Civil and Administrative Tribunal

New South Wales

Case Name:	Pan v Shanehsazzadeh
Medium Neutral Citation:	[2024] NSWCATAP 23
Hearing Date(s):	6 December 2023
Date of Orders:	19 February 2024
Decision Date:	19 February 2024
Jurisdiction:	Appeal Panel
Before:	G Sarginson, Senior Member P H Molony, Senior Member
Decision:	1. Leave to appeal is refused. 2. The appeal is otherwise dismissed.
Catchwords:	LEASES AND TENANCIES – Residential Tenancies Act 2010 (NSW) – Notice of rent increase – Whether validly served prior to renewal of lease – Leave to appeal – Significant new evidence not reasonably available – No grounds for leave established
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Tribunal Rules 2014 (NSW) Residential Tenancies Act 2010 (NSW) Residential Tenancies Regulation 2019 (NSW)
Cases Cited:	Al-Daouk v Mr Pine Pty Ltd t/as Furnco Bankstown [2015] NSWCATAP 111 Collins v Urban [2014] NSWCATAP 17 Cominos v Di Rico [2016] NSWCATAP 5 Jackson v NSW Land and Housing Corporation [2014] NSWCATAP 22 Pholi v Wearne [2014] NSWCATAP 78 John Prendergast & Vanessa Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 Ryan v BKB Motor Vehicle Repairs Pty Ltd [2017]

	NSWCATAP 39 Semaan v McIlroy; McIlroy v Semaan [2017] NSWCATAP 146 Sengos v Hassan [2022] NSWCATAP 366 Sun v Zhang [2023] NSWCATAP 333 Whear v Kids on Hayes Street Pty Ltd [2021] NSWCATAP 123
Texts Cited:	None cited
Category:	Principal judgment
Parties:	Lin Pan (Appellant) Saeed Shanehsazzadeah (Respondent)
Representation:	N Qin (JIF Realty Pty Ltd) (Agent) (Appellant) Respondent (Self-Represented)
File Number(s):	2023/00308033
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	Not Applicable
Date of Decision:	20 September 2023
Before:	S De Jersey, General Member
File Number(s):	RT 23/21603

REASONS FOR DECISION

1 This is an appeal by a landlord from a decision of the Consumer and Commercial Division of the Tribunal in favour of a former tenant.

2 In this decision, any reference to “the landlord” is a reference to the appellant and any reference to “the tenant” is a reference to the respondent.

3 The decision under appeal is dated 20 September 2023. The Tribunal gave written reasons for its decision.

4 The Tribunal hearing occurred on 19 September 2023, but the decision and reasons of the Tribunal were issued to the parties on 20 September 2023 (the Tribunal having reserved its decision).

5 At the Tribunal hearing, Mr Qin, agent, appeared for the landlord. The tenant was self-represented. Both Mr Qin and the tenant also appeared at the appeal hearing.

6 The decision under appeal involved a claim by the tenant for a refund of overpaid rent, on the basis that the landlord had not issued a valid rent increase under the applicable provisions of the *Residential Tenancies Act 2010* (NSW) (RT Act), and payment of the bond.

7 Both parties provided the Appeal Panel with documents which they asserted were in evidence at the Tribunal hearing.

8 The Tribunal made the following orders:

(1) Landlord to pay tenant $3,750.01, being refund of the amount paid in respect of the invalid rent increase from 1 November 2022 to 2 May 2023, including discount for 2 days of unpaid rent before vacating the premises.

(2) Rental bond services to refund the whole bond plus interest to the tenant.

(3) Time for filing the application for the rent refund extended to 10 May 2023.

9 The landlord filed an appeal against the Tribunal decision on 28 September 2023. The appeal was filed within the time required by r 25(4) of the Civil and Administrative Tribunal Rules 2014 (NSW) (NCAT Rules).

10 No previous orders have been made by the Appeal Panel granting a stay of the orders of 20 September 2023.

Background

11 On 25 October 2021, the parties entered a written residential tenancy agreement for a fixed term of 12 months commencing 1 November 2021. The rent payable was $600 per week (pw). The agent representing the landlord was Guan Realty Pty Ltd t/as Elite Estate.

12 On 3 November 2021, the landlord engaged a new agent, JIF Realty Pty Ltd and signed a managing agency agreement.

13 According to the landlord's agent, on 19 September 2022, the agent emailed the tenant regarding "Urgent-rent increase and renew lease." The email stated that the landlord had done "research" of other rents in the strata building, and similar residences rented for $850-$1,000 pw. The email stated that if the tenant sought to remain in the property after the expiration of the lease, the landlord "required" that the tenant pay $800 pw rent from 1 November 2022. The email concluded by stating that if the tenant did not accept the landlord's demand "we are hereby to serve you the termination notice" (sic).

14 That email contains no reference to a Notice to Increase Rent having been served on the tenant.

15 At the Tribunal hearing, the tenant asserted that the date of the landlord's agent's email had been changed to 19 September 2022 from 26 September 2022. He provided a screenshot of his emails that contained the same email of the landlord's agent, but dated 26 September 2022.

16 In the period between late September 2022 and mid-October 2022 there were email negotiations between the parties. Ultimately, the parties agreed to sign a new written lease for $750 pw rent, but for a 6 month fixed term.

17 On 1 November 2022, the parties entered into a written lease for a 6 month fixed term (expiring on 2 May 2023) for rent of $750 pw.

18 The ledger of the landlord's agent clearly showed the landlord demanded, and the tenant paid, rent of $750 pw from 1 November 2022.

19 According to the tenant, on about 4 March 2023 the landlord's agent telephoned him and orally stated that the landlord sought to increase rent to $950 pw. The tenant did not agree.

20 On 4 March 2023, the landlord sent the tenant an email, which referred to having spoken to the tenant "this afternoon". The email stated that the landlord was serving the tenant with an end of fixed term Notice to Terminate under s 84 of the RT Act, with a date of vacant possession of 2 May 2023. The email attached a Notice to Terminate for end of fixed term.

21 The tenant vacated the premises in accordance with the landlord's Notice to Terminate.

22 On 10 May 2023, the tenant commenced Tribunal proceedings against the landlord. The orders sought were that the rent increase was excessive under s 44(1)(a) of the RT Act, and that the bond be returned in full to the tenant.

23 The tenant's application stated that the landlord had not issued a valid Notice to Increase Rent on the tenant, and that the tenant had overpaid the landlord for rent from 1 November 2022.

24 During the course of the Tribunal proceedings the tenant was granted leave to amend the claim so that, rather than the setting aside of a rent increase under s 44(1)(a) (which the Tribunal would have no jurisdiction to hear in circumstances where the application was filed after the tenancy had ended) the tenant was claiming a money order under s 187 of the RT Act for reimbursement of the purported overpayment of rent (i.e. that the landlord had no legal entitlement to demand rent above $600 pw because the landlord had not issued a valid Notice to Increase Rent), and additionally, payment of the bond.

25 A key issue in dispute before the Tribunal was whether or not the landlord had validly served a Notice of Rent Increase.

26 At the Tribunal hearing, the landlord's agent relied upon a written Notice of Rent Increase dated 20 August 2022, which the landlord asserted had been sent by post to the tenant.

27 The tenant denied having been served with the Notice of Rent Increase dated 20 August 2022.

28 The Tribunal noted, in its reasons, that each party had filed and served documentary evidence in accordance with Tribunal directions, but the purported Notice of Rent Increase dated 20 August 2022 was not contained in the landlord's documents. The tenant asserted that, prior to the hearing, the document had never been sent to him or provided to him. According to the tenant, the first time he had seen the document was when it was produced at the hearing on 19 September 2023.

29 The purported Notice of Rent Increase produced by the landlord at the Tribunal hearing:

(1) Did not contain any address of the residential premises the subject of the rent increase.

(2) Stated it was sent by post to the tenant.

(3) Was purportedly signed by the landlord's agent Mr Qin.

(4) Stated the rent would be increased to $850 payable from 1 November 2022.

30 The Tribunal stated in its reasons that, although the tenant asserted that he had never received or seen the Notice of Rent Increase dated 20 August 2022 prior to the hearing on 19 September 2023, the Tribunal determined leave be granted to admit it into evidence because it was "central to the dispute".

Decision and Reasons of the Tribunal

31 The Tribunal made the following findings:

(1) The tenant gave vacant possession on 2 May 2023, and there were two days of unpaid rent.

(2) That the email proposing a rent increase was sent on 26 September 2022, which was less than 60 days before it was due to commence on 1 November 2022. It was therefore non-compliant with s 41 of the RT Act.

(3) That the tenant had not received the purported Notice of Rent Increase dated 20 August 2022. The Tribunal found Mr Qin's evidence that the Notice of Rent Increase was served by post was "not creditable" because:

(a) The written tenancy agreement contained a provision that the tenant agreed to service of Notices by email. All relevant correspondence had been by email, and there was no logical reason why the landlord's agent would have sent the Notice by post.

(b) There was no contemporaneous evidence to support Mr Qin's oral evidence that the Notice of Rent Increase had been sent by post, such as a mail book real estate agency business record verifying that the Notice had been posted on 20 August 2022, or at all.

(c) None of the contemporaneous emails of the parties referred to a Notice of Rent Increase dated 20 August 2022 having been sent.

(4) No valid Notice of Rent Increase had been served by the landlord pursuant to its obligation under s 41 of the RT Act prior to the parties entering into the new written residential tenancy agreement commencing on 1 November 2022.

32 The Tribunal considered whether time should be extended to bring the proceedings in the Tribunal. The Tribunal held that there was no provision of the RT Act or its Regulations that stipulated a time period to bring the Tribunal proceedings. The Tribunal applied r 23(3)(b) of the NCAT Rules that provides a 28 day time period to bring proceedings in the Tribunal from the date a party "became entitled under the enabling legislation" if the enabling legislation does not stipulate a time period. That limitation period is subject to extension under s 41 of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act).

33 The Tribunal found that the tenant should have commenced proceedings within 28 days of "being aware of the rent increase" under r 23(3)(b) of the NCAT Rules and was out of time. However, the Tribunal was satisfied that time to bring the proceedings should be extended under s 41 of the NCAT Act. The Tribunal accepted that the tenant had provided a reasonable explanation for not commencing proceedings within the applicable limitation period, as the tenant was concerned that the landlord would terminate the tenancy if he took proceedings challenging the rent increase. The Tribunal found that the contemporaneous emails of the landlord (including stating that a Notice to Terminate would be served if the tenant did not accept the rent increase) supported the tenant's belief that to challenge payment of the rent increase would lead to the landlord seeking to terminate the residential tenancy agreement.

34 After determining that time to bring proceedings in the Tribunal should be extended to the date the proceedings were commenced, the Tribunal found that the landlord had not complied with s 41(3) of the RT Act and that as a valid Notice of Rent Increase had not been issued by the landlord, the rental remained at $600 pw rent from 1 November 2022 to the end of the tenancy, not $750 pw. On that basis, the Tribunal ordered a refund of monies to the tenant, less the 2 days of rent that was outstanding.

35 Although the Tribunal did not refer to the bond in its reasons, there was no claim by the landlord on the bond. Accordingly, there was no legal basis for not awarding the bond to the tenant.

GROUNDS OF APPEAL

36 The landlord's Notice of Appeal identified the ground of appeal as follows:

> Decision dissatisfied with the application orders.

37 The Notice of Appeal states that the landlord is seeking leave to appeal under cl 12 of Sch 4 on the basis that:

(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 available at the date of the hearing.

38 The purported significant new evidence that was not reasonably available at the date of the hearing was a purported extract from the landlord's agent's mail book from August 2022, which, according to the landlord's agent, contains a record of the Notice of Rent Increase dated 20 August 2022 being sent to the tenant by post.

SCOPE AND NATURE OF APPEALS

39 Internal appeals may be made as of right on a question of law, and otherwise with leave (that is, the permission) of the Appeal Panel: s 80 (2) of the NCAT Act.

40 Internal appeals involve consideration of whether there has been any error of law; or any error other than an error of law sufficient to grant leave to appeal under cl 12 of Sch 4 of the NCAT Act.

41 An appeal is not simply an opportunity for a dissatisfied or aggrieved party to re-argue the case they put at first instance: *Ryan v BKB Motor Vehicle Repairs Pty Ltd* [2017] NSWCATAP 39 (*Ryan v BKB*) at [10].

42 In *John Prendergast & Vanessa 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.

43 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 Sch 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 on the basis that:

(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).

44 In *Collins v Urban* [2014] NSWCATAP 17 (*Collins v Urban*), the Appeal Panel stated at [76] that a substantial miscarriage of justice for the purposes of cl 12 (1) of Sch 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.

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

46 In *Collins v Urban*, the Appeal Panel stated at [84] 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;

> (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.

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

48 In respect of a self-represented non legally trained appellant, grounds of appeal should be considered generally (subject to procedural fairness considerations) to determine whether a question of law has been raised (*Prendergast* at [12]; *Cominos v Di Rico* [2016] NSWCATAP 5 at [13]).

CONSIDERATION

Error on a Question of Law

49 The landlord did not provide a copy of the sound recording of the Tribunal hearing or a transcript of the hearing. The procedural directions made by the Appeal Panel at the Call Over on 11 October 2023 make clear that any party who seeks to rely upon what was said at the hearing is to provide a sound recording or transcript of the hearing or relevant part of the hearing.

50 The landlord is the appellant who must establish appealable error, and bears the consequences of the failure to provide a sound recording or transcript of the hearing (*Whear v Kids on Hayes Street Pty Ltd* [2021] NSWCATAP 123 at [25]; *Sengos v Hassan* [2022] NSWCATAP 366 at [42]-[43]).

51 Accordingly, we must focus upon the written reasons of the Tribunal and the documents provided by each party in the appeal that were in evidence before the Tribunal.

52 The Grounds of Appeal filed by the landlord do not identify any question of law. The oral submissions at the appeal hearing by the landlord's agent Mr Qin also failed to identify or articulate any question of law. The purported error of law

was that the landlord was dissatisfied with the decision. The Appeal Panel decision in *Ryan v BKB* makes abundantly clear that mere dissatisfaction with a Tribunal decision does not provide the legal basis for an appeal to the Appeal Panel under s 80 of the NCAT Act.

53 As no arguable error on a question of law has been identified, the appeal can only succeed if we are satisfied that leave to appeal should be granted under cl 12 of Sch 4 of the NCAT Act.

Leave to Appeal

Decision Not Fair and Equitable

54 The substance of the landlord's oral argument on the appeal was that the Tribunal should have found that the landlord's agent had validly served the Notice of Rent Increase dated 20 August 2022.

Notice of Rent Increase-Statutory Requirements

55 Sections 41 and 42 of the RT Act states as follows:

> **41 Rent increases**
>
> (1) The rent payable under a residential tenancy agreement may be increased only if—
>
> (a) the tenant is given a written notice by the landlord or the landlord's agent specifying the increased rent and the day from which it is payable, and
>
> (b) the notice is given at least 60 days before the increased rent is payable.
>
> (1A) Subsection (1) does not apply to a fixed term agreement for a fixed term of less than 2 years that specifies the date on which, and the amount by which, the rent payable under that agreement will be increased. This subsection does not affect the operation of subsection (2) in relation to the renewal of a fixed term agreement.
>
> (1B) The rent payable under a periodic agreement may not be increased more than once in any period of 12 months.
>
> (2) This section extends to an increase in the rent payable under a residential tenancy agreement on renewal of the agreement as if the increase were an increase during the term of the agreement.
>
> Note—
>
> Notice of a rent increase on renewal is required under subsection (1) before the lease is renewed.
>
> (3) A rent increase is not payable by a tenant unless the rent is increased in accordance with this section or the rent is increased by the Tribunal.

(4) The residential tenancy agreement is varied to specify the increased rent from the date the rent is increased in accordance with this section.

(5) Notice of a rent increase must be given by a landlord or landlord's agent in accordance with this section even if details of the rent increase are set out in the residential tenancy agreement.

(6) Notice of a rent increase may be cancelled or varied (so as to reduce the increase) by a subsequent written notice given to the tenant by or on behalf of the landlord. Any such later notice takes effect from the date on which the earlier notice was to take effect.

(7) Notice of a rent increase is not required to be given by a landlord or landlord's agent if the increase arises because of the end of, or a reduction in, a rent reduction.

(8) Subsections (1)–(7) are terms of every residential tenancy agreement.

42 Rent increases under fixed term agreements

(1) The rent payable under a fixed term agreement for a fixed term of less than 2 years must not be increased during the fixed term unless the agreement specifies the increased rent or the method of calculating the increase.

(2) The rent payable under a fixed term agreement for a fixed term of 2 years or more—

(a) must not be increased more than once in any period of 12 months, and

(b) may be increased whether or not the agreement specifies the increased rent or the method of calculating the increase.

(3) A landlord or landlord's agent must not increase the rent payable under a fixed term agreement in contravention of this section.

Maximum penalty—20 penalty units

Landlord's Email in September 2022 Purporting to Increase Rent

56 The email of the landlord's agent dated either 19 September 2022 (on the landlord's evidence before the Tribunal) or 26 September 2022 (on the tenant's evidence, which the Tribunal accepted) cannot constitute a valid Notice of Rent Increase.

57 The first written residential tenancy agreement commencing 1 November 2021 between the parties and the second written residential tenancy agreement between the parties commencing 1 November 2022 contain identical written terms dealing with rent increases. Relevantly, they state as follows:

RENT INCREASES

5. The landlord and the tenant agree that the rent cannot be increased after the end of the fixed term (if any) of this agreement or under the agreement if the agreement is for a fixed term of 2 years or more, unless the landlord gives

not less than 60 days written notice of the increase to the tenant. The notice must specify the increased rent and the day from which it is payable.

Note: Section 42 of the Residential Tenancies Act 2010 set out the circumstances in which rent may be increased during the fixed term of a residential tenancy agreement. An additional term for this purpose may be included in the agreement.

…

7. The landlord and the tenant agree:

7.1 that the increased rent is payable form the day specified in the notice, and

7.2 that the landlord may cancel or reduce the rent increase by a later notice that takes effect on the same day as the original notice, and

7.3 that increased rent under this agreement is not payable unless the rent is increased in accordance with this agreement and the Residential Tenancies Act 2010 or by the Civil and Administrative Tribunal.

58 As the Tribunal correctly held, the purported rent increase (irrespective if the email was dated 19 September 2022 or 26 September 2022) did not give 60 days' notice from the date the rent increase was to commence (1 November 2022). For that reason alone, it did not comply with provisions of s 41 of the RT Act, nor cl 5 of the residential tenancy agreement. 60 clear days from 19 September 2022 is 18 November 2022; and 60 clear days from 26 September 2022 is 25 November 2022. The second tenancy agreement with its rent of $750.00 a week commenced on 1 November 2022. The Notice of Rent Increase was therefore non-compliant with s 41 of the RT Act.

59 Additionally, the written residential tenancy agreement commencing 1 November 2021 does not contain a clause that the tenant agrees to Notices being serve electronically (although the Tribunal in its reasons does not make clear that it is the agreement commencing 1 November 2022 that allows service of notices by email rather than the first agreement commencing on 1 November 2021). The written residential tenancy agreement commencing 1 November 2022 does contain such a clause, but the operative residential tenancy agreement when the purported Notice of Rent Increase was served in September 2022 was the agreement commencing 1 November 2021.

60 Consequently, the email sent by the landlord's agent in late September 2022 could not constitute a valid service of a Notice to Increase Rent by reason of s 223(1)(v) of the RT Act, as the tenant had not specified that Notices under the RT Act could be served on him by email.

61 Whether or not we should grant leave to appeal and consider the written Notice of Rent Increase dated 20 August 2022 is discussed below.

Notice of Rent Increase Dated 20 August 2022

62 The next issue is the finding that the purported written Notice of Rent Increase dated 20 August 2022 was not served on the tenant.

63 In our view, the factual findings made by the Tribunal on that issue were open to the Tribunal on the evidence before it at the hearing (as best we are able to understand the evidence in the absence of any sound recording or transcript of the hearing). The factual findings set out in the written reasons are logical and orthodox.

Extension of the Limitation Period

64 No issue was raised in the appeal that the Tribunal had made any legal error (either an error on a question of law or any other error to which leave to appeal would be granted) in respect of its finding that the limitation period should be extended.

65 There is nothing in the reasons to indicate the Tribunal did not consider and apply the well-established principles in *Jackson v NSW Land and Housing Corporation* [2014] NSWCATAP 22 at [22], notwithstanding that the reasons are expressed economically.

Time Limit to Bring Proceedings in the Tribunal Under ss 187 and 190 of the RT Act.

66 There is an issue that requires comment, but it is not a ground of appeal nor a basis for being satisfied leave to appeal should be granted.

67 The Tribunal found that the tenant had 28 days to file the Tribunal application from the date the tenant was aware of the rent increase, because there was no applicable limitation period in the enabling legislation, and accordingly r 23 of the NCAT Rules applied.

68 We disagree with that interpretation of the applicable limitation period.

69 By reason of s 41(8) of the RT Act and cl 7.3 of the written lease of the parties, compliance with s 41 of the RT Act was a term of the lease. Accordingly, the landlord's failure to comply with s 41 of the RT Act is a breach of the lease, and

s 41(3) of the RT Act states that increased rent is "not payable" unless the landlord complies with its obligations under s 41 or there is an order of the Tribunal increasing rent. Clause 7.3 of the written lease is in identical terms.

70 Section 41(2) of the RT Act makes clear that a landlord must give a valid Notice of Rent Increase "on renewal" of the lease between the parties. The landlord cannot simply rely on signing a new lease with the same tenant at an increased rent without having given a valid Notice of Rent Increase previously.

71 Section 187 of the RT Act identifies orders that may be made by the Tribunal "on application by a landlord or tenant or other person under this Act". Section 187(1)(d) refers to "an order for compensation". Section 187(2)(a) and (b) states that an order for compensation can be made for (a) loss of rent, (b) any other breach of a residential tenancy agreement".

72 Section 190 of the RT Act states as follows:

> **190 Applications relating to breaches of residential tenancy agreements**
>
> (1) A landlord or a tenant may apply to the Tribunal for an order in relation to a breach of a residential tenancy agreement within the period prescribed by the regulations after the landlord or tenant becomes aware of the breach or within such other period as may be prescribed by the regulations.
>
> (2) An application may be made—
>
> (a) during or after the end of a residential tenancy agreement, and
>
> (b) whether or not a termination notice has been given or a termination order made.
>
> (3) A landlord's agent may make an application on behalf of a landlord.

73 Reg. 39(9) of the Residential Tenancies Regulation 2019 (NSW) states that "for the purposes of s 190(1) of the Act, the prescribed period is within 3 months after the applicant becomes aware of the breach".

74 Section 47 of the RT Act states as follows:

> **47 Tenant's remedies for repayment of rent and excess charges**
>
> (1) **Requests to landlord** A tenant may make a written request to the landlord that the landlord repay to the tenant any rent, or other amounts, paid by the tenant that are not required to be paid under this Act or the residential tenancy agreement.
>
> (2) A request may be made during or after the termination of a residential tenancy agreement.

(3) A landlord must, within 14 days of a written request by a tenant, repay to the tenant the amount of any rent or other amount paid in excess of the amount payable by the tenant under this Act or the residential tenancy agreement.

(4) **Tribunal orders** A tenant may apply to the Tribunal for an order for the repayment of rent or any other amount paid by the tenant if a written request by the tenant for payment is not complied with by the landlord within 14 days.

(5) The Tribunal may order that rent or any other amount be repaid to the tenant if it finds that the rent or amount was not required to be paid by the tenant under this Act or the residential tenancy agreement.

75 In respect of the interaction between s 47 and s 187 of the RT Act in the context of electricity charges and a rent increase, the Appeal Panel in *Semaan v McIlroy; McIlroy v Semaan* [2017] NSWCATAP 146 stated at [48]-[51] and [58]-[62]:

> Mr McIlroy submits that the Member misinterpreted the section by determining that the power to make an order was only engaged if a written request for repayment had first been made. He points to the provisions of subsection (5), identifying the power of the Tribunal to make an order for repayment in terms that do not qualify the exercise of the power by reference to a prior written request.
>
> There are difficulties with that submission if, consistent with the ordinary cannons of statutory construction, all of the provisions of the section are read as an harmonious expression of a tenant's remedies for repayment of rent or "other amounts" in the form of excess charges. The obligation of the landlord in subsection (3) to repay rent or other amounts and the entitlement to apply to the Tribunal for an order under subsection (4) are each, in terms, predicated upon "a written request by ['a' or 'the'] tenant". If, as is the case, a tenant's entitlement to apply to the Tribunal under subsection (4) is predicated upon a written request for payment not having been complied with, it would lead to an odd result if, when exercising the power provided in subsection (5), the making of a written request for payment was irrelevant. The better view is that subsection (5) is silent as to the need for a prior written request for payment because the Tribunal's jurisdiction is only engaged under subsection (4) if such a request has been made but not complied with by the landlord within the requisite time.
>
> However, without finally deciding the matter upon the proper interpretation of s 47, the alternate basis upon which Mr McIlroy contends the Member was in error on this issue has a surer foundation. In seeking to identify the specific provisions within Div 2 of Pt 3 of the *Residential Tenancies Act* that give rise to a claim, the Member appears to have overlooked the fact that in his application to the Tribunal, Mr McIlroy had relied upon the general powers of the Tribunal found in ss 187-190 of the *Residential Tenancies Act*. By s 187, the Tribunal has power to make an order "as to compensation" in any proceedings under the Act.
>
> As the Member accepted, Mr McIlroy was liable to AGL, the electricity supplier, for electricity used at the premises during the currency of the tenancy. By dint of the Tenancy Agreement and the "gentleman's agreement" reached with Mr Semaan, informed by s 38(1)(a) of the *Residential Tenancies Act*, Mr McIlroy

> was entitled to be compensated for the electricity charges that he had incurred but for which, as against Mr Semaan, he was not liable. The Member failed to address the claim made by Mr McIlroy in that way and therefore failed to engage with the case that he sought to make. There was legal error in failing to do so (*CG Constructions Pty Limited v Hanson Construction Materials Pty Limited* [2017] NSWCATAP 130 at [33]).
>
> …
>
> Moreover, Mr McIlroy maintained before us, as he had before the Member, that no written notice of an intention to increase rent had been received. When shown the document upon which Mr Semaan sought to rely, Mr McIlroy stated that he had never seen that document before, even though it purported to be addressed to him.
>
> In the circumstances that we have briefly outlined, we are not prepared to allow Mr Semaan to rely upon his purported notice. In the result, Mr McIlroy has paid more rent than he was required by the Tenancy Agreement to pay, noting that the requirement for rent increases to be made only in accordance with the provisions of s 41 are provisions that were terms of the Tenancy Agreement: s 41(8).
>
> Mr McIlroy again challenges, as being legally erroneous, the Member's reliance upon the absence of a written request for the overpaid rent to be refunded by Mr Semaan conformably with s 47, as the basis for denying an order requiring the amount to be paid to him. By parity of reasoning given when addressing the claim for refund of electricity charges, we doubt that recovery of overpaid rent can be ordered under s 47(5) in the absence of prior written request for payment.
>
> However, for reasons earlier expressed when addressing the electricity refund claim, we are of the opinion that the Member did err by failing to appreciate the power available under s 187 to make an appropriate order. Given that payment had been made by Mr McIlroy in the mistaken belief that he was bound to make the payment when, in law, he was not so bound, the quantum of the overpayment was recoverable on a common money count for money had and received. By s 187(1)(e), the Tribunal has the power to make an order "for the payment of an amount of money" in proceedings brought under the *Residential Tenancies Act*. Had the Member properly appreciated the power he was being asked to exercise, there can be no doubt, having regard to his findings of fact, that an order requiring Mr Semaan to refund that overpayment would have been made. We did not understand Mr Semaan to challenge the amount of overpayment if we did not sustain his contention that written notice of the intended increase had been given to Mr McIlroy.
>
> We propose to order that a refund of the overpaid rent be made by Mr Semaan to Mr McIlroy.

76 In our view, s 47 of the RT Act is not the exclusive remedy for recovery of a rent increase imposed by a landlord who has not complied with the provisions of ss 41 and/or 42 of the RT Act. If a written demand was made under s 47, the limitation period is set out in s 47(4), which can be extended under s 41 of the NCAT Act. If no written demand was made under s 47, the tenant can still bring a claim for breach of the residential tenancy agreement by the landlord under

ss 187 and 190 of the RT Act. If a claim for breach of the agreement is brought (as distinct from failure of the landlord to reimburse under s 47) the applicable time period is 3 months from when the tenant becomes aware of the breach. The "breach" is not the date of any invalid notice, it is when the landlord starts to charge increased rent in circumstances where s 41 and/or 42 of the RT Act has not been complied with.

77 We also note that in *Sun v Zhang* [2023] NSWCATAP 333 the Appeal Panel held a rent increase was not payable in a renewed written residential tenancy agreement between the same parties in circumstances where landlord had failed to comply with s 41 of the RT Act prior to the parties entering into the renewed agreement.

78 Accordingly, in the circumstances of this matter where the tenant was aware he was being charged increased rent from 1 November 2022, the applicable limitation period to bring proceedings in the Tribunal was 1 February 2023, subject to time being extended under s 41 of the RT Act.

79 Irrespective of whether r 23 of the NCAT Rules or r 39(9) of the RT Regulations applied, the tenant was out of time to bring proceedings and required an extension under s 41 of the NCAT Act. No error has been established in respect of the Tribunal's decision to extend time under s 41 of the NCAT Act, so the Tribunal's finding regarding the operation of r 23 of the NCAT Rules is immaterial to the outcome.

Decision Against the Weight of Evidence

80 We are not satisfied that the decision was against the weight of evidence, particularly in circumstances where the appellant landlord failed to provide a sound recording or transcript of the evidence and submissions given at the hearing.

Substantial New Evidence Not Reasonably Available At The Date of the Hearing

81 The substantial new evidence the landlord relies upon is an extract of the mail book of the landlord's agent from August 2022 purporting to record the Notice of Rent Increase dated 20 August 2022 having been sent by post to the tenant.

82 For leave to be granted, the purported new evidence must not only be ”significant”, but it must also be evidence that was unavailable at the date of the hearing in the sense that ”no person could reasonably have obtained the evidence” (*Al-Daouk v Mr Pine Pty Ltd t/as Furnco Bankstown* [2015] NSWCATAP 111 at [23]).

83 The mail book of the landlord’s agent was available to the landlord as at the date of the hearing. It was clear in the Tribunal application by the tenant that he was asserting that no valid Notice of Rent Increase had been served by the landlord, and the rent increase from 1 November 2022 was not payable. The failure of the landlord to adduce a copy of the agent’s mail book at the hearing is not a basis for granting leave to appeal. It is evidence that the landlord could have reasonably provided to the Tribunal at the hearing, but failed to do so.

Conclusion-Leave to Appeal

84 We are not satisfied that leave to appeal should be granted.

ORDERS

(1) Leave to appeal is refused.

(2) The appeal is otherwise dismissed.

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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