Civil and Administrative Tribunal

New South Wales

Case Name:	Aboss v Hafeez
Medium Neutral Citation:	[2022] NSWCATAP 345
Hearing Date(s):	27 September 2022
Date of Orders:	04 November 2022
Decision Date:	4 November 2022
Jurisdiction:	Appeal Panel
Before:	G Curtin SC, Senior Member D Robertson, Senior Member
Decision:	(1) Leave to appeal refused. (2) Appeal dismissed. (3) The respondent may, within 14 days of the date of publication of these reasons, file and serve submissions, not exceeding five pages, in support of an application for costs in respect of the appeal. (4) If the respondent files submissions in accordance with order (3), the appellant may file and serve submissions in response, not exceeding five pages, within a further 14 days. (5) Any submissions filed in accordance with orders (3) and (4) should address the issue whether the question of costs can be determined on the basis of the written submissions and without a further hearing. (6) If the respondent does not file submissions in accordance with order (3) there will be no order in relation to the costs of the appeal.
Catchwords:	LEASES AND TENANCIES – Residential Tenancies Act 2010 (NSW) – premises not subject to occupation certificate and not legally able to be occupied at commencement of tenancy – premises nevertheless fit for habitation within meaning of s 52 of Act

Legislation Cited:	Australian Consumer Law (NSW) Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Tribunal Rules 2014 (NSW) Environmental Planning and Assessment Act 1979 (NSW) Home Building Act 1989 (NSW) Residential Tenancies Act 2010 (NSW) Residential Tenancies Regulation 2019 (NSW)
Cases Cited:	Collins v Urban [2014] NSWCATAP 17 Cominos v di Rico [2016] NSWCATAP 5 Dyldam Developments Pty Ltd v The Owners- Strata Plan No 85305 [2019] NSWCATAP 229 Fasako v TianyD Beauty & Hairdressing Australia Pty Ltd [2022] NSWCA 112 Kings v Chand [2019] NSWCATAP 180 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 Shokrgozar v Abouloukme [2017] NSWCATAP 232 Suttor v Gundowda Proprietary Limited [1950] HCA 35; (1950) 81 CLR 418 Watson v Chen [2022] NSWCATAP 44 Whear v Kids on Hayes Street Pty Ltd [2021] NSWCATAP 123 ZID v Green [2018] NSWCATAP 198
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Abdul Ahad Aboss (Appellant) Farman Hafeez (Respondent)
Representation:	Solicitors: Pannu Lawyers (Respondent)
File Number(s):	2022/00229117
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	NA

Date of Decision:	19 July 2022
Before:	P French, Senior Member
File Number(s):	RT 22/08496; RT 22/12123

REASONS FOR DECISION

Introduction

1 The appellant (the tenant) was a tenant of the respondent (the landlord) pursuant to a residential tenancy agreement made on 22 January 2021 for a fixed term of 12 months. The premises the subject of the tenancy agreement is a two-level free-standing house on a residential block in The Ponds (a suburb of Sydney). It has four bedrooms, one with an en-suite bathroom, primary bathroom, kitchen, lounge, laundry, entrance hall and two car garage. It was newly constructed at the start of the tenancy. The tenant and his family were its first occupants.

2 The Tribunal described the situation of the premises as follows:

> "12 The residential premises is situated on land that has been developed, in the first stage as dual occupancy (which is complete), and in a second stage, as a sub-division, which has not been finalised. The development consents for dual occupancy by two detached dwellings and subdivision were issued by the authorised officer of Blacktown City Council (Council) on 10 July 2018 and 25 July 2019 respectively
>
> 13 The land that is the subject of this development is [title reference redacted], which is known as [address redacted], The Ponds. It is a 500sqm block on the corner of [street name redacted] and [street name redacted]. The subdivision will create two Lots of 250sqm. When the subdivision is complete one of these Lots, which is the residential premises, will have a street frontage onto [street name redacted], and it will formally be assigned the address [address redacted]. That address is not presently a registered address.
>
> 14 A Construction Certificate authorising the construction of the dual occupancy dwellings was issued by Council on 3 December 2018. The dwellings were then constructed. On 11 September 2020 a Registered Certifier issued an Interim occupation certificate in relation to one of the dwellings. However, the residential premises was excluded from that certificate by note 5 which states: "5. This Certificate excludes the construction of Unit 2(dwelling 2)". Mr Hafeez gave evidence that he was not aware of that note until the institution of the tenant's proceedings. He contends that he believed that both dwellings were covered by the Interim Occupation Certificate. On 12 March 2021 the Registered Certifier issued a final occupation certificate in relation to both dwellings.
>
> …

> 16 The tenant became concerned that the sub-division had not been finalised early in the tenancy. This was because the address was not registered, and consequently, there were initial difficulties in the delivery or (sic – of) mail and obtaining a telephone and internet connection. He became aware that there was no occupation certificate authorising occupation of the premises before 12 March 2021 after conducting searches of Council in late 2021 or January 2022."

3 The landlord issued a termination notice on 30 November 2021, requiring vacant possession at the end of the fixed term on 21 January 2022. The tenant returned the keys to the landlord's managing agent on 14 February 2022.

4 The landlord brought an application in the Tribunal seeking orders pursuant to the *Residential Tenancies Act* 2010 (NSW) for arrears of rent and water usage charges on 25 February 2022.

5 The tenant filed an application in the Tribunal on 18 March 2022. The content of that application was described in the decision under appeal as follows:

> "3 The second application in time is RT 22/12123. This is an application by the former tenant for orders in the alternative under s 44(1)(b) or ss 49, 52, 187(1)(d) and 190 of the RT Act that would require the landlord to refund him all the rent and water usage he paid under the residential tenancy agreement ($37,700.00) and his relocation costs ($2,024.00) on the ground that the premises was not approved for occupation as a residence and was otherwise uninhabitable. In the further alternative, the tenant applies for an order pursuant to ss 39, 187(1)(c) and 190 that would require the landlord to repay him all water usage he paid during the term of the agreement on the ground that the water supply was not separately metered. Additionally, the tenant applies for an order pursuant to ss 63, 187(1)(d) and 190 of the RT Act that would require the landlord to pay him $7,669.88 in compensation or the replacement of a television and lounge suite he claims were fatally damaged by a water leak in the premises. The tenant also applies for an order that would require Rental Bond Services to pay him the whole of his rental bond. This application was made to the Tribunal on 18 March 2022."

6 Both applications were heard together on 15 July 2022. By decision dated 19 July 2022 (the Decision), the Tribunal substantially allowed the landlord's claim and dismissed the tenant's claim.

7 The tenant filed a Notice of Appeal on 22 August 2022. The Notice of Appeal did not identify the orders which the tenant challenged but rather stated (in the space on the standard form headed "Orders challenged on appeal"):

> "The points we appeal are specific points 6, 13, 15, 17, 26, 27, 29, 30, 33, 34, 36, 37, 40, 44, 45, 46, 47, 49, 54 and 69."

8 It is apparent from the tenant's written and oral submissions that the tenant does not challenge the Tribunal's orders in favour of the landlord, save insofar as he seeks to set off that liability against the amounts he claims from the landlord.

9 By the Notice of Appeal, the tenant seeks orders:

> "1 Reverse the decision
>
> 2 Analyse the evidence in the tenancy bundle following the guidelines provided for each points our grounds of this appeal."

The scope and nature of internal appeals

10 By virtue of s 80(2) of the *Civil and Administrative Tribunal Act* 2013 (NSW) (NCAT Act), internal appeals from decisions of the Tribunal may be made as of right on a question of law, and otherwise with leave of the Appeal Panel.

11 In *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 (*Prendergast*) the Appeal Panel set out at [13] a non-exclusive list of questions of law:

(1) Whether there has been a failure to provide proper reasons;

(2) Whether the Tribunal identified the wrong issue or asked the wrong question.

(3) Whether a wrong principle of law had been applied;

(4) Whether there was a failure to afford procedural fairness;

(5) Whether the Tribunal failed to take into account relevant (i.e., mandatory) considerations;

(6) Whether the Tribunal took into account an irrelevant consideration;

(7) Whether there was no evidence to support a finding of fact; and

(8) Whether the decision is so unreasonable that no reasonable decision-maker would make it.

12 The circumstances in which the Appeal Panel may grant leave to appeal from decisions made in the Consumer and Commercial Division are limited to those set out in cl 12(1) of Schedule 4 of the NCAT Act. In such cases, the Appeal Panel must be satisfied that the appellant may have suffered a substantial miscarriage of justice because:

> (a) The decision of the Tribunal under appeal was not fair and equitable; or

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

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

13 In *Collins v Urban* [2014] NSWCATAP 17, the Appeal Panel stated at [76] that a substantial miscarriage of justice for the purposes of cl 12(1) of Schedule 4 may have been suffered where:

> "… there was a "significant possibility" or a "chance which was fairly open" that a different and more favourable result would have been achieved for the appellant had the relevant circumstance in para (a) or (b) not occurred or if the fresh evidence under para (c) had been before the Tribunal at first instance."

14 Even if an appellant from a decision of the Consumer and Commercial Division has satisfied the requirements of cl 12(1) of Schedule 4, the Appeal Panel must still consider whether it should exercise its discretion to grant leave to appeal under s 80(2)(b).

15 In *Collins v Urban*, the Appeal Panel stated at [84(2)] that ordinarily it is appropriate to grant leave to appeal only in matters that involve:

(a) issues of principle;

(b) questions of public importance or matters of administration or policy which might have general application; or

(c) an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand;

(d) a factual error that was unreasonably arrived at and clearly mistaken; or

(e) the Tribunal having gone about the fact finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed.

Grounds of appeal

16 The Notice of Appeal identifies the tenant's grounds of appeal as follows:

> "The tribunal member misconceived the information and evidence provided by the other party as a result, some evidence were given more weight than other evidence resulting in decision going against me.
>
> Our evidence covered the following areas before the tribunal member;

> 1. Landlord and its agents misrepresentation and misleading, deceptive conduct;
>
> 2. Breach of tenancy and environmental act by the landlord and its agents
>
> 3. Failure to carry out landlord obligation for the required repairs under the tenancy act."

17 The tenant also seeks leave to appeal on each of the bases set out in clause 12(1) of Schedule 4 to the NCAT Act, that is that the Decision was against the weight of evidence and not fair and equitable and that there was significant new evidence that was not reasonably available at the time of the hearing.

18 The grounds stated for submitting that the Decision was against the weight of evidence were effectively the same as the grounds of appeal.

19 The basis upon which the tenant submitted that the Decision was not fair and equitable was that:

> "The evidence presented in the tenancy bundle contradicts the decision outcome."

20 The tenant then listed the same paragraph numbers as had been listed under "Orders challenged on appeal" and provided further arguments in respect of paragraphs 26, 30 and 44 of the Decision, said to be by way of "example".

21 In relation to paragraph 26, the tenant stated that the incoming inspection report had been "forged". In relation to paragraphs 30 and 44, the tenant repeated the submission that the premises were uninhabitable by reason of the lack of an occupation certificate, that the occupation certificate obtained by the landlord on 12 March 2022 was not applicable to the premises and that there was a "severe" water leak in the premises between November 2021 and January 2022.

22 The new evidence on which the tenant sought to rely was identified in the tenant's written submissions as "photos and videos (supplied on USB) of water leak on Jan 2022."

23 The USB containing the "new evidence" had not been provided to the Appeal Panel.

24 The tenant explained that he had not tendered the photos and video at the original hearing because he had been unable to download them from his phone

before the hearing. The Appeal Panel noted that the applicant had had five months from the time that he filed his application to download the videos and photographs and, if necessary, obtain assistance to do that. The Appeal Panel indicated that it did not consider that the evidence was "not reasonably available at the time the proceedings under appeal were being dealt with."

25 In this regard we refer to the decision of the Appeal Panel in *Al–Daouk v Mr Pine t/a Furnco Bankstown* [2015] NSWCATAP 111 at [19] – [24]. In short, the appellant would have been able to obtain the new evidence in time for the hearing before the Tribunal had he so desired, and therefore the new evidence was reasonably available to him at that time. Accordingly, we are not satisfied the appellant satisfies the test for the admission of the new evidence on the appeal set out in cl 12(1)(c) of Schedule 4 of the NCAT Act.

26 The Appeal Panel ruled, accordingly, that we would not grant leave to appeal on the basis of the new evidence. Consequently, the fact that the USB on which the tenant claimed to have filed the new evidence was not available to the Appeal Panel did not prevent the appeal hearing from proceeding.

27 It is also convenient to note at this point that the Appeal Panel made directions on 19 August 2022 (subsequently corrected in an irrelevant respect on 21 September 2022) that the tenant:

> "3 … is to lodge with the Appeal Registry and give to the Respondent by 09 September 2022:
>
> (a) All the evidence given to the Tribunal at first instance on which it is intended to rely;
>
> (b) Any evidence not provided to the Tribunal at first instance in making the decision under appeal, on which it is intended to seek leave to rely;
>
> (c) The Appellant's written submissions in support of the appeal; and
>
> (d) If oral reasons were given and/or what happened at the hearing at first instance is being relied on by the Appellant in the appeal, a typed transcript of the relevant parts of the hearing together with the sound recording of the entire hearing."

28 The orders made by the Appeal Panel also contained the following:

> "7 NOTES:
>
> (1) If a party does not lodge with the Appeal Registry and give to the other parties documents, sound recordings and submissions as directed above, that party may not be allowed to rely on those

> documents, sound recordings and submissions at the hearing of the appeal."

29 Despite those directions, the tenant did not file either the evidence given to the Tribunal by the tenant at first instance, or a transcript or recording of the hearing at first instance.

30 In these circumstances it is impossible for the Appeal Panel to conclude that the decision was against the weight of evidence (as the evidence weighed by the Tribunal is not available to the Appeal Panel): see *Shokrgozar v Abouloukme* [2017] NSWCATAP 232 at [90]; *Whear v Kids on Hayes Street Pty Ltd* [2021] NSWCATAP 123 at 24-26; and *Watson v Chen* [2022] NSWCATAP 44 at [27]-[37].

31 For the same reason, the Appeal Panel could not determine that any finding made by the Tribunal, or the decision as a whole, was not fair and equitable. The basis upon which the tenant submitted that the decision was not fair and equitable was that "the evidence presented in the tenancy bundle contradicts the decision outcome." That submission cannot be assessed in the absence of the evidence presented in the "tenancy bundle", which the tenant did not provide to the Appeal Panel.

32 Accordingly, we need not consider further the tenant's application for leave to appeal.

33 We turn to consider the grounds of appeal. In doing so we have adopted the approach to the grounds of appeal drafted by non-legally trained litigants set out in *Cominos v Di Rico* [2016] NSWCATAP 5 at [12] – [13]:

> "12 The Appeal Panel must give effect to the *guiding principle* when exercising functions under the CAT Act, which is to "facilitate the just, quick and cheap resolution of the real issues in the proceedings" (s 36(1)). This is reinforced by s 38(4) which provides that the Tribunal is required to act with 'as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.'
>
> 13 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. The Appeal Panel has taken such an approach in a number of cases, for instance, *Khan v Kang*

> [2014] NSWCATAP 48 and *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69. However, this must be balanced against the obligation to act fairly and impartially (*Bauskis v Liew* [2013] NSWCA 297 at [68] citing *Hamod v State of New South Wales* [2011] NSWCA 367 at [309]-[316]). Relevantly, s 38(2) provides that that Tribunal "may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice."

34 It is not clear that the tenant's grounds 1 and 3 raise any question of law. In any event, for the reasons which follow, none of the tenant's grounds of appeal can succeed.

Ground 1 – Misleading and deceptive conduct

35 In paragraphs [48] and [49] of the Decision, the Tribunal held:

> "48 The tenant also contends that the advertising of the premises for lease without an Occupation Certificate being in force was a contravention of s 26 of the RT Act, which concerns misleading and deceptive representations by landlords and agents about premises. Section 26 is a civil penalty offence. The Tribunal has no role in its enforcement, other than the power to make a termination order on that ground on application under s 98A.
>
> 49 This element of the claim must therefore be dismissed on the basis that it is misconceived."

36 The tenant did not seek to suggest that the Tribunal erred in that conclusion. In our view the Tribunal was clearly correct.

37 The tenant rather seeks to rely upon s 18 of the Australian Consumer Law (NSW), alleging that the landlord, by failing to disclose the absence of a valid occupation certificate, engaged in misleading and deceptive conduct in trade and commerce.

38 The tenant acknowledged that this submission had not been made at first instance.

39 The landlord objected to the tenant being permitted to rely upon this ground when it had not been raised at first instance.

40 It is a well-established principle that a party will not be permitted to raise on appeal a ground which was not taken at first instance, if there is any possibility that, had it been raised at first instance, it might have been met with evidence which had not been led.

41 In *Suttor v Gundowda Proprietary Limited* [1950] HCA 35; (1950) 81 CLR 418 the High Court said at 438:

> "… The circumstances in which an appellate court will entertain a point not raised in the court below are well established. Where a point is not taken in the court below and evidence could have been given there which by any possibility could have prevented the point from succeeding, it cannot be taken afterwards. In *Connecticut Fire Insurance Co. v. Kavanagh* (1892) AC 473, Lord Watson, delivering the judgment of the Privy Council, said, "When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the court of ultimate review is placed in a much less advantageous position than the courts below." (1892) AC, at p 480."

42 Those principles are applicable in the Appeal Panel. As the Court of Appeal held in *Fasako v TianyD Beauty & Hairdressing Australia Pty Ltd* [2022] NSWCA 112 at [20] and [24]:

> "20 The Appeal Panel set out the relevant principles identified in *Suttor v Gundowda Pty Ltd*. At least in this Court, the applicant submitted that reliance on a new ground had to be affirmatively justified, because a consequence of permitting that course was to deprive the applicant of one level of appeal. Why that rendered the application of *Suttor* an error of law was not explained.
>
> …
>
> 24 Although in this Court, the applicant resisted any suggestion that it had to demonstrate prejudice or practical unfairness on the part of the Appeal Panel in permitting the respondents to rely on a breach of cl 9.3, that position disregarded the statutory obligation on the Appeal Panel to determine the dispute according to "the substantial merits of the case without regard to technicalities or legal forms". … If the failure to refer to cl 9.3 caused prejudice to the applicant, it should have raised that issue before the Appeal Panel and explained why that was so. …"

43 Mr Shakeri, solicitor, who appeared for the landlord both at first instance and on the appeal, submitted that he had not undertaken cross-examination of the tenant in relation to aspects of the alleged misleading and deceptive conduct, in particular the extent to which the tenant had relied upon the alleged misleading and deceptive conduct and the extent to which he had suffered detriment by reason of the alleged misleading and deceptive conduct. That cross-examination, had it been conducted, may have elicited evidence which is not otherwise available.

44 We accept that, regardless that the tenant had raised before the Tribunal the question of compliance with s 26 of the *Residential Tenancies Act*, there were factual questions which would be raised by a claim pursuant to s 18 of the Australian Consumer Law which may not have been fully explored in cross-

examination at first instance and thus, had the allegation been raised before the Tribunal, it is probable that evidence on that topic would have been elicited by the landlord.

45 Accordingly, we do not consider it appropriate to permit the tenant to rely upon s 18 of the Australian Consumer Law for the first time on the appeal as, fundamentally, it would be unfair to do so because it would deprive the landlord of the opportunity to have elicited evidence on the point when before the Tribunal.

46 We note that, in any event, even if the Appeal Panel had given the tenant leave to rely upon s 18 in support of a claim to compensation, the tenant was not able to explain to the Appeal Panel how he had suffered any loss by reason of the alleged misleading conduct of the landlord, nor was there any evidence before us of any loss.

47 The tenant sought to suggest that there would not have been any water leaks in the premises if the occupation certificate had been issued before he moved in. That submission is groundless. The issue of an occupation certificate does not guarantee that the waterproofing of the premises will be without defects, as the decisions of the Tribunal in numerous cases under the *Home Building Act* 1989 (NSW) demonstrate.

48 The only other detriment that the tenant could suggest was that he would not have entered into the tenancy agreement if he had been aware that an occupation certificate had not been issued.

49 However, the tenant could not point to any detriment that he had suffered through entry into the tenancy agreement. Clearly, if the tenant had not entered into the tenancy agreement with the landlord, he would still have required accommodation, and logically would have incurred liability for rent elsewhere.

50 It follows that the tenant's first ground of appeal must fail.

Ground 2 – Breach of environmental legislation

51 The tenant relied upon sections 6.9(1)(a) and 6.10(1) of the *Environmental Planning and Assessment Act* 1979 (NSW) which relevantly provide:

> 6.9 Requirement for occupation certificate

(cf previous ss 109H(1), 109M, 109N)

(1) An occupation certificate is required for—

(a) the commencement of the occupation or use of the whole or any part of a new building, or

…

6.10 Restrictions on issue of occupation certificates

(cf previous s 109H)

(1) An occupation certificate must not be issued unless any preconditions to the issue of the certificate that are specified in a development consent have been complied with.

(2) An occupation certificate must not be issued to authorise a person to commence occupation or use of a new building (or part of a new building) unless—

(a) a development consent is in force with respect to the building (or part of the building), and

(b) in the case of a building erected pursuant to a development consent (other than a complying development certificate), a construction certificate has been issued with respect to the plans and specifications for the building (or part of the building), and

(c) the completed building (or part of the building) is suitable for occupation or use in accordance with its classification under the *Building Code of Australia*, and

(d) such other requirements as are required by the regulations to be complied with before such a certificate may be issued have been complied with.

(3) An occupation certificate must not be issued to authorise a person to commence a new use of a building (or of part of a building) resulting from a change of building use for an existing building unless—

(a) a development consent is in force with respect to the change of building use, and

(b) the building (or part of the building) is suitable for occupation or use in accordance with its classification under the *Building Code of Australia*, and

(c) such other requirements as are required by the regulations to be complied with before such a certificate may be issued have been complied with.

52 The tenant submitted that the conditions in the development consent issued for the construction of the premises had not been complied with, but did not in his submissions explain in what respects the conditions had not been complied with.

53 The tenant noted that an interim occupation certificate issued in September 2020 had excluded the premises occupied by the tenant, while the final occupation certificate issued in May 2021 included both parts of the dual occupancy. The tenant asserted that the certifier had not inspected the premises between issuing the interim certificate and the issue of the final occupation certificate. The tenant submitted that the certifier could not have validly issued the occupation certificate without inspecting the premises and that therefore the final occupation certificate was not valid.

54 The flaw in this submission is that the tenant did not occupy the premises until January 2021 and thus could not know whether the certifier had attended the premises between September 2020 and 21 January 2021.

55 Nevertheless, the occupation certificate was issued on 12 March 2021 and, clearly, applied to the premises occupied by the tenant. These proceedings are not an appropriate forum for a collateral challenge to the validity of the occupation certificate (cf *Dyldam Developments Pty Ltd v The Owners- Strata Plan No 85305* [2019] NSWCATAP 229 at [96]-[117] and [124]). Therefore, from 12 March 2021, the occupation of the premises was authorised pursuant to the *Environmental Planning and Assessment Act*.

56 The tenant also submitted that the absence of an occupation certificate authorising occupation of the premises before 12 March 2021 meant that the premises were not fit for habitation, contrary to s 52 of the *Residential Tenancies Act*. Section 52 provides:

> 52 Landlord's general obligations for residential premises
>
> (1) A landlord must provide the residential premises in a reasonable state of cleanliness and fit for habitation by the tenant.
>
> (1A) Without limiting the circumstances in which residential premises are not fit for habitation, residential premises are not fit for habitation unless the residential premises—
>
> (a) are structurally sound, and
>
> (b) have adequate natural light or artificial lighting in each room of the premises other than a room that is intended to be used only for the purposes of storage or a garage, and
>
> (c) have adequate ventilation, and

(d) are supplied with electricity or gas and have an adequate number of electricity outlet sockets or gas outlet sockets for the supply of lighting and heating to, and use of appliances in, the premises, and

(e) have adequate plumbing and drainage, and

(f) are connected to a water supply service or infrastructure that supplies water (including, but not limited to, a water bore or water tank) that is able to supply to the premises hot and cold water for drinking and ablution and cleaning activities, and

(g) contain bathroom facilities, including toilet and washing facilities, that allow privacy for the user.

(1B) For the purposes of subsection (1A)(a), residential premises are structurally sound only if the floors, ceilings, walls, supporting structures (including foundations), doors, windows, roof, stairs, balconies, balustrades and railings—

(a) are in a reasonable state of repair, and

(b) with respect to the floors, ceilings, walls and supporting structures—are not subject to significant dampness, and

(c) with respect to the roof, ceilings and windows—do not allow water penetration into the premises, and

(d) are not liable to collapse because they are rotted or otherwise defective.

(1C) The Secretary may exempt any specified premises or any specified class of premises from the operation of all or any part of this section. An exemption may be unconditional or subject to conditions.

(2) A landlord must not interfere with the supply of gas, electricity, water, telecommunications services or other services to the residential premises unless the interference is necessary to avoid danger to any person or to enable maintenance or repairs to be carried out.

(3) A landlord must comply with the landlord's statutory obligations relating to the health or safety of the residential premises.

Note—

Such obligations include obligations relating to swimming pools under the *Swimming Pools Act* 1992.

(4) This section is a term of every residential tenancy agreement.

57 There is nothing in s 52 to suggest that the term "fit for habitation" includes "lawfully able to be occupied". There is no reason why it should be so construed. The obligation on a landlord to ensure that premises are lawfully able to be occupied arises pursuant to s 49(1) of the *Residential Tenancies Act* which provides:

49 Occupation of residential premises as residence

> (1) A landlord must take all reasonable steps to ensure that, at the time of entering into the residential tenancy agreement, there is no legal impediment to the occupation of the residential premises as a residence for the period of the tenancy.
>
> (2) A landlord must ensure that the tenant has vacant possession of any part of the residential premises to which the tenant has a right of exclusive possession on the day on which the tenant is entitled to occupy those premises under the residential tenancy agreement.
>
> (3) This section is a term of every residential tenancy agreement.

58 The tenant submitted to the Tribunal that the absence of an occupation certificate was a breach of s 49(1) of the *Residential Tenancies Act* and that the residential tenancies agreement was therefore void and of no effect and the tenant was entitled to the reimbursement of the rent paid.

59 The Tribunal dealt with this submission in paragraphs [44] to [47] of the Decision:

> "44 The tenant has established on the evidence that the landlord had not obtained an Occupation Certificate authorising the occupation of the premises as a residence before the date the residential tenancy agreement was made (22 January 2021). That constituted a breach of s 49(1) (found in clause 14.2 of the agreement). The tenant was entitled to a remedy in relation to this breach at the material time. He could have issued the landlord with a termination notice under s 87 of the Act, and he would have been entitled to seek compensation for removalist costs brought forward. However, this breach was remedied when a final occupation certificate was issued for the premises on 12 March 2021. There has been no legal impediment to the occupation of the premises as a residence since that time.
>
> 45 The tenant's contention that the landlord's breach of s 49(1) renders the residential tenancy agreement void and of no effect because of "illegality", thus entitling him to "clawback" all the rent and water usage charges he has paid, is misconceived. Non-compliance with the requirements of the *Environmental Planning and Assessment Act* 1979 (EPA Act) with respect to the occupation of premises does not invalidate a residential tenancy agreement. It constitutes a breach of the agreement in relation to which the RT Act provides various remedies: *Kings v Chand* [2019] NSWCATAP 180; *ZID v Green* [2018] NSWCATAP 198.
>
> 46 In this case, the breach did not result in any loss to the tenant. He occupied the premises as a residence for more than the whole of the 12-month fixed term. At no point was his tenancy threatened or his peace disturbed by any enforcement action initiated by Council under the EPA Act. The breach persisted for 48 days, and he did not even find out about it until after it had been remedied.
>
> 47 The tenant asserts that the absence of an Occupation Certificate applicable on 22 January 2021 means that the dwelling did not comply with building safety standards. There is no evidence that this is the case. The fire alarms were not activated, but they had been installed and certified. All electricity features had been certified. An Occupation Certificate was issued on

> 12 March 2021. It is not explained how the premises did not satisfy building standards on 22 January 2021 but did on 12 March 2021."

60 The tenant submitted that the Tribunal erred in this finding but did not present any submission to suggest that the Appeal Panel decisions in *Kings v Chand* [2019] NSWCATAP 180 and *ZID v Green* [2018] NSWCATAP 198 were not correct.

61 In *Kings v Chand*, the Tribunal at first instance had determined that the absence of an occupation certificate for premises the subject of a residential tenancy agreement rent rendered the agreement "void at ab initio" that is of no force or effect from its inception.

62 The Appeal Panel reversed that decision, holding at [37] to [43]:

> "37 Mr Kings contends that even if it is accepted that he had contravened s 49(1) of the *Residential Tenancies Act*, the agreement was not void and unenforceable, citing in support *Gnych v Polish Club Limited* [2015] HCA 23; 255 CLR 414 ("*Gynch*"); *ZID v Green* [2018] NSWCATAP 198 ("*ZID*"); *Murphy v Pitt* [2017] NSWCATCD 44.
>
> 38 In *Gynch*, the respondent Club leased part of its licenced premises to the appellants Mr and Mrs Gynch [sic] without the approval of the Independent Liquor and Gaming Authority as required by s 92(1) of the *Liquor Act 2007* (NSW). The High Court rejected the contention that the Club's contravention of s 92(1)(d) of the *Liquor Act* rendered the lease void and unenforceable.
>
> 39 In *ZID* the Appeal Panel (Senior Members P Durack SC and P Boyce) usefully summarised at [77]-[81] the principles in *Gynch* governing the determination of the question of whether an agreement is prohibited by statute, and if so, whether that agreement is unenforceable for statutory illegality:
>
> …
>
> > 'Secondly, there are two sources from which the effect of illegality is to be determined, namely the relevant statute(s) and the common law. Even if a statute does not expressly or impliedly deny legal operation to an agreement, the common law might intervene to refuse to enforce the agreement, more commonly in modern times, on the basis that a person ought not to be assisted by the law to benefit from an illegal act: per Gageler J in *Gynch* at [62], [70], [71], [73] and [74].
> >
> > Thirdly, whilst, perhaps, not comprehensive, the effect of illegality can be considered by reference to the categories identified by the plurality in *Gynch* as follows (at [35] and per Gageler J at [59] – [60]):
> >
> > In *Equuscorp Pty Ltd v Haxton*, French CJ, Crennan and Kiefel JJ explained that an agreement may be unenforceable for statutory illegality in three categories of case, where:

"(i) the making of the agreement or the doing of an act essential to its formation is expressly prohibited absolutely or conditionally by the statute;

(ii) the making of the agreement is impliedly prohibited by statute. A particular case of an implied prohibition arises where the agreement is to do an act the doing of which is prohibited by the statute;

(iii) the agreement is not expressly or impliedly prohibited by a statute but is treated by the courts as unenforceable because it is a 'contract associated with or in the furtherance of illegal purposes'.

In the third category of case, the court acts to uphold the policy of the law, which may make the agreement unenforceable. That policy does not impose the sanction of unenforceability on every agreement associated with or made in furtherance of illegal purposes. The court must discern from the scope and purpose of the relevant statute 'whether the legislative purpose will be fulfilled without regarding the contract or the trust as void and unenforceable'." (footnotes omitted).

Fourthly, whichever category applies, there remains the question of statutory construction as to whether it is the legislative intention that a contract prohibited by statute or associated with an illegal purpose is void and unenforceable: *Gynch*, plurality at [36] – [39] and per Gageler J at [77]. There is no reason why an implied statutory consequence cannot stop short of what can be seen as a "blunt and drastic rule" to render all contracts unenforceable in all circumstances: per Gageler J at [65] and [82].

Fifthly, two particular factors that militate against a statutory implication of nullification of contracts are:

(1) The adverse effect of such a consequence on innocent parties: *Gynch* at [45] (although, the importance of this factor in the circumstances addressed in *Gynch* was not accepted by Gageler J because of the ability of the innocent party to ascertain the details of the regulatory regime before entering into the lease, amongst other matters).

(2) The provision in the statute of other means to sanction and remedy the illegality apart from nullification of agreements. This diminishes the need for nullification and can lead to incoherence or inconsistency in the law if nullification were to be imposed: *Gynch* at [47] – [57] and per Gageler J at [83].'

40 In *ZID,* in contravention of (the then) s 76A of the *EPA Act*, the respondent landlord converted the downstairs portion of a house into a "granny flat" without obtaining development consent. Subsequently, the respondent landlord and the appellant tenant entered into an agreement made under the *Residential Tenancies Act*. The Appeal Panel concluded that the *EPA Act* neither expressly nor impliedly prohibited the making of the tenancy agreement: at [86] and [88]. In concluding that the *EPA Act* did not impliedly prohibit the making of that agreement, the Appeal Panel reasoned that the agreement was not an agreement for "doing an act prohibited under

> s 76A": at [88]. The Appeal Panel considered it relevant that the consent authority had not exercised its discretionary power to order that the use of the flat cease. (In the version of the *EPA Act* considered by the Appeal Panel, s 121B(1) gave the relevant consent authority a discretionary power to order the owner to cease using the premises for purposes for which development consent was required but not obtained.)
>
> 41 The making of the agreement the subject of this appeal was not expressly prohibited by the *EPA Act*. Without the benefit of considered argument we are reluctant to express a concluded view on whether the making of the agreement was impliedly prohibited.
>
> 42 In any event, even if the making of the agreement was impliedly prohibited by the *EPA Act*, for largely the reasons given by the Appeal Panel in *ZID* at [90], on the proper construction of that Act it cannot be said that an implied statutory consequence of the prohibition on making that agreement rendered the agreement void and unenforceable.
>
> 43 The Tribunal erred in determining that the agreement was void and unenforceable."

63 In our view the decision in *Kings v Chand* is correct.

64 The tenant sought to distinguish *Kings v Chand* on the basis that it had not dealt with the proposition that the absence of an occupation certificate rendered the premises uninhabitable pursuant to s 52 of the *Residential Tenancies Act*. In our view that proposition is not correct

65 As we have noted above, s 52 requires premises to be provided "fit for habitation". The Tribunal addressed the question whether the premises were fit for habitation separately from the issue of the significance of s 49. The Tribunal held:

> "53 The tenant contends that the landlord was in breach of s 52 (clause 19.1 of the agreement) because of the state of disrepair of the premises in general, and specifically because of a water leak from the upstairs bathroom which caused damp and mould, and dangerous electrical wiring. He contends that this is an alternative basis upon which he is entitled to be compensated all of the rent he paid under the agreement, for the loss a TV and lounge suite due to water damage, and the cost of his relocation from the premises.
>
> 54 Residential premises will be fit for habitation if they may be dwelt in with safety and reasonable comfort having regard to contemporary standards of living: *Proudfoot v Hart* (1890) 25 QBD 42. Premises will not be found uninhabitable lightly: *De Soleil v Palmhide P/L* [2010] NSWCTTT 464.
>
> 55 The tenant has not established that there was any defective electrical wiring in the premises. The most his evidence is capable of proving is that there was for a short time after the tenancy commenced an uncapped power outlet with plastic encased wires protruding from the wall cavity. That may have been unsightly, but it was not unsafe. The landlord's evidence satisfies me that the premises has been certified by a licensed electrician as fully compliant with relevant legislative requirements and building standards.

> 56 The tenant has established that there was water leaking from the upstairs bathroom through the kitchen/living room ceiling from the start of the agreement up to 22 April 2021 when the shower waterproofing was reinstated. He has not proved any water leak after that date, nor has he proved any persistent dampness or mould after that date. The evidence of the landlord's plumber satisfies me that the waterproofing was rectified on 22 April 2021 and that there was no recurrence of the water leak after that date.
>
> 57 The water leak which occurred up to April 2021 did not render the premises uninhabitable. It may have resulted in a loss of amenity, but the premises could still be dwelt in with safety and reasonable comfort. There is no evidence that the tenant contended otherwise at the material time, and he and his family did continue to occupy the premises during this period.
>
> 58 The other items of disrepair the tenant complains about are relatively minor (which is not to say they are unimportant). They are not capable, either individually or collectively, of rendering the premises uninhabitable.
>
> 59 It follows from these conclusions that the tenant could suffer no loss on the basis that the premises was uninhabitable, such as removalist costs. In any event, the tenant moved out after the end of the fixed term of the residential tenancy agreement, after being issued with an End-of-Fixed Term Termination Notice by the landlord. He could suffer no loss in doing what he was obliged to do."

66 We agree with the Tribunal's summary of the test for whether premises are fit for habitation. The insertion of sub-sections (1A) and (1B) into s 52 has identified specific circumstances in which premises are to be considered not fit for habitation, but those provisions do not limit the circumstances in which premises will be found to be not fit for habitation. The test for whether premises are not fit for habitation does not have regard to the question whether the occupation of the premises might be contrary to any other law.

67 The requirement that a tenant be legally entitled to occupy premises is addressed by s 49(1). There is no reason to construe s 52, or the term "fit for habitation" in that section, as intended to govern the same issue.

68 Ground 2 must be rejected. We accept that the question whether "fit for habitation" in s 52 includes legally able to be occupied raises a question of law, being the correct interpretation of the words of the section, but find that the Tribunal did not err in its interpretation or application of the section.

Ground 3 – Failure to carry out repairs

69 The tenant's submissions concerning this ground of appeal raised no more than factual challenges to the Tribunal's rejection of his claims regarding water leaks and damage to his television and lounge. Factual challenges do not raise

any question of law and are not sufficient to ground a right of appeal. To succeed on appeal, an appellant must demonstrate some relevant error in the Tribunal's reasoning. That is, they must demonstrate an error of law or other appellable error which would justify a grant of leave to appeal.

70 The Tribunal dismissed the tenant's claims because it did not accept that the tenant had established either breach, damage or loss. The Tribunal assessed the tenant's evidence in relation to these issues in paragraph [33] of the Decision:

> "33 The tenant contends that the water leak fatally damaged a television and lounge suite. He claims compensation for the cost of their replacement in the amount of $2,369.99 and $5,299.89. There is no evidence of the damage to the television. Nor is there any evidence of complaint about damage to the television before these proceedings were instituted. The tenant relies on a receipt for the purchase of a television dated 1 June 2021. There is a photograph of the allegedly damaged lounge suite in the tenant's evidence. No damage is apparent in that photograph. The tenant relies upon a receipt for the purchase of six items of furniture including a lounge suite which is dated 8 February 2022. The total of the six items of furniture is the amount claimed. There is no evidence of complaint about damage to the lounge before these proceedings were instituted."

71 The Tribunal expressed its conclusion in relation to the tenant's claim for damages arising from water leaks in paragraph [63] of the Decision:

> "63 To succeed in relation to this element of his claim it is necessary for the tenant to prove breach, damage, and loss. On the evidence I have set out above, the tenant has not proved damage with respect to either item. Additionally, there are difficulties for him proving breach (arguably the landlord acted with reasonable diligence to carry out the repair, but was delayed in doing so by the tenant's conduct), and loss (there is no evidence as to the residual value of these assets at the time they were allegedly water damaged)."

72 The Tribunal also dismissed the claim for damages on the basis that it was out of time, having been brought more than three months after the tenant became aware of the loss: see s 190(1) of the Residential Tenancies Act and regulation 39(9) of the Residential Tenancies Regulation 2019 (NSW). The Tribunal declined, in the exercise of its discretion, to extend the time for the tenant to bring the claim.

73 We can see no error in those reasons.

74 No error of law was identified by the tenant either in the Tribunal's findings concerning the claim or in the Tribunal's refusal to extend the time for bringing the claim.

75 Accordingly, ground 3 must be rejected.

Conclusion

76 For the foregoing reasons leave to appeal must be refused and the appeal dismissed.

Costs

77 Mr Shakeri indicated at the hearing of the appeal, that his client would seek an order for costs in the event the appeal was dismissed. The Appeal Panel indicated at the conclusion of the hearing that, if it dismissed the appeal, it would give Mr Shakeri an opportunity to file written submissions in relation to the question of costs. Those submissions should include submissions on the question whether rule 38A of the Civil and Administrative Tribunal Rules 2014 (NSW) is applicable to the appeal and, if not, whether there are special circumstances warranting an order for costs.

ORDERS

78 Our orders are:

(1) Leave to appeal refused.

(2) Appeal dismissed.

(3) The respondent may, within 14 days of the date of publication of these reasons, file and serve submissions, not exceeding five pages, in support of an application for costs in respect of the appeal.

(4) If the respondent files submissions in accordance with order (3), the appellant may file and serve submissions in response, not exceeding five pages, within a further 14 days.

(5) Any submissions filed in accordance with orders (3) and (4) should address the issue whether the question of costs can be determined on the basis of the written submissions and without a further hearing.

(6) If the respondent does not file submissions in accordance with order (3) there will be no order in relation to the costs of the appeal.

****

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