Civil and Administrative Tribunal

New South Wales

Case Name:	Hill v Venkatesan
Medium Neutral Citation:	[2022] NSWCATAP 278
Hearing Date(s):	17 August 2022
Date of Orders:	24 August 2022
Decision Date:	24 August 2022
Jurisdiction:	Appeal Panel
Before:	R C Titterton OAM, Senior Member Dr R Dubler SC, Senior Member
Decision:	1. The appeal is allowed in relation to the payment of rent by the tenant in the period 13 April to 26 April 2022. 2. The order of the Tribunal of 14 June 2022 in matter RT 22/17833 is amended so as to read: "1. The respondent is to pay the applicants $1,300. 2. Otherwise, the application is dismissed". 3. The respondent is to pay the appellants $1,300 on or before 7 September 2022. 4. To the extent that the appeal raises errors not involving a question of law, leave to appeal is refused. 5. Otherwise, the appeal is dismissed. 6. The respondent is to file submissions on costs within 14 days of the publication of these reasons. 7. The appellant may respond within a further 14 days.

8. The respondent may reply within a further 7 days.

9. These submissions should address whether a hearing on costs should be dispensed with pursuant to s 50(2) of the Civil and Administrative Tribunal Act 2013 (NSW).

Catchwords:	LEASES AND TENANCIES – Residential Tenancies Act 2010 (NSW) – fixed term lease for 52 weeks – obligation of the tenants to pay rent where landlord accepts return of vacant possession - abandonment by the tenants - compensation – obligation on the landlord to mitigate the loss – whether the Tribunal erred in failing to apply correct principles
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) – ss 55(1)(b), 60, 80; cl 12 of Sch 4 Residential Tenancies Act 2010 (NSW) – s 47
Cases Cited:	Al-Daouk v Mr Pine Pty Ltd t/as Furnco Alliance Motor Auctions Pty Ltd v Saman [2018] NSWCATAP 137 Andy and Patrick Floor Covering Pty Ltd t/as Silver Trading Timber Floor v Li [2018] NSWCATAP 172 Bankstown [2015] NSWCATAP 111 Car Mart Direct Pty Ltd v Lesslie [2022] NSWCATAP 182 Collins v Urban [2014] NSWCATAP 17 Coulton v Holcombe [1986] HCA 33 Harris v The Owners-Strata Plan No 34056 (No 2) [2022] NSWCATAP 167 Lethorn v Wagenheim [2020] NSWCATAP 199 Noori v JMG Auto Parts Pty Ltd [2022] NSWCATAP 250 Pholi v Wearne [2014] NSWCATAP 78 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 The Owners-Strata Plan No 63731 v B & G Trading Pty Ltd (No 2) [2020] NSWCATAP 273
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Mayada Hill (First Appellant) Isa Hill (Second Appellant)

	Jaikumar Venkatesan (Respondent)
Representation:	Isa Hill (First Appellant) Second Appellant (Self-represented) Du Yang (Agent) (Respondent)
File Number(s):	2022/00186677
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Date of Decision:	14 June 2022
Before:	S De Jersey, Member
File Number(s):	RT 22/17833

REASONS FOR DECISION

Summary

1 The appellants (the **tenants** or the **Hills**) appeal from a decision of the Consumer and Commercial Division of the Tribunal (**Tribunal**) of 14 June 2022 (**Decision**).

2 The Tribunal dismissed the tenants' application against the respondent landlord (**landlord**).

3 For the following reasons, we have decided to allow the appeal in relation to the payment by the tenants of rent in the period 13 to 26 April 2022, but to otherwise dismiss the appeal.

Preliminary matters

4 There are three preliminary matters to deal with.

The tenants' application for leave for Mr Yang to represent the landlord be revoked

5 By email to the Registry dated 15 August 2022, the tenants notified the Appeal Panel that they had filed a complaint against the landlord's agent, Mr Du Yang and Sy Realty Pty Ltd with NSW Fair Trading. They allege that Mr Yang had

breached “the Tenancy Agreement & Legislation” and included a copy of the complaint.

6 The tenants stated “[a]s such, we strongly object to Du Yang to represent the Landlord” at the appeal.

7 We dealt with this issue at the commencement of the appeal hearing. We did not consider that the fact that a complaint had been made to NSW Fair Trading constituted a proper basis for the leave already granted to Mr Yang to represent the landlord to be withdrawn.

8 Accordingly, the application was dismissed.

Dismissal of proceedings pursuant to s 55(1)(b) of the NCAT Act.

9 The landlord made an overarching submission that the appeal should be dismissed pursuant to s 55(1)(b) of the *Civil and Administrative Tribunal Act 2013* (NSW) (**NCAT Act**). That section provides that the Tribunal may dismiss at any state any proceedings before if it considers that the proceedings are frivolous or vexatious or otherwise lacking in substance.

10 While we consider that the appeal was a weak one, and even a confused one, we decline to dismiss the appeal on this basis.

Additional evidence

11 The tenants sought to tender on appeal approximately 90 pages of evidence that was not before the Tribunal. No persuasive reason was advanced as to why this material was not available at the time of the hearing in June. Indeed, some of the material was clearly available at the time of the June hearing.

12 As we are not satisfied that this material was not reasonably available at the time of the hearing, we have had no regard to that material for the purposes of the appeal: *Al-Daouk v Mr Pine Pty Ltd t/as Furnco Bankstown* [2015] NSWCATAP 111.

Background

13 This is a residential tenancy matter. The tenants rented premises from the respondent landlord in Riverstone.

14 It is common ground that the parties entered into a residential tenancy agreement on 26 April 2021 (**RTA**). The term of the RTA was 52 weeks, commencing on 28 April 2021 and ending on 26 April 2022. The weekly rent was $650. At the commencement of their tenancy the tenants provided a bond of $2,600 which was lodged with Rental Bond Services in the usual way.

15 By application RT 22/17833 filed 26 April 2022 the tenants sought a variety of orders. These relate to:

(1) "Sydney Water Final Reading Bill". The tenants alleged that:

> The landlord and his real estate agent have committed fraud and increased the water bill falsely (we have checked in calculations by ourselves using Sydney [W]ater website tool. We also called Sydney [W]ater and they have confirmed the same that their water bill is too high and very wrong. They have highly exceeded the amount payable by the landlord according to the water supplier bill.
>
> He has claimed the false water final charge from our bond. We have always paid our water bill on time and in full. The landlord is denigrating our name in the renting market on purpose.

(2) "Contract Breach". The tenants raised a number of issues including:

(a) the landlord requiring the tenants to pay three weeks' rent in advance;

(b) the landlord requiring the tenants to pay a two weeks' holding fee;

(c) the landlord failing to comply with his obligation that "[t]he whole of the fee will be refunded to the prospective tenant if [balance of sentence]. The entering into of the residential tenancy agreement is conditional on the landlord carrying out repairs or other work and the landlord does not carry out the repairs or other work during the specified period";

(d) the landlord charging "higher rates";

(e) the landlord failing to rectify reported damages;

(f) the failure of the landlord to return the bond in full to the tenants;

(g) the landlord failing to comply with his health and safety responsibilities;

(h) the landlord refusing to undertake pest control.

(3) "Claiming Our Bond Falsely". Here the tenants dispute claims of the landlord relating to a faulty lock, paint in the living room, and damage to a wall.

(4) "Denied Access & Reparation During Our Tenancy Period". Here the tenants state:

> We lent the keys to the real estate agent and landlord so they can do the open house on 12/04/2022. We have paid the final rent from 06/04/2022 to 26/04/2022 (3 weeks rent paid). They leased the property in 3 days within our tenancy period. They denied us access to the property to do any reparations. They refused to refund us the remaining days of unused rent. They made us homeless.
>
> In reference to point 51.4 of the contract, we have to pay only one week rent since the fixed term of our rent has been expired. We actually paid 3 weeks rent.
>
> In reference to point 6 under notes, warning point of the contract they have obtained possession of [redacted], during our tenancy period and without an order of NCAT.
>
> (Please see the attached advert on 17/04/2022, which shows that the property was leased in 3 days, this clearly demonstrate that we left the property in a beautiful clean state and therefore no claim should be made against the bond). It also shows that the landlord break of the contract. To note that we received the bond claim notice on 19/04/2022 after the property being leased).

16 In summary, the tenants stated that:

> Despite refuting their false claim against the bond completely. They have not given us the opportunity to do any reparations for this alleged damage. Therefore, they cannot claim our bond.

17 However, the bond was dealt with in other proceedings, with the bond being returned to the tenants in full.

The Tribunal's Decision

18 The Tribunal published lengthy written reasons on 14 June 2022. After setting out procedural matters relating to jurisdiction and recounting the evidence filed, the Tribunal stated at [16] that at the commencement of the hearing the tenants confirmed that they sought the following orders:

> Compensation for short stay accommodation in South Australia from 14 April 2022 to 17 May 2022, necessitated by the fact that the landlord's agent refused access to the leased premises from 14 to 26 April 2022;
>
> Refund of the last 2 weeks rent paid for the leased premises from 13 April 2022 to 26 April 2022 - $1300;
>
> Cost of storage for business and personal possessions from 13 April 2022 to 31 May 2022 - $1100;
>
> Reimbursement of urgent repairs - $842.50;
>
> Compensation for loss of business earnings - $30,000;
>
> Compensation for stress arising from false bond claims and negative references $5-10,000.

19 The reasons then note that the tenants confirmed that they agreed to be bound by the Tribunal's maximum monetary jurisdiction of $15,000.

20 The Tribunal rejected all these claims and dismissed the application.

21 During the appeal hearing, the tenants confirmed that they accepted that the Tribunal had accurately stated in [16] of its reasons the matters that they wished to pursue at the hearing.

Notice of Appeal

22 The tenants filed a Notice of Appeal on 27 June 2022.

23 The grounds of appeal appear to be:

(1) the tenants were not provided a fair or transparent process at the hearing;

(2) the Tribunal member was biased;

(3) the landlord did not present any evidence to support their "vexatious statements";

(4) the Tribunal member failed to properly apply s 47 of the *Residential Tenancies Act 2010* (NSW) (**RT Act**);

(5) the Tribunal ignored the landlord's agent's "confession" when he stated "clearly on the hearing day that the new tenant moved into the property before" 26 April 2022;

(6) the Tribunal member failed to take into account cl 51.4 of the residential tenancy agreement between the parties;

(7) the Tribunal member "misunderstood the whole case which was not discussed at all [at] the hearing".

24 In the Notice of Appeal, the tenants say that the Tribunal should make the following orders:

> 1. The maximum financial compensation [that] can be rewarded by NCAT jurisdiction.
>
> 2. Letter "To Whom it May Concern' good reference from landlord and his agent for future tenancy applications.
>
> 3. Strip of licence for SY Realty and penalty points for adverse actions outside legislation Or forwarding this material to the relevant authorities.
>
> 4. Strip of JP or forwarding this material to the relevant authorities.
>
> 5. Prosecution for breach of surveillance act for landlord, real estate gent and neighbors that provide affidavits on our comings and goings or forwarding this material to the relevant authorities.
>
> (typographical and grammatical errors as in original)

25 However, in an attachment to the Notice of Appeal, the tenants state:

> Compensation
>
> 1. Our last fortnight payment & one rent day. Du Yang said that we have vacated the property on 12 Apr 2022.
>
> And we were forced to pay last fortnight payment (13 Apr 2022 - 26 Apr 2022) (see page 155 of NSW Act, clause 47 for tenant's remedies for repayment of rent and excessive charges) $1300 + one day rent $92.9
>
> 2. All short stay accommodation payments we have incurred due to the false claim on the bond. $9551.50
>
> 3. Repair done for the property
>
> 3.1 URGENT Installation of a fixture (see clauses 30.2 & 30.2 page 10) the landlord should use a qualified person to install a fixture (the monitor and pay for the installation). He did NOT and we were not aware of this clause at the time. We had to store the old fixture in the property. $222.50
>
> 3.2 Unblocking drains of the property $620
>
> 4. Business compensation for loss of earnings for one month $30,000
>
> 5. Compensation for the stressful time as a family - Day-care and routine $10.000
>
> 6. Storage cost have incurred due to the false claim on the bond $1070
>
> 7. Travel and Time Food costs incurred to view properties $ for Judges determination
>
> 8. All cost incurred by us to file NCAT case & appeal with postage
>
> 9. Reasons why Du Yang was allowed to be a representative for the landlord
>
> 10. Letter "To Whom It May Concern" good reference from landlord and his agent for future tenancy applications.
>
> 11. Strip of licence for sy Realty and penalty points for adverse actions outside legislation Or forwarding this material to the relevant authorities
>
> 12. Strip of JP Or forwarding this material to the relevant authorities
>
> 13. Prosecution for breach of surveillance act for landlord, Agent and Neighbours that provide affidavits on our comings and goings. Or forwarding this material to the relevant authorities

26 We explained to the tenants during the course of the appeal hearing that:

(1) we could not order the landlord to provide a “good reference” for the tenants;

(2) we did not have the power to “strip” the landlord’s agent of its licence, to “strip” the landlord’s agent of his entitlement to be a Justice of the Peace, nor prosecute the landlord for “breach of surveillance act”;

(3) whether we would refer documents to the “relevant authorities” as requested would be dealt with in these reasons.

Reply to Appeal

27 The landlord filed his Reply to Appeal on 21 July 2022. The landlord states:

> 1. The applicant has not raised any Grounds of law
>
> 2. The application has not identified the grounds on which the appeal is based - Clause 12 of Schedule 4
>
> 3. The applicant has sought orders against Du Yang who is not party to these proceedings
>
> 4. The applicant has sought to improperly adduce new evidence which is opposed
>
> 5. The applicant has not addressed the most significant finding of fact in this matter being that tribunal member found that, in paragraph 26 that there is no breach of the lease by landlord.
>
> 6. In relation to various matters raised in the attachment to the notice of appeal, I respond as follows:
>
> a. Most of the material has no relevance to the issues dealt with, at the hearing
>
> b. Where the issues were dealt with at the hearing, I rely on the evidence at the hearing
>
> c. The bond was refunded to the tenant in full and therefore no issues in relation to the bond
>
> d. Section 47 of the residential tenancy act does not apply as the rental is paid as per the tenancy agreement

28 As to his reply to the tenants' application for leave to appeal, the landlord states:

> 1. The applicant has not raised any Grounds of law
>
> 2. The application has not identified the grounds on which the appeal is based - Clause 12 of Schedule 4
>
> 3. The applicant has sought orders against Du Yang who is not party to these proceedings
>
> 4. The applicant has sought to improperly adduce new evidence which is opposed
>
> 5. The applicant has not addressed the most significant finding of fact in this matter being that tribunal member found that, in paragraph 26 that there is no breach of the lease by landlord.
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>
> c. The bond was refunded to the tenant in full and therefore no issues in relation to the bond

d. Section 47 of the residential tenancy act does not apply as the rental is paid as per the tenancy agreement

Documents filed on the appeal

29 The tenants filed a copy of their evidence which was before the Tribunal (111 pages), a further bundle of 187 pages of documents and a transcript of proceedings before the Tribunal. As noted above, we have had no regard to the materials that were not before the Tribunal.

30 The respondent filed approximately 80 pages of materials which were attached to his Reply to Appeal.

Oral submissions

31 On the whole Mrs Hill represented herself and her husband during the appeal hearing, although Mr Hill made contributions from time to time.

32 We invited Mrs Hill to address each of the 13 matters set out in [25] which appeared as part of the tenants' Notice of Appeal. Where relevant we will refer to her oral submissions below.

33 Mr Yang for the landlord made very brief oral submissions at the appeal hearing.

Nature of an appeal

34 Section 80 of the NCAT Act sets out the basis upon which appeals from decisions of the Tribunal may be brought. That section states that an appeal may be made as of right on any question of law or with leave of the Appeal Panel on any other ground (s 80(2)(b)).

A question of law

35 In Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69, without listing exhaustively possible questions of law, the Appeal Panel considered the requirements for establishing an error of law giving rise to an appeal as of right. These include (but are not limited to):

- whether there has been a failure by the Tribunal to provide proper reasons;
- whether the Tribunal identified the wrong issue or asked the wrong question;
- whether a wrong principle of law had been applied;
- whether there was a failure to afford procedural fairness;

- whether the Tribunal failed to take into account relevant (that is, mandatory) considerations;
- whether the Tribunal took into account an irrelevant consideration; and
- whether there was no evidence to support a finding of fact.

Leave to appeal

36 Clause 12 of Sch 4 of the NCAT Act provides that, in an appeal from a decision of the Consumer and Commercial Division of the Tribunal, an Appeal Panel may grant leave to appeal only if satisfied that the appellant may have suffered a substantial miscarriage of justice because:

(1) the decision of the Tribunal under appeal was not fair and equitable; or

(2) the decision of the Tribunal under appeal was against the weight of evidence; or

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

37 The principles to be applied by an Appeal Panel in determining whether or not leave to appeal should be granted are well settled. In Collins v Urban [2014] NSWCATAP 17 the Appeal Panel conducted a review of the relevant cases at [65]-[79] and concluded at [84(2)] that:

> Ordinarily it is appropriate to grant leave to appeal only in matters that involve:
>
> (a) Issues of principle;
>
> (b) questions of public importance or matters of administration or policy which might have general application; or
>
> (c) an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand;
>
> (d) a factual error that was unreasonably arrived at and clearly mistaken; or
>
> (e) the Tribunal having gone about the fact finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed.

38 Even if an appellant establishes that the appellant may have suffered a substantial miscarriage of justice in the sense explained above, the Appeal Panel retains a discretion whether to grant leave under s 80(2) of the Act. An appellant must demonstrate something more than that the Tribunal was arguably wrong: Pholi v Wearne [2014] NSWCATAP 78 at [32].

Consideration

39 There are five issues to determine:

(1) have the tenants identified a question of law?

(2) if so, should the appeal be allowed, and what orders should be made?

(3) have the tenants identified any other error in respect of which leave to appeal should be granted?

(4) if so, should leave to appeal be granted?

(5) if so, should the appeal be allowed?

(6) if so, what orders should the Appeal Panel make?

Issue 1: Has the tenant identified a question of law?

40 In Prendergast, the Appeal Panel stated at [12] that, in circumstances where an appellant is not legally represented, it is appropriate for the Tribunal to approach the issue by looking at the grounds of appeal generally, and to determine whether a question of law has in fact been raised (subject to any considerations of procedural fairness to the respondent that might arise).

41 We have undertaken that exercise. It appears to the Appeal Panel that the tenants have raised three questions of law, namely that:

(1) they were denied procedural fairness;

(2) the Tribunal was biased;

(3) the Tribunal misapplied the relevant law.

42 We will consider each of these questions of law in turn,

Were the tenants denied procedural fairness?

43 We were provided with a transcript of the hearing. We see nothing that suggests that the tenants were denied procedural fairness in the Tribunal's conduct of the hearing. On the contrary, the presiding member asked the tenants to articulate their claims; asked the tenants to confirm the evidence on which they relied; went through each issue in a clear and methodical way and did not appear to interrupt the tenants while they were giving evidence or making submissions.

44 During the appeal hearing we asked the tenants to identify any passages in the transcript which supported this submission. We were not persuaded that the

transcript of the proceedings supports the tenants' submission that they were denied procedural fairness.

45 In the circumstances, we do not consider that the appeal should be allowed on this ground.

Was the Tribunal biased?

46 As the Appeal Panel stated in *Saurine v Coral Homes Qld Pty Ltd* [2015] NSWCATAP 147:

> 18. Bias can be actual or apprehended: *Bogoevski v Stricklands* [2015] NSWCATAP 133 at [110]. Mr Saurine has not articulated whether his claim is one of actual bias or apprehended bias. Claims of actual bias are rarely made, and even more rarely upheld. Actual bias usually, but not universally, contemplates an "interest" (whether financial or otherwise) by the judicial officer (in this case the Tribunal member) in the outcome of the proceedings. No such claim is made in this appeal. In the circumstances, we do accept that the member was motivated by actual bias in the hearing and determination of Mr Saurine's application.
>
> …
>
> 20. The relevant principles in determining whether there is apprehended bias and how they are to be applied were explained by the High Court of Australia in *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63 at [6], where the High Court stated:
>
> > "Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), as here, the governing principle is that, subject to qualifications relating to waiver (which is not presently relevant) or necessity (which may be relevant to the second appeal), a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. That principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that a tribunal be independent and impartial.
>
> 21. Mr Saurine appears to be suggesting that the reasoning of member in his written reasons illustrates (apprehended) bias. We do not agree. Mr Saurine also appears to be suggesting the member came to conclusions that were not reasonably available to him, or otherwise against the weight of the evidence, but this does not amount to apprehended or ostensible bias. In any event, Mr Saurine alleges that the conduct of the member in the preceding matter demonstrated the "member's bias to applicants without even hearing the case". As he was the applicant, it is unclear how such conduct, even if it occurred, could amount to bias against him.

47 We reject entirely any suggestion that the member constituting the Tribunal was actually biased.

48 Nor do we see any reason why a fair-minded lay observer might reasonably apprehend that the Tribunal member might not bring an impartial mind to the resolution of the issues she was required to decide.

49 In the circumstances, we do not consider that the appeal should be allowed on this ground.

Did the Tribunal misapply the relevant law?

50 This claim arises in connection with the Hills' claim for a refund of the last two weeks' rent paid for the premises for the period 13 April 2022 to 26 April 2022, being $1300.

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

> 27. The tenants were required to pay rent until 26 April 2022 being the last date [of] the fixed term, as was made clear by the agent in the email dated 14 April sent at 8.27 AM. Accordingly there is no basis for the tenants to claim a refund of rent for this period, even though the property was relet in this period.

52 On appeal, the tenants submit that:

> The judge is totally unaware of the tenancy break clause 51.4 in the tenancy agreement (break fee for fixed term of not more than three years). She agrees with Du Yang and the landlord to deny our access to one of our rights under the tenancy agreement (this is against the legislation). We have told Du Yang we want to break the contract. He refused. The judge did not read all the email communications and made false decision again.

53 Clause 51.4 of the RTA relevantly provided that if the tenants ended the RTA before the end of the fixed term of the agreement, the tenants must pay a break fee of one week's rent if 75% or more of the fixed term had expired.

54 It does not appear that the tenants raised cl 51.4 of the RTA during the course of the hearing. Ordinarily parties on appeal are bound by their conduct of the hearing at first instance: *Coulton v Holcombe* [1986] HCA 33; *Car Mart Direct Pty Ltd v Lesslie* [2022] NSWCATAP 182.

55 However, we see that the tenants' raised this clause in their written submission to the Tribunal, stating that the landlord's agent misled them into believing that there was no break fee. The tenants submitted to the Tribunal that they were actually entitled to pay "just 1 week break clause".

56 As we have noted above, the failure of the Tribunal to take into account a relevant consideration is an error of law. Nevertheless, we would not allow the

appeal for this reason. That is because we do not think that the clause is relevant.

57 Such a clause is relevant in circumstances where a tenant abandons the premises: see ss 106 and 107 of the RT Act. Here the tenants did not abandon the premises, on the contrary, they sought the landlord's permission to vacate before the end of the fixed term, and returned the keys to his agent on 12 April 2022.

58 This is not abandonment. As the Appeal Panel noted in *Lethorn v Wagenheim* [2020] NSWCATAP 199:

> 27. In Darren and Julia Patterson v David Patterson [2015] NSWCATAP 31 (Patterson) at [56] the Appeal Panel held that abandonment occurs when a tenant vacates within the fixed term of a lease without the consent of the landlord or without a Tribunal order.
>
> 28. We are not satisfied that there had been a termination of the tenancy agreement by abandonment of the premises within s 81(4)(d) of the RT Act by reason of the appellant's request in the 21 January 2020 email. As held by the Appeal Panel in Patterson at [56] and consistent with s 106(4)(b) of the RT Act, there can be no abandonment of the residential premises by the tenant unless the tenant no longer resides at the premises. The appellant's request for the respondents to allow him and his partner to leave the premises on 5 February 2020 did not constitute an abandonment of the premises.
>
> 29. In McDonald v Pochin [2016] NSWCATAP 259 the Appeal Panel at [15] and [19] found that there had been a termination of a residential tenancy agreement with the landlord's consent within s 81(4)(e) of the RT Act in circumstances where the written termination notice was not received, the agent gave the tenant notice by telephone that he was to give possession of the premises by a specified date, and the tenant gave up possession of the premises on that date. The Appeal Panel at [20] held:
>
> > "20 Similarly s 107 of the [RT Act] refers to a landlord's remedies on abandonment by the tenant. In circumstances where the Tribunal found that the tenancy came to an end by the consent of the parties, it cannot be said that the tenancy was abandoned by the tenant."
>
> 37. We are satisfied that there had been a termination of the tenancy agreement with the respondents' consent within s 81(4)(e) of the RT Act in circumstances where the notice of termination was actually received by the appellant (although not given "in accordance with" the RT Act as required by s 81(2)) and the appellant gave up possession of the premises on 5 February 2020.
>
> 38. Consistent with the finding in McDonald v Pochin at [20], we are satisfied that, since there has been a termination of the tenancy agreement with the respondents' consent within s 81(4)(e) of the RT Act, there cannot have been an abandonment of the premises within s 81(4)(d) of the RT Act.

59 The Tribunal found at [23] that:

> I accept the agent's evidence that all keys were returned by the tenants to the office on about 12 April 2022 in accordance with the photos on the top left hand corner of the landlords documents of page 162. The tenants return of the keys was a return of vacant possession of the leased premises to the landlord on that date and as such the tenancy ended on that date. I find that there was no right after that date for the tenants to be granted possession.

60 The Tribunal's finding that the tenancy ended on the date the keys were returned is consistent with s 81(4)(e) of the RT Act. Section 81 provides:

> **81 Circumstances of termination of residential tenancies**
>
> (1) **Termination only as set out in Act** A residential tenancy agreement terminates only in the circumstances set out in this Act.
>
> (2) **Termination by notice and vacant possession** A residential tenancy agreement terminates if a landlord or tenant gives a termination notice in accordance with this Act and the tenant gives vacant possession of the residential premises.
>
> (3) **Termination by order of Tribunal** A residential tenancy agreement terminates if the Tribunal makes an order terminating the agreement under this Act.
>
> (4) **Other legal reasons for termination** A residential tenancy agreement terminates if any of the following occurs—
>
> (a) a person having superior title (such as a head landlord) to that of the landlord becomes entitled to possession of the residential premises,
>
> (b) a mortgagee of the residential premises becomes entitled to possession of the premises to the exclusion of the tenant,
>
> (c) a person who succeeds to the title of the landlord becomes entitled to possession of the residential premises to the exclusion of the tenant,
>
> (d) the tenant abandons the residential premises,
>
> (e) the tenant gives up possession of the residential premises with the landlord's consent, whether or not that consent is subsequently withdrawn,
>
> (f) the interests of the landlord and tenant become vested in the one person (merger),
>
> (g) disclaimer occurs (such as when the tenant's repudiation of the tenancy is accepted by the landlord).
>
> (emphasis added)

61 In summary, a residential tenancy agreement terminates if the tenant gives up possession of the residential premises with the landlord's consent. That is precisely what occurred in the circumstances of this tenancy. The landlord accepted on 11 April 2022 that the tenants would be returning the keys and giving up vacant possession of the premises with the permission of the landlord on 12 April 2022. This means that the RTA terminated on 12 April 2022. It follows that the tenants were not liable for rent after this date.

62 We accept that the landlord made it clear to the tenants that they were to pay rent until the expiration of the fixed term, however that was after 12 April 2022, which the Tribunal found, correctly in our view, was when the tenancy ended. Accordingly, the Tribunal was in error in finding at [27] that the tenants were required to pay rent after that date and until the end of the fixed term.

63 We reject any suggestion that the Tribunal failed to properly apply s 47 of the RT Act. That section provides tenant's remedies for repayment of rent and excess charges. It is a mechanism for the Tribunal to refund rent and other costs to the tenant. While the Tribunal may not have mentioned s 47 in express terms, clearly it considered whether any rent should be refunded to the tenants.

64 Accordingly, in our view, the tenants are entitled to a refund of $1,300.00. It follows that the appeal should be allowed in relation to this issue, and an order made in substitution for the order made by the Tribunal that the landlord pay the tenants $1,300.00. This amount should be paid within two weeks of the date of these reasons.

Issue 2: if so, should the appeal be allowed and what orders made?

65 For the above reasons the appeal should be allowed in this respect.

66 We will deal with the appropriate orders at the conclusion of these reasons after considering the other matters raised by the tenants.

Issue 3: Has the tenant identified any other error in respect of which leave should be granted?

67 As noted above, the other errors identified by the tenant, for which leave is required, are as follows:

(1) the landlord did not present any evidence to support their "vexatious statements";

(2) the Tribunal ignored the landlord's agent's "confession" when he stated "clearly on the hearing day that the new tenant moved into the property before" 26 April 2022;

(3) the Tribunal member "misunderstood the whole case which was not discussed at all [at] the hearing".

68 In relation to the first matter, (namely that the landlord did not present any evidence to support their "vexatious statements"), the tenants bore the onus of proof in their application. It was a matter for the Tribunal to accept or not

accept their claims on the basis of the evidence they placed before the Tribunal. As the Appeal Panel stated in *Andy and Patrick Floor Covering Pty Ltd t/as Silver Trading Timber Floor v Li* [2018] NSWCATAP 172 at [40] (see also *Alliance Motor Auctions Pty Ltd v Saman* [2018] NSWCATAP 137 at [18]):

> A court or tribunal is informed and persuaded only by the presentation of evidence. Evidence is material which tends to persuade the court or tribunal of the truth or probability of the facts being alleged. Evidence may be photograph[ic], documentary or testimonial. But it will only succeed in persuading the tribunal if it appears as being truthful, reliable and cogent. In civil cases the standard or proof depends on the balance (or preponderance) of probabilities. This simply means that a party must prove that their case is more likely than not to be true. If the scales tip in favour of the party, however slight, they have proved their case. But if the probabilities are equal, they have failed to prove their case. ...

69 In other words, we do not consider that the landlord's lack of evidence to have any bearing on the outcome of the tenants' application.

70 As to the second matter, we have effectively deal with this earlier in these reasons.

71 As to the third matter, namely that the Tribunal member "misunderstood the whole case which was not discussed at all [at] the hearing", we are satisfied that the Tribunal identified the matters to be determined, and that the tenants both before the Tribunal and at the appeal hearing agreed that the matters the Tribunal identified at [16] of the Decision were the matters the Tribunal had to determine.

72 In conclusion, we would not grant leave to appeal in respect of any of these matters. We are not satisfied that any ground involves an issue of principle, a question of public importance, an injustice which is reasonably clear or that the Tribunal has gone about its fact finding process in such an unorthodox manner that it is likely to have produced an unfair result.

Conclusion

73 As the Appeal Panel stated in *Noori v JMG Auto Parts Pty Ltd* [2022] NSWCATAP 250:

> 74. … an appeal to the Appeal Panel does not provide a losing party in the Tribunal below with the opportunity to run their case again: Ryan v BKB Motor Vehicle Repairs Pty Ltd [2017] NSWCATAP 39 at [10]. And, as the Appeal Panel stated in Temple, in passages relied on by the respondent:

> 38. … Any decision to grant leave to appeal must be undertaken in a legally principled manner and not simply because, if we were hearing the matter anew on the evidence led before the Member, we might reach a different conclusion when considering that evidence (although in the present case that would not be so).
>
> 39. It is fundamental that an appeal on a question of fact does not provide and is not intended to provide an opportunity for an applicant dissatisfied by the result of a hearing at first instance to re-run the same case before an Appeal Panel. Yet, that is, in effect, what the present Appellants seek to do by identifying what they contend are contestable findings of fact by the Member.

> 75. To put the matter another way, as indicated in the Tribunal's Guideline 1, Internal Appeals (which can be found on the Tribunal's website):
>
> … an appeal is not an opportunity to have a second go at a hearing.

74 This appears to be what the tenants are seeking to do. Save for the issue of the last two weeks' rent, the appeal should be dismissed.

Costs

75 The landlord seeks costs. The governing rule in the circumstances of this appeal is set out in s 60 of the NCAT Act. That section provides:

> **60 Costs**
>
> (1) Each party to proceedings in the Tribunal is to pay the party's own costs.
>
> (2) The Tribunal may award costs in relation to proceedings before it only if it is satisfied that there are special circumstances warranting an award of costs.
>
> (3) In determining whether there are special circumstances warranting an award of costs, the Tribunal may have regard to the following--
>
> (a) whether a party has conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceedings,
>
> (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceedings,
>
> (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law,
>
> (d) the nature and complexity of the proceedings,
>
> (e) whether the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance,
>
> (f) whether a party has refused or failed to comply with the duty imposed by section 36(3),
>
> (g) any other matter that the Tribunal considers relevant.
>
> (4) If costs are to be awarded by the Tribunal, the Tribunal may--
>
> (a) determine by whom and to what extent costs are to be paid, and

(b) order costs to be assessed on the basis set out in the legal costs legislation (as defined in section 3A of the Legal Profession Uniform Law Application Act 2014) or on any other basis.

(5) In this section--

"costs" includes--

(a) the costs of, or incidental to, proceedings in the Tribunal, and

(b) the costs of, or incidental to, the proceedings giving rise to the application or appeal, as well as the costs of or incidental to the application or appeal.

76 The meaning of "special circumstances" has been considered in a number of Appeal Panel decisions. In *The Owners-Strata Plan No 63731 v B & G Trading Pty Ltd (No 2)* [2020] NSWCATAP 273 (see too *Harris v The Owners-Strata Plan No 34056 (No 2)* [2022] NSWCATAP 167) the Appeal Panel stated:

> 10. 'Special circumstances' are circumstances that are out of the ordinary, but need not be those which are exceptional or extraordinary: Cripps v G & M Dawson Pty Ltd [2006] NSWCA 81 at [60] (Santow J); Megerditchian v Kurmond Homes Pty Ltd [2014] NSWCATAP 120 at [11]; CPD Holdings Pty Ltd t/as The Bathroom Exchange v Baguley [2015] NSWCATAP 21 at [32]; Commissioner for Fair Trading v Edward Lees Imports Pty Ltd (No 2) [2019] NSWCATAP 222 at [8]; Edwards v Commissioner for Fair Trading, Department of Customer Service (Costs) [2019] NSWCATAP 249 at [9]; Youssef v NSW Legal Services Commissioner (Costs) [2020] NSWCATOD 115 at [107].
>
> 11. However, it does not follow that a costs order should be made simply because one or more of the factors in s 60(3) are made out.
>
> 12. Even if satisfied that there are special circumstances, the Appeal Panel must further be satisfied that they are circumstances 'warranting an award of costs' – Fitzpatrick Investments Pty Ltd v Chief Commissioner of State Revenue [2015] NSWCATAD 103 at [21]; Youssef at [108].
>
> 13. The exercise of the discretion requires the Tribunal 'to weigh whether those circumstances are sufficient to amount to 'special' circumstances that justify departing from the general rule that each party bear their own costs': BPU v New South Wales Trustee and Guardian (Costs) [2016] NSWCATAP 87 at [9]; Obieta v Australian College of Professionals Pty Ltd (2014) NSWCATAP 38 at [81]; Khalaf v Commissioner of Police [2019] NSWCATOD 178 at [29]; Alliance Motor Auctions Pty Ltd v Saman [2018] NSWCATAP 137 at [35].
>
> 14. He who asserts must prove, and so the party seeking the costs order bears the onus of proving that special circumstances exist - Styles v Wollondilly Shire Council [2017] NSWCATAP 108 at [5] under the heading 'Costs'.
>
> 15. Whether special circumstances exist is a question of fact and each case must be assessed according to its circumstances: Wynne Avenue Property Ltd v MJHQ Pty Ltd (No 2) [2019] NSWCATAP 68 at [57]; The Owners - Strata Plan 20211 v Rosenthal [2019J NSWCATAP 49 at [15].

77 We will give directions for the filing of submissions on costs.

78 We propose to deal with the issue of costs "on the papers" and without a hearing. If either party wishes to have a hearing, they should address that matter in their submissions.

Orders

79 The Appeal Panel orders:

(1) The appeal is allowed in relation to the payment of rent by the tenant in the period 13 April to 26 April 2022.

(2) The order of the Tribunal of 14 June 2022 in matter RT 22/17833 is amended so as to read:

> "1. The respondent is to pay the applicants $1,300.
>
> 2. Otherwise, the application is dismissed".

(3) The respondent is to pay the appellants $1,300 on or before [insert date 14 days after publication of reasons].

(4) To the extent that the appeal raises errors not involving a question of law, leave to appeal is refused.

(5) Otherwise, the appeal is dismissed.

(6) The respondent is to file submissions on costs within 14 days of the publication of these reasons.

(7) The appellant may respond within a further 14 days.

(8) The respondent may reply within a further 7 days.

(9) These submissions should address whether a hearing on costs should be dispensed with pursuant to s 50(2) of the *Civil and Administrative Tribunal Act 2013* (NSW).

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