



Civil and Administrative Tribunal
New South Wales

Case Name: Lekhwar v Singh

Medium Neutral Citation: [2022] NSWCATCD 108

Hearing Date(s): 9 June 2022

Date of Orders: 24 June 2022

Decision Date: 24 June 2022

Jurisdiction: Consumer and Commercial Division

Before: G Blake AM SC, Senior Member

Decision: The Notice of Order issued 24 June 2022 is amended under Section 63 of the Civil and Administrative Tribunal Act 2013, and should read as follows:

- (1) Time for the commencement of proceedings RT 22/23153 is extended until 25 May 2022.
- (2) The residential tenancy agreement in respect of the premises is terminated.
- (3) The tenants Gurgit Singh and Kiranjit Kaur (the tenants) are to give possession of the premises to the landlords Keshavanand Lekhwar and Vinita Lekhwar (the landlords) immediately.
- (4) The operation of order (3) above is suspended until 22 July 2022.
- (5) The tenants are to pay to the landlords a daily occupation fee at the rate of \$57.14 per day from 25 June 2021 until the date they give vacant possession of the premises to the landlords.
- (6) The landlords are at liberty to relist the proceedings within 60 days after they obtain vacant possession of the premises to claim the amount owing by the tenants as occupation fees.
- (7) Proceedings RT 22/23153 are dismissed.

Catchwords: CIVIL PROCEDURE — Hearings — Adjournment —

Relevant factors
CIVIL PROCEDURE — Hearings — Procedural fairness – Bias — Actual bias
CIVIL PROCEDURE — Hearings — Procedural fairness - Apprehended bias
LEASES AND TENANCIES — Residential Tenancies Act 2010 (NSW) — NSW Civil and Administrative Tribunal — Jurisdiction and power
LEASES AND TENANCIES — Residential Tenancies Act 2010 (NSW) — Termination — By landlord – expiry of fixed term
LEASES AND TENANCIES — Residential Tenancies Act 2010 (NSW) — Termination — Notices – defect in the manner of service

Legislation Cited:

Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)
Bankruptcy Act 1966 (Cth)
Civil and Administrative Tribunal Act 2013 (NSW)
Constitution (Cth)
Migration Act 1958 (Cth)
National Security (Women's Employment) Regulations 1942 (Cth)
Residential Tenancies Act 2010 (NSW)
Residential Tenancies Act 1995 (SA)
Residential Tenancies Regulation 2019 (NSW)

Cases Cited:

Aerolink Air Services Pty Ltd v Bankstown Airport Ltd [2022] NSWSC 587
Assistant Commissioner Condon v Pompano Pty Ltd (2013) 252 CLR 38; [2013] HCA 7
Attorney-General of NSW v Gatsby (2018) 99 NSWLR 1; [2018] NSWCA 254
Charisteas v Charisteas [2021] HCA 29; (2021) 95 ALJR 824
Citta Hobart Pty Ltd v Cawthorn [2022] HCA 16
Collier v Country Women's Association of New South Wales [2018] NSWCA 36
Cominos v Di Rico [2016] NSWCATAP 5
Henderson v Housing Choices South Australia Ltd [2019] SASC 121
Jackson v NSW Land and Housing Corporation [2014] NSWCATAP 22
Jackson v NSW Land and Housing Corporation [2015]

NSWCATAP 281
Kostov v Amelie Housing (NCAT Appeal) [2019]
NSWSC 16
Kostov (Bankrupt) v Australian Financial Security
Authority, in the matter of Kostov [2020] FCA 1105
Minister for Immigration and Multicultural Affairs v
Bhardwaj (2002) 209 CLR 597; [2002] HCA 11
Navazi v New South Wales Land and Housing
Corporation [2015] NSWCA 308
Re JRL; Ex parte CJL (1986) 161 CLR 342 at 352;
[1986] HCA 39
Rochford v Dayes (1989) 63 ALJR 315 at 315; [1989]
HCA 17
Rola Co (Australia) Pty Ltd v Commonwealth (1944) 69
CLR 185; [1944] HCA 17
Singh v Charles [2022] NSWSC 743
Singh v Khan [2021] NSWSC 1093
Singh v Lekhwar [2022] NSWCATAP 158
Wilson v Chan & Naylor Parramatta Pty Ltd (2020) 103
NSWLR 140; [2020] NSWCA 213
Wilson v Minister for Aboriginal & Torres Strait Islander
Affairs (1996) 189 CLR 1; [1996] HCA 18

Texts Cited:

Nil

Category:

Principal judgment

Parties:

RT 22/23153:

Keshavanand Lekhwar (First Applicant)

Vinita Lekhwar (Second Applicant)

Gurgit Singh (First Respondent)

Kiranjit Kaur (Second Respondent)

Innis Cull (Third Respondent)

Gess Rambaldi (Fourth Respondent)

RT 22/23685:

Keshavanand Lekhwar (First Applicant)

Vinita Lekhwar (Second Applicant)

Gurgit Singh (First Respondent)

Kiranjit Kaur (Second Respondent)

Innis Cull (Third Respondent)

Gess Rambaldi (Fourth Respondent)

Representation:

First and Second Applicants (Self-represented)

First and Second Respondents (Self-represented)

File Number(s): RT 22/23153; RT 22/23685

Publication Restriction: Nil

REASONS FOR DECISION

Overview

- 1 In these two proceedings the first and second applicants, Keshavanand Lekhwar (Mr Lekhwar) and Vinita Lekhwar (Mrs Lekhwar), who are the landlords (collectively referred to as Mr and Mrs Lekhwar or the landlords), seek relief under the *Residential Tenancies Act 2010* (NSW) (RT Act) against the first and second respondents, Gurgit Singh (Mr Singh) and Kiranjit Kaur (Ms Kaur), who are the tenants (collectively referred to as Mr Singh and Ms Kaur or the tenants), of premises at Kingswood (the property or the premises) under a residential tenancy agreement between them (the residential tenancy agreement), and the third and fourth respondents, Innis Cull (Mr Cull) and Gess Rambaldi (Mr Rambaldi), who are the trustees in bankruptcy of Mr Singh (collectively referred to as Messrs Cull and Rambaldi or the trustees).
- 2 I have decided to grant relief to Mr and Mrs Lekhwar by way of a termination order and consequential orders.

The factual background

- 3 On 27 July 2020, Jaimin Babushankarsinh Yadav (Mr Yadav) and Divya Yadav (Mrs Yadav) as the landlords and Mr Singh and Ms Kaur as the tenants entered into a residential tenancy agreement in respect of the premises for a period of 12 months commencing on 27 July 2020 at a rent of \$400.00 per week and a rental bond of \$1,600.00 (the residential tenancy agreement). On page 1 the “Landlord’s agent details” are specified as being Vady Pty Ltd trading as Fortis Real Estate (Fortis). On page 3 there are blank boxes “Yes” and “No” adjacent to the question “Does the tenant give express consent to the electronic service of notices and documents?” and a specified email address (referred to as the Singh email address).

- 4 On 7 April 2021, Mr and Mrs Yadav as the vendors and Mr and Mrs Lekhwar as the purchasers entered into a contract for sale of land in respect of the property subject to existing tenancies.
- 5 On 6 May 2021, Messrs Cull and Rambaldi were appointed as the joint and several trustees of the bankrupt estate of Mr Singh.
- 6 On 23 June 2021, Mr and Mrs Lekhwar as the landlords served a termination notice in the form issued by the Real Estate Institute of New South Wales dated 23 June 2021, signed by the landlords' agent Yoginder Sharma, and addressed to the tenants stated to be Mr Singh and Ms Kaur, requiring them to give vacant possession of the premises on 26 July 2021 (the 23 June 2021 termination notice). The first page records that the grounds other than "End of Fixed Term – section 84" have been struck through. The second page records that the notice was served on the tenants by sending it by email to the Singh email address and was signed by the landlords' agent Yoginder Sharma under the words "Signature of person serving notice".
- 7 The following other proceedings between Mr and Mrs Lekhwar and Mr Singh and Ms Kaur in relation to disputes about the residential tenancy agreement have been commenced in the Tribunal as at 9 June 2022:
 - (1) proceedings RT 21/32134 (the RT 21/32134 proceedings);
 - (2) proceedings RT 21/36269 (the RT 21/36269 proceedings);
 - (3) proceedings RT 21/38704 (the RT 21/38704 proceedings);
 - (4) proceedings RT 21/47463 (the RT 21/47463 proceedings);
 - (5) proceedings 2021/00332235 (the 2021/00332235 proceedings);
 - (6) proceedings RT 22/05789 (the RT 22/05789 proceedings);
 - (7) proceedings RT 22/21758 (the RT 22/21758 proceedings).
- 8 Arising out of decisions made by the Tribunal in relation to disputes about the residential tenancy agreement Mr Singh or Mr Singh and Ms Kaur have commenced the following proceedings in the Supreme Court of New South Wales:
 - (1) proceedings 2021/00255522 (the 2021/00255522 proceedings);
 - (2) proceedings 2021/00291230 (the 2021/00291230 proceedings);

- (3) proceedings 2021/00328613 (the 2021/00328613 proceedings);
- (4) proceedings 2022/00082479 (the 2022/00082479 proceedings);
- (5) proceedings 2022/00148475 (the 2022/00148475 proceedings);
- (6) proceedings 2022/00148604 (the 2022/00148604 proceedings).

The RT 21/32134 proceedings

9 On 26 July 2021, Mr and Mrs Lekhwar as the first and second applicants commenced the RT 21/32124 proceedings against Mr Singh and Ms Kaur as the first and second respondents by filing an application form (the RT 21/32124 application), which specified the Singh email address as the email address of Mr Singh and in which:

- (1) they sought the following orders:

“Section 87 - A termination order where the tenant has breached the residential tenancy agreement

Section 105 - A termination order where a tenant has given a termination notice and not vacated”

- (2) they provided the following reasons for these orders:

“TERMINATION NOTICE HAS GIVEN TO THE TENANT OF [ADDRSS OMITTED] AS TENANT NOT VACATED THE PREMISES BY THE GIVEN DATE, THEY NOT SURE WHERE THEY WOULD MOVE OUT, WE APPLY FOR HEARING AS THE LAND LORD OF ABOVE PROPERTY.WE WOULD NOT RENT OUR PROPERTY MORE FURTHER AS THIS IS OUR FIRST HOME AND NOT INVESTMENT. WE REQUEST PLEASE TAKE ACTION AS SOON AS POSSIBLE. THANK YOU”

10 On 11 August 2021, the Tribunal received as a bundle of documents from the landlords which included the email from Rachael Tabone, General Manager of Fortis sent on 9 June 2021 at 3.51 pm to Mr Singh and Ms Kaur at the Singh email address advising that the property had recently settled, the new landlords were Mr and Mrs Lekhwar, and Fortis was still the managing agent for the property (the 9 June 2021 email).

11 On 24 August 2021, the Tribunal constituted by General Member Pirina made the orders (the 24 August 2021 orders) including:

“2. The applicant landlords are granted leave to seek an order for termination, pursuant to s 84 of the Residential Tenancies Act 2010 (NSW).

3. The respondent shall provide to the applicant and the Tribunal, either in person or by post, a copy of all documents (see note below), on which the respondent intends to rely at the hearing by 31-Aug-2021.”

- 12 On 7 September 2021, Mr Singh using the Singh email address sent an email to the Tribunal and other persons requesting a statement of reasons for the 24 August 2021 orders (the 7 September 2021 email).
- 13 On 10 September 2021, General Member Pirina published the reasons for the 24 August 2021 orders (the 24 August 2021 reasons) which relevantly provided:

“Factual Background

[4] The landlords had purchased the subject property around the beginning of 2021. They were aware that a fixed term tenancy was on foot at the time of purchase, however their intention was to obtain vacant possession and use the property as their primary residence. The landlords did not have the benefit of a managing agent, following settlement. The landlords were renting in the interim, which was beginning to cause hardship. Numerous formal and informal requests were made for the tenants to vacate, without success. In June 2021, the landlords served the tenants with an end of fixed term termination notice, pursuant to s 84 of the Residential Tenancies Act 2010 (NSW) (‘the Act’). The tenants failed to vacate by the termination date and were refusing to provide vacant possession.

Leave to Amend Application

[5] The landlords did not have the benefit of a managing agent for the management of the lease, issuing of notices or the NCAT Application process. They initially filed a misconceived application for termination and vacant possession, based on tenant breach, pursuant to s 87 of the Act. Upon review of the evidence, however, it was clear that they were, in fact, seeking a termination and possession order pursuant to s 84 of the Act - as they had served the tenants with an end of lease termination notice, and the tenants had failed to vacate. That is, they appear to have considered the tenants’ failure to vacate as a ‘breach’, which accounted for the way they had initially framed their application.

[6] Accordingly, leave was granted for the landlords to amend their application to seek an order pursuant to s 84 of the Act. The tenants objected to leave being granted, on the basis that the tenants had not specifically requested leave and that they had not had notice or the chance to respond. Leave was nonetheless granted, given the landlords had an arguable case on the evidence provided and that injustice may result if they were not allowed the opportunity to amend their claim. Furthermore, the tenants could be afforded procedural fairness by way of adjournment and the opportunity to provide further evidence and submissions prior to final hearing and determination of the substantive issues in dispute.”

- 14 On 10 September 2021, Mr Singh using the Singh email address sent three emails to the Tribunal requesting a sealed copy of the 24 August 2021 reasons and a transcript of the hearing on the 24 August 2021 (the 10 September 2021 emails).

- 15 On 12 September 2021, Mr Singh using the Singh email address sent an email to the Tribunal attaching a document in which he asserted that the landlords had not served documents upon him (the 12 September 2021 email).
- 16 On 9 November 2021, the Tribunal constituted by Senior Member Charles relevantly made the following orders (the 9 November 2021 orders):

“ ...

2. By consent, the Residential Tenancy Agreement is terminated in accordance with: - s 84 of the Residential Tenancies Act 2010, as the landlord has served a termination notice for termination at the end of the fixed term.

3. By consent, the Residential Tenancy Agreement is terminated immediately and possession is to be given to the landlord on the date of termination.

4. By consent, the order for possession is suspended until 30-Nov-2021

5. By consent, the tenant shall pay the landlord a daily occupation fee at the rate of \$57.14 per day from the day after the date of termination, namely 10-Nov-2021 until the date vacant possession is given to the landlord.

6. By consent, within 60 days of the date for possession of the premises specified in these orders the landlord may request the relisting of the application to determine the amount of the occupation fee owing.

7. These orders and directions are made in File Nos. RT 21/32134, the Landlords' first application seeking an order to terminate a residential tenancy agreement under s 84 of the Residential Tenancies Act 2010 NSW (RT Act), RT 21/36269, the Landlords' second application seeking to terminate the residential tenancy agreement for non-payment of rent under s 87 of the RT Act, and RT 21/38704, the Tenants' application seeking a declaration under s 11 of the RT Act that there was no residential tenancy agreement.

...

11. The proceeding constituted by the application in file no RT 21/32134 continues as the Landlords' claim for rent arrears; otherwise, the Landlords' second application (file no RT 21/36269) and the Tenants' application (file no RT 21/38704) are dismissed.”

- 17 On 7 February 2022, the Tribunal constituted by Senior Member Ellis SC:

- (1) made the following orders:

“1. GURJIT SINGH SINGH and KIRANJIT KAUR, [address omitted], is to pay KESHVANAND LEKHWAR and VINITA LEKHWAR, [address omitted], the sum of \$4,914.28 immediately.

2. For the avoidance of doubt, the Tribunal notes that order 1 relates to arrears of rent up to and including 9 November 2021 and not to the occupation fee payable thereafter under the orders made on 9 November 2021.

3. Each party is to bear their own costs of this application.”

(2) published its reasons for decision (the 7 February 2022 reasons) which relevantly provide:

“ ...

9. Documents admitted as evidence were as follows:

Exhibit 1 Documents received from the owners on 11 August 2021

Exhibit 2 Documents received from the owners on 15 September 2021

Exhibit 3 Documents received from the owners on 20 October 2021

Exhibit 4 Documents received from the owners on 15 November 2021

Exhibit 5 Documents received from the owners on 18 November 2021

Exhibit 6 Documents received from the occupants on 15 September 2021

Exhibit 7 Documents received from the occupants on 7 December 2021

Exhibit 8 Documents received from the owners on 10 January 2022

...

Summary of the evidence

11. Exhibit 1 contained an undated, unsigned two-page submission in which the owners indicate that they signed a contract to purchase the subject property on 7 April 2021 and that the occupants' lease expired on 25 July 2021. This exhibit also contained a copy of a 9 June 2021 email from the previous owner's real estate agent to the occupants which said that the sale of the property had settled, indicated who were the new owners and said that they were still managing agents for the property.

12. Exhibit 2 comprised a copy of a residential tenancy agreement between the previous owner and the occupants dated 27 July 2020, which was for a term of 12 months, from 27 July 2020 to 26 July 2021, at a rent of \$400 per week, payable in advance, and a copy of a notice to terminate dated 23 June 2021, based on s 84 of the RTA, requiring vacant possession on 26 July 2021. This exhibit also contained a notice of termination dated 14 September 2021 which did not indicate the grounds by ticking any of the eight boxes on that form.

13. Exhibit 3 contained medical information which does not go to the issues now under consideration.

14. Exhibit 4 comprised two pages from the managing real estate agent which suggested four payments of \$400 by the occupants which resulted in the rent being paid up to and including 1 August 2021.

15. Exhibit 5 contained emails exchanged between the parties. On 26 July 2021 Mrs Lekhwar emailed Mr Singh, indicating that she and her husband were now managing the property and suggesting that rent would be \$500 per week from that day. The following day Mr Singh replied, saying:

"The weekly rent payable is \$400 per week for this property [address]. There is no provision to increase rent arbitrarily based on your financial needs in our residential lease agreement.

I reject the rent increase of \$100 per week as excessive and invalid. I am happy to increase to \$410 for next 12 months.

During this rent negotiation let me know which of the following you would choose:

- 1) Landlord will continue to accept \$400 until Tribunal decides applications filed in relation to termination
- 2) The Landlord will accept \$410 as new rent for the next 12 months.
- 3) Landlord will not accept \$400 or \$410 and ask you to hold the rent until determination of rent increase by independent authority."

16. Later on 27 July 2021 Ms Lekhwar replied as follows (setting out exactly what appeared in that email):

"Please be advice that your tenancy agreement already expired on 26/7/2021 as this agreement was with previous owner of the property, [address].

As notice given and you were not able to move out on the given date on this notice. We are not renting or leasing the property anymore further. If you were not able to find the property your rent is increased \$500 per week it is not negotiable it is decision by owner.

Please also mind to make any decisions by your own, before any sign or without owner's permission. Until hearing date we applied."

17. The following day, on 28 July 2021, Mr Singh responded as set out below:

"Despite previous notice that once the matter goes to NCAT, communication in relation to dispute management must be in writing. However, you called today and raised the following allegations:

- 1) I have been not looking for moving out of the property.
- 2) I have not been answering your phone calls for the last two days when I have received no such calls from you in the last two days.
- 3) I have not been listening to your unlawful demands such as an increase of \$100 rent with one day notice, in circumstances when those demands are unlawful.
- 4) I have not listened to you, in circumstances when I replied to all your emails promptly in the last two days.

I reject all those allegations and the onus is on you to prove them."

18. Exhibit 6 is a document which appears to have been prepared as the occupants' submissions. Although the second line of the heading refers to "Supreme Court of NSW", the third line refers to three applications: RT 21/32134, RT 21/36329, and RT 21/38704. On the last page of those submissions the following words appear: "[The owners] have misled the tribunal and provided information they know to be false. [The occupants] will provide evidence that will establish the truth."

19. Exhibit 7 is a folder which contains an index, followed by an affidavit of Mr Singh plus 131 numbered pages. The focus of the affidavit dated 18 November 2021 is the 9 November 2021 hearing. It purports to withdraw consent to the orders made on that occasion. At 7/1-2 (ie pages 1 and 2 in Exhibit 7) is a copy of the notice of termination dated 14 September 2021 to which reference has already been made.

20. At 7/3-10 is a statement of Mr Singh in which he purports to set out various emails, including those quoted above. Mr Singh contends that the effect of the 27 July 2021 email from Ms Lekhwar was that he was told to either pay \$500 or waiting till the hearing date when the matter would be considered by the Tribunal. He goes on to say, at [8] on 7/4: "It is my understanding that the landlord position is there is no residential tenancy agreement between the parties since they have not signed any residential tenancy contract." At [10] on 7/5 Mr Singh maintains he has not been served with a 90-day termination notice.

21. It is convenient to here note that s 84 of the RTA relates to termination at the end of a fixed term residential tenancy agreement, s 85 relates to a 90-day notice (which does not require grounds), s 86 relates to a termination notice based on sale of the tenanted property, s 87 relates to a breach of the residential tenancy agreement, and s 88 relates to termination for non-payment of rent.

22. Mr Singh's statement goes on to refer to a sequence of emails from 10 September 2021 which included a 12 September 2021 email in which Mr Singh said: "I am happy to start paying rent \$400 per week as per our original agreement as soon as you let me do that."

23. Exhibit 7 also contains a copy of a letter to the Tribunal member who presided at the 9 November 2021 hearing (7/13-15) followed by copies of further emails and a letter to the Tribunal's President (7/23-24).

24. Subsequent documents related to the conduct of other proceedings but included a copy of the reasons delivered on 9 November 2021 which included the words (7/69 at (6)): "The Tenants further agreed that their application (file no RT 21/38704) could be dismissed, as the Landlords would provide an acknowledgement that the Tenants occupied the premises as the Landlords' Tenants under a residential tenancy agreement."

25. A copy of the verified Supreme Court Statement of Claim lodged by Mr Singh against the Tribunal member who presided on 9 November 2021 and the owners was also provided (7/65-73). That Statement of Claim includes the following paragraphs:

"1. Plaintiff is a tenant at [address] pursuant to the residential tenancies act 2010.

...

3. Second and Third Defendant are Landlords and herein referred to as Landlords.

...

4. The contract between the landlord and tenant is that the landlord agrees that the tenant has the right to occupy the residential premises during the tenancy.

5. In breach of the residential contract between the plaintiff and landlords, landlords on 26 July 2021 issues a notice to the plaintiff notifying a substantial rent increase in the rent without any notice.

6. In breach of the residential contract between the plaintiff and landlords, landlords on 23 June 2021 issues an invalid termination notice and falsely claimed that plaintiff occupation of the premises is without valid tenancy."

26. The remaining pages of Exhibit 7 (74-131) contain a copy of the Residential Tenancy Amendment (Covid-19) Regulation 2020 and various Public Health orders.

27. Exhibit 8 contained submissions, a list of amounts claimed for compensation, bank statement pages showing two payments of \$400, on 3 and 10 December 2021, a rent ledger which suggests the occupants have not paid any rent since 1 August 2021 and other documents not relevant to the issues now under consideration other than the last page which is a copy of the front page of the contract for sale which records that the owners purchase of the subject property was "subject to existing tenancies".

..."

The RT 21/36269 proceedings

18 On 25 August 2021, Mr and Mrs Lekhwar as the first and second applicants commenced the RT 21/36269 proceedings against Mr Singh and Ms Kaur as the first and second respondents by filing an application form in which they sought relief under ss 87, 95 and 187 of the RT Act. The application form specified the Singh email address as the email address of Mr Singh.

19 On 9 November 2021, the Tribunal dismissed the RT 21/36269 proceedings pursuant to order 11 of the 9 November 2021 orders.

The RT 21/38704 proceedings

20 On 12 September 2021, Mr Singh and Ms Kaur as the first and second applicants commenced the RT 21/38704 proceedings against Mr and Mrs Lekhwar as the first and second respondents by filing an application form in which they sought relief under s 11 of the RT Act. The application form specified the Singh email address as the email address of Mr Singh.

21 On 9 November 2021, the Tribunal dismissed the RT 21/38704 proceedings pursuant to order 11 of the 9 November 2021 orders.

The RT 21/47463 proceedings

- 22 On 19 November 2021, Mr Singh and Ms Kaur as the first and second applicants commenced the RT 21/47463 proceedings against Mr and Mrs Lekhwar as the first and second respondents by filing an application form in which they sought relief under ss 11 and 187 of the RT Act. The application form specified the Singh email address as the email address of Mr Singh.
- 23 On 9 February 2022, the Tribunal constituted by Senior Member Ellis SC dismissed the RT 21/47463 proceedings.

The 2021/00332235 proceedings

- 24 On 22 November 2021, Mr Singh and Ms Kaur as the first and second appellants commenced the 2021/00332235 proceedings against Mr and Mrs Lekhwar as the first and second respondents by filing a notice of appeal in which they appealed against the 9 November 2021 orders.
- 25 On 16 May 2022, the Appeal Panel constituted by Principal Member Suthers and Senior Member Durack SC made orders and published their reasons for decision: *Singh v Lekhwar* [2022] NSWCATAP 158 (the 16 May 2022 Appeal Panel decision). In the 16 May 2022 Appeal Panel decision the Appeal Panel relevantly made the following orders:

“(3) The appeal is allowed.

(4) The orders made by the Tribunal on 9 November 2021 the subject of this appeal, namely orders 1, 2, 3, 4, 5, 6 and 7 are set aside.

(5) Proceedings RT 21/32134 be remitted to the Tribunal for re-determination insofar as those proceedings seek orders in relation to possession of the residential premises the subject of these proceedings, including any order for termination of a residential tenancy agreement between the parties.

(6) Mr Singh’s trustee(s) in bankruptcy is/are made a party to proceedings RT 21/32134.”

The RT 22/05789 proceedings

- 26 On 9 February 2022, Mr Singh and Ms Kaur as the first and second applicants commenced the RT 22/05789 proceedings against Mr and Mrs Lekhwar as the first and second respondents by filing an application form in which they sought relief under s 187 of the RT Act. The application form specified the Singh email address as the email address of Mr Singh.

27 On 4 April 2022, the Tribunal constituted by Senior Member Ellis SC relevantly made the following orders:

“ ...

3. The application for disqualification for bias is rejected.

4. The application is dismissed.”

The RT 22/21758 proceedings

28 On 16 May 2022, the Tribunal renumbered the RT 21/32124 proceedings as the RT 22/21758 proceedings following their remittal by the Appeal Panel.

29 On 20 May 2022, the Tribunal constituted by Deputy President Harrowell made procedural directions (the 20 May 2022 orders) including:

“ ...

3. On or before 5 PM on 23 May 2022 the applicants are to file and serve any further evidence and short submissions (not more than 5 pages) concerning whether a termination order should be made under s 84 of the Residential Tenancies Act, 2000 and if so why.

4. On or before 5 PM on 24 May 2022 the respondents are to file and serve any further evidence and short submissions (not more than 5 pages) in reply.

5. Evidence from all witnesses must be in the form of a statutory declaration or affidavit and documents (including evidence from witnesses, must be in an indexed and paginated bundle of documents.

6. Witnesses must be available for cross examination.

7. Documents may be lodged by the portal provided that documents lodged by each party by this method are limited to one PDF document, not more than 5 Mb in size. If this condition cannot be met then documents must be delivered to the Tribunal in hard copy and must arrive by the due time.

...”

30 On 20 May 2022, the Deputy Register sent an email at 12.09 pm to Messrs Cull and Rambaldi attaching the RT 21/32124 application, the 24 August 2021 orders, and the 16 May 2022 Appeal Panel decision.

31 On 20 May 2022, the Deputy Register sent an email at 2.49 pm to Mr Cull attaching the 20 May 2022 orders.

32 On 20 May 2022, the Deputy Register sent a notice of contested hearing on 25 May 2022 to the parties.

33 On 24 May 2022, Mr Cull sent an email at 11.05 am to the Deputy Register, which was copied to each of Mr and Mrs Lekhwar and Mr Singh and in which

he attached the letter dated 24 May 2022 on the letterhead of Pitcher Partners with an address in Melbourne Victoria to Deputy President Harrowell (the 24 May 2022 letter) which enclosed a copy of the Certificate of Appointment of Trustee of the Australian Financial Security Authority and relevantly provides:

“I refer to the above-mentioned Proceeding. Gess Rambaldi and I are the joint and several trustees of the bankrupt estate of Gurjit Singh. A copy of our Certificate of Appointment is enclosed.

I confirm receipt of:

- the orders made by Deputy President Harrowell on 20 May 2022 in the Proceeding;
- the application in the Proceeding;
- the Tribunal's orders made on 24 August 2021 amending the application to seek termination of the residential tenancy pursuant to s.84 of the Residential Tenancies Act 2010 (NSW); and
- the Appeal Panel decision made on 16 May 2022 and the reasons in *Singh v Lekhwar* [2022] NSWCATAP 158.

I do not intend to file any material in the Proceeding.

I do not oppose the landlord's application or the Orders sought by the landlord to terminate the residential tenancy.

I have not identified any property in the bankrupt estate of any value. I have made no realisations in the bankrupt estate. I am presently without funds.

I do not intend to appear at the hearing in this matter unless otherwise directed to do so by the Tribunal.

I authorise the use of this letter as evidence of my position.”

- 34 On 24 May 2022, the Tribunal constituted by Deputy President Harrowell dismissed an application by the tenants to vacate the hearing on 25 May 2022.
- 35 On 27 May 2022, the Tribunal constituted by Deputy President Harrowell made procedural directions (the 27 May 2022 orders) including:

“ ...

5. The following directions are made:

- a. The parties are to file and serve any further evidence and submissions in support of their respective positions by 5:00pm 3 June 2022;
- b. The parties are to file and serve any evidence and submissions in reply by 5:00pm on 7 June 2022;
- c. All evidence from witnesses must be in the form of a statutory declaration or affidavit;
- d. Submissions must be no more than 10 pages and must address the issues identified below;

e. All documents required by these orders must be provided to the Tribunal in hard copy, in a folder, paginated and indexed;

f. Documents filed pursuant to these orders must not be filed by email, through the Tribunal portal or in any other electronic form. Any documents filed in contravention of these orders may not be relied upon at the hearing on 9 June 2022;

...

7. The applicants have leave to file and serve any further application (New Application) seeking termination on the ground of non-payment of rent (s 88 RT Act) or on the ground of hardship (s 93 RT Act) subject to the following conditions:

a. The application must be filed and served no later than 5:00pm on 1 June 2022;

b. The application must name the Trustees as respondents;

c. All evidence and submissions in support of the application must be filed and served in accordance with the directions in order 5 above, including any termination notices relied upon.

8. In the event the conditions in order 7 are met:

a. The New Application will be listed for hearing on 9 June 2022 at the same time as these proceedings;

b. The respondents are to file and serve any evidence and submissions in reply to the New Application in accordance with order 5 above.

Any dispute concerning whether the conditions have been met will be dealt with at the hearing 9 June 2022.

9. The directions in order 5 otherwise apply to evidence and submissions filed in accordance with orders 7 and 8.

..."

36 On 27 May 2022, Deputy President Harrowell published the reasons for the 27 May 2022 orders (the 27 May 2022 reasons) which relevantly provided at [6] and [48]:

"[6] The tenancy agreement is in writing. The parties to the tenancy agreement when signed were the tenants and Jaimin Babushankasrinh and Divya Yadav as landlords. However, the applicants purchased the premises, the subject of the tenancy agreement on about 7 April 2021. Consequently, as successors in title, the applicants became landlords: see definition of landlord s 3 RT Act."

"[48] During the course of these submissions, the Tribunal raised with the applicants that it appeared the application for termination made under s 84 of the RT Act had been filed prematurely and ought to be dismissed."

37 On 27 May 2022, the Deputy Register sent a notice of contested hearing on 9 June 2022 to the parties.

The 2021/00255522 proceedings

38 In September 2021, Mr Singh as the plaintiff commenced the 2021/00255522 proceedings against the Tribunal, Mr Lekhwar and Mrs Lekhwar as the first, second and third defendants by filing a summons in which he sought judicial review of orders 2 and 3 of the 24 August 2021 orders.

39 On 1 October 2021, Rothman J dismissed the summons.

The 2021/00291230 proceedings

40 On 13 October 2021, Mr Singh as the plaintiff commenced the 2021/00291230 proceedings against the Tribunal, Mr Lekhwar and Mrs Lekhwar as the first, second and third defendants by filing a summons in which he appealed against orders 2 and 3 of the 24 August 2021 orders.

The 2021/00328613 proceedings

41 On 18 November 2021, Mr Singh as the plaintiff commenced the 2021/00291230 proceedings against the Senior Member Charles, Mr Lekhwar and Mrs Lekhwar as the first, second and third defendants by filing a statement of claim in which he claimed damages against Senior Member Charles for fraud and “public malfeasance”.

42 On 10 June 2022, Garling J delivered a judgment: *Singh v Charles* [2022] NSWSC 743 (the 10 June 2022 Supreme Court judgment). In the 10 June 2022 Supreme Court judgment Garling J made the following orders (the 10 June 2022 Supreme Court orders):

“(1) Order, pursuant to rule 13.4 of the Uniform Civil Procedure Rules 2005, that the plaintiff’s Statement of Claim filed on 18 November 2021 be dismissed as against the first defendant.

(2) Order that the plaintiff pay the first defendant’s costs of the proceedings, including the Notice of Motion filed on 31 January 2022.

(3) List the balance of the proceedings before the Common Law Registrar at 9am on 20 June 2022.”

The 2022/00082479 proceedings

43 On 22 March 2022, Mr Singh as the plaintiff commenced the 2022/00082479 proceedings against Dominique Anne Carroll, Daniel Joseph Mckinnon, Complete Legal and Conveyancing, Mrs Lekhwar, Mr Lekhwar and Suzanne Gainsford-Holland as the first to sixth defendants by filing a statement of claim

in which he claimed damages arising out of their involvement in the RT 21/32124 proceedings.

The 2022/00148475 proceedings

44 On 23 May 2022, Mr Singh and Ms Kaur as the first and second plaintiffs commenced the 2022/00148475 proceedings against Mr Lekhwar, Mrs Lekhwar, Messrs Cull and Rambaldi, the Tribunal, Deputy President Harrowell, Senior Member Ellis SC, Principal Member Suthers and Senior Member Durack SC as the first to eighth defendants by filing a summons in which they sought various orders including the 20 May 2022 orders be set aside, and Deputy President Harrowell, Senior Member Ellis SC, Principal Member Suthers and Senior Member Durack SC cease to have any involvement “in this matter”.

The 2022/00148604 proceedings

45 On 23 May 2022, Mr Singh and Ms Kaur as the first and second plaintiffs commenced the 2022/00148604 proceedings against Mr Lekhwar, Mrs Lekhwar, and the Tribunal as the first to third defendants by filing a summons in which they sought various orders including an order that all orders made by Principal Member Suthers and Senior Member Durack SC be set aside.

The history of the two proceedings

46 On 25 May 2022, Mr and Mrs Lekhwar as the first and second applicants commenced proceedings RT 22/23153 (the RT 22/23153 proceedings) against Mr Singh and Ms Kaur as the first and second respondents by filing an application form (the RT 22/23153 application), which specified the Singh email address as the email address of Mr Singh and in which:

(1) they sought the following orders:

“Section 84 - A termination order at the end of the fixed term

Section 187(1)(i) - A termination order or an order for the possession of premises”

(2) they provided the following reasons for these orders:

“A termination order was sent by an agent and the date for the termination order was 26/07/2021, under section 84. The tenant did not move out of the property and another termination order was made for 14/09/2021. The tenant did not move out of the property once again. Since the 07/08/2021, only 2 weeks of rent was paid totalling to

\$1034.34. There is still a remaining of \$18,965.66 until the 21/05/2022. We would like the tenant to move out as he has been dragging this matter along for too long and has now declared bankruptcy, even though multiple appeals and even a lawyer was hired. The tenant's wife has a restaurant opened under her name and the tenant is still claiming bankruptcy. There has been a major financial impact to us and has caused us to be unable to pay rent to the house we are currently residing in right now. If there is no decision made, we have no other choice but to go into our home ourselves, as they may be a eviction or termination order coming from my real estate agent. We would like a decision to be made as soon to be made, please.”

- 47 On 27 May 2022, the Deputy Register sent a notice of contested hearing on 25 May 2022 for the RT 22/23153 proceedings to the parties.
- 48 On 28 May 2022, Mr and Mrs Lekhwar as the first and second applicants commenced proceedings RT 22/23685 (the RT 22/23685 proceedings) against Mr Singh and Ms Kaur as the first and second respondents by filing an application form (the RT 22/23685 application), which specified the Singh email address as the email address of Mr Singh and in which:
- (1) they sought the following orders:
- “Section 93 - A termination order due to undue hardship
Section 187(1)(i) - A termination order or an order for the possession of premises”
- (2) they provided the following reasons for these orders:
- “NOT PAID RENT SINCE 01/08/2021 ONLY 2 WEEKS RENT PAID , THE RENT IS \$400 PER WEEK. WE SEEKING termination orders immediately, notice has given the tenant under 84 fixed terms, tenant not vacated the premieres we are in financial hardship and many health issue as this matter was in tribunal since 26/07/2021 tribunal not solve this issues in 11 months how ever they asked us to file fresh new application. we provided all evidence to related to our matter in previously”
- 49 On 30 May 2022, the Deputy Register sent a notice of contested hearing on 25 May 2022 for the RT 22/23685 proceedings to the parties.
- 50 On 31 May 2022, the Tribunal constituted by Deputy President Harrowell made procedural directions in the RT 22/23153 proceedings and the RT 22/23685 proceedings:
- “1. Leave is given to the applicants to amend their applications RT 22/23153 and RT 22/23685 to join the Trustees of the respondent Mr Singh, namely Mr Innis Cull and Mr Gess Rambaldi.

2. Notice of these orders and the amended application is to be given to the respondents by email.”

- 51 On 31 May 2022, Mrs Lekhwar on behalf of herself and Mrs Lekhwar sent an email at 10.28 am to the Registrar requesting the joinder of the trustees as respondents in the RT 22/23153 proceedings and the RT 22/23685 proceedings.
- 52 The records of the Tribunal were amended to join Messrs Cull and Rambaldi as the third and fourth respondents in the RT 22/23153 proceedings and the RT 22/23685 proceedings.

The hearing

- 53 On 9 June 2022, the hearing of the RT 22/21758 proceedings, the RT 22/23153 proceedings and the RT 22/23685 proceedings took place. Mr and Mrs Lekhwar together with an interpreter in the Hindi language appeared by audio visual link. Mr Singh appeared on behalf of himself and Ms Kaur by telephone. There was no appearance by Messrs Cull and Rambaldi.
- 54 At the commencement of the hearing I made an order with the consent of the parties that subject to relevance the evidence in one proceedings be evidence in the other proceedings.
- 55 I then dismissed the RT 22/21758 proceedings as the landlords withdrew the RT 21/32124 application.
- 56 The landlords relied on the following documents which I admitted into evidence over the objection of the tenants:
- (1) the residential tenancy agreement (marked as exhibit A1);
 - (2) the 23 June 2021 termination notice (marked as exhibit A2);
 - (3) a bundle of documents received by the Tribunal on 1 June 2022 (marked as exhibit A3) (the 1 June 2022 bundle of documents).
- 57 The objection of the tenants to the residential tenancy agreement was that they had not received a hard copy as required by the Tribunal. I admitted the residential tenancy agreement into evidence as neither the 20 May 2022 orders nor the 27 May 2022 orders required the parties to serve documents on each other in hard copy.

- 58 The objection of the tenants to the 23 June 2021 termination notice was that they had not received a hard copy as required by the Tribunal and that it had not been served on them. I admitted the 23 June 2021 termination notice into evidence as neither the 20 May 2022 orders nor the 27 May 2022 orders required the parties to serve documents on each other in hard copy. Further, while the issue of whether the 23 June 2021 termination notice had been served on the tenants was a matter to be determined, the submission by the tenants that it had not been served was not a reason for the refusal to receive it into evidence.
- 59 The objection of the tenants to the 1 June 2022 bundle of documents was that it had not been served on them. When I asked the landlords whether they had served this bundle on the tenants they said it had been sent to the tenants by email to the Singh email address on 31 May 2022 approximately between 6.00 pm and 7.00 pm. When he asked Mr Singh whether he had received this email on 31 May 2022, he responded after, a gap of approximately one minute, "6.28 pm". When I asked Mr Singh to confirm that he received the documents at 6.28 pm, he answered "Yes". I then admitted the documents into evidence. Mr Singh then denied that he had answered my question and said that Mr Lekhwar had answered the question.
- 60 Mr Singh then made an application that I disqualify myself on the ground of apprehended bias, and made submissions in support of the application. I dismissed the application and indicated that I would provide reasons in my decision.
- 61 Mr Singh then made an application that the two proceedings be adjourned, and made submissions in support of the application. I dismissed the application and indicated that I would provide reasons in my decision.
- 62 The tenants relied on the following documents which I admitted into evidence without objection of the landlords:
- (1) the email of Mr Singh to the Tribunal sent on 24 May 2022 at 5.29 pm and the attached first outline of submissions (marked as exhibit R1);
 - (2) the email of Mr Singh to the Tribunal sent on 25 May 2022 at 1.33 am and the attached second outline of submissions (marked as exhibit R2);

- (3) the email of Mr Singh to the Tribunal sent on 25 May 2022 at 3.17 am and the attached third outline of submissions (marked as exhibit R3);
- (4) the email of Mr Singh to the Tribunal sent on 25 May 2022 at 4.21 am and the attached fourth outline of submissions (marked as exhibit R4);
- (5) the email of Mr Singh to the Tribunal sent on 25 May 2022 at 6.28 am and the attached fifth outline of submissions (marked as exhibit R5).

63 In response to my inquiry the landlords said that they were not seeking to give oral evidence.

64 In response to my inquiry Mr Singh said that he was seeking to give oral evidence. Mr Singh then made an application to give oral evidence, and made submissions in support of the application. I dismissed the application and indicated that I would provide reasons in my decision.

65 The landlords and the tenants then made oral submissions.

66 At the conclusion of the hearing I reserved my decision.

The issues

67 In *Cominos v Di Rico* [2016] NSWCATAP 5 (*Cominos*), the Appeal Panel at [13] stated that it may be difficult for self-represented appellants to clearly express their grounds of appeal. In such circumstances and having regard to the guiding principle, it is appropriate for the Appeal Panel to review an appellant's stated grounds of appeal, the material provided, and the decision of the Tribunal at first instance to examine whether it is possible to discern grounds that may either raise a question of law or a basis for leave to appeal.

68 I consider that the principles in *Cominos* at [13] with appropriate adjustments apply equally to proceedings at first instance before the Tribunal.

69 Having regard to the RT 22/23153 application, the RT 22/23685 application, the documents received into evidence and the submissions of the parties, the following issues arise for determination in one or both of the two proceedings:

- (1) whether the Tribunal has jurisdiction to determine the two proceedings;
- (2) as to the RT 22/23153 proceedings:
 - (a) whether there is a defect in the 23 June 2021 termination notice;
 - (b) whether there is a defect in the manner of service of the 23 June 2021 termination notice;

- (c) whether the RT 22/23153 proceedings were commenced within the prescribed period, and if not time for their commencement should be extended;
 - (d) whether a termination order and a possession order should be made;
- (3) as to the RT 22/23685 proceedings:
- (a) whether the landlords would suffer under hardship if the residential tenancy agreement was not terminated;
 - (b) whether a termination order and a possession order should be made.

70 I have considered each of the issues, notwithstanding that I have determined an issue adversely to a party, in case I am later found to be wrong: *Aerolink Air Services Pty Ltd v Bankstown Airport Ltd* [2022] NSWSC 587 at [110] per Leeming JA.

71 Before dealing with these issues, it is appropriate to give my reasons for dismissing the three applications of the tenants and to set out the applicable statutory provisions.

The application for disqualification

72 Mr Singh made the following submissions in support of his application that I disqualify myself on the ground of apprehended bias:

- (1) I had said that he had admitted receiving documents when it was Mr Lekhwar who answered my question;
- (2) I had admitted the landlords' documents into evidence when they had not been served upon him in accordance with the directions of the Tribunal;
- (3) I had said that the residential tenancy agreement and the 23 June 2022 termination notice had been served upon him in previous proceedings when he previously had told Deputy President Harrowell, Senior Member Charles and General Member Pirina that he had not received the documents;
- (4) I had approached the proceedings without a free mind, and with a predetermined decision to admit the documents of the landlords into evidence, and had been instructed to do so by Deputy President Harrowell who since 2018 had been causing him "to completely ruin my life".

73 When I asked Mr Singh to repeat his submissions, made the following submissions in support of his application that I disqualify myself on the ground of apprehended bias:

- (1) I had recorded evidence as having been given by him when it was given by Mr Lekhwar;
- (2) he had not been served with any of the landlords' evidence;
- (3) I had come to the proceedings with a predetermined mind to deny natural justice to the tenants by admitting the documents of the landlords into evidence, despite his denial that he had not received the documents;
- (4) I was not an independent person, and was not acting on the basis of the evidence. I was acting under the influence of some person, which he would say was Deputy President Harrowell;
- (5) I had said he had been served with evidence in previous proceedings, but I had not identified the proceedings, the date and the Tribunal member. He previously had told Deputy President Harrowell, Senior Member Charles and General Member Pirina that the landlords' documents had not been served upon him in accordance with the directions of the Tribunal.

74 When I put to Mr Singh that he in fact was alleging actual bias on my part because I had prejudged the two proceedings, he insisted that he was only alleging apprehended bias.

75 The principles applicable to allegations of apprehended bias were recently summarised by the High Court in *Charisteas v Charisteas* [2021] HCA 29 at [11] (Kiefel CJ, Gageler, Keane, Gordon and Gleeson JJ); (2021) 95 ALJR 824, and are as follows:

“...The apprehension of bias principle is that ‘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’. The principle gives effect to the requirement that justice should both be done and be seen to be done, reflecting a requirement fundamental to the common law system of adversarial trial – that it is conducted by an independent and impartial tribunal. Its application requires two steps: first, ‘it requires the identification of what it is said might lead a judge... to decide a case other than on its legal and factual merits’; and, second, there must be articulated a ‘logical connection’ between that matter and the feared departure from the judge deciding the case on its merits. Once those two steps are taken, the reasonableness of the asserted apprehension of bias can then ultimately be assessed.” (citations omitted)

76 The principles applicable to allegations of apprehended and actual bias were recently summarised in some detail in *Collier v Country Women's Association of New South Wales* [2018] NSWCA 36 at [23]-[27] by Gleeson JA:

"Apprehended bias – relevant principles"

[23] The test for recusal is whether a fair-minded lay person, with knowledge of the matters relied upon by Mrs Collier, might reasonably consider that the judicial officer might not carry out his judicial functions with an impartial and unprejudiced mind. [8]

[24] The test for apprehension of bias is objective. It does not require an assessment of the state of mind of the judicial officer in question, as is necessary on an inquiry about actual bias. [9]

[25] The application of the apprehension of bias principle involves two steps. The first is to identify what it is said might lead the judicial officer to decide a case other than on its legal and factual merits. The second is to articulate the logical connection between the circumstances identified in that matter and the apprehension that the case might not be decided on its merits. [10]

[26] Accordingly, an allegation of apprehended bias requires an objective assessment of the connection between the facts and circumstances said to give rise to the apprehension and the asserted conclusion that the judicial officer might not bring an impartial mind to bear upon the issues that are to be decided. The question is not whether the judicial officer had in fact prejudged an issue.

Actual bias – relevant principles

[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 and 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 prejudice 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 prejudice 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 prejudice requires an assessment of the state of mind of the judge in question: *Michael Wilson & Partners Limited v Nicholls & Others* [2011] HCA 48; 244 CLR 427 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 and 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.”
(footnotes omitted)

- 77 Notwithstanding the disavowal by Mr Singh, he was clearly alleging actual bias on my part. Mr Singh adduced no evidence of prejudice on my part or that I had been influenced by Deputy President Harrowell. My ruling to receive the documents of the landlords into evidence over his objection does not demonstrate prejudice of the two proceedings. Their determination involves consideration of the issues I have identified, and involves application of the applicable statutory provisions and legal principles to the relevant facts.
- 78 Mr Singh has not established that I have an opinion with respect to the two proceedings, that such opinion is adverse to the tenants and is one that I would apply on the determination of the two proceedings, or that I would do so without giving the issues I have identified in the those proceedings consideration in light of whatever facts, statutory provisions, legal principles and arguments may be relevant to them. Similarly, Mr Singh has not established that I have a lack of impartiality with respect to the two proceedings.
- 79 Insofar as the application as properly characterised involves an allegation of apprehended bias, the first step is my ruling to receive the documents of the

landlords into evidence. However, as to the second step, Mr Singh did not articulate any logical connection between my ruling and the apprehension that the two proceedings might not be decided on their merits.

80 In hearing this application I have been mindful that it is my duty to determine matters which come before me as a member of the Tribunal and also that it is my duty not to withdraw unless there are reasons which require me to do so. The following comments of Mason J in *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352; [1986] HCA 39 in relation to judicial officers are equally applicable to members of the Tribunal:

“Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.”

81 For these reasons, I dismissed the application of the tenants for me to disqualify myself.

The application for an adjournment

82 Mr Singh in substance made the submission that he had not had time to respond to the landlords' evidence because he had not received it in support of his application for an adjournment of the two proceedings. Mr Singh did not identify the nature of the evidence he proposed to adduce in response to the landlords' evidence.

83 Section 51 of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act) provides:

51 Adjournment of proceedings

The Tribunal may adjourn proceedings to any time and place (including for the purpose of enabling the parties to negotiate a settlement).

84 I decided not to grant an adjournment of the two proceedings for the following reasons:

- (1) the orders sought by the landlords and reasons for those orders were set out in each of the RT 22/23153 application and the RT 22/23685 proceedings. The RT 22/23153 proceedings were a replication of the RT 21/32124 proceedings and the orders sought by the landlords and

reasons for those orders had been set out in order 2 of the 24 August 2021 orders and the 24 August 2021 reasons at [4] to [6];

- (2) the tenants had had ample opportunity to adduce their evidence as provided by order 4 of the 20 May 2022 orders and orders 5a, 5b and 8b of the 27 May 2022 orders. There was no requirement that the tenants receive any evidence of the landlords before they provided their evidence in conformity with these orders;
- (3) the tenants did not indicate what additional evidence they proposed to adduce in addition to the material already provided to the Tribunal in the five emails of Mr Singh sent on 24 and 25 May 2022.

85 For these reasons, I dismissed the application of the tenants for an adjournment of the two proceedings.

The application to give oral evidence

86 Mr Singh made the submission that he wished to give evidence that he had not received the landlords' evidence in support of his application to give oral evidence.

87 I decided not to permit Mr Singh to give oral evidence for the following reasons:

- (1) I had already decided to admit the landlords' documents into evidence;
- (2) order 5 of the 20 May 2022 orders and orders 5c, 7, 8b and 9 of the 27 May 2022 orders made clear that the evidence of the parties was to be by statutory declaration or affidavit. The tenants provided no adequate explanation as to why their evidence was not in the form of a statutory declaration or affidavit.

88 For these reasons, I dismissed the application of the tenants for Mr Singh to give oral evidence.

The applicable statutory provisions

NCAT Act

89 Part 3 (ss 28-34) of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act) contains provisions dealing with the jurisdiction of the Tribunal. Section 28 deals with the jurisdiction of the Tribunal generally, and relevantly provides:

28 Jurisdiction of Tribunal generally

- (1) The Tribunal has such jurisdiction and functions as may be conferred or imposed on it by or under this Act or any other legislation.
- (2) In particular, the jurisdiction of the Tribunal consists of the following kinds of jurisdiction—

(a) the general jurisdiction of the Tribunal,

...

90 Section 29 deals with the general jurisdiction of the Tribunal, and relevantly provides:

29 General jurisdiction

(1) The Tribunal has general jurisdiction over a matter if—

(a) legislation (other than this Act or the procedural rules) enables the Tribunal to make decisions or exercise other functions, whether on application or of its own motion, of a kind specified by the legislation in respect of that matter, and

(b) the matter does not otherwise fall within the administrative review jurisdiction, appeal jurisdiction or enforcement jurisdiction of the Tribunal.

...

(2) The Tribunal also has the following jurisdiction in proceedings for the exercise of its general jurisdiction—

...

(b) the jurisdiction to exercise such other functions as are conferred or imposed on the Tribunal by or under this Act or enabling legislation in connection with the conduct or resolution of such proceedings.

91 Part 5 Division 2 (ss 39-88) contains provisions dealing with the commencement of proceedings in the Tribunal. Section 41 deals with the power of the Tribunal to grant extensions of time, and provides:

41 Extensions of time

(1) The Tribunal may, of its own motion or on application by any person, extend the period of time for the doing of anything under any legislation in respect of which the Tribunal has jurisdiction despite anything to the contrary under that legislation.

(2) Such an application may be made even though the relevant period of time has expired.

92 Schedule 4 contains provisions dealing with the Consumer and Commercial Division of the Tribunal (the CC Division). Clause 3 deals with the functions allocated to the CC Division, and relevantly provides:

3 Functions allocated to Division

(1) The functions of the Tribunal in relation to the following legislation are allocated to the Division—

...

Residential Tenancies Act 2010

...

RT Act

- 93 Part 5 Division 1 (ss 80-83) contains general provisions relating to the termination of residential tenancy agreements. Section 80 contains definitions, and relevantly provides:

80 Definitions

In this Part—

...

termination date means the day specified in a termination notice as the day on which the residential tenancy agreement is terminated and by which vacant possession of the residential premises is to be given.

termination notice means a notice terminating a residential tenancy agreement.

termination order means an order terminating a residential tenancy agreement together with an order for possession of the residential premises.

- 94 Section 81 deals with the circumstances of termination of residential tenancies, and relevantly provides:

81 Circumstances of termination of residential tenancies

...

(3) **Termination by order of Tribunal** A residential tenancy agreement terminates if the Tribunal makes an order terminating the agreement under this Act.

...

- 95 Section 82 deals with termination notices, and relevantly provides:

82 Termination notices

(1) A termination notice must set out the following matters—

(a) the residential premises concerned,

(b) the day on which the residential tenancy agreement is terminated and by which vacant possession of the premises is to be given,

(c) if the notice is not given under section 84, 85, 96 or 97, the ground for the notice,

(d) any other matters prescribed by the regulations.

(2) A termination notice must be in writing and be signed by the party giving the notice or the party's agent.

...

- 96 Section 83 deals with termination orders, and provides:

83 Termination orders

(1) If the Tribunal makes an order terminating a residential tenancy agreement under this Act, it must also make an order for possession of the residential premises specifying the day on which the order takes or took effect.

(2) An application to the Tribunal by a landlord for a termination order—

(a) must be made after the termination date specified in the relevant termination notice and within the period prescribed by the regulations, and

(b) must be made only if vacant possession of the premises is not given as required by the notice.

97 Part 5 Division 2 (ss 84-95) contains provisions relating to the termination of residential tenancy agreements by a landlord. Section 84 deals with the end of a residential tenancy agreement at the end of fixed term tenancy, and relevantly provides:

84 End of residential tenancy agreement at end of fixed term tenancy

(1) A landlord may, at any time before the end of the fixed term of a fixed term agreement, give a termination notice for the agreement that is to take effect on or after the end of the fixed term.

(2) The termination notice must specify a termination date that is on or after the end of the fixed term and not earlier than 30 days after the day on which the notice is given.

(3) The Tribunal must, on application by a landlord, make a termination order if it is satisfied that a termination notice was given in accordance with this section and the tenant has not vacated the premises as required by the notice.

...

98 Section 87(2) specifies the requirements for a termination notice for breach of the residential tenancy agreement.

99 Section 88(3) specifies the requirements for a termination notice for non-payment of rent or charges.

100 Section 93 deals with the termination of residential tenancy agreements where there is hardship to the landlord, and relevantly provides:

93 Hardship to landlord

(1) The Tribunal may, on application by a landlord, make a termination order if it is satisfied that the landlord would, in the special circumstances of the case, suffer undue hardship if the residential tenancy agreement were not terminated.

...

(4) A landlord may make an application under this section without giving the tenant a termination notice.

...

101 Part 5 Division 6 (ss 110-118) contains miscellaneous provisions relating to the termination of residential tenancy agreements. Section 113 deals with defects in termination notices, and provides:

113 Defects in termination notices

The Tribunal may make a termination order for a residential tenancy agreement or any other order even though there is a defect in the relevant termination notice or the manner of service of the notice if—

- (a) it thinks it appropriate to do so in the circumstances of the case, and
- (b) it is satisfied that the person to whom the notice was given has not suffered any disadvantage because of the defect in the notice or service or that any disadvantage has been overcome by the order and any associated order.

102 Section 114 deals with the suspension of possession orders, and provides:

114 Suspension of possession orders

(1) The Tribunal may suspend the operation of an order for possession of residential premises for a specified period if it is satisfied that it is desirable to do so, having regard to the relative hardship likely to be caused to the landlord and tenant by the suspension.

(2) The Tribunal may impose an obligation on a tenant to pay a specified occupation fee for the period for which the order for possession is suspended.

103 Part 9 Division 1 (ss 187-189) contains provisions dealing with the general powers of the Tribunal. Section 187 specifies the orders that may be made by the Tribunal, and relevantly provides:

187 Orders that may be made by Tribunal

(1) The Tribunal may, on application by a landlord or tenant or other person under this Act, or in any proceedings under this Act, make one or more of the following orders—

...

- (i) a termination order or an order for the possession of premises,

...

104 Part 12 (ss 219-228) contains miscellaneous provisions. Section 223 deals with the service of notices and other documents, and relevantly provides:

223 Service of notices and other documents

(1) A notice or other document that is authorised or required by this Act or the regulations or a residential tenancy agreement to be given to or served on any person may be given or served by—

- (a) in the case of a natural person—

...

(v) sending it to an email address specified by the person for the service of documents of that kind, or

...

(3) If there is more than one landlord or tenant under a residential tenancy agreement, a notice required to be served on a tenant or landlord under the agreement is taken to be served on all the tenants or landlords under the agreement if it is served on one of the tenants or landlords.

RT Regulation

105 Clause 39 of the Residential Tenancies Regulation 2019 (NSW) (RT Regulation) deals with times for the making of applications to the Tribunal, and relevantly provides:

39 Times for making applications to Tribunal—ss 44(2), 83(2)(a), 98(4), 115(3), 125(3), 134(3), 141(2), 175(3) and 190(1) of Act

...

(2) For the purposes of section 83(2)(a) of the Act, the prescribed period is within 30 days after the termination date specified in the relevant termination notice.

...

Whether the Tribunal has jurisdiction to determine the two proceedings

106 I am satisfied that the Tribunal has jurisdiction to determine the two proceedings pursuant to ss 28(1) and (2)(a) and 29(1)(a) of the NCAT Act as ss 84(3) and 187(1)(i) of the RT Act enables the Tribunal to make decisions in relation to the RT 22/23153 proceedings and the RT 22/23685 proceedings respectively. It follows that the functions of the Tribunal in relation to the RT Act have been allocated to the CC Division pursuant to Sch 4 cl 3(1) of the NCAT Act.

107 The landlords in their documents received into evidence advanced the submission that the Tribunal does not have jurisdiction to determine the two proceedings on a number of different bases:

- (1) the High Court has original jurisdiction pursuant to s 75(iv) of the *Constitution* because the two proceedings are between residents of different States by reason of Messrs Cull and Rambaldi being residents of Victoria;
- (2) the validity of the 23 June 2021 termination notice was determined by General Member Pirina on 24 August 2021;
- (3) the Tribunal does not have power to amend the 23 June 2021 termination notice.

108 The Tribunal must be taken to have incidental jurisdiction to determine whether the hearing and determination of a particular claim or complaint would be within the legislated limits of its State jurisdiction: *Citta Hobart Pty Ltd v Cawthorn* [2022] HCA 16 at [25] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), at [63] (Edelman J); see also *Wilson v Chan & Naylor Parramatta Pty Ltd* (2020) 103 NSWLR 140; [2020] NSWCA 213 at [13]-[17] (Leeming JA) (Macfarlan JA at [1] agreeing), at [72]-[74] (White JA).

Whether the Tribunal does not have jurisdiction because the two proceedings are between residents of different States

109 Section 75 of the *Constitution* relevantly provides:

75. Original jurisdiction of High Court.

In all matters—

...

(iv.) Between States, or between residents of different States, or between a State and a resident of another State:

...

the High Court shall have original jurisdiction.

110 The landlords submitted that the trustees are Victorians, the Tribunal is not a “court of a State” for the purposes of Ch III of the Constitution, and therefore does not have jurisdiction to determine matters between residents of different States, and relied on *Attorney-General of NSW v Gatsby* (2018) 99 NSWLR 1; [2018] NSWCA 254 (*Gatsby*).

111 The New South Wales Court of Appeal in *Gatsby* did not consider the meaning of s 75(iv) of the *Constitution*.

112 In *Rochford v Dayes* (1989) 63 ALJR 315 at 315; [1989] HCA 17 (*Rochford*) Gaudron J considered the meaning of s 75(iv) of the *Constitution*:

“The issue raised in the present case is whether the preposition “between” in the expression “between residents of different States” in s 75(iv) signifies a necessary distribution of parties on opposite sides of the record or whether it signifies the necessary and only permitted distribution of parties. Either meaning, but no other, is, I think, fairly open as a matter of ordinary language. The first meaning was unanimously rejected in *Watson and Godfrey v Cameron* (1928) 40 CLR 446. It is sufficient to refer to the words of Higgins J in that case (at 448-449):

“The argument for the plaintiffs is that we should read the constitutional provision as if it merely purported to give the High Court jurisdiction

where there is some distribution of parties as between different States. But that ignores the full force of the word 'between' in s 75. The action must be 'between' residents of different States and, in my opinion, the plaintiff or plaintiffs must be resident in one State and the defendant or defendants must be resident in another State."

The decision in *Watson and Godfrey* was accepted as correct by Gibbs ACJ (with whom Stephen, Jacobs, Murphy and Aickin JJ agreed) in *In re Anderson; Ex parte Bateman* (1978) 53 ALJR 165at 166; 21 ALR 56 at 58."

113 I am prepared to assume that Messrs Cull and Rambaldi are residents of Victoria.

114 Having regard to the authority of *Rochford*, I am satisfied that the two proceedings are not between residents of different States within s 75(iv) of the *Constitution* because all the respondents are not resident in a different State to the applicants. While I have assumed that Messrs Cull and Rambaldi are residents of Victoria, there is no doubt that Mr Singh and Ms Kaur are residents of New South Wales.

115 For these reasons, I reject this challenge to the jurisdiction of the Tribunal.

Whether the validity of the 23 June 2021 termination notice was determined by General Member Pirina on 24 August 2021

116 The landlords submitted that the validity of the 23 June 2021 termination notice was determined by General Member Pirina on 24 August 2021 referring to attached documents (Ex R1). There are no attached documents in exhibit R1.

117 The argument of the landlords appears to be that the validity of the 23 June 2021 termination notice was determined because of the following exchange between Mr Singh and General Member Pirina on 24 August 2021:

"GURJIT 11:17 With the amendment of regulation, the time is 90 days.

MEMBER Christina Pirina 11:25 I dont think that that Amendment applies this time around."

118 Further, the landlords submitted that the validity of the 23 June 2021 termination notice was now before the Supreme Court for determination in the 2021/00291230 proceedings, and referred to the following passage in *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38; [2013] HCA 7 at [183] (Gageler J):

"[183] ... To render State and Territory courts able to be vested with the separated judicial power of the Commonwealth, Ch III of the Constitution

preserves the institutional integrity of State and Territory courts. A State or Territory law that undermines the actuality or appearance of a State or Territory court as an independent and impartial tribunal is incompatible with Ch III because it undermines the constitutionally permissible investiture in that court of the separated judicial power of the Commonwealth.”

119 The landlords also referred to:

- (1) the following passage in *Rola Co (Australia) Pty Ltd v Commonwealth* (1944) 69 CLR 185 (*Rola*) at 189 (argument of Menzies KC); [1944] HCA 17:

“The power to find any fact that is fundamental to a legal liability is part of the judicial power.”

- (2) the following passage in *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1 (*Wilson*) at 22 (Gaudron J); [1996] HCA 18:

“And public confidence depends on two things. It depends on the courts acting in accordance with the judicial process. More precisely, it depends on their acting openly, impartially and in accordance with fair and proper procedures for the purpose of determining the matter in issue by ascertaining the facts and the law and applying the law as it is to the facts as they are. And, just as importantly, it depends on the reputation of the courts for acting in accordance with that process”

- (3) the entire judgment in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597; [2002] HCA 11 (*Bhardwaj*).

120 The argument of the landlords appeared to be that the Tribunal could not have power to determine the validity of the 23 June 2021 termination notice because that would undermine the actuality or appearance of the Supreme Court as an independent and impartial tribunal and is thereby incompatible with Ch III of the *Constitution*.

121 I am not satisfied that General Member Pirina made any decision about the validity of the 23 June 2021 termination notice on 24 August 2021. There is no such decision referred to in either the 24 August 2021 orders or the 24 August 2021 reasons. The exchange between Mr Singh and General Member Pirina is not a decision. In any event, the exchange appeared to concern the period prescribed under cl 39(2) of the RT Regulation within which proceedings under s 83(2)(a) of the RT Act must be commenced rather than the validity of the 23 June 2021 termination notice. Prior to 26 March 2021 the prescribed period had been 90 days pursuant to the definition of moratorium period in s 228A of the RT Act and cl 41D(2)(a) of the RT Regulation.

122 Further, in the 10 June 2022 Supreme Court judgment at [49] and [51] Garling J determined that the NCAT Act did not infringe Ch III of the *Constitution*:

“[49] Previous decisions of the High Court and the NSW Court of Appeal make these propositions clear beyond argument:

(a) NCAT is not a “court of a State” for the purposes of Ch III of the Constitution: *Attorney-General of NSW v Gatsby* (2018) 99 NSWLR 1; [2018] NSWCA 254 at [184]-[190] per Bathurst CJ;

(b) NCAT exercises judicial power of the State of NSW when making orders under the *Residential Tenancies Act*: *Gatsby* at [125]-[137];

(c) NCAT is not vested with federal jurisdiction and does not have any jurisdiction to hear and determine any matter under s 75 or s 76 of the Constitution: *Burns v Corbett* (2018) 265 CLR 304; [2018] HCA 15.”

“[51] As [*Pompano* at [183]] shows, it is of the essence that to be included in the terms of Ch III, NCAT must be a court of a “State”, which it is not, or else arguably a body exercising federal jurisdiction, which it does not. NCAT stands outside the provisions of Ch III and, accordingly, there is no basis to consider or determine the question of invalidity of any part of the Act which constitutes and empowers NCAT by reason of Ch III of the Constitution.”

123 To the extent that the landlords argument was based on the lack of power of General Member Pirina to make order 2 of the 24 August 2021 orders, that argument has been determined adversely to the tenants in the 16 May 2022: Appeal Panel decision at [19]-[29].

124 The passages in *Rola* and *Wilson* and the judgment in *Bhardwaj* relied on by the tenants do not detract from the jurisdiction of the Tribunal to determine the two proceedings.

125 In *Rola* the High Court considered whether judicial power was conferred on Committees of Reference which were authorised by reg 5C of the *National Security (Women's Employment) Regulations 1942* (Cth) to determine, in relation to decisions of the Women's Employment Board, facts as to what females are or were employed on work specified in a decision of the Board and as to the nature of the work upon which they are or were employed. The High Court by majority (Latham CJ, Starke and McTiernan JJ, Rich and Williams JJ dissenting) held that neither in its original form nor as amended did reg 5C purport to confer judicial power upon Committees of Reference.

126 The argument of Menzies KC in *Rola* at 189 is not part of the judgment of the High Court, and so is not authoritative or binding upon the Tribunal.

- 127 In *Wilson* the High Court considered whether the nomination of a Federal Court judge under s 10(1)(c) of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) to report to the Minister for Aboriginal and Torres Strait Islander Affairs under s 10(4) was constitutionally compatible with the holding of office as a judge appointed under Ch III of the *Constitution*. The High Court by majority (Brennan CJ, Dawson, Toohey, McHugh, Gaudron and Gummow JJ, Kirby J dissenting) held that that s 10(1)(c) did not authorise the nomination of judges appointed under Ch III of the *Constitution* because the function of reporting to the Minister under that provision was not constitutionally compatible with the holding of office as a judge appointed under Ch III.
- 128 While it may be accepted that the principles stated by Gaudron J in *Wilson* at 22 apply equally to the Tribunal as much as to courts, and apply in particular to the Tribunal in determining the two proceedings, they provide no basis for finding that the Tribunal does not have jurisdiction to determine them.
- 129 In *Bhardwaj* the High Court considered an administrative tribunal's capacity to correct its own error when, in consequence of that error, it has failed to discharge its statutory function. The Immigration Review Tribunal dismissed the application of the respondent, whose student visa was cancelled by a delegate of the Minister for Immigration and Multicultural Affairs, for a review of the decision under Pt 5 of the *Migration Act 1958* (Cth). This decision was made in ignorance of a letter stating that the respondent was ill and would be unable to attend the hearing, and requesting an adjournment, which by an administrative oversight, did not come to the Tribunal's attention. A new hearing date was arranged. The Tribunal heard the respondent's explanation of the conduct which had resulted in the cancellation of his visa, accepted the explanation, and revoked the cancellation. The Minister brought proceedings in the Federal Court seeking the setting aside of the decision on the ground that the Tribunal "had previously made a decision in respect of the same application and was functus officio". The application failed. An appeal to the Full Court was dismissed. The High Court by majority (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ, Kirby J dissenting) held that the Tribunal had power to make the second decision and dismissed the appeal by the Minister:

- (1) by Gleeson CJ, on the basis that the question was whether the statute pursuant to which the decision-maker was acting manifested an intention to permit or prohibit reconsideration in the circumstances in issue and that it was not inconsistent with the scheme of the *Migration Act* for the Tribunal, upon becoming aware that it had not given effect to its own intention and had failed to conduct a review in accordance with the Act, to give the applicant the opportunity to be heard that the Act required, that he desired, and that the Tribunal had intended to give;
- (2) by Gaudron and Gummow JJ, McHugh J and Hayne JJ concurring, on the basis that, as the Tribunal's first decision was made in jurisdictional error, it did not effect a review as required by the *Migration Act* and was of no legal effect, the Act not expressly or impliedly providing to the contrary;
- (3) by Callinan J, on the basis that, as the Tribunal's first decision was a failure to exercise the jurisdiction that the Tribunal was bound to exercise, it was open to the Tribunal to exercise that jurisdiction by its further decision.

130 The judgment in *Bhardwaj* has no bearing on the jurisdiction of the Tribunal. As I have already found, the Tribunal did not make any decision about the validity of the 23 June 2021 termination notice on 24 August 2021.

131 For these reasons, I reject this challenge to the jurisdiction of the Tribunal.

Whether the Tribunal has power to amend the 23 June 2021 termination notice

132 The landlords submitted that the Tribunal does not have power to amend the 23 June 2021 termination notice. The assumption underlying this submission appeared to be that the 23 June 2021 termination notice was defective because it did not name the trustees as one of the tenants, and it would require to be amended to be a valid termination notice.

133 This submission is misconceived because the landlords made no application to amend the 23 June 2021 termination notice, and accordingly the power of the Tribunal to amend it does not arise for determination.

134 For these reasons, I reject this challenge to the jurisdiction of the Tribunal.

The RT 22/23153 proceedings

Whether there is a defect in the 23 June 2021 termination notice

135 I am satisfied that the 23 June 2021 termination notice complied with the requirements of ss 82(1) and (2) and 84(1) and (2) of the RT Act for the following reasons:

- (1) it was given on 23 June 2021 which was before the end of the residential tenancy agreement;
- (2) it specified the premises;
- (3) it specified 26 July 2021 as the day on which the residential tenancy agreement was terminated and by which vacant possession of the premises was to be given;
- (4) it was in writing and signed by the landlords' agent;
- (5) the termination date of 26 July 2021 was before the end date of the residential tenancy agreement.

136 The assumption underlying the submission of the tenants that the Tribunal does not have power to amend the 23 June 2021 termination notice appears to be that upon his bankruptcy Mr Singh's interest in the residential tenancy agreement is property and so vested in the trustees, and so the 23 June 2021 termination notice was defective because it was not addressed to the trustees so far as Mr Singh's interest in the residential tenancy.

137 The landlords made no submission on this issue.

138 The Supreme Court has determined that the property of Mr Singh on his bankruptcy on 6 May 2021 vested in the trustees pursuant to s 58(1) of the *Bankruptcy Act*. *Singh v Khan* [2021] NSWSC 1093 at [38].

139 The question which arises is whether Mr Singh's interest in the residential tenancy agreement is property for the purposes of the *Bankruptcy Act*.

140 In *Kostov v Amelie Housing (NCAT Appeal)* [2019] NSWSC 16 (*Kostov*) at [8]-[16] Fagan J held that the plaintiff's claimed interest under a residential tenancy agreement fell within the meaning of "property" and hence vested in the trustee in bankruptcy pursuant to s 58(1) of the *Bankruptcy Act*.

141 *Kostov* has been followed in respect of a residential tenancy agreement under the *Residential Tenancies Act 1995 (SA)*: *Henderson v Housing Choices South Australia Ltd* [2019] SASC 121 at [61]-[120] (Peek J). Further, *Kostov* has also been referred to with approval in the Federal Court: *Kostov (Bankrupt) v Australian Financial Security Authority, in the matter of Kostov* [2020] FCA 1105 at [221] (Farrell J).

142 Having regard to *Kostov* at [8]-[16], I am satisfied that upon his bankruptcy on 6 May 2021 Mr Singh's interest in the residential tenancy agreement vested in the trustees.

143 While the 23 June 2021 termination notice did not specify that the trustees were a tenant of the premises, I am not satisfied that it thereby contained a defect. The inclusion of the name of the tenant or tenants is not required to be set out in a termination notice pursuant to ss 82(1) and (2) and 84(1) and (2) of the RT Act. As the 23 June 2021 termination notice was on the ground of s 84 of the RT Act, it is unnecessary to consider whether it complied with the requirements of one or both of ss 87(2) and 88(3) of the RT Act.

Whether there is a defect in the manner of service of the 23 June 2021 termination notice

144 The 23 June 2021 termination notice contained a notation that it was sent to the tenants by email to the Singh email address.

145 I am satisfied that there was a defect in the manner of service of the 23 June 2021 termination notice because the tenants had not consented in the residential tenancy agreement to the electronic service of notices and documents as permitted by s 223(1)(a)(v) of the RT Act.

146 As I have found there was no defect in the 23 June 2021 termination notice by reason of not being addresses to the trustees, I am also satisfied that there was no defect in its manner of service by reason of not being served on the trustees.

Whether the RT 22/23153 proceedings were commenced within the prescribed period, and if not time for their commencement should be extended

147 The RT 22/23153 proceedings were commenced on 25 May 2022.

148 I am satisfied that the RT 22/23153 proceedings were not commenced within the period of 30 days after 26 July 2021, being the termination date specified in the 23 June 2021 termination notice, prescribed under cl 39(2) of the RT Regulation.

149 In *Jackson v NSW Land and Housing Corporation* [2015] NSWCATAP 281 at [23]-[24] the Appeal Panel found that the following three factors identified in

Jackson v NSW Land and Housing Corporation [2014] NSWCATAP 22 at [22] were applicable to the consideration of an extension of time under s 41 of the NCAT Act for the commencement of proceedings under the RT Act:

“[22] ...

(1) The discretion can only be exercised in favour of an applicant upon proof that strict compliance with the rules will work an injustice upon the appellant - *Gallo v Dawson* [1990] HCA 30, 93 ALR 479 at [2], *Nanschild v Pratt* [2011] NSWCA 85 at [38];

...

(3) Generally, in an application for an extension of time to appeal the Appeal Panel will be required to consider:

(a) The length of the delay;

(b) The reason for the delay;

(c) The appellant's prospects of success, that is usually whether the applicant has a fairly arguable case; and

(d) The extent of any prejudice suffered by the respondent (to the appeal),

- *Tomko v Palasty (No 2)* (2007) 71 NSWLR 61 at [55] (per Basten JA) but note also [14], *Nanschild v Pratt* [2011] NSWCA 85 at [39] to [42]; and

(4) It may be appropriate to go further into the merits of an appeal if the explanation for the delay is less than satisfactory or if the opponent has a substantial case of prejudice and, in such a case, it may be relevant whether the appellant seeking an extension of time can show that his or her case has more substantial merit than merely being fairly arguable - *Tomko v Palasty (No 2)* (2007) 71 NSWLR 61 at [14] (per Hodgson JA, Ipp JA agreeing at [17]) and *Molyneux v Chief Commissioner of State Revenue* [2012] NSWADTAP 53 at [58] - [59].”

150 I am satisfied that it is appropriate to extend the time for the commencement of these proceedings until 25 May 2022. While the length of the delay is substantial, it is explained by the fact that until 9 June 2022 the RT 21/32124 proceedings which on 16 May 2022 were renumbered as the RT 22/21758 proceedings were pending in the Tribunal. It was only in the course of the directions hearing on 25 May 2022 that Deputy President Harrowell raised with the landlords the fact that the RT 21/32124 proceedings had been commenced prematurely as they had not been commenced after 26 July 2021 as required by s 83(2)(a) of the RT Act. I infer that the landlords had not been aware of the requirement in s 83(2)(a) of the RT Act as they had continued with the prosecution of the RT 21/32124 proceedings, and no member of the Tribunal had previously raised the non-compliance with this provision as an issue in the proceedings. While the tenants will suffer substantial prejudice by an extension

of time because they will lose a defence to the proceedings that would have been available to them under s 83(2)(a) of the RT Act, the landlords' application for a termination order under s 84(3) of the RT Act has substantial merit.

151 It follows that I have decided to extend time for the commencement of the RT 22/23153 proceedings until 25 May 2022 pursuant to s 41 of the NCAT Act.

Whether a termination order and a possession order should be made

152 The Tribunal has already determined that Mr and Mrs Lekhwar are the landlords and Mr Singh and Ms Kaur are the tenants under the residential tenancy agreement: the 27 May 2022 reasons at [6].

153 Where the requirements of s 84(1) and (2) of the RT Act are satisfied in relation to a termination notice, then the Tribunal is required by s 84(3) to make a termination order where the tenant has not vacated the premises as required by the notice. There is no dispute between the parties that Mr Singh and Ms Kaur have not vacated the premises as required by the 23 June 2021 termination notice.

154 This issue raises the question of whether I should make a termination order notwithstanding the defect in the manner of the service of the 23 June 2021 termination notice having regard to the power conferred on the Tribunal under s 113 of the RT Act. In case my finding that there was no defect in the 23 June 2021 termination notice by reason of not being addressed to the trustees instead of Mr Singh is later found to be wrongly decided, I have considered whether I would have exercised the power under s 113 of the RT Act to make a termination order on the assumption that there was such a defect in the notice. Further, in case my finding that there was no defect in the manner of service of the 23 June 2021 termination notice by reason of it not being served on the trustees, I have considered whether I would have exercised the power under s 113 of the RT Act to make a termination order on the assumption that there was such a defect in the manner of service.

155 In *Navazi v New South Wales Land and Housing Corporation* [2015] NSWCA 308 at [56] Sackville AJA observed that it is a matter for the Tribunal to decide whether the termination notice, despite the defect, satisfies the broad criteria

stated in s 113 of the RT Act (with Leeming JA at [1] and Adamson J at [126] agreeing).

156 I am satisfied that the 23 June 2021 termination notice was received by the tenants on 23 June 2021 for the following reasons:

- (1) it was sent to the Singh email address which is the same email address:
 - (a) used by the agent of Mr and Mrs Yadav in their communication to the tenants in the 9 June 2021 email;
 - (b) Mr Singh in his communications to the Tribunal in the RT 21/32124 proceedings including the 7 September 2021 email, the 10 September 2021 emails and the 12 September 2021 email;
- (2) notwithstanding the denial of receipt by Mr Singh referred to in the 7 February 2022 reasons at [20], the **tenants** have not adduced any evidence that explains why they did not receive the 23 June 2021 termination notice in circumstances where there is no suggestion that Mr Singh was not otherwise sending emails from the Singh email address and receiving emails at the Singh email address at around that time. On the contrary, as recorded in the 7 February 2022 reasons at [11] and [15]-[17], Mr Singh sent or received emails on 9 June 2021 and 26 and 27 July 2021.

157 In circumstances where that the 23 June 2021 termination notice was received by Mr Singh on 23 June 2021, I have decided to exercise the discretion under s 113 of the RT Act to make a termination order. I am satisfied that the tenants have not suffered any disadvantage because of the defect in the manner of service of the 23 June 2021 termination notice.

158 If I had found that there was a defect in the 23 June 2021 termination notice by reason of not being addressed to the trustees, then I would have decided to exercise the discretion under s 113 of the RT Act to make a termination order. I would have been satisfied that the trustees had not suffered any disadvantage by reason of their position in relation to the residential tenancy agreement communicated in the 24 May 2022 letter.

159 Further, If I had found that there was a defect in the manner of service of the 23 June 2021 termination notice by reason of not being sent to the trustees, then I would have decided to exercise the discretion under s 113 of the RT Act to make a termination order. I would have been satisfied that the trustees had

not suffered any disadvantage by reason of their position in relation to the residential tenancy agreement communicated in the 24 May 2022 letter.

160 As I have decided to make a termination order, I must also make a possession order as required by s 83(1) of the RT Act. Pursuant to s 114(1) of the RT Act I have decided to suspend the operation of the order for possession for 28 days until 21 July 2022 to enable the tenants to find alternative accommodation. This is one week more than the period of the suspension of the possession order under order 4 of the 9 November 2021 orders. Pursuant to s 114(2) of the RT Act I have decided to impose an obligation on the tenants to pay a daily occupation fee at the rate of \$57.14 per day from the day after the date of termination, namely 25 June 2021, until the date vacant possession is given to the landlords. The daily rate of \$57.14 is one seventh of the current rent of \$400.00 per week payable by the tenants under the residential tenancy agreement.

The RT 22/23685 proceedings

161 As I have decided to make a termination order in the RT 22/23153 proceedings, it is unnecessary to determine the RT 22/23685 proceedings and it is appropriate that they should be dismissed.. In case I am later found to have wrongly decided the RT 22/23153 proceedings, I have considered the findings that I would have made if I had determined the RT 22/23685 proceedings.

Whether the landlords would suffer under hardship if the residential tenancy agreement was not terminated

162 The 1 June 2022 bundle of documents includes the following documents:

- (1) a one page document addressed to the Tribunal dated 30 May 2022 and signed by Mr and Mrs Lekhwar which relevantly states:

“I would like to submit the following information before the honourable court to take notice of the points indicated below, to provide a fair and prompt decision in this case:

...

Mr Singh has shown unremorseful intentions where he has NOT paid rent nor any utilities being used, where he was repeatedly ordered by NCAT.

Mr Singh currently owes a lump sum of \$21,200. From this amount, he has only paid \$1034.34 in total where the sum concludes to \$20,165.66 from 07/08/21 to 1/06/22

I request NCAT to apply force to Mr Singh and be more upfront as Mr Singh's refusal to pay the rent amount has caused my family and me to be financially and mentally disturbed where the rent owed is about \$20,165.66. ... I am currently financially disturbed and I no longer can pay my mortgage and rent together where this week due to financial issues I am unable to pay my rent. Overall, I am requesting that NCAT moves this case forward as we are unable to wait as we are having more and more problems that are increasingly risking our health and financial situation. I request NCAT to give Mr Singh an eviction letter where he must get out of my house **IMMEDIATELY**. ...”

- (2) a four page document addressed to the Tribunal dated 30 May 2022 and signed by Mr and Mrs Lekhwar which relevantly states:

“ ...

I would like to draw your attention to the below facts in this case:

...

Mr Singh represents his remorseful intentions of not paying any rent for living and utilities he has and is currently using.

...

With this there is a \$2000.00 council and an additional \$2000.00 for strata of maintenance of the house. ...

We have various safety and maintenance concerns where Mr Singh indicates and threatens us, he will change our property main entrance locks and has deliberately refused our entry to our own property.

... This results in our grave financially, creating immense mental psychological stress to our whole family. (Witness evidence, Mr Devendar Mehta) [mobile telephone number and email address omitted]

...

Overall, through this matter the financial stress from this caused me to stop paying my rent, which may lead to termination of the property that I am currently living in, where if this leads to I, where is the home I am meant to own? Further Mr Singh roughly owes \$1200.00 in water bills from Sydney waters, where there isn't any factual proof of records of Mr Singh fully paying them.”

- (3) the 23 June 2021 termination notice;
- (4) a document entitled “rent ledger (sic)”;
- (5) a Sydney Water bill dated 8 June 2021 for \$239.70 for the property;
- (6) a Sydney Water bill dated 17 September 2021 for \$640.41 for the property;
- (7) an instalment notice of Penrith City Council dated 18 April 2022 for \$825.50 for the property;

- (8) a notice of levies of Raine & Horne dated 21 May 2022 issued on behalf of The Owners – Strata Plan No 89043 for \$1,803.05 for the property.

163 I would not have attached any weight to the statements of the landlords in their two documents addressed to the Tribunal dated 30 May 2022 for the following reasons:

- (1) they failed to comply with order 5 of the 20 May 2022 orders and orders 5c and 7c of the 27 May 2022 orders by adducing their evidence by statutory declaration or affidavit;
- (2) in any event, their evidence as to the financial and mental stress they have suffered is general and conclusory. In particular, the landlords adduced no evidence as to their assets and liabilities and their difficulty in paying their mortgage. They also did not adduce any evidence from a medical practitioner as to their mental distress.

164 In these circumstances, I would not have been satisfied that the landlords would suffer undue hardship if the residential tenancy agreement were not terminated within s 93(1)(a) of the RT Act.

Whether a termination order and a possession order should be made

165 As I would have found that the landlords had not established that they would suffer undue hardship if the residential tenancy agreement were not terminated within s 93(1)(a) of the RT Act, I would not have made a termination order and a possession order. Accordingly, I would have dismissed the RT 22/23153 proceedings.

Orders

166 I make the following orders:

- (1) time for the commencement of the RT 22/23153 proceedings is extended until 25 May 2022;
- (2) the residential tenancy agreement in respect of the premises is terminated;
- (3) the tenants are to give possession of the premises to the landlords immediately;
- (4) the operation of order (3) above is suspended until 22 July 2022;
- (5) the tenants are to pay to the landlords a daily occupation fee at the rate of \$57.14 per day from 25 June 2021 until the date they give vacant possession of the premises to the landlords;

- (6) the landlords are at liberty to relist the proceedings within 60 days after they obtain vacant possession of the premises to claim the amount owing by the tenants as occupation fees;
- (7) the RT 22/23153 proceedings are dismissed.

The image shows a handwritten signature in black ink to the left of a circular official seal. The seal features the text 'NSW CIVIL & ADMINISTRATIVE TRIBUNAL' around the perimeter and a central emblem with a shield and a crown.

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

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.