Civil and Administrative Tribunal

New South Wales

Case Name:	Fimmano v Anderson
Medium Neutral Citation:	[2024] NSWCATAP 22
Hearing Date(s):	24 January 2024
Date of Orders:	20 February 2024
Decision Date:	20 February 2024
Jurisdiction:	Appeal Panel
Before:	Dr R Dubler SC, Senior Member L Wilson, Senior Member
Decision:	1. Leave to appeal refused. 2. Appeal dismissed. 3. The Appellants are to pay the Respondent's costs in the amount of $112.80 immediately.
Catchwords:	LEASES AND TENANCIES – retaliatory notice – reasonable state of repair – excessive rent due to withdraw or reduction in goods, services and facilities
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Tribunal Regulations 2013 (NSW) Civil and Administrative Tribunal Rules 2014 (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 Mendonca v Legal Services Commissioner [2020] NSWCA 84 Ryan v BKB Motor Vehicle Repairs Pty Ltd [2017] NSWCATAP 39 Secretary, Department of Family and Community

	Services v Smith [2017] NSWCA 206
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Patricia Fimmano & Vince Fimmano (Appellants) Ryan Nathan Anderson (Respondent)
Representation:	B Mills – agent (Appellants) Respondent (self-represented)
File Number(s):	2023/00353076
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	n/a
Date of Decision:	24 October 2023
Before:	P French, Senior Member
File Number(s):	2023/00387723 (Previously RT 23/30197)

REASONS FOR DECISION

Introduction

1 This matter concerns a residential tenancy agreement that was first made on 22 March 2015 for 12 months. The tenancy continued upon the expiry of the initial fixed term on the basis of further fixed term agreements. At the material time, the tenancy continued on the basis of a fixed term 12-month agreement (the Agreement).

2 The premises, the subject of the Agreement, are a studio apartment located in a residential block and strata plan in Pyrmont. By orders made on 24 October 2023, the Tribunal relevantly made the following orders:

(a) Pursuant to s 115(1) of the Residential Tenancies Act 2010 (NSW) (the RTA) the Tribunal declares that the Termination

Notice dated 20 June 2023 is of no effect because it is a retaliatory notice,

(b) The landlords must cause the carrying out of the following work in a proper and work-person-like manner at their own expense by 24 November 2023:

1 Replace the Convection Microwave oven with a Microwave Convection oven that is capable of heating to 200 degrees (or in the alternative as agreed upon between the parties).

2 Reinstate dimmer switches in the bedroom and living area.

(c) The rent payable for the premises was excessive from 25 October 2022 to 24 October 2024 and is not to exceed $423.00 for the period 25 October 2022 to 31 March 2023 and $495.00 for the period 1 April 2023 to 24 October 2023.

3 The Tribunal published reasons for its decision on 27 November 2023 (the Decision).

4 The Appellants (the landlord), who were the landlords below, appeared by their agent, Ms B Mills. The Respondent (the tenant) was self-represented.

5 The landlord, in essence, put forward two contentions on appeal. First, that the Tribunal erred in the orders that it made by failing to accord proper and ultimately decisive weight to the landlords' evidence in coming to the decision that it did. Secondly, the Appeal Panel should receive new evidence which supports the overturning of the Tribunal's Decision in favour of orders dismissing the tenant's application in whole.

6 For the reasons which follow, we have decided that leave to appeal, which is necessary, should not be granted to permit the landlords to pursue their first contention. Secondly, we have decided that the Appeal Panel should not receive the new evidence as such evidence was either available with due diligence at the time of the hearing or such evidence would not affect the outcome of the proceedings.

7 For the reasons which follow, we have decided to refuse leave to appeal and dismiss the appeal.

The Tribunal's reasons

The Termination Notice

8 The landlords issued a Notice of Termination (termination notice) under s 85 of the RTA on 20 May 2023 which required the tenant to deliver up vacant possession of the premises on 18 September 2023.

9 The Tribunal was of the view that on its face the termination notice complied with the requirements of s 85 and otherwise of the requirements of Part 5 of the RTA: [46] – [47] the Decision.

10 The Tribunal however noted that the landlords had not instituted an application for termination of the tenancy in accordance with the notice, and the 30 day period in which such an application should be made had lapsed: see s 83(2)(a) of the RTA and s 39T of the *Residential Tenancies Regulation 2019* (NSW) (the Regulation): [48] the Decision.

11 Nevertheless, having regard to the Tribunal's power under s 41 of the *Civil and Administrative Tribunal Act 2013* (NSW) (the NCAT Act) to extend the time in which an application can be made, the Tribunal still considered the application to declare the termination notice retaliatory under s 115 of the RTA as there remained the potential for an application for termination to be made: [48] the Decision.

12 The Tribunal referred to the history of the tenant's complaints about the status of repairs to the premises: [51]. Based upon this history, the Tribunal made the following finding at [52]:

> 52 On this evidence I am satisfied that at the material time for this element of the dispute the tenant had notified the landlords' agent that he proposed to apply to the Tribunal for an order (that fact is recorded by Ms O'Connor in the file note she created on 11 May 2023) and that the tenant had taken other action to enforce his rights under the residential tenancy agreement. In this respect he had made a complaint to NSW Fair Trading about the state of disrepair of the premises and about the delay in the recording of his rent payments, among other things. The circumstances envisaged by s 115(2) of the Act are thus engaged.

13 The Tribunal then made the following findings at [57] – [58]:

> 57 It is clear from what is set out in the response that Ms O'Connor had already started to engage with the landlords to find a basis for terminating the tenancy. Nothing about the tenant's complaint to NSW Fair Trading raised an

issue about terminating the tenancy, yet the response forecasts that outcome in some detail. It is a pre-emptive attempt to justify termination of the tenancy.

58 I am thus satisfied that there is a direct connection between the tenant's complaint to NSW Fair Trading, and his foreshadowed application to NCAT and the issuing of the termination notice.

14 The Tribunal set out the landlords' submissions as to why the termination notice was not retaliatory, based upon two matters:

(1) It was submitted that the landlords may sell the property in the future; and

(2) The Owners' Corporation intended to carry out remedial works to the gas supply to the apartment which would require the apartment to be vacant and the landlords intended to renovate the apartment at the same time.

15 The Tribunal then set out its conclusion at [59] – [61] as follows:

59 The landlord submits that the termination notice is not retaliatory on the following bases:

(i) it submitted they may sell the property in the future.

I am satisfied that this is at most a vague possibility. An email of enquiry of a selling agent is submitted in support of it. However, the landlords only refer to the sale of the property as a future possibility. They do not request the selling agent to prepare any marketing submission for their consideration. There is obviously no contract for the sale of the property which specifies that vacant possession is required. It is implausible that the landlords would terminate the tenancy and therefore forego rent payments based on some vague possibility that they may sell the property at some unspecified time in the future,

(ii) the Owners Corporation intend to carry out remedial works

to the gas supply to the apartment which will require the apartment to be vacant. They intend to renovate the apartment at the same time.

The only evidence that is offered in support of this claim is an email from the Owners Corporation's plumber which indicates that the Owners Corporation has an intention to commission work to the gas supply. There is no scope of work before me in relation to such remedial work. There is no notice to the lot owners/landlords from the Owners Corporation that advises of these remedial works and what it required of the Lot Owners in relation to them. Assuming that this work will be carried out, I do not know when it will occur, how extensive the works will be or how long it will take, or what is required of the landlords in terms of access to the apartment. There is therefore insufficient evidence for me to conclude that the works will require vacant possession of the apartment.

Even if they did, in the absence of any evidence as to the duration of the works (ie whether they will take hours, days, weeks or months to complete) it is not open to me to find that it is reasonable for the

> landlords to terminate the tenancy rather than fund the tenant's temporary relocation from the premises while the works are completed.
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> In relation to the landlords' stated intention to renovate the apartment in
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> conjunction with such works, there is no scope of works for a renovation in evidence that indicates the scale of work contemplated. The landlords have not entered into any contract with a builder for renovation works which specifies a start date and completion date. In these circumstances, even if the landlords do have a genuine intention to renovate, I could not be satisfied that the scale of any such renovation is such that vacant possession is required.
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> 60 In relation to both 'reasons' given by the landlords for the issuing of the termination notice, I note that the landlords offered the tenant a 12 month fixed-term lease in January 2023 which would not have lapsed until January 2024. I accept that circumstances can change, but no actual change of circumstances has been proved in this case.
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> 61 For the foregoing reasons, I am satisfied that the landlords were wholly motivated to issue the termination notice by the tenant's complaint to NSW Fair Trading and his foreshadowed application to NCAT, urged on by Ms O'Connor's deplorable behaviour. The landlords' have not discharged their practical onus of establishing that there was another reason for the termination notice to be issued. I therefore declare the termination notice a retaliatory notice.

The Convection Microwave

16 The Tribunal summarised the evidence in respect of this matter at [14]. It said that there 'was very little, factual dispute between the parties in relation to this element of the claim'.

17 In brief summary form, the Tribunal at [14] made the following relevant findings on the evidence:

(1) Originally the rented premises incorporated a Convection Microwave oven which had a capacity to heat to 200 degrees, and therefore was capable of cooking meat;

(2) On or about 3 December 2019, the original Convection Microwave oven was replaced with a Smeg Microwave Oven;

(3) At various times, Smeg technicians confirmed that the oven was not heating to 200 degrees, that the oven in question was not designed to heat to that level and on or about 27 February 2023, a temperature probe inserted into the oven, a photocopy of which was before the Tribunal, showed the oven recorded a maximum temperature of 141 degrees.

18 The Tribunal then concluded the following at [16]:

> I am satisfied on the evidence that the landlords breached their obligation to maintain the premises in a reasonable state of repair by ensuring that there is

> a Convection Microwave oven available for the tenant's use which is capable of heating to at least 200 degrees. There was a such an appliance incorporated into the premises when the residential tenancy was made, and the landlords were therefore obliged to maintain at least an equivalent capacity appliance in the premises. It is clear on the facts I have set out above they have not done so.

The dimmer lights

19 Again, the Tribunal summarised the evidence in respect of this issue at [14] and again stated that there 'is very little, if any, factual dispute between the parties in relation to this element of the claim'.

20 In short summary, the following findings on this evidence in respect of this issue were made:

(1) The rented premises incorporated at the commencement of the rental tenancy agreement downlights over the bedroom and living room area, which could be regulated in intensity by dimmer switches;

(2) On 17 November 2022, the landlords caused the original lights to be replaced with LED lights, which caused the tenant to complain to the landlords that such lights were unable to be dimmed and that one light was humming constantly;

(3) The landlords relied upon an email from their electrical contractor dated 20 July 2023 which stated the following:

> For the lights in the property, I am aware you had dimmer switches in the property, however we have followed the electrician advice in replacing those with normal working lights as it can be more cost effective for the landlord in the future and legislation requires you to have working lights and I can confirm that the property has working lights;

and

(4) At the time of the hearing the relevant dimmer lights had not been installed.

21 The conclusion of the Tribunal was as follows (at [17]):

> I am also satisfied on the evidence that the landlords breached their obligation to maintain the premises in a reasonable state of repair by maintaining dimmer switches on the lights in the premises to allow the intensity of light to be regulated. There is no issue that such facilities were provided with the rented premises when the residential tenancy agreement was made. There is no issue that they were disconnected on or about 18 November 2022.

Notice of Appeal

22 An appeal to the Appeal Panel does not simply provide a losing party in the Tribunal below with the opportunity to run their case again: *Ryan v BKB Motor Vehicle Repairs Pty Ltd* [2017] NSWCATAP 39 at [10].

23 To succeed in an appeal, the Appellant must demonstrate either an error on a question of law, which may be argued as of right; or that permission (that is 'leave') to appeal should be granted to bring the appeal: NCAT Act s 80(2).

24 In *Cominos v Di Rico* [2016] NSWCATAP 5 at [13], the Appeal Panel 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 in s 36(1) of the NCAT Act, 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.

25 The Appeal Panel has a discretion whether to grant leave under s 80(2) of the NCAT Act. Pursuant to the *Civil and Administrative Tribunal Regulations* 2013 (NSW), the Appeal Panel can only give leave, in respect of an appeal from the Consumer and Commercial Division, which includes this appeal, if it is satisfied that the Appellants may have suffered a substantial miscarriage of justice because:

(1) The decision was not fair and equitable;

(2) The decision was against the weight of evidence;

(3) Significant new evidence is now available that was not reasonable available at the time of the hearing.

26 The principles governing an application for leave to appeal under the NCAT Act are well established and repeated in many decisions of the Appeal Panel, often quoting *Collins v Urban* [2014] NSWCATAP 17. They are the same principles applied by the courts. It is enough as a summary to refer to the *Secretary, Department of Family and Community Services v Smith* [2017] NSWCA 206 where the Court said, at [28] (citations omitted):

> only if the decision is attended with sufficient doubt toward its reconsideration on appeal will leave be granted. Ordinarily, it is only appropriate to grant leave where there is an issue of principle, a question of general public importance, or an injustice which is reasonably clear, in the sense of going beyond of what is merely arguable. It is well established that it is not sufficient merely to show that the trial was arguably wrong.

27 Justice McCallum, as her Honour then was, in *Mendonca v Legal Services Commissioner* [2020] NSWCA 84 held at [43] that:

> [T]here may be cases in which it is appropriate for the Court to give the correct legal construction to an arguable point poorly articulated by a self-represented litigant. However, the Court is not required to undertake a partisan analysis of lengthy, unstructured assertions and misconceptions with a view to ensure that a self-represented litigant had not missed some argument or point.

28 The landlords were represented by their agent who is not legally qualified. We have decided to apply the same principles as summarised by us above as if the landlords were self-represented.

The application to include new evidence

29 The landlords at the hearing narrowed their application to introduce new evidence to pages 37, 40 and 44 – 47 of their bundle of documents.

30 Page 37 of the landlords' bundle consists of an email from Smeg dated 26 October 2023, which relevantly confirmed that the National Technical Manager had spoken with the tenant in late April 2023 and had offered 'to attend and check the operation of the current unit, as well as bring out a unit of the same model that was fully tested in our Workshop. … The tenant then declined that offer and we did not proceed any further.'

31 We note that the tenant denies that he declined any such offer. Nevertheless, it is plain to us on the evidence that even if the tenant declined the offer to have the microwave oven replaced with a 'unit of the same model', this would not amount to 'significant' new evidence that could affect the outcome.

32 This is because the evidence before the Tribunal shows that the current unit was unlikely to be capable of reaching the temperature of the previous Convection Oven. Accordingly, it may well have been reasonable for the tenant to decline the offer. The obligation on the landlords to ensure that any oven on the premises was capable of reaching the required 200 degrees of the previous

Convection Oven remains irrespective of any alleged such conduct of the tenant.

33 Accordingly, we decline the application to introduce this new evidence on appeal.

34 Page 40 of the landlords' bundle consists of a letter from Smeg dated 16 February 2023. No submission was put to us as to why this document was not available at the time of the hearing with reasonable diligence on the part of the landlords. Further, it became apparent during the appeal hearing that the substance of this letter was before the Member below. The letter referred to the inspection which took place on 30 November 2022 which is referred to in an email from the landlords' agent to the tenant on 20 February 2023 set out in [14(viii)] of the Decision. In any event, we are not satisfied that this letter was not reasonably available at the hearing which was nine months after the date of the letter and for that reason we decline to receive this document on appeal.

35 Pages 44 – 47 of the landlords' bundle consists of a series of emails between Smeg and the landlords' agent Ms Mills concerning the replacement of the oven by Smeg dated between 8 December 2023 and 14 December 2023.

36 Evidence as to the replacement of the oven after the Decision of the Tribunal can only go the question of compliance with the existing orders and can have no relevance in demonstrating any error on the part of the Tribunal.

37 For completeness, we note that in one of the emails dated 14 December 2023 by Smeg's National Technical Manager there appears this sentence: 'The old unit also tested OK'.

38 This argument could have some relevance to the issue that was before the Tribunal at the time of the hearing. However, on its face the statement that the old unit tested 'OK' without reference to any precise temperature would have little relevance to the real issues that were before the Tribunal at the time of the hearing. Further, it would not be in the interests of the finality of litigation to permit evidence of further testing of equipment to be introduced on appeal after the issues were fully canvased and evidence of the capacity of the equipment was already before the Tribunal.

39 Accordingly, we decline the landlords' application to introduce new evidence before the Appeal Panel.

Retaliatory Notice

40 Ms Mills accepted at the hearing that the submission in respect of this matter amounted to the proposition that the two reasons that were given for why a Termination Notice was issued ought to be accepted rather than the proposition accepted by the Tribunal that the Termination Notice was issued in retaliation or because of the complaints being made by the tenant that predated the Termination Notice.

41 This clearly does not involve a question of law and leave to appeal is required. As we understand it, the landlords are submitting that the conclusion of the Tribunal was against the weight of the evidence or was not fair and equitable.

42 In our view, there was plainly evidence before the Tribunal which made it open for the Tribunal to find as it did in respect of this matter. Accordingly, we are not satisfied that the Decision was not fair and equitable or against the weight of the evidence.

43 Accordingly, we refuse leave to appeal in respect of this ground of the appeal.

The dimmer switches

44 With the greatest respect to Ms Mills, it was ultimately difficult to discern what ground of appeal if any was actually being pursued in respect of the matter of the dimmer switches. It was accepted that there were dimmer switches at the commencement of the tenancy and that they were replaced and not restored up to the time of the hearing. It was not submitted that the absence of dimmer lights did not amount to a loss amenity for the tenant.

45 It appears to us that the issue of dimmer lights has been raised merely by way of background to the submission, which we deal with below, concerning orders 3 and 4 in respect of compensation for breach of the Agreement.

46 For completeness, we note that our view that there was ample evidence before the Tribunal which justified and made it open for the Tribunal to find as it did in respect of the dimmer switches. We are not satisfied that the Tribunal's

findings were against the weight of the evidence or that the Decision was not fair and equitable.

47 Accordingly, we decline to grant leave to appeal in respect of this ground.

The Convection Oven

48 Again, Ms Mill's accepted that the substance of the landlords' contention in this regard was that on the evidence before the Tribunal, the Tribunal ought to have found that the relevant oven was working, was functional and was capable of reaching 200 degrees in the same manner as the oven that was on the premises at the commencement of the residential tenancy agreement.

49 At best in this regard, the only evidence could be regarded as possibly favourable to the landlords' case included the following:

(1) The manual stated that in relation to 'Convection cooking' that the 'temperature can be chosen from 150 degrees to 200 degrees'; and

(2) the landlords' agent emailed the tenant on 20 February 2023 stating that Smeg found that on inspection on 30 November 2022 the unit 'only reaches 200 degrees at the temp probe'.

50 On the other hand, there was overwhelming evidence that the oven in question could not come to the same temperature as the previous oven and in particular there was evidence that on or about 27 February 2023 the maximum recorded temperature was 141 degrees including a photograph of the temperature reading.

51 In our view, the evidence made it clearly open to the Tribunal to find as it did in respect of the issue of the oven. In our view the Decision of the Tribunal was not against the weight of the evidence. Further in our view the Decision was fair and equitable.

52 Accordingly, we decline to grant leave to appeal in respect of this ground of appeal.

Excessive rent order

53 The Tribunal's power to declare that rent is excessive is found in s 44 of the RTA, which provides relevantly:

44 Tenant's remedies for excessive rent

(1) Excessive rent orders: The Tribunal may, on the application of a tenant, make any of the following orders –

…

(b) an order that rent payable under an existing or proposed residential tenancy agreement is excessive, having regard to the reduction or withdrawal by the landlord of any goods, services or facilities provided with the residential premises and that, from a specified day, the rent for residential premises must not exceed a specified mount.

…

(3) Applications on withdrawal of goods or services: A tenant may, before the end of a tenancy, make an application that the rent is excessive, having regard to the reduction or withdrawal of any goods, services or facilities provided with the residential premises, even if those goods, services or facilities were provided under a separate or a previous contract, agreement or arrangement.

…

(5) The Tribunal may have regard to the following in determining whether a rent increase or rent is excessive –

(a) the general market level of rents for comparable premises in the locality or a similar locality,

(b) the landlord's outgoings under the residential tenancy agreement or proposed agreement,

(c) any fittings, appliances or other goods, services or facilities provided with the residential premises,

(d) the state of repair of the residential premises,

(e) the accommodation and amenities provided in the residential premises,

(f) any work done to the residential premises by or on behalf of the tenant,

(g) when the last increase occurred,

(h) any other matter it considers relevant (other than the income of the tenant or the tenant's ability to afford the rent increase or rent).

(6) Effect of excessive rent order: An order by the Tribunal specifying a maximum amount of rent –

(a) has effect for the period (of not more than 12 months) specified by the Tribunal,

…

54 The tenant applied for excessive rent orders reducing the rent payable for the premises due to the reduction in use of the lights, the withdrawal of the dimmer switches, and the withdrawal of the convection microwave oven capable of heating to 200 degrees from 3 December 2019 up to the date of the hearing, being a period of three years and six months.

55 Section 44(6)(a) of the RTA does not permit the Tribunal to make an excessive rent order in respect of a period greater than 12 months. This required the tenant to limit himself and to specify a 12-month period in relation to which he sought the order. He settled on the 12-month period up to the date of the hearing (that is 25 October 2022 to 24 October 2023).

56 The Tribunal found that the rent payable during this period was a market rent: [26]. The landlords did not dispute this finding. The Tribunal found that the electric lights were the subject of significant malfunction on and from 25 October 2022 to on or about 18 November 2022: [28]. The landlords did not dispute this finding.

57 The Tribunal found that the dimmer switches were withdrawn from the tenant by the landlords on or about 18 November 2022 up to the date of the hearing: [29]. The landlords did not dispute this finding.

58 The Tribunal found that the replacement oven between the whole of the period 25 October 2022 to 24 October 2023 was never capable of heating to 200 degrees in accordance with the manufacturer's specifications for that model: [30]. Whilst the landlords appeared to have disputed this finding, we have already rejected this ground of appeal and refused the landlords leave to appeal to overturn this finding.

59 The conclusion then of the Tribunal in respect of excessive rent was set out at [33] – [36] as follows:

> 33 For the foregoing reasons I am satisfied that the malfunctioning lights, the disconnection of the dimmer switches and the absence of a functioning Convection oven had a significant impact on the tenant's comfort and amenity.
>
> 34 In determining to what extent rent was excessive having regard to the reduction and withdrawal of these goods and facilities, I must consider them in the context of the totality of the goods, services and facilities provided with the rented premises. In that regard, it is important to bear in mind that this is a studio apartment with limited goods, services, and facilities.
>
> 35 Weighing these considerations in the balance I will allow that rent was excessive by 5% due to the reduction in use of the lights and then the withdrawal of the dimmer switches, and by a further 5% in relation to the withdrawal of a Convection oven capable of heating to 200 degrees. Rent was thus excessive by $94.00 per fortnight between 25 October 2022 and 31 March 2023 and by $110.00 per fortnight from 1 April 2023 up to 24 October 2023. I will therefore make excessive rent orders to this effect.
>
> 36 It was not in issue that the tenant has paid all rent owing in relation to these periods at the rate of $940.00 and $1,100.00 per week respectively. It is therefore appropriate to liquidate the excessive rent orders to a money order that will require the landlords to pay the tenant the excessive rent he has paid by operation of those orders which is $2,687.27.

60 Ultimately, as we understood the submissions of the landlords, the complaint made about the Tribunal's excessive rent order was wholly derivative upon its previous grounds of appeal. As we have rejected those grounds of appeal, there is no basis for the landlords' challenge of the excessive rent order.

61 Further, and in any event, we have considered the totality of the evidence that was before the Tribunal and in our view the findings of the Tribunal with respect to its excessive rent orders and the liquidation of the excessive rent orders to a money order were orders that were well-available to the Tribunal on the evidence before it. We are not satisfied that such orders were against the weight of the evidence or that the decision to make the orders was not fair and equitable.

62 Accordingly, we refuse the landlords leave to appeal the excessive rent orders. Accordingly, we reject this ground of appeal.

Costs

63 The tenant made an application for his printing costs under s 60(2) of the NCAT Act due to the landlords' claim being 'frivolous and vexatious'.

64 The tenant's claim for costs was based upon photocopying charges of $0.10 per page at Officeworks. Officeworks' schedule of charges was tendered and shows relevant photocopying charges at $0.10 per page.

65 The tenant claimed photocopying costs of 664 pages or $66.40 cents calculated as follows: five copies of Reply to Appeal (23 pages each); four copies of original application (105 pages each); four copies of summonses documents (26 pages each); and five copies of recent emails (five pages each). Coming to a total of 664 pages.

66 In addition, the tenant sought binding costs of $46.40. We can confirm that the tenant did bind each of the documents referred to above.

67 At the hearing, we heard submissions from the parties as to the claim for costs. Ms Mills opposed the application for costs but was unable to formulate any meaningful basis for saying the Tribunal should decline to make any order for costs.

The relevant statutory provisions

68 Section 60 of the NCAT Act relevantly, provides,

60 Costs

(1) Each party to proceedings in the Tribunal is to pay the party's own costs.

(2) The Tribunal may award costs in relation to proceedings before it only if it is satisfied that there are special circumstances warranting an award of costs.

(3) In determining whether there are special circumstances warranting an award of costs, the Tribunal may have regard to the following—

(a) whether a party has conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceedings,

(b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceedings,

(c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law,

(d) the nature and complexity of the proceedings,

(e) whether the proceedings were frivolous or vexatious or otherwise misconceived or lacking in substance,

(f) whether a party has refused or failed to comply with the duty imposed by section 36(3),

(g) any other matter that the Tribunal considers relevant.

…

"costs" includes—

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

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

69 The tenant below sought $15,000 by way of excessive rent orders. We are prepared to assume for the purposes of rule 38 and 38A of the *Civil and Administrative Tribunal Rules 2014* (NSW), which govern costs in the Consumer and Commercial Division of the Tribunal and appeals from decisions in that division, that the amount claimed or disputed in the proceedings is not more than $30,000.

70 Accordingly, the tenant must show special circumstances to justify an order for costs pursuant to s 60 of the NCAT Act.

71 In our view, it is plain for the reasons we have explained above that in substance the landlords sought simply to rerun the case previously run before the Tribunal. Leave to appeal would be required.

72 The case put forward by the landlords failed to show any reasonably arguable basis for the grant of leave as there was no real substance to the proposition that the Decision was against the weight of the evidence or was not fair and equitable.

73 In our view, there was no tenable basis in fact or law for the appeal put forward by the landlords and their appeal proceedings lacked substance: see s 60(3)(c) and (e) of the NCAT Act.

74 Accordingly, we are satisfied that there are special circumstances warranting an award for costs within the meaning of s 60(2) of the NCAT Act.

75 We are also satisfied that the relevant photocopying and binding costs of the tenant are within the meaning of ‘costs’ provided for in s 60 of the NCAT Act. We are also satisfied that the costs put forward by the tenant are reasonable.

76 Pursuant to s 60(4) of the NCAT Act, if costs are to be awarded by the Tribunal, the Tribunal may determine by whom and to which extent costs are to be paid.

77 For the foregoing reasons we have decided to order that the landlords should pay the tenant's costs in the amount of $112.80.

Disposition

78 The orders of the Appeal Panel are as follows:

(1) Leave to appeal is refused.

(2) Appeal dismissed.

(3) The Appellants are to pay the Respondent's costs in the amount of $112.80 immediately.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar