)(e) ACL - as unfit for retail use whilesoever (sic) the fire safety exit paths from the lease property breached the approved floor plan:

(a) Specifically the blocked exit to the hotel lobby and blocked external exit in the event of a fire in the food production kitchen area,

(i) As outlined in the report of expert planner John Boers dated 7 October 2020:

a. That in general the advertised use of floor space is not for use as restaurant.

b. "The key detail being fire safety detail referred to in paras 33, 34, 40 (p10), 102. And particularly cl.183 of the SFV affidavit of 7 October 2020".

c. "The floor space being unfit for advertised use may have exposed SFV to a bad situation if there had been a fire."

d. "If not potential injury or loss of life, denied insurance claim."

e. "Also, any unauthorised land use (clothes shop) would expose her to potential fine (max $6000 for business) plus order to cease from City of Sydney Council."

(b) The history of planning instruments and approvals history indicates the building may not have building certification or occupancy certificate for the permitted use in the Lease as a restaurant and commercial kitchen.

(4) Restitutionary damages under s.72AA of the Act generally and specifically s. 72AA(1)(a) and as outlined at [185] of SFV affidavit of 7/10/20 (and generally):

(a) Loss of co-occupant/ co-tenant Hungry Mind and the Dumpling Guy for contribution of rent for one year at $600 per week for the duration of the lease, estimated as:

(i) Loss of $600/ week rent income from Hungry Mind Pty Ltd for 12 months estimated at total of $30,000;

(b) $50,000 refund to an investor refunded back on or about 17 April 2019.

(c) Average lost income and wastage of costs as indicated in the lessee's bank statements as 3 v $5,300 for a total of $15,900 plus $8,000 deficit for unexpected outgoings for a total of $23,900.

(d) $441 for research from the Office of Liquor and Gaming.

(e) Legal costs of this (cross) application and the defence of the lessor's application be paid to the lessee.

(f) No costs application be made against the lessee in her withdrawn application.

(5) An order that rent from about 1 December 2019 to 27 February 2020 (or end date of lease) of about $10,551.44 not be paid to the lessor.

(6) An order that the security bond of $7,333.33 be immediately released to the lessee."

31 Put shortly, and putting aside the many particulars contained in that summary, the appellant's case was for compensation or damages for unconscionable, misleading or deceptive conduct under ss 62B and 62D of the RLA and ss 18, 29, 30(1)(e), 60, 61 and 267(4) of the ACL. The remedies she sought were for damages/compensation and/or an order declaring the lease void.

32 In its principal decision the Tribunal noted that the appellant had attached to her written submissions (delivered on a day subsequent to the hearing day) further evidence from her expert, Mr Boer. The Tribunal rejected this evidence for the following reasons (at [11]):

> "Leave was not sought by the lessee to reopen her case and tender further evidence after the hearing had concluded. Had leave been sought it would have been refused. It is plainly unfair to the lessor for the lessee to tender further evidence after the conclusion of both parties' cases. The lessor opposed the tender of the new evidence: para 31 of its reply submissions. It was quite improper for the lessee to attempt to put further evidence before the Tribunal in this way and it is removed from the submissions and the Tribunal has had no regard to it nor to any submissions (such as in paragraph 135) which attempts to refer to the document."

33 The Tribunal said that it had considerable difficulty understanding the appellant's submissions and the case she was propounding. Nevertheless, the Tribunal summarised the important factual findings at [31]-[62] of the principal decision with references to the objective facts, contemporaneous documents and apparent logic of events which supported those findings.

34 Those paragraphs of the principal decision also included a finding that the appellant was not a witness of credit (at [54]), a finding that she was "evasive and dishonest" when cross-examined about an altered email tendered as part

of her case (at [57]), and a finding that on one occasion she gave false evidence (at [59]). The Tribunal said, unsurprisingly, that it would not accept the appellant's evidence unless it was corroborated by other reliable evidence (at [60]). See also [116].

35 To overcome that demeanour-based finding of credit the appellant bears the onus of establishing, on appeal, that the Tribunal failed to use or palpably misused the advantage it had of seeing and hearing the appellant give evidence, that it relied on evidence which was inconsistent with facts incontrovertibly established by the evidence, or acted on evidence which was glaringly improbable, or fell into some error of principle, mistook or misapprehended the facts, made findings which were not reasonably open given the effect of the overall evidence or that the evidence established a complex pattern of events into which the incontrovertible evidence could only be fitted if a different view of the credibility of the appellant was taken by the Appeal Panel – *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705; [2001] NSWCA 305 per Heydon JA (as his Honour then was) at [34].

36 The Tribunal rejected the appellant's ACL claims. The Tribunal said that it did not have any jurisdiction to make orders for alleged breaches of ss 30, 60, 61, 267, 268 or 269 of the ACL (at [108] of the principal decision) and rejected each of the appellant's submissions made in support of that case (at [70]-[107] of the principal decision).

37 The Tribunal then turned to the (overlapping) claims under the RLA at [111]-[149] of the principal decision. In short, the Tribunal found there had not been any misleading, deceptive or unconscionable conduct, and found that (assuming there had been such conduct) the appellant had not proved that any damage was proved to have been caused by such conduct.

Grounds 1, 4, 10, 13 and 14

38 These grounds are dismissed because, even had the assertions contained therein been established, they did not and could not have affected the result of the proceedings (see [16] above). See also *Abed v Cosgrove trading as Alison Arts; Cosgrove v Abed [2018] NSWCATAP 4 and Sydney Water Corporation v Caruso and Ors [2009] NSWCA 391 at [8]-[27] and [108]-[112]*. For example,

even had the Tribunal been wrong in finding the Court Book lacked efficacy and professionalism the result of the proceedings would not have been altered. Cases are decided by evidence (as this case was) and not by the presence or absence of efficacy and professionalism in preparing Court Books.

39 In addition, we make the following particular observations.

40 Ground 1 asserted a denial of procedural fairness because the Tribunal considered that Court Book lacked efficacy and professionalism. First, this ground does not state one of the recognised errors which raise a question of law. Second, a criticism of the state of a court book does not constitute procedural unfairness. Procedural fairness relates to the fairness of the procedure by which a decision is made (such as providing an opportunity for a party to lead evidence and have their submissions heard).

41 The question of bias raised in Ground 1 will be dealt together with Ground 12 later in these reasons.

42 Ground 4 asserted that the Tribunal's decision was unreasonable (per *Li*) in finding the Court Book was unprofessional. *Li* concerned unreasonableness in a process of reasoning that led to a decision. *Li* is not concerned with an observation as to the state of a court book.

43 Ground 10 asserted that the Tribunal erred in law by failing to consider a relevant factor in respect of her RLA and ACL claims, namely the mis-description of the dimensions of the premises. The appellant says the premises were advertised as being of about 97 sqm whereas there was evidence (from Mr May) that the premises were only of about 86 sqm.

44 However, it does not appear this difference (assuming there was such a difference) in area formed part of the appellant's case. We can see no reference to it in the appellant's Statement of Agreed Facts (either as an agreed fact or a fact in issue) provided to the Tribunal nor in the appellant's voluminous written submissions. The advertisement to which the appellant directed us in the Appeal Book ("AB") at AB 595-9 (the AB page references in the submissions and grounds of appeal were for a document other than an

advertisement) said the floor area was 1 sqm, and the lease itself (at AB 577) said the floor area was 42 sqm.

45 Therefore, we are unaware of any evidence underpinning the factual assertions made in Ground 10. No oral or written submissions were developed to explain the factual assertions, their source or the apparent disconformity between the assertions made and the matters to which we have referred.

46 Ground 13 asserted that the Tribunal erred in law (at [63] of the principal decision) by failing to consider s 62B of the RLA in its summary of legislative framework. Section 62B concerns unconscionable conduct in retail shop lease transactions.

47 We assume the alleged legal error relied on by the appellant was the alleged overlooking of part of the appellant's case (although that was not said so explicitly). If that was the assertion, then it cannot be accepted. At [63] of the principal decision the Tribunal briefly referred to the sections of the RLA relied on by the appellant. It is true that in that paragraph no reference is made to s 62B, but the section is referred to three times at [23] of the principal decision (when setting out the appellant's claims), at [70] (when quoting a submission by the appellant), and at [72], [89], [91], [93], and [103] of the principal decision. In the last-mentioned paragraph the Tribunal said:

> "… Even if they were, this does not prove the lessor engaged in unconscionable conduct or misleading or deceptive conduct in connection with the lease."

48 Those references and the contents of those paragraphs satisfy us that the appellant's claims under s 62B were considered.

49 Ground 14 asserted that the Tribunal erred in law for breach of procedural fairness (at [72]-[73] of the principal decision) by stating that it would not consider any evidence to which the parties did not draw the Tribunal's attention. At [72] of the principal decision the Tribunal said:

> "The Tribunal expressly reminded the parties, both of whom were legally represented, that it would not independently be reading each of the pages of the Tender Bundles, which exceed 1,000 pages, to figure out what the parties might be claiming. The Tribunal would only have regard to the evidence which the parties drew to its attention - both oral and written. Here it can be seen the lessee took the Tribunal to no evidence whatsoever to support her claim that "possibly" or "arguably" no rent is owed for the entirety of the lease or for the

> final three months of the lease. Without evidence the Tribunal cannot be satisfied on the balance of probabilities, or at all, that the lessee's claim that the lease is void or that the lessor engaged in conduct that was unconscionable (s.62B) or misleading or deceptive (s.62D)."

50 The appellant submitted that the Tribunal must have regard to the evidence before it and cited a decision of a Federal Magistrate (as they were then known). So much is uncontroversial. But the practice and procedure of the Tribunal is required to 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 – s 36(4) of the NCAT Act.

51 The Tribunal was faced with a great many documents and the Tribunal was, in substance, asking the parties (as it was entitled to ask) to direct the Tribunal to the relevant evidence. The appellant's solicitor was (as were the respondent's legal representatives) under a statutory obligation to give effect to the Tribunal's guiding principle to facilitate the just, quick and cheap resolution of the real issues in the proceedings (s 36(1) of the NCAT Act), and that obligation extended to responding to the Tribunal's request that it be specifically directed to the relevant evidence. Further, if the appellant's solicitor did not consider a particular document to be so germane to and persuasive of his client's case as to be worth specifically bringing to the Tribunal's attention, then it was not for the Tribunal to examine the multitudinous documents (not referred to by the appellant in submissions) in a partisan way to see whether the appellant's case was supported by evidence.

52 In our opinion the Tribunal did not err in asking the parties for the assistance it did.

Ground 2

53 The appellant asserted that the Tribunal erred in law for failing to consider relevant considerations and in (wrongly) considering irrelevant considerations in its summary of "Facts" at [31]-[62] of the principal decision.

54 In oral submissions, it became apparent that the appellant was complaining that certain evidence was not referred to in the Tribunal's reasons.

55 We do not accept this ground.

56 The Tribunal is not required to refer to all of the evidence in its reasons for decision - *Pollard v RRR Corporation Pty Ltd* [2009] NSWCA 110 per McColl JA, with whom Ipp JA and Bryson AJA agreed, at [61]-[62].

57 A Tribunal should refer to evidence which is important or critical to the proper determination of the matter before it, and to conflicting evidence of a significant nature for example. However, the appellant did not develop any submission to that effect in relation to Ground 2 in the context of the reasons why the Tribunal dismissed the appellant's claims.

58 The appellant did refer to many subordinate or basic facts and evidence in her submissions which, she submitted, were not recorded in the Tribunal's reasons. Accepting that is so for the purpose of argument, that is not enough to make out this ground of appeal because, as *Pollard* says, there is no obligation to record every fact and every item of evidence. More is required.

59 To succeed on an appeal on this ground an appellant is required to provide submissions which demonstrate why any one or more facts or items of evidence not recorded in the Tribunal's principal decision was *critical* to the case, and therefore establish that the failure to refer to it meant that the Tribunal erred in either failing to engage with the appellant's case or failed to give adequate reasons. But that was not the appellant's ground of appeal in this case, and nor did the appellant attempt to demonstrate the matters to which we have just referred.

Ground 3

60 In Ground 3 the appellant asserted that the Tribunal denied the appellant procedural fairness in failing to consider relevant factors and excluding expert evidence.

61 This ground has three parts.

62 First, it was submitted that certain evidence was not referred to in the Tribunal's reasons. We repeat what we have said above at [55]-[59] above, namely that the Tribunal is not required to record all of the evidence, but it should refer to critical and significant evidence (and it has not been demonstrated that any of the omitted evidence was critical or significant).

63 The evidence the appellant says was significant or critical, but which was not referred to in the principal decision, was evidence from a Mr Zadravec and a Mr Saz. It is correct that that evidence is not expressly referred to in the principal decision, but in our view that evidence was neither significant nor critical.

64 In Mr Zadravec's short written evidence he recorded his instructions that the appellant had intended to sub-lease part of the premises to a caterer (about which we shall say more later in these reasons). He said that no inspection had been carried out by the local council, but had one been carried out there would have been "breaches" noted requiring immediate attention prior to opening for business. This, he said, prejudiced the appellant's "opportunity" to "cancel" the lease (how that was legally possible was not explained) or negotiate for work to be done at the respondent's cost.

65 Mr Zadravec proceeded to list the work he said needed doing, namely a larger handwash basin and a number of perceived deficiencies in the mechanical ventilation. He said that the absence of remedial work to those items would have prevented a business (presumably being a reference to a caterer) opening.

66 In Mr Saz's short written evidence, he said that he inspected the premises and particularly the mechanical ventilation. He said that the exhaust system was not fully functional and did not provide adequate exhaust air flow required for cooking.

67 In our view the written evidence of Messrs Zadravec and Saz was neither significant nor critical because, assuming (without deciding) that those opinions (together with other evidence) established that there had been some wrongful conduct by the respondent of the types alleged, the Tribunal dismissed the appellant's causation case and the ground of appeal on that aspect of the case (Ground 11) has failed (for reasons set out later below).

68 The evidence before the Tribunal established that the appellant never intended to operate a commercial kitchen and that her plan was to sublet that part of the premises to others to operate a commercial kitchen. She claimed she had two prospective sub-tenants willing to do so but the Tribunal found (at [126]-[131])

those prospective sub-tenants did not proceed with any sub-lease for reasons unconnected with the deficiencies referred to by Messrs Zadravec and Saz.

69 The second part of Ground 3 is to the effect that the Tribunal wrongly excluded the evidence of Mr Zadravec and Mr Saz. There was no ruling to that effect that we can find. In addition, the submission is contradicted by the appellant's written submissions to the effect that at the hearing the appellant rejected the Tribunal's invitation to withdraw their evidence.

70 The third part of Ground 3 is to the effect that the Tribunal said (at [141] of the principal decision) that there was "no evidence" of a non-functional kitchen. The appellant's submission is incorrect because at [141] the Tribunal said something distinctly different, namely:

> "The rangehood or ventilation unit complaints the lessee raised in these proceedings take her claim nowhere."

71 The Tribunal's statement at [141] follows a careful consideration in the preceding paragraphs as to the reasons why that conclusion was so, namely the findings that the alleged lost sub-tenants did not proceed for other reasons unconnected with the alleged deficiencies in the premises, there was evidence from the appellant that she had sub-let the kitchen part of the premises to a food business for a brief period during her tenancy (which contradicted the evidence that any deficiencies in the kitchen prevented it being used) and the uncontested evidence of the respondent that the premises had been let to a bakery and doughnut shop since the appellant vacated with no issues with the kitchen or ventilation system. We do not accept the appellant's contention that the Tribunal made a finding at [141] that there was no evidence of a non-functional kitchen.

Ground 5

72 The appellant asserted that the Tribunal's decision was unreasonable (per *Li* and at [102]-[104] and [115] of the principal decision) in finding the appellant did not provide any evidence of unconscionable and deceptive conduct by the respondent.

73 It is first necessary to state what is meant by "unreasonable" in this context.

74 *Li* stands for the proposition that a decision may be erroneous because it is affected by what is sometimes called legal unreasonableness. This unreasonableness, put simply, refers to a conclusion reached in a decision that is considered to lack an evident and intelligible justification – *Li* at [76] per Hayne, Kiefel (as her Honour then was) and Bell JJ.

75 We also note that Ground 5 incorrectly attributes to the Tribunal in the paragraphs relied upon by the appellant a finding that the appellant did not provide any evidence of unconscionable, misleading or deceptive conduct in the paragraphs identified in the principal decision. Paragraphs [102]-[104] of the principal decision rejected the specific allegations of wrongful conduct made by the appellant and [115] of the principal decision relates to causation.

76 At [102]-[104] of the principal decision the Tribunal said:

> "102 Then it is submitted (by the appellant in her written submissions) in paragraphs 57 to 59:
>
> > 'A synthesis of the above clauses of the Disclosure reveals the inherent unconscionability of the Lease: The mechanical ventilation is not functional and not even connected to power and non-compliant with Building Code of Australia, while the fire exits are illegal, yet SFV must repair and maintain the ventilation, while it remains the property of Oldstream, who at the outset of a Lease advertise that the property is ready to occupy but there no outgoings [sic] for SFV to commence the Lease. In short this Disclosure is a self serving illegal nonsense in the context of the equipment failure for the main value of the Property being its commercial kitchen.
> >
> > Similarly the Lease terms are contrary to the advertised uses for the lease of the Property as per the disclosure - refer pp451 - 490 JTB.'
>
> 103 The reference to TB451-490 is the lease. This reference certainly does not support a finding that the lease terms are contrary to the advertised uses as per the disclosure, it is merely a reference to the lease. Nothing is proved by these submissions. If they were attempting to have the Tribunal accept there was some inconsistencies between the lease, disclosure statement and/or some aspect of the advertisement for the property, these unnamed inconsistencies have not been established. Even if they were, this does not prove the lessor engaged in unconscionable conduct or misleading or deceptive conduct in connection with the lease.
>
> 104 The lessee then complains about the development approval for the property (paragraphs 60 to 64) concluding in paragraph 65:
>
> > 'At all material times [the then real estate agent] and and [sic] legal advisers to Oldstream knew, or ought to have known, that:

> a) SFV was re-locating her retail shop from her previous leased shop with non refundable deposit and security bond to the new shop lease at the Property, and there was a sensitive financial transition from her old to new Lease at the Property dependant from the outset on the commercial kitchen being functional for a co-occupant.
>
> b) The commercial kitchen was non functional at the time the Lease of the Property was entered into.'"

77 At the end of [114] (for context) and [115] the Tribunal said:

> "[114] … (the appellant) did not tender any evidence from any prospective tenants setting out that they did not enter an agreement with the lessee for use of the kitchen for any of the issues or deficiencies she now complains of in these proceedings.
>
> [115] That is not surprising because most of the alleged deficiencies were not known to the lessee during the tenancy, and were only discovered upon obtaining expert evidence for her first and now this second application, for example the alleged issue with the fire exit paths."

78 It is self-evident from a proper reading of those passages that the Tribunal had an evident and intelligible justification for rejecting the particular submissions made by the appellant to which the Tribunal was referring.

79 In addition, and taking up [115] of the principal decision, those passages underline the point that the Tribunal dismissed the appellant's causation case, namely that the alleged lost prospective sub-tenants were not lost to the appellant because of any wrongful conduct by the respondent (we say more of this under Ground 11 below) but for other reasons unconnected with the alleged deficiencies in the premises or the conduct of the respondent.

Ground 6

80 The appellant submitted that the Tribunal erred in law (at [75]-[87], [108] and [110] of the principal decision) in finding there was no jurisdiction to consider the alleged breaches of the ACL and cited *Webb v Flight Centre Travel Group Limited* [2021] NSWCATCD 31 in support.

81 In Webb the Tribunal referred to the jurisdiction granted to the Tribunal by the Fair Trading Act 1987 (NSW) (the "FTA") to decide consumer claims which may arise under a law of NSW which, by reason of s 28 of the FTA, includes the ACL.

82 As the appeal in relation to causation was dismissed, and that dismissal is dispositive of any case for damages reliant on an allegation of wrongful conduct under the ACL which may sound in damages recoverable in the Tribunal as allowable under the FTA [pursuant to s 79N(a)], we need not consider this ground any further.

83 Put another way, if the Tribunal did have the jurisdiction alleged, and the breaches alleged occurred, the appellant did not prove that any breach caused her the damage alleged. As her appeal on causation is dismissed, the appellant would remain unsuccessful on this appeal even if this ground were upheld.

84 The other remedy sought by the appellant for alleged breaches of the ACL and RTA was a declaration that the lease was void (presumably ab initio).

85 Whilst such a remedy could be granted by a court in an appropriate case, the Tribunal does not have jurisdiction to grant that remedy.

86 The Tribunal is a statutory body which can only do those things which are authorised by statute. The two prime sources of that statutory authority are the NCAT Act and certain NSW statutes.

87 Some statutes, such as the *Residential Tenancies Act 2010* (NSW) supply both the cause of action and the Tribunal's jurisdiction to hear cases and provide the relief referred to in that statute. The RLA is a similar statute in that it authorises the Tribunal to grant certain relief for "retail tenancy claims" in s 72 and unconscionable conduct claims in s 72AA. Neither of those sections authorise the Tribunal to declare a lease void. The only authority granted to the Tribunal is to declare any *provision* made by a lease to be void for being inconsistent with the RLA or the regulations, but that was not the appellant's case (nor could it have been on our understanding of the facts).

88 As for the ACL, the Tribunal's authority to grant relief is provided in ss 79N, 79O and 79P of the FTA (and is not granted by the ACL). Section 79N is the relevant section in this case, and it does not grant the Tribunal authority to declare a lease void, a point made by the Tribunal at [85] of the principal

decision citing *Lam v Steve Jarvin Motors Pty Ltd* [2016] NSWCATAP 186, a decision the Tribunal in this case was obliged to follow.

Ground 7

89 The appellant submitted that the Tribunal erred in law (at [114] of the principal decision) by wrongly deciding the application of the adverse inference principle in *Jones v Dunkel*.

90 At [114] of the principal decision the Tribunal expressed criticism of the appellant's solicitor's understanding of the principle of that case, but the Tribunal did not, in fact, express any finding or holding in relation to any *Jones v Dunkel* point. It might charitably be inferred (in favour of the appellant) that the Tribunal rejected the appellant's submissions that various *Jones v Dunkel* inferences should be drawn against the respondent for not calling various witnesses. However, there is no rule that if certain witnesses are not called the adverse inference *must* be drawn, only that such inferences *may* be drawn.

91 It is obvious that the Tribunal was not persuaded that any *Jones v Dunkel* inference should be drawn in the circumstances of this case and no error has been identified in that decision for the following reasons.

92 First, even had such inferences been drawn they would not have assisted the appellant's case given the Tribunal rejected her testimonial evidence and dismissed her causation case. An inference that the identified witnesses would not have assisted the respondent's case would not have overcome the deficiencies in the appellant's case. That is because it was for the appellant to prove a connection between the alleged wrongful conduct and the loss of the prospective sub-tenants and not for the respondent to prove the opposite.

93 That leads to the second reason. The rule only applies where a party is "required to explain or contradict" something – *Cross on Evidence*, online edition, at [1215]. What a party is required to explain or contradict depends on the issues in the case and no inference can be drawn unless evidence is given of facts "requiring an answer". It is readily apparent that the Tribunal did not consider that there were any facts requiring an answer, nor did the appellant identify any such facts in its submissions.

94 Third, the rule cannot be applied to the non-calling of a witness unless it would be natural for the party to have called the witness, or the party might reasonably be expected to have called the witness. None of the witnesses identified in the appellant's submissions, such as previous tenants, would seem to fall within this category.

95 Turning to the supposed adverse inference said to arise by the failure of the respondent to call any expert evidence to counter the evidence of Messrs Zadravec, Saz and Boers, such a circumstance does not fall within the principles of *Jones v Dunkel* unless, for example, there is proof of the existence of non-tendered reports (as opposed to the absence of any reports being commissioned or experts being retained). Here, there was no evidence the respondent engaged experts to opine on the matters identified and then elected not to call them and so no inference could be drawn that that non-existent expert opinion would not have assisted the respondent's case.

Ground 8

96 The appellant submitted that the Tribunal erred in law by finding (at [38], [53]-[60], [116], [122] and [125] of the principal decision) that the appellant was not a witness of credit.

97 The appellant's submission was:

> "The Tribunal erred in law by finding for instance at [38], [53-60], [116], [122) and in effect [125] relating to her own evidence of co-occupants rejecting the non-functional kitchen, that (the appellant) is not a witness of truth effectively in breach of s.71 (criminal offence) in the NCAT Act, including a finding there is no principle of law that a person of hitherto good character with no prior criminal record, such as (the appellant), may be presumed a witness, of truth, and thereby the Tribunal failing to consider the good character evidence of (the appellant) in (the various circumstances which followed)."

98 The appellant cited the following passage from the Civil Trials Benchbook published by the NSW Judicial Commission at [4-1310]:

> "If evidence of good character is adduced, it has been held that it is necessary to direct the jury that such evidence should be borne in mind as affecting the likelihood that the accused committed the crime charged and, if thought appropriate, that it is relevant as supporting any explanation given by the accused and his credibility as a witness: *R v RJC* (unrep, 1/10/1998, NSWCCA), at 27. See also *R v Lewis* [2001] NSWCCA 345 at [31]–[32]."

99 No error of law is identified in the appellant's submission (nor in the ground of appeal). It is not an error of law if the appellant simply says that the Tribunal made an incorrect finding (in this case, as to credit). The appellant did not identify any question of law, nor did she identify any other recognised ground of appeal for which leave to appeal may have been sought.

100 We will assume the question of law raised is whether the Tribunal applied the correct principle of law to the issue of the appellant's credibility.

101 If that is so, then the submission is misconceived.

102 The appellant submits that she should have been presumed to have been of good character because she had no prior criminal convictions and (impliedly) that no other finding could be made whatever the other evidence and cross-examination may have revealed.

103 There is no "presumption" of good character as the appellant submitted. Evidence of good character may be admitted for certain purposes in certain cases, but it is only (in those cases) *admissible* and does not give rise to any "presumption". Once admitted, any evidence of good character is weighed together with other evidence (of bad character) for the decision-maker to consider in assessing the witness's credibility.

104 In addition, assuming that a presumption of good character did arise, that presumption was rebuttable (as the Tribunal observed at [116] of the principal decision) and was rebutted in this case by the rather potent evidence referred to by the Tribunal which led the Tribunal (obviously with the assistance of hearing the appellant give oral evidence) to conclude that she was not a witness of credit.

105 That is, the respondent was entitled to cross-examine on credit, which it did, and have the answers to that cross-examination considered on the question of credit. In this case it was successful in establishing that the appellant had altered an email on two occasions for the purpose of assisting her case and denied doing so in her oral evidence. The Tribunal, in the advantageous position of hearing the appellant give oral evidence, found the appellant to be

"evasive and dishonest" and, at [59] of the principal decision, found that the appellant made:

> "assertions which were not true, knowing they were not true, to achieve a desired outcome …"

106 None of that evidence (and the other evidence relied upon by the Tribunal) was given any attention by the appellant in submissions, and no submissions were made to the effect that there was some error in the Tribunal's reliance on that evidence in coming to the conclusions the Tribunal did as to the appellant's credit.

107 We note that the only evidence of good character mentioned in the appellant's submissions (other evidence was referred to, but this was not character evidence) was the absence of any criminal convictions. That evidence is obviously of some weight, but very little. Little experience in the law is required before one observes witnesses who lack any criminal history but whose testimony should not be accepted on credit grounds.

Ground 9

108 The appellant submitted that the Tribunal's decision was unreasonable (per *Li*) by not finding that the preponderance of evidence showed that the respondent was guilty of unconscionable and deceptive conduct under the RLA.

109 This ground does not raise a question of law, and the submission as to "preponderance" of evidence does not fall (in this case) within the principles of *Li*. *Li* stands for the proposition that a decision lacking an evident and intelligible justification may be set aside – *Li* at [76] per Hayne, Kiefel and Bell JJ – not whether such a decision could be set aside because it was not consistent with the preponderance of evidence.

110 In any event, the preponderance of evidence in this case favoured the respondent and not the appellant. Putting aside the credibility finding against the appellant, the respondent's case was supported by objective evidence, contemporaneous documents and the apparent logic of events, factors which the High Court said should be generally preferred to recollection evidence – *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22 at [31] – and upon which the Tribunal expressly relied in coming to its decision.

111 On the other hand, the appellant’s case relied almost exclusively on her recollection evidence, which was, in important respects, contrary to the objective evidence, contemporaneous documents and the apparent logic of events.

112 One example is well illustrated in the Tribunal’s reasons at [58] of the principal decision. The Tribunal said:

> “The lessee's repeated attempts to deny King & Wood Mallesons acted for her on the lease transaction further reduced her credibility. ... The lessee was represented by King & Wood Mallesons for the purposes of the lease negotiations, whether she chose them because a friend worked there or whether she paid reduced fees or anything else, they acted for her. They accepted service of documents on her behalf, for example the disclosure statement, they provided her with advice and they communicated with the lessor's lawyers on her behalf. Her repeated denials that King & Wood Mallesons was her lawyer or acted for her cannot be believed and reduce her credibility further.”

113 This discrepancy between the parties in terms of the objective evidence, contemporaneous documents and the apparent logic of events, and the appellant’s predominant reliance on her recollection evidence, is well exampled by the evidence led in relation to causation and the alleged lost proposed sub-tenants, a matter to which we will now turn in Ground 11. In short, no error has been established in the Tribunal’s reasoning in considering the preponderance of evidence (or weight) which favoured the respondent and not the appellant.

Ground 11

114 The appellant submitted that the Tribunal erred in law (at [119] and [128]-[131] of the principal decision) by failing to consider relevant factors and unreasonableness (sic) as to the cause of the appellant’s proposed sub-tenants not proceeding with the proposed sub-lease.

115 The appellant’s causation case was that she had failed to secure sub-tenants because of the respondent’s wrongful acts and omissions. The Tribunal (at [113] of the principal decision) did not accept that:

> “… the supposed issues or deficiencies with the premises played any material part in her being unable to sub-let the kitchen space to prospective sub-tenants. The Tribunal agrees with the lessor when it submitted, at paragraph 51 of its reply submissions, that this ‘is fatal to all of Ms Freeman's claims for pecuniary relief’.”

116 As we have mentioned earlier, the Tribunal is not required to refer to all of the evidence in its reasons and thus the submission that the Tribunal did not consider relevant evidence goes nowhere unless the appellant demonstrated that critical or significant evidence was overlooked (which she did not).

117 In any event, the appellant's evidence on the point was limited to her testimonial evidence. There was no objective or contemporaneous evidence which supported her case – and none was identified in the appellant's submissions - nor was she assisted by the apparent logic of events. Rather, such evidence supported the respondent's case on causation. As the Tribunal said at [117] of the principal decision:

> "The only evidence the lessee has about losing the potential sub-tenants are her assertions, which are contrary to contemporaneous, documentary evidence. Those assertions are not accepted by the Tribunal. As the lessor wrote at the time (May 2019), the reason people were not interested in renting the kitchen was because the roof terrace could not be used, a fact the lessee knew well before entering the lease."

118 In the circumstance of this reliance by the appellant on her recollection evidence, the absence of any corroborative objective or contemporaneous evidence, the appellant's lack of credibility and where no evidence was called from the alleged lost sub-tenants as to why they did not proceed with the sub-leases, the Tribunal's decision on this point was open to it and no error was shown.

Ground 12

119 The appellant submitted that the Tribunal erred in law for breach of procedural fairness for bias against the appellant and her solicitor.

120 The appellant listed in her submissions numerous matters which it said supported her claim of bias, although she never identified whether she was asserting actual or apprehended bias. As her list included various observations and findings contained in the Tribunal's reasons, we assume the appellant is asserting actual bias (since the time for "apprehension" had passed and no application for recusal was made prior to the publishing of the principal decision).

121 Gleeson JA set out a summary of the principles relating to actual bias in *Collier v Country Women's Association of New South Wales* [2018] NSWCA 36 Gleeson JA at [27]. His Honour said (footnotes omitted):

> "[27] In Reid v Commercial Club (Albury) Ltd, the following summary of principles was stated:
>
> > '[68] A finding of actual bias is a grave matter: Sun v Minister for Immigration and Ethnic Affairs (1997) (Sun v Minister) 81 FCR 71 at 127 per Burchett J. Authority requires that an allegation of actual bias must be distinctly made and clearly proved; that such a finding should not be made lightly; and that cogent evidence is required: South Western Sydney Area Health Services v Edmonds [2007] NSWCA 16 at [97] and the authorities there cited.
> >
> > [69] Where the issue is actual bias in the form of prejudgment, the appellant had to establish that the primary judge was "so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented": Minister for Immigration & Multicultural Affairs v Jia Legeng [2001] HCA 17; 205 CLR 507 at [72] per Gleeson CJ and Gummow J (Hayne J agreeing at [176]). See also Kirby J at [127].
> >
> > [70] As Gleeson CJ and Gummow J observed in that case at [71]:
> >
> > > 'The question is not whether a decision-maker's mind is blank; it is whether it is open to persuasion.'
> >
> > [71] In the same case, Hayne J noted at [185] the several distinct elements underlying the assertion that a decision-maker has prejudged or will prejudge an issue, or the assertion that there is a real likelihood that a reasonable observer might reach that conclusion. The first is the contention that the decision-maker has an opinion on a relevant aspect of the matter in issue in the particular case. The second is the contention that the decision-maker will apply that opinion to the matter in issue. The third is the contention that a decision-maker will do so without giving the matter fresh consideration in light of whatever may be the facts and arguments relevant to the particular case.
> >
> > [72] His Honour observed at [186] that allegations of actual bias through prejudgment often fail at the third step he had identified. This was because notwithstanding whatever expression of preconceived opinions by the decision-maker, it does not follow that the evidence will be disregarded.
> >
> > [73] The test of actual bias in the form of prejudgment requires an assessment of the state of mind of the judge in question: Michael Wilson & Partners Ltd v Nicholls (2011) 244 CLR 427; [2011] HCA 48 at 437 [33]. However, actual bias need not be confined to an intentional state of mind. Bias may be subconscious, provided it is real: Bilgin v Minister for Immigration & Multicultural Affairs (Bilgin v Minister) (1997) 149 ALR 281 at 289–290 per Finkelstein J; Sun v Minister at 127 per Burchett J and 135 per North J. As Finkelstein J said in Bilgin v Minister at 290:

> 'The wrong involved is the failure to decide a case impartially. Whether that failure was deliberate or not should be beside the point insofar as the validity of the decision is concerned.'"

122 In our opinion the appellant's assertion of bias has not been distinctly or clearly established, nor is it supported by cogent evidence.

123 It is true that the Tribunal expressed dissatisfaction with various aspects of the presentation of the appellant's case, a view that had an evident and intelligible basis. The expression of those views is not evidence at all, let alone cogent evidence, that the Tribunal Member was biased against the appellant or her solicitor. The Tribunal Member simply expressed the difficulties in following and being able to understand the appellant's case as expressed orally and in writing and is not any evidence that the Tribunal did not bring an independent mind to the legal and factual disputes between the parties.

124 That independent mind is borne out by the manner in which the Tribunal dealt with the issues in dispute and the reasons given for deciding those issues. The fact that rent was prima facie outstanding was never an issue in the proceedings, the appellant's case really being by way of counter claims for an amount greater than the rent. Those claims failed for a number of reasons which included the failure by the appellant to prove she lost the alleged proposed sub-tenants by reason of the wrongful actions of the respondent. On that issue, for example, the Tribunal gave clear and cogent reasons for the rejection of the appellant's causation case, rooted in the lack of any reliable evidence led by the appellant (the bulk of her case being reliant upon her uncorroborated testimonial evidence in circumstances where the Tribunal made an adverse credit finding against the appellant), the contemporaneous documents tendered by the respondent and the lack of any evidence being called from the putative sub-tenants (which one would ordinarily have expected to be led by the appellant).

125 This ground fails.

Ground 15

126 The appellant submitted that the Tribunal erred in law (at [137]-[139] of the principal decision) by not finding unconscionable conduct (under the RLA) and not finding a major failure (under the ACL).

127 In support of this submission the appellant relied upon the evidence of Mr Boers to the effect that, in his opinion, there had been some alterations in the premises which affected the fire exit paths which “may” (not “did”) have compromised the safety of anyone using that space, and that the premises did not have “all required approvals”.

128 It is not clear whether the Tribunal directly addressed this allegation in terms of whether it amounted to unconscionable conduct (to have leased the premises to the appellant whilst those alleged defects existed). But the allegation goes nowhere because even if the matters alleged amount to unconscionable conduct, the Tribunal found that the appellant did not prove that that unconscionable conduct caused the appellant any damage.

129 The Tribunal said:

> “137 Mr Boer's evidence tried to establish an issue with the fire exit paths in the premises. Even if the Tribunal accepted this was an issue, which the lessee discovered after vacating the premises, there is no proof that this had any bearing on the potential sub-tenants choosing not to rent the kitchen. It also has no bearing on the lessee's business as she never intended to use the kitchen in her own clothing business. The only risk from this alleged fire exit issue was the potential for the local council to take some action about it: 3 hrs, 58 mins to 4 hrs.
>
> 138 There is no evidence that the local council took any steps towards enforcement action while the lessee was in occupation of the premises.
>
> 139 Even if this fire exit issue was proved and impacted the lessee's ability to trade she could have relied on the 'out clause' namely Part 25 of the lease: TB487-488.
>
> …
>
> 148 There is no evidence to support a finding that the lessee could not rent out the kitchen "as a result of' or "because of' or "by reason of' any act or omission of the lessor or otherwise because of any unproved issues with the fire exits or kitchen equipment.”

130 Insofar as the appellant’s causation case was encompassed by Ground 11, we have dismissed that Ground and therefore this ground, even if made out, would go nowhere. Insofar as the appellant’s causation case on this ground went beyond the matters alleged in Ground 11 (it is not clear to us that the appellant’s causation case did include fire safety issues as they are not mentioned in the appellant’s “Table of evidence by appeal grounds – SFV v Oldstream NCAT Appeal Panel 3/12/21” in relation to Ground 11), no appeal

point is taken in relation to the findings we have set out at [129] above and we were not taken to the evidence (if it existed) to support that causation case.

Ground 16

131 The appellant submitted that the Tribunal erred in law in failing to consider certain alleged relevant factors (namely bushfire smoke and the Covid-19 pandemic).

132 The ground fails because, contrary to the submission, they were considered.

133 The Tribunal said:

> "25 It must be remarked that the presentation of the lessee's case did not assist the Tribunal to resolve the proceedings in a quick, just nor cheap manner which was in complete contrast to the assistance the lessor's representatives gave the Tribunal. The lessee raised matters in her written submissions which were not raised in the final hearing, such as … Another example is stating, for the first time in closing written submissions, that the "Tribunal may properly take notice of factors arising in the retail market in December 2019 to February 2020, a period in which the lessee admitted her business had long since "failed" despite paying no rent at that time. These factors were submitted to include the bushfires in NSW and the Covid 19 emergency which the lessee either erroneously or misleadingly submitted started "hard and soft lock downs from mid February 2020 onwards": paragraph 12. There is absolutely no evidence that the bushfires impacted the lessee's business and there were no lockdowns in NSW (or elsewhere in Australia) until mid-March 2020, about a month after the lessee vacated the premises. In any event, it is unknown how the lessee wanted the Tribunal to use findings that the bushfires and Covid impacted the lessee's business in any way. The lessee submitted "SFV would have provided evidence of these matters with sufficient notice": paragraph 13. Notice of what? Notice by the Tribunal to the lessee in case the lessee thought of more possible causes of action after the end of the final hearing of her second claim? In any event it would be unlikely any evidence could prove a link between regional bushfires with an inner city retail lease or a pandemic which impacted retailers about a month after this lessee vacated her premises. Furthermore it is impossible to guess how the bushfires or a pandemic could be the basis of the lessor compensating the lessee for misleading or unconscionable conduct. Is the suggestion the lessor knew there would be regional bushfires or a pandemic in China (in February 2020 as there was no pandemic in NSW in February 2020), and failed to tell the lessee about these?
>
> …
>
> 144 In a request for rent reduction sent to the lessor on 28 November 2019, when she had already stopped paying rent, she cited her inability for using the roof terrace as the reason she should get a rent reduction: TB847-848. She did not mention any ventilation or rangehood issues, nor did she mention the newly invented justifications for her business failing raised for the first time in her closing written submissions namely bushfires."

134 The appellant submitted on appeal that its submissions-in-chief to the Tribunal referred to a “partial mitigation” defence. But there was no duty to mitigate. The respondent’s claim was for rent due under the lease, not damages for breach of the lease. The issue of mitigation does not arise in the former case absent some contractual obligation to the contrary (which was not alleged).

135 The appellant submitted on appeal that “in respect of bushfire noxious smoke – *res ipsa loquitur* impact on a clothing retail business”. Res ipsa loquitur is a tortious principle inapplicable to a claim for rent under a contract (the lease) or the appellant’s counter claims.

136 The appellant also refereed to various public statements by a number of institutions (such as NSW Health) concerning Covid but never addressed the Tribunal’s factual finding that there was no evidence that either the bushfires or Covid had any effect on the appellant’s business or, assuming they did, how that could legally reduce the rent owed, or how it formed part of the appellant’s case against the respondent.

137 In any event, the evidence on this point provided in the Appeal Book does not seem to have been tendered to the Tribunal and would not be admissible on this appeal because it has not been proven to have not been reasonably obtainable at the time of the hearing before the Tribunal – see cl 12(1)(c) of Sch 4 of the NCAT Act.

Conclusion

138 As all grounds of appeal in the principal appeal have failed the appeal should be dismissed

The Costs Appeal

139 Ground 17 of the principal appeal related to costs and will be dealt with now. The grounds of the costs appeal will be dealt with after that.

Ground 17 of the principal appeal

140 Ground 17 said that orders 4, 5, 6 and 7 of the Tribunal erred in law for “unreasonableness”.

141 As there are orders numbered 1-7 in the principal decision, and only orders numbered 1-4 in the costs decision, we assume Ground 17 refers to orders 4-7 of the principal decision. Those orders were:

> "4. Oldstream Pty Ltd may make a cost application for costs in any or all of proceedings COM20/31056, COM20/44840 and COM20/07370. This must be filed and served by 27 September 2021. Any evidence, such as Calderbank offers, which are relied on in the cost application, must be attached to the submissions.
>
> 5. If Ms Freeman-Vagg opposes the cost orders sought, she is to file and serve her submissions by 11 October 2021 setting out the basis upon which she opposes the cost order.
>
> 6. Both parties to express their attitude to the Tribunal disposing of a hearing on costs and determining the cost application on the papers.
>
> 7. If no cost application is made, the Tribunal will order Ms Freeman-Vagg pay Oldstream Pty Ltd's legal costs of COM20/44840 on the ordinary basis, as agreed or assessed."

142 Orders 4-6 were directions, and we do not understand what possible legal error could or did arise from the making of those directions. A costs application was made, and so Order 7 became otiose.

143 The appellant submitted that Orders 4-7 "are premised on unreasonable and/or unlawful findings about the presentation of the Court Book and the conduct of the matter in" (a number of circumstances were then cited but need not be set out here).

144 We reject this submission. The directions were made because the appellant was unsuccessful in the second and third proceedings and withdrew the first proceedings. Hence, the respondent was entitled to make an application for costs and the directions were made to ensure procedural fairness for the parties in determining the costs applications.

The Tribunal's Costs Decision

145 It will be recalled that the third proceedings (when the appellant was legally represented) were essentially a repeat of the first proceedings (when the appellant was not legally represented and withdrew her claim at the end of the hearing). There was no substantive defence to the second proceedings (the respondent's claim for arrears of rent) other than the off-setting claims made by the appellant in the third proceedings.

146 Given that context, the Tribunal determined the costs issues in the third proceedings first, then the first proceedings (on the basis there was substantial overlap between the first and third proceedings), and then the second proceedings.

147 In the third proceedings, the Tribunal ordered the appellant to pay the respondent's costs on the indemnity basis as agreed or assessed. The Tribunal correctly held that as the appellant claimed more than $30,000 rule 38 of the Civil and Administrative Rules 2014 (the "NCAT Rules") applied, thus displacing the need to prove special circumstances.

148 The first relevant principle (applied correctly by the Tribunal) in such a case is that costs should generally follow the event unless there be good reason to the contrary such as the existence of disentitling conduct by the respondent.

149 The Tribunal went further and accepted the respondent's submissions, based principally upon a number of passages in *Mendonca v Tonna* [2017] NSWCATAP 176 at [60]-[64], that the respondent should be awarded indemnity costs.

150 In relation to the costs of the third proceedings the Tribunal said:

> "37 The Tribunal accepts that the lessee's application was groundless, without substance, hopeless or so weak as to be futile. The Tribunal detailed its assessment of the lessee's hopeless claim throughout the Decision including at [119], [122], [125) and [148].
>
> 38 The Tribunal accepts that the second application was essentially the same as the first application, which the lessee withdrew at the last moment, after the final hearing was concluded, and therefore accepts that the second set of proceedings unnecessarily prolonged the proceedings and constituted unreasonable conduct.
>
> 39 The Tribunal already accepted at [54], [56], [58)]and [59] that the lessee altered her evidence and was not wholly honest under her affirmation, and assessed the lessee as "dishonest, evasive and unreliable" at [116].
>
> 40 The Tribunal accepts it should, in the exercise of its discretion, made an award of costs in the lessor's favour on the indemnity basis. The circumstances outlined by the Appeal Panel in *Medonca v Tonna* have been made out and given the conduct of the matter it is appropriate the lessor should have its costs on an indemnity basis."

151 The Tribunal rejected an application made by the respondent that the appellant's solicitor pay the costs of those proceedings, and no appeal has been brought from that decision.

152 As for the first proceedings, the Tribunal ordered that each party was to pay their own costs other than for the three-hour hearing on 26 August 2020. The Tribunal ordered the appellant to pay the costs of the three-hour hearing on 26 August 2020 on the ordinary basis as agreed or assessed.

153 In relation to the costs of the first proceedings the Tribunal said:

> "43 The Tribunal accepts it could award costs in favour of the lessor in COM20/07370. Much if not all of the arguments made in the first application were repeated in her second application, so the time spent preparing for the hearing on 26 August 2020 was not wasted as they needed to be repeated in the April 2021 hearing. Also the lessee was self-represented at the August 2020 hearing and could have the advantage of claiming, although she made no such submission, that she did not understand how hopeless was her claim until she got legal representation. Once she obtained legal representation she certainly should have been made aware her claim was hopeless.
>
> 44 However there were costs thrown away by the lessor on the day of the final hearing itself, which could not be incorporated into the second hearing (in the same way the Tribunal has held the preparation could). The lessor was required to appear at the final hearing and cross examine the lessee and present its submissions, only to have the lessee recognise the futility of her claim and withdraw it. These costs thrown away of the lessor appearing on 26 August 2020 are costs the lessee should pay.
>
> 45 Even though the claim exceeded $30,000 and ordinarily costs should follow the event for all of the withdrawn proceedings, because the lessee was self-represented and withdrew her claim before the Tribunal determined it, the Tribunal exercises its discretion not to award all of the costs incurred in COM20/07370 and instead order each party to pay their own costs except for the three hour hearing itself, which were thrown away by the lessee's very late withdrawal."

154 In the second proceedings, to which rule 38 did not apply, the Tribunal found that special circumstances existed and awarded costs to the respondent.

155 In relation to the costs of the second proceedings the Tribunal said:

> "47 The Tribunal accepts special circumstances exist such that an award of costs in the lessor's favour, in the lessor's case, is appropriate.
>
> 48 The Tribunal agrees there was no real defence to the rental arrears claim other than the success of the lessee's own claim, which was utterly hopeless: see Decision at [70].
>
> 49 Had the lessee not continued to press her misconceived claim which certainly lacked substance, the lessor would not have been put to the expense of prosecuting its straightforward rent arrears claim. The lessee's conduct in pressing a claim with no tenable basis in fact or law constitutes special circumstances and accordingly the lessor should be entitled to its costs of the arrears claim. On (sic) the ordinary basis."

156 The finding of special circumstances appeared to be an acceptance of the respondent's submissions which were quoted at [46] of the Tribunal's costs decision.

The Grounds of the Costs Appeal

157 The grounds set out in the Notice of Appeal in the costs appeal were:

> "The Costs Decision is wrong by reason of the errors of law, and unfairness / unreasonableness, as outlined in the reasons for main appeal 2021 /00283619 set for hearing on 2.15pm 14/1 /22 ("Main Appeal"), of the decision 6/9/21 (the "Decision"). In particular false premises in the Costs Decision include:
>
> 1. At [7], the Tribunal notes appellant's costs submissions dated 11/10/21 yet omits at [4] of those submissions "'a copy of the [Main Appeal 5/10/21] grounds are attached, which includes a list of new material sought to be allowed with leave of the Appeal Panel" being 35 pages long. The Tribunal claims - at [22], [7] and [24] and implicitly at [32] - to not have seen any of this 35 page document relating to recusal of that Tribunal Member on the matter of costs (e.g. bias on face of the record) to find the Tribunal (not the Appeal Panel) may make the Costs Decision: Refer [27] to [30];
>
> 2. Appellant's expert evidence (Saz and Zadravec) is excluded in circumstances where the standard direction notice for witnesses to be duly notified was not followed by Oldstream, with that exclusion relied upon by the Tribunal finding at [37-38], [48]. Boers expert planning evidence of illegal removal of fire exits is also ignored;
>
> 3. Evidence of the appellant herself is excluded despite prior good character, and corroboration from independent materials, including Saz and Zadravec Expert Evidence ([39] Costs Decision);
>
> 4. Uncritical adoption of Oldstream submissions mis-describing the appellant case as "hopeless" and "groundless" and "without substance" at sub paragraphs 11-15 of [34] and for example [37] [48] and [49] after unreasonable exclusions of expert evidence;
>
> 5. Finding the solicitor for the appellant had no grounds for the "second application" at [41], [48-49], which was "essentially the same as the first application" by the appellant (at [38]) who in fact at that earlier time was unrepresented, with no sworn evidence or legal submissions regarding absence of real estate agent as witness for Oldstream (Jones v Dunkel)."

158 The Notice of Appeal also sought leave to appeal on the following basis:

> "1. By reason of the grounds of this appeal of the Costs Decision outlined above - for example failure of the Tribunal to take into account the 35 page Main Appeal grounds submitted with its costs submissions on 11 October 2021 - refer this critical omission in Costs Decision at [22] and [7] and [24] and implicitly at [32] - to the effect of not receiving any of the 35 page document highly relevant to recusal by the Tribunal Member on the matter of costs - for example bias on face of the record - and then finding the Tribunal (not the Appeal Panel) should make the Costs Decision - refer [27] to [30];
>
> 2. By reason of the grounds of the Main Appeal dated 5/10/21, for breach of procedural fairness including bias, and errors of law, such that the Decision

(6/9/21) should be overturned, and thus it follows the orders in the Costs Decision are also unfair and unjust."

159 As best we understand them, those grounds boil down to (using the appellant's terminology as far as possible):

(1) The costs decision is wrong by reason of the errors of law, and unfairness / unreasonableness, as outlined in the reasons for main appeal.

(2) The costs decision failed to take into account relevant considerations or took into account irrelevant considerations (proceeded on the "false premises") being:

(a) failing to consider a copy of the [Main Appeal 5/10/21] grounds including a list of new material sought to be allowed with leave of the Appeal Panel;

(b) failing to consider the (wrongful) exclusion of the evidence of Messrs Saz and Zadravec, and the (wrongful) ignoring of Mr Boers evidence regarding the fire exits;

(c) taking into account (in terms of the "uncritical adoption" of) Oldstream's submissions which allegedly mis-described the appellant's case as "hopeless", "groundless" and "without substance" after the Tribunal's unreasonable exclusion of the appellant's expert evidence.

(3) The costs decision proceeded on a material error of fact in that the Tribunal found that the appellant's solicitor had no grounds for the third proceedings because they were essentially the same as the first proceedings (the error being that the first proceedings were brought by the appellant when she was unrepresented, with no sworn evidence or legal submissions regarding the absence of certain witnesses who should have been called by the respondent).

(4) The Tribunal Senior Member erred in failing to recuse herself from deciding the question of costs.

160 In general terms, since the power to award costs is discretionary, the "constrained" or "deferential" standard of appellate review adopted in *House v The King* applies – *McInnes v Rheem Australia Pty Limited* [2021] NSWCA 89 per Gleeson JA, with whom Bell P (as his Honour then was) and Payne JA agreed, at [22]. To establish such an error, it is not enough that an Appeal Panel might conclude that it would have exercised the discretion differently if the discretion had been conferred on it in the first instance.

161 Costs issues also fall within the category of matters of practice and procedure and hence there is the "added restraint" and "particular caution" which an

Appeal Panel should exercise in reviewing a decision on such matters – *McInnes* at [23].

162 Taking into account those considerations, and the parties' submissions, all of these grounds of appeal must fail, and our reasons may be shortly stated.

Ground 1

163 As the principal appeal failed the identified basis for this ground is not made out.

Ground 2

164 None of the matters identified in Ground 2 are relevant on the question of costs and this ground must be dismissed.

Ground 3

165 The alleged material error of fact relied on by the appellant does not exist. The first and third proceedings were, in substance, essentially the same and that observation was not incorrect. The fact the appellant was unrepresented in the first proceedings is irrelevant, and the submissions referred to (such as that concerning *Jones v Dunkel*) have not been accepted on this appeal and thus were not wrongly ignored by the Tribunal.

Ground 4

166 There was no basis for the Senior Member to have recused herself from deciding the question of costs. Bias was and has not been established, and it is by far the preferable course for the Tribunal which decided a matter to decide the question of costs even if an appeal from the principal decision been lodged prior to any decision on costs.

Conclusion

167 As all grounds of appeal in the costs appeal have failed the appeal should be dismissed.

Costs of the Appeals

168 On both 29 October and 21 December 2021, the Appeal Panel (differently constituted) directed both parties to include with their principal submissions any submissions on costs they desired to make in respect of the appeals.

169 In his submissions dated 17 December 2021 and 24 January 2022 the respondent sought costs against the appellant in both appeals on the indemnity basis, and that there be an order that the appellant's solicitor be jointly and severally liable to the respondent for those costs. Submissions were made in support of those orders.

170 The appellant replied to the costs submissions of the appellant dated 17 December 2021 in her written submissions dated 10 January 2022, and by email to the Tribunal and the respondent's solicitors dated 29 January 2022. The matter of costs was also the subject of oral submissions at the hearing of this appeal.

171 As we have earlier noted, the principal appeal was really two appeals, being appeals from the decision made in each of the second and third proceedings, and the costs appeal was really three appeals, being appeals from the decision on costs in each of the first, second and third proceedings.

Costs of the Principal Appeal

172 As for the principal appeal, the only substantive argument related to the decision dismissing the third proceedings (the appellant's counter claims), it being the only answer to the respondent's claim for outstanding rent in the second proceedings. Therefore, as a matter of substance, we shall treat the principal appeal as one appeal even though it concerned more than one, separate proceeding before the Tribunal at first instance.

173 The respondent submitted, and we accept as correct, that the amount claimed or in dispute in the principal appeal was greater than $30,000. This was because the appellant's claim for compensation in the Tribunal in the third proceedings was for a sum greater than $30,000 and the order she asked (in the appellant's written submissions) the Appeal Panel to make if successful on appeal was for the sum of approximately $122,000.

174 It follows that, per *Allen v TriCare (Hastings) Ltd* [2017] NSWCATAP 25, we may award costs in the principal appeal even in the absence of special circumstances. The appellant does not submit to the contrary.

175 In such cases the ordinary rule is that costs follow the event, and no submission has been made against that proposition, nor was any submission made that the respondent was guilty of some disentitling conduct.

176 The real questions are whether those costs should be on the indemnity or ordinary basis and whether the appellant's solicitor should be jointly and severally liable for those costs.

Indemnity Costs

177 The respondent cited *Mendonca* on the appeal (as it had at first instance) and particularly paragraphs [60]-[64] in support of its application for indemnity costs. In those passages the Appeal Panel said:

> "60. Other than in relation to the unreasonable refusal of a genuine offer of settlement, one circumstance in which indemnity costs may be awarded is when a case is commenced or continued where there is no chance of success (*Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd (No 2)* [2009] NSWCA 12 at [4]), such as where the claim is "without substance", "groundless", "fanciful or hopeless" or so weak as to be futile, such as where a limitation period is obviously at an end: *Hillebrand v Penrith Council* [2000] NSWSC 1058. However, mere weakness of a case will not be sufficient to warrant an exercise of the discretion to award indemnity costs: *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534.
>
> 61. In this case, Dr Mendonca's fundamental case is that she has a residential tenancy agreement with Mr Tonna and that he owes a significant amount of rent arrears. While some aspects of the proceedings before the Tribunal clearly lacked merit - in particular the application to reinstate proceedings that had been withdrawn – we do not consider that her case overall was so weak that it would have had no chance of success had her applications not been withdrawn.
>
> 62. Another circumstance which may warrant an order for costs on an indemnity basis is where the proceedings amount to an abuse of process: *Baillieu Knight Frank (NSW) Pty Ltd v Ted Manny Real Estate Pty Ltd* (1992) 30 NSWLR 359 at 362. Examples of abuse of process include where the proceedings are commenced other than in good faith or for an ulterior or collateral purpose: *Palmer v Gold Coast Newspapers Pty Ltd* [2013] QSC 352; *Packer v Meagher* [1984] 3 NSWLR 486 at 500. Regardless of whether there is in fact a residential tenancy agreement between the parties, we are not satisfied that Dr Mendonca's applications either individually or collectively were made in bad faith or amount to an abuse of process.
>
> 63. An award of indemnity costs may also be made for unreasonable conduct. Such conduct may include unnecessarily prolonging the proceedings, (*Degmam Pty Ltd (in liq) v Wright (No 2)*, at 358); unfounded allegations of fraud or improper conduct (*Maule v Liporoni (No 2)* (2002) 122 LGERA 216 at 229); deliberate or high-handed conduct (*Rouse v Shepherd (No 2)* (1994) 35 NSWLR 277) and behaviour which causes unnecessary anxiety, trouble or expense, such as the failure to adhere to proper procedure (*FAI General Insurance Co Ltd v Burns* (1996) 9 ANZ Ins Cas 61-384). Disregard of

court orders may justify an indemnity costs order (*O'Keefe v Hayes Knight GTO Pty Ltd* [2005] FCA 1559 at [35]). Perverse persistence by an unrepresented litigant with a hopeless application may also do so: *Rose v Richards* [2005] NSWSC 758.

> 64. Misconduct of a serious nature, such as fraud, perjury, contempt or dishonest conduct may also justify costs being awarded on an indemnity basis: *Berkeley Administration Inc v McClelland* [1990] FSR 565 at 568–569; *Ivory v Telstra Corporation Ltd* [2001] QSC 102); *Vance v Vance* (1981) 128 DLR (3d) 109 at 122."

178 The respondent submitted that the principal appeal had no chance of success because it was without substance, was groundless, fanciful or hopeless or so weak as to be futile (*Mendonca* at [60]). We shall return to this submission shortly.

179 The respondent also submitted that there had been unreasonable conduct by the appellant (*Mendonca* at [63]). The unreasonable conduct was said to be the bringing of the appeal, and the commencement of the third proceedings in light of her withdrawal of the first proceedings. This latter matter is not relevant to the costs of the appeal and shall not be further considered. As to the first matter, we do not agree that the mere bringing of an appeal (without more) amounts to the requisite type of unreasonable conduct. The mere bringing of an appeal is not the type of conduct exampled in *Mendonca* at [63]. We do not accept this submission.

180 The respondent submitted that there had been misconduct of a serious nature, such as fraud, perjury, contempt or dishonest conduct (*Mendonca* at [64]). Whilst that was true in the proceedings before the Tribunal, those were matters relevant to the costs issues in the first instance proceedings. But here, the respondent would be required to demonstrate that such conduct occurred in relation to *the appeal* if it wished to rely on such matters to support its claim for costs of the appeal. There is no such conduct of which we are aware and none was identified. We do not accept this submission.

181 Returning to the submission that the principal appeal was without substance, was groundless, fanciful or hopeless or so weak as to be futile, we do not accept that submission. The appellant's grounds of appeal and the supporting submissions were weak, we agree, but not so weak as to fall within those descriptors.

182 We appreciate that the Tribunal found that the appellant’s case at first instance did fall within those descriptors. However, no error was demonstrated in the Tribunal’s decision and that decision was one for the Tribunal to make. It is for us to decide the strength of the appeal, and in our view we would not regard it as so weak as to attract indemnity costs. The respondent should have its costs, but they should be paid on the ordinary basis.

183 That leaves the question of whether the appellant’s solicitor should be jointly and severally liable for those costs.

184 That question has two parts: does the Tribunal have power to order costs against non-parties (including legal practitioners acting for a party) and, if so; what principles apply in exercising that discretion.

185 The two parts of that question overlap and shall therefore be considered together.

Costs Against a Non-Party Solicitor

186 The NCAT Act authorises us to “determine by whom and to what extent costs are to be paid” – s 60(4)(a) of the NCAT Act - but is otherwise silent as to whom “by whom” refers and as to the principles to apply in exercising that discretion if it is to be exercised against non-parties.

187 There are only four decisions in the Tribunal on this question that the parties have cited or that our researches have found.

188 After a brief discussion of these four cases we will first turn to the issue of whether there is power to award costs against a non-party (which would include legal practitioners), and then the principles to apply to costs applications against non-parties (generally speaking) followed by the principles to apply to costs applications against legal practitioners specifically.

189 A single Senior Member of the Tribunal considered that the Tribunal had power to make such an order in *Diaspora Holdings Pty Ltd v The Owners – Strata Plan No. 68608* [2018] NSWCATCD 52. The Tribunal considered the differences between s 60(4)(a) of the NCAT Act and s 98(1)(b) of the *Civil Procedure Act 2005* (NSW) (the “CPA”) which was in the following terms:

> (1) Subject to rules of court and to this or any other Act—

(a) costs are in the discretion of the court, and

(b) the court has full power to determine by whom, to whom and to what extent costs are to be paid, and

(c) the court may order that costs are to be awarded on the ordinary basis or on an indemnity basis.

190 After noting that the word "full" preceded the word "power" in s 98(1)(b) of the *Civil Procedure Act 2005* (NSW), but does not do so in s 60(4)(a) of the NCAT Act, the Tribunal said:

> "113. Further, I find that the NCAT Act does not limit an award of costs to be made against a party only and that in consequence the Tribunal does have power to make a costs order against the solicitors even though they are not a party to the proceedings. Subsection 60(4) confers a power upon the Tribunal to determine: "by whom and to what extent costs are paid". I respectfully adopt the NSW Court of Appeal's interpretation of that statutory language (also used in s 98(1)(b) of the *Civil Procedure Act*) as extending to non-parties: *Heath v Greenacre Business Park Pty Ltd* [2016] NSWCA 34 at [33]."

191 The Tribunal did not discuss what principles ought to apply to the exercise of that power, perhaps because the circumstances were simple in that the solicitor was held not to have had valid instructions to commence proceedings for a party. Such reflects the general law position in those circumstances. As Emmett AJA observed in *Australian Federation of Islamic Councils Inc v Farrell* [2016] NSWCA 256 at [30]:

> "Ordinarily, where solicitors commence proceedings without a proper retainer and the commencement of the proceedings is not ratified, it should be common for an order for costs to be made against the solicitors in favour of the defendant. In such circumstances, the defendant has been brought to court and incurred costs in proceedings that have been dismissed. Ordinarily, such a defendant would be out of pocket unless the solicitors who acted without instructions were required to bear the costs. However the question of costs is a matter for the exercise of discretion."

192 In *Amir Ashrafinia v Mohammad Reza Ashrafinia; Parvaneh Karami Fakhrabadi v Mohammad Reza Ashrafinia* [2012] NSWSC 500 Slattery J said at [57]:

> "The applicable principles may be concisely stated. The common order or ordinary rule when a solicitor has taken unauthorised steps in litigation, is to require the solicitor to personally pay the costs they have caused the parties to incur up until the order is made: *Hawksford v Hawksford* [2005] NSWSC 463 at [111] per Campbell J; *Hillig v Darkinjung Pty Ltd (No 2)* [2008] NSWCA 147 at [47]–[52] per McColl JA (Beazley and Giles JJA agreeing); *A W & L M Forrest Pty Ltd v Beamish* (1998) 146 FLR 450 at 458 per Young J. However, on sufficient grounds being shown the court may depart from the ordinary rule: *A W & L M Forrest Pty Ltd v Beamish* (1998) 146 FLR 450 at 458 per

> Young J; *Hillig v Darkinjung Pty Ltd (No 2)* [2008] NSWCA 147 at [51]–[52] per McColl JA, Beazley and Giles JJA agreeing. Any costs the subject of a cost order may be on an indemnity basis or on the ordinary basis: *A W & L M Forrest Pty Ltd v Beamish* (1998) 146 FLR 450 at 460 per Young J."

193 Nevertheless, on appeal from the Senior Member's decision in Diaspora Holdings, in Preston v Diaspora Holdings Pty Ltd; Diaspora Holdings Pty Ltd v Owners Corporation of Strata Plan 68608 [2019] NSWSC 651, Parker J expressed reservations about the Tribunal's holding that it had power to order costs against a non-party. His Honour said:

> "[232] The second point concerns the Tribunal's power to make the order that the solicitor pay the costs of the proceedings which usually follows a successful challenge. This was considered by the Tribunal in the judgment under appeal (at 36–37 [108]–[113]). The Tribunal considered that the power to award costs in s 60(4)(a) is wide enough. The Tribunal's conclusion was that, on the analogy with the curial power to award costs (*Civil Procedure Act 2005* (NSW), s 98), the Tribunal could make a costs order against Clarke Kann as a third party.
>
> [233] I have, with respect, some reservations about this. As the Tribunal noted, the two sections are not precisely the same. More importantly, there is a difference in context. Section 60 is expressed to be subject to a general rule that each party bear that party's own costs. The relevant factors in determining whether to make a costs order as an exception to that general rule are all concerned with the nature of the proceedings and the conduct of the parties. This suggests that the Parliament may only have been contemplating costs orders against parties. In my view there is room for further debate on the question."

194 Ultimately his Honour did not need to decide that question, his Honour otherwise upholding the appeal and setting aside the costs order as a result.

195 The issue of a solicitor paying costs was also addressed in *1735 Pty Ltd v Chief Commissioner of State Revenue; 1735 Pty Ltd atf Bares Family Trust v Chief Commissioner of State Revenue (Costs)* [2021] NSWCATAD 134.

196 In that case the Senior Member held the Tribunal had power to order costs against a solicitor although without explicitly setting out the basis for such power other than a passing reference to s 60(4). In that case the Tribunal held that a firm of solicitors should pay some of the costs, the Tribunal stating:

> "120 In the circumstances, I find that Dandanis & Associates is jointly responsible with the Applicants for costs incurred by the Chief Commissioner in dealing with the summonses issued in January 2020 at the request of the Applicants without leave of the Tribunal; without any application for leave; notwithstanding that counsel for the Applicants informed the Tribunal at the end of the hearing on 6 December 2019 that the Applicants had closed their case in relation to documentary evidence; and having regard to the guillotine

> order of the Tribunal on 17 September 2019. I find the issuing of the summonses disregarded the Tribunal's consent orders and caused unnecessary trouble and expenses for the Chief Commissioner. The costs are awarded on an indemnity basis as agreed and in default of agreement as assessed."

197 In *The Owners Strata Plan No. 84751 v Karimbla Construction Services Pty Ltd* [2016] NSWCATAP 145 the Appeal Panel said at [122] (noting that the reference to s 80(4)(a) must be a typographical error – there is no s 80(4) - with the correct section being s 60(4)(a)):

> "As a professional legal practitioner, such conduct approaches professional negligence. In the circumstances, we are minded to order that the costs be paid by her personally. Such a power is available: s 80(4)(a) of the CAT Act. Before we determine whether this course is appropriate, and as the matter was not raised with the solicitor for the appellant at the hearing of the appeal, we think it only fair that she have an opportunity to make submissions on this issue."

198 The Appeal Panel did not discuss the issue further, and the solicitor concerned subsequently consented to an order that she indemnify her client for the costs her client was ordered to pay.

199 In a decision dealing with an application for costs *in favour* of a non-party, rather than *against* a non-party, a single Principal Member of the Tribunal determined that the Tribunal could not make a costs order *in favour* of a non-party under s 60 of the NCAT Act (*GZN* [2016] NSWCATGD 78). However, in undertaking a broader examination of the statutory limits of s 60, the Tribunal concluded that s 60 is limited to costs orders in respect of parties ([43]). In relation to the relevance of s 98 of the CPA, the Tribunal stated (at [41]):

> "… If s 60 of the CAT Act was intended to extend beyond parties, the legislature could have expressly provided for this, as in s 98 of the *Civil Procedure Act*. While s 60(4)(a) of the CAT Act gives a broad discretion to the Tribunal to "determine by whom and to what extent costs are paid" in similar terms to s 98 of the *Civil Procedure Act*, the difference is that subs 60(4)(a) of the CAT Act is only enlivened after the Tribunal determines to award costs under s 60(3) of that Act. In contrast, s 98 of the *Civil Procedure Act* includes this discretion as part of the jurisdictional basis for costs."

200 The reservations Parker J expressed are a valid basis upon which to exercise caution on this issue, especially in circumstances where, such as in the appeal before us, the parties did not address the issues that his Honour raised. The decisions discussed clearly illustrate his Honour's point that there is room for debate. However, on balance, we are of the view that s 60(4) of the NCAT Act

authorises the Tribunal to order costs against a non-party taking into account the principles applicable to statutory construction as set out in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28.

201 In that case the plurality said at [69] (footnotes omitted):

> "The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". In Commissioner for Railways (NSW) v Agalianos, Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed."

202 Coherence in the law is also relevant. In *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219; [2014] HCA 34 five justices said, in a unanimous judgment, at [42] (footnotes omitted):

> "The proposition just stated is a conclusion about the proper construction of the Act. As was said by four members of this court in Project Blue Sky Inc v Australian Broadcasting Authority, "[t]he meaning of [a] provision must be determined 'by reference to the language of the instrument viewed as a whole'". And an Act must be read as a whole "on the prima facie basis that its provisions are intended to give effect to harmonious goals". Construction should favour coherence in the law.

203 In our view s 60(4) of the NCAT Act authorises the Tribunal to order costs against a non-party for the following six reasons.

204 First, and most importantly, is the language of the section. In our view, the lack of the word "full" before "power" in s 60(4) signifies nothing in circumstances where, if the power were less than "full", the limitations on the power are not set out in the statute. Put another way, the phrase that the Tribunal may "determine *by whom*" costs should be paid without any following limitation as to the class of people against "whom" costs may be ordered is strongly indicative that no class of people (and most particularly non-parties) are excluded from the operation of that section.

205 Second, although this may be part of the first reason, to read a limitation into the section would be to add words to the section which are not present (see the quote at [213] below).

206 Third, the use of the word “whom” rather than the words “by which party” (or similar) is indicative that non-parties were to be included in the operation of the section.

207 Fourth, in terms of the purpose of the costs provision (to compensate parties for legal costs incurred) and coherence in the law (applied as a broad concept in this instance) it would seem logical that the Tribunal would be able to order costs against non-parties when all other NSW courts also have that power. Put another way, there would not seem to be anything about the cases determined within the Tribunal’s jurisdiction - in many of which the parties are entitled to legal representation of right and, where not so entitled, may be granted leave to have legal representation – which would logically suggest a basis for preventing the Tribunal ordering costs against non-parties (including legal practitioners) in the same circumstances as apply in those other jurisdictions in the absence of any express words in the NCAT Act limiting the jurisdiction to award costs.

208 Fifth, although Parker J was correct to observe at [233] that s 60 is expressed to be subject to a general rule that each party bear his, her or its own costs, costs may still be ordered against a party if special circumstances are made out pursuant to s 60(2). In addition, where r 38 of the NCAT Rules applies (as it does in this case), the general rule is displaced, and the usual order is that costs follow the event absent some disentitling conduct by the successful party – see *Thompson v Chapman* [2016] NSWCATAP 6 at [69] ff. Our point being that the general rule that parties bear their own costs is the subject of significant exceptions.

209 Sixth, we would apply, at least by analogy, the reasoning of Mason CJ and Deane J in *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 190–1; [1992] HCA 28 to the proper construction of s 60(4). In that case the High Court considered whether O 90 r 1 of the Rules of the Supreme Court of Queensland authorised the making of costs orders against non-parties. The terms of O 90 are assuredly different to the terms of s 60(4) of the NCAT Act, but their Honour’s reasoning as applied to that section is, in our view, equally applicable to s 60(4).

210 O 90 r 1 said:

> Subject to the provisions of the Judicature Act and these Rules, the costs of and incident to all proceedings in the court, including the administration of estates and trusts, shall be in the discretion of the court or Judge: Provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings of any right to costs out of a particular estate or fund to which he would be entitled according to the Rules heretofore acted upon in Courts of Equity: Provided also, that, subject to the next following Rule, when any cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the Judge by whom such cause, matter, or issue is tried, or the court, shall for good cause otherwise order.

211 Mason CJ and Deane J (who formed part of the majority) said:

> "According to their natural and ordinary meaning, the words of the rule are sufficiently expansive to enable the court to make an order for costs against a person, whether that person is formally a party to the proceedings or not. The jurisdiction and the discretion thereby conferred are not limited. Because they are not limited it is easy to postulate a variety of circumstances where an exercise of the jurisdiction against a non-party would be extravagant and unjust. However, the existence of that possibility provides no justification for the imposition by the courts, by way of implication, of an arbitrary limitation upon the general jurisdiction conferred by the rule. To do so would, as will appear, deny power to the court to order costs against a non-party in cases in which, in the interests of justice, such orders should be made. The inevitable answer to arguments directed to limiting curial jurisdiction based on the supposition that the jurisdiction might lend itself to abuse is that the court will and should develop principles governing the exercise of the discretion which will ensure that the jurisdiction is not exercised in such a way as to give rise to abuse. And that is the answer to the appellants' case to the extent to which it seeks to confine the scope of the jurisdiction by reference to arguments in terrorem."

212 And:

> "It is preferable to interpret the words of the rule according to their natural and ordinary meaning as conferring a grant of jurisdiction to order costs not limited to parties on the record and ensure that the jurisdiction is exercised responsibly."

213 Applying that reasoning to s 60(4), the words of the section are sufficiently expansive to allow for costs orders against non-parties, the possibility that the exercise of that jurisdiction might be extravagant provides no justification for the imposition, by way of implication, of an arbitrary limitation upon the general jurisdiction conferred by the section, and to do so would deny power to the Tribunal to order costs against a non-party in cases in which, in the interests of justice, such an order should be made.

214 In *FPM Constructions v Council of the City of Blue Mountains* [2005] NSWCA 340 Basten JA, with whom Beazley JA (as Her Excellency then was) and Giles JA agreed, applied the reasoning in *Knight* to the interpretation of s 148B of the *District Court Act 1973* (NSW) which was in the materially same form as the present s 98(1) of the CPA. His Honour held at [201]:

> "In Knight v FP Special Assets Ltd (1992) 174 CLR 178, the High Court held that a rule of the Queensland Supreme Court Rules permitting the costs of and incident to all proceedings to be in the discretion of the court was wide enough to allow an order to be made against a non-party. Section 148B is more explicit in its breadth than the Queensland rule so that the conclusion applies a fortiori. Further, as noted in the joint judgment of the whole Court in Owners of "Shin Kobe Maru" v Empire Shipping Co Inc (1994) 181 CLR 404 at 421:
>
> > 'It is quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words.'"

215 So here. In our view it is inappropriate to read s 60(4) by making implications or imposing limitations which are not found in the express words of the section. As there is no express limitation that "by whom" is limited to the parties, it would be inappropriate to imply that limitation.

216 His Honour continued in relation to the principles to apply in costs applications against non-parties generally, noting that in *Knight* the non-party against whom the primary judge ordered costs was the director and sole shareholder of one of the parties:

> "[210] It is clear that the categories of case which may attract the exercise of the power are by no means closed, nor should they be. Nevertheless, the requirements of justice should not be allowed to expand an exception to the general rule, so as to undermine the rule itself. What is significant from a survey of the cases in which orders have been made against non-parties is that they tend to satisfy at least some, if not a majority, of the following criteria:
>
> > (a) the unsuccessful party to the proceedings was the moving party and not the defendant;
> >
> > (b) the source of funds for the litigation was the non-party or its principal;
> >
> > (c) the conduct of the litigation was unreasonable or improper;
> >
> > (d) the non-party, or its principal, had an interest (not necessarily financial) which was equal to or greater than that of the party or, if financial, was a substantial interest, and
> >
> > (e) the unsuccessful party was insolvent or could otherwise be described as a person of straw.
> >
> > …

> [214] The criteria identified in *Knight v FP Special Assets* should not ultimately be treated as separate and independent factors. Each requires an evaluative assessment of factors which will clearly tend to interact. Nor should it be forgotten that the power is only to be exercised in exceptional cases. In many cases involving individuals in the superior courts the parties may lack the resources to meet the costs of the litigation if unsuccessful. Similarly, there will frequently be a non-party, be it a company officer or solicitor, who will be active in the conduct of the litigation and who will obtain some direct or indirect financial benefit from its success. The fact that it is entirely proper for legal practitioners to runs cases on a speculative basis, so long as satisfied that they have reasonable prospects of success, demonstrates that care must be taken not to apply the criteria mechanically. Careful attention is required to the conduct of the party said to be involved in the litigation and the nature of the "interest" in its outcome or subject-matter."

217 As [214] of his Honour's judgment says, sometimes those general principles were applied to solicitors although they mostly concerned others with a more direct interest in the litigation.

218 In relation to legal practitioners specifically (as a class of non-parties against whom costs orders may be made) the CPA contains s 99 which authorises it to order, in appropriate circumstances, that a barrister or solicitor pay costs or indemnify parties. Section 99 says:

> (1) This section applies if it appears to the court that costs have been incurred:
>
> (a) by the serious neglect, serious incompetence or serious misconduct of a legal practitioner, or
>
> (b) improperly, or without reasonable cause, in circumstances for which a legal practitioner is responsible.
>
> (2) After giving the legal practitioner a reasonable opportunity to be heard, the court may do any one or more of the following:
>
> (a) it may, by order, disallow the whole or any part of the costs in the proceedings:
>
> (i) in the case of a barrister, as between the barrister and the instructing solicitor, or as between the barrister and the client, as the case requires, or
>
> (ii) in the case of a solicitor, as between the solicitor and the client,
>
> (b) it may, by order, direct the legal practitioner:
>
> (i) in the case of a barrister, to pay to the instructing solicitor or client, or both, the whole or any part of any costs that the instructing solicitor or client, or both, have been ordered to pay to any other person, whether or not the solicitor or client has paid those costs, or

> (ii) in the case of a solicitor, to pay to the client the whole or any part of any costs that the client has been ordered to pay to any other person, whether or not the client has paid those costs,
>
> (c) it may, by order, direct the legal practitioner to indemnify any party (other than the client) against costs payable by that party.

219 There is no equivalent provision in the NCAT Act, but as one can see, s 99 prima facie extends the general law considerations applicable to s 98 and to which Basten JA referred in *FPM*. That is, there is conduct that falls within s 99 which may not fall within s 98.

220 It is correct to observe, of course, that neither s 98 nor s 99 apply to the Tribunal. But the exercise of the discretion as to costs against non-parties in the Tribunal cannot be exercised arbitrarily and the NCAT Act is silent as to the principles to apply. Mason CJ and Deane J said in *Knight* that the Queensland Supreme Court would and should develop principles governing the exercise of the discretion to ensure that the jurisdiction is not exercised in such a way as to give rise to abuse, and, in the absence of any statutory guidance in the NCAT Act the Tribunal should follow suit.

221 With that in mind, and taking into account the desirability of coherence (speaking broadly) in the law and no other obvious source of principle, it is our view that the Tribunal should apply, by analogy, the same principles applicable in the Supreme, District and Local Courts of NSW (touched on by Basten JA in *FPM)* in relation to applications for costs orders against non-parties generally speaking. In relation to applications for costs orders against legal practitioners in particular, the Tribunal should also apply by analogy the same principles applicable in the Supreme, District and Local Courts of NSW to such applications, namely those set out in s 99(1) of the CPA.

222 Of course, the application of those principles is subject to any statutory provisions relevant to costs as provided in the NCAT Act, and most particularly s 60(1)-(3). Put another way, the application of the principles to which we have referred cannot circumvent the requirements of s 60(1)-(3). Rather, if costs are able to awarded after the application of s 60(1)-(3), then regard may be had to the principles to which we have referred [not inconsistently with s 60(1)-(3)] in relation to any costs application made against a non-party.

223 Applying those same principles in the Tribunal will mean that non-parties (including solicitors) to litigation in the Tribunal will be subject to the same obligations and exposure to costs orders as they would be exposed to in the Supreme Court of NSW, no more and no less [subject to any requirements of the NCAT Act such as s 60(1)-(3)]. In that way the conduct of litigation (so far as non-parties are concerned) in NSW is coherent.

224 To the extent there are first instance decisions in the Tribunal in relation to costs orders against legal practitioners in which different criteria (such as "reasonableness" in Diaspora Holdings) are applied, we disagree with those decisions.

(i) That is, in relation to applications for costs against legal practitioners in the Tribunal, and in summary form, if it appears to the Tribunal that costs have been incurred by the serious neglect, serious incompetence or serious misconduct of a legal practitioner, or incurred improperly, or without reasonable cause, in circumstances for which a legal practitioner is responsible, then the Tribunal may, in the exercise of its discretion, exercise the power under s 60(4) to order the legal practitioner to pay costs.

225 We take the view for six reasons.

226 First, Mason CJ and Deane J said in *Knight* (see [211] above) that courts will and should develop principles governing the exercise of the costs discretion (against non-parties) to ensure that the jurisdiction is not exercised in such a way as to give rise to abuse. No reason presents itself to us why that same injunction should not apply to the Tribunal in the absence of statutory guidance as to the principles to apply.

227 Second, given s 99 operates against legal practitioners in the Supreme and District Courts, and against them in the kinds of civil proceedings listed in column 2 in Schedule 1 of the CPA in the Local Court, no reason presents itself why legal practitioners should be the subject of costs orders on any more or less onerous standard in the Tribunal than that provided by s 99 in those other courts.

228 Third, legal practitioners have the same professional obligations in relation to litigation in the Tribunal as they have to litigation in the courts of NSW under

the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 for solicitors and Legal Profession Uniform Conduct (Barristers) Rules 2015 for barristers. Relevant duties in this context of possible costs orders are the duties of independence, duties to the court ("court" is defined in both sets of rules to include tribunals), the responsible use of court process and privilege and the integrity of evidence. The obligations under those rules might, generally speaking, be relevant to allegations of the type referred to in s 99.

229 Fourth, legal practitioners are subject to similar statutory duties in the Tribunal (imposed by s 36 of the NCAT Act) as they are in the Supreme, District and Local Courts (imposed by s 56 of the CPA), and such duties might, generally speaking, be relevant to allegations of the type referred to in s 99.

230 In the Tribunal legal practitioners are obliged to co-operate with the Tribunal to give effect to the guiding principle to facilitate the just, quick and cheap resolution of the real issues in the proceedings and to participate in the processes of the Tribunal and to comply with directions and orders of the Tribunal.

231 In the Supreme, District and Local Courts legal practitioners must not, by their conduct, cause a party to civil proceedings to be put in breach of the party's duty to assist the court to further the overriding purpose to facilitate the just, quick and cheap resolution of the real issues in the proceedings and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court.

232 Fifth, it is generally beneficial to the operations of the Tribunal that legal practitioners be held to the same standards, and be subject to the same costs sanctions, as they are held and subject to in the other courts of NSW.

233 Sixth, the authorities make clear that costs orders against legal practitioners are compensatory not punitive. There is no reason apparent to us why parties to Tribunal litigation should be denied recourse to a potential source of compensation (in appropriate circumstances) otherwise available to parties involved in litigation in other NSW courts.

234 It could perhaps be argued that the power to order costs against legal practitioners should only reside with judges and not Tribunal members and that accounts for the absence of a provision like s 99 of the CPA in the NCAT Act. That argument has some force, but any abuse or misuse of the power by Tribunal members can be addressed on an internal appeal or appeal to the Supreme Court. That would seem to us to be the lesser evil than denying Tribunal parties the right to seek such compensatory orders at all.

235 That brings us to the respondent's submissions as to why the appellant's solicitor should be ordered to pay costs.

236 In short, the respondent submitted that the appellant's solicitor acted unreasonably in advising the appellant to lodge her appeals. The respondent then pointed to various weaknesses in the appellant's appeal and submitted that the appeals were obviously hopeless, the solicitor must have known they were hopeless and thus the solicitor concerned acted unreasonably in acting for the appellant on the appeals.

237 We do not accept this submission for three reasons.

238 First, a standard of "unreasonableness" is not sufficient to trigger costs sanctions against a legal practitioner if we are right to apply s 99(1) of the CPA by analogy in these circumstances. Unreasonable conduct does not amount to serious neglect, serious incompetence or one of the other matters mentioned.

239 Second, even if the standard was one of reasonableness, we would not accept the submission. Legal practitioners are not judges of their client's cases, and it is no small thing to impose overly onerous obligations on legal practitioners which may dissuade them from representing clients who may have weak but arguable cases, or cases in which reasonable minds might differ as to their likelihood of success.

240 In *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; [2000] HCA 57 Gaudron and Gummow JJ, at [81], quoted with apparent approval what was said by Megarry J in *John v Rees* [1970] Ch 345 at 402, namely:

> "[a]s everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely

answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change".

241 What was true then remains true now.

242 The other difficulty with the submission is that it is predicated on the assumption that the appellant’s solicitor knew or ought to have known the appeal was hopeless. To succeed on the former basis, we would have to make a factual finding to that effect and fairness would have required the respondent to have put that proposition to the appellant’s solicitor in cross-examination. No oral evidence was called, the appellant’s solicitor was not cross-examined, and no application was made by the respondent to cross-examine him.

243 To succeed on the latter basis implies that some objective standard should apply as to what a reasonable solicitor in particular circumstances should have known or appreciated, but we do not consider that a test of objective reasonableness (in the sense used) is the touchstone for costs orders against legal practitioners. Something more is required, such as the type of conduct caught by the CPA ss 98 and 99 cases.

244 Therefore, we reject the application that the appellant’s solicitor be ordered to be jointly and severally liable for costs.

Costs of the Costs Appeal

245 The costs appeal, although the subject of a separate Notice of Appeal, should, as a matter of substance, be treated as part of the principal appeal.

246 Its outcome was, in a real sense, dependent upon the success or failure of the principal appeal, both written and oral submissions advanced in relation to it were proportionally small compared to the oral and written submissions advanced in relation to the principal appeal, and any costs orders in relation to it should be no different that would have been the case had the appellant simply amended her Notice of Appeal in the principal appeal to include the grounds set out in the costs appeal.

247 For those reasons, and for the reasons given in relation to the costs of the principal appeal, the appellant should pay the respondent’s costs of the costs appeal on the ordinary basis. We do not accept the submission that costs

should be on the indemnity basis, and do not accept that the appellant's solicitor should be held to be jointly and severally liable for those costs.

Orders

248 In appeal 2021/00283619:

(1) Appeal dismissed.

(2) The appellant is to pay the respondent's costs of the appeal on the ordinary basis.

249 In appeal 2021/00353172:

(1) Appeal dismissed.

(2) The appellant is to pay the respondent's costs of the appeal on the ordinary basis.

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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

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