NSW Civil & Administrative Tribunal

Retail Lease Jurisdiction

Continuing Legal Education Seminar

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Introduction

1. This CLE (CPD) presentation will address the following matters, by reference to a selection of recent decisions of the Tribunal:

    - Jurisdiction and powers
    - Practice and procedure
    - Aspects of substantive law
    - Enforcement and costs

Jurisdiction and Powers

2. The Tribunal has jurisdiction to adjudicate on the question of its own jurisdiction: *Wilson v Chan & Naylor Parramatta Pty Ltd* [2020] NSWCA 213 at [12] – [13] (Leeming JA); *The Hilltop Store Pty Ltd v BVL Partnership* [2022] NSWCTAD 113.

3. The Tribunal has general jurisdiction that is conferred by the operation of s29 the *Civil and Administrative Tribunal Act* 2013 (**NCAT Act**) and other Acts which enable the Tribunal to make decisions or exercise functions.

4. In relation to retail leases, the enabling legislation that confers jurisdiction in conjunction with s29 is the *Retail Leases Act* 1994 (**RL Act**). Division 3 of Part 8 of the RL Act confers this jurisdiction.

5. Section 71 provides as follows:

> **71 Lodging of retail tenancy claims with Tribunal**
>
> (1) A party or former party to a retail shop lease or former retail shop lease may lodge a retail tenancy claim in respect of the lease with the Tribunal for determination of the claim.
>
> (2) A claim may not be lodged more than 3 years after the liability or obligation that is the subject of the claim arose.

6. Section 72 provides the Tribunal with a range of powers within its jurisdiction over retail leases:

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[1] Barrister, 13 Wentworth Chambers. The author records his appreciation of the research assistance in preparing this paper provided by Ms Katherine Gardner.

72 Powers of Tribunal relating to retail tenancy claims

(1) In proceedings for a retail tenancy claim lodged with the Tribunal under this Part, the Tribunal is empowered to make any one or more of the following orders that it considers appropriate—

(a) an order that a party to the proceedings pay money to a person specified in the order, whether by way of debt, damages or restitution, or refund any money paid by a specified person,

(b) an order that a specified amount of money is not due or owing by a party to the proceedings to a specified person, or that a party to the proceedings is not entitled to a refund of any money paid to another party to the proceedings,

(c) an order that a party to the proceedings—

(i) do any specified work or perform any specified service or any obligation arising under this Act or the terms of a lease, or

(ii) surrender possession of specified premises to another person, or

(iii) assign his or her or its rights under a lease to a specified person, or

(iv) do or perform, or refrain from doing or performing, any specified act, matter or thing,

(d) an order granting a party to the proceedings relief against forfeiture,

(e) an order (as permitted by section 72AB) requiring the rectification of the lease or the lessor's disclosure statement,

(e1) an order (as permitted by section 72AB) deeming a disclosure statement given by the lessor after the lease is entered into (with or without amendments specified by the Tribunal) to have been given in compliance with section 11 before the lease was entered into,

(f) an order—

(i) declaring any provision made by a lease to be void for being inconsistent with this Act or the regulations, or

(ii) declaring that a lessor is not entitled to withhold consent to an assignment of the rights of a lessee, or

(iii) declaring the rights and liabilities of the parties under law, whether any consequential relief is or could be claimed or not, or

(iv) declaring that a party is or is not entitled to receive payment of the whole or a part of a security bond,

(g) such other order, in the nature of an interlocutory order of a kind referred to in paragraphs (a)–(f), as the Tribunal considers proper to be made in order to resolve or assist resolution of the dispute between the parties.

(2) The Tribunal may make such ancillary orders as it considers necessary for the purpose of enabling an order under this section to have full effect.

(3) The Tribunal may impose such conditions as it considers appropriate when making an order under this section.

(4) The Tribunal may make an interim order under this section pending final determination of a claim, if it appears to the Tribunal desirable to do so.

7. A "retail tenancy claim" is defined in s70 as follows:

70 Definitions

In this Division—

retail tenancy claim means any of the following—

(a) a claim in connection with a liability or obligation with which a retail tenancy dispute is concerned, being—

(i) a claim for payment of money (whether or not stated to be by way of debt, damages, restitution or refund),

(ii) a claim for relief from payment of a specified sum of money,

(iii) a claim for the doing of specified work or the provision of specified services,

(iv) a claim for the surrender of possession of specified premises,

(v) a claim for assignment of rights under a lease or for a declaration that a lessor is not entitled to withhold consent to an assignment of the rights of a lessee,

(vi) a claim for relief against forfeiture,

(vii) a claim for the rectification of the lease or the lessor's disclosure statement,

(viii) a claim regarding the invalidity of a lease for inconsistency with this Act or the regulations,

(ix) a claim for a declaration of the rights, obligations and liabilities of the parties under a lease,

(x) without limiting the generality of subparagraph (i), a claim for compensation under section 10, 34, 35 or 62E,

(xi) without limiting the generality of any other subparagraph, a claim with respect to the entitlement of a party or former party under a lease to receive payment of the whole or a part of a security bond,

(b), (c) (Repealed)

(d) an application by a specialist retail valuer under section 31 (3) (including as applied by section 32A),

(e) a claim against a specialist retail valuer under section 31A (3) (including as applied under section 32A) for compensation for loss or damage suffered as a consequence of the use or communication or divulging of information.

unconscionable conduct claim means a claim for relief under section 62B.

8. The Tribunal also has jurisdiction over "unconscionable conduct claims":

71A Lodging of unconscionable conduct claims with Tribunal

(1) A lessor or lessee, or former lessor or lessee, under a retail shop lease or former retail shop lease may lodge an unconscionable conduct claim with the Tribunal for determination of the claim.

(2) A claim may not be lodged more than 3 years after the alleged unconscionable conduct occurred.

(3) In this section—

lessor or ***lessee*** under a retail shop lease or former retail shop lease includes a person who is a guarantor or covenantor under a lease or former lease.

9. The recent case of *Norsk Dor Pty Ltd v Tuxfend Pty Ltd* [2020] NSWCATAP 183 discussed these principles.

Summary:

10. Air-conditioning was a critical factor in the successful operation of the business in this case and its importance may not have been properly factored into the operational costs by the Lessee prior to entering the lease. Such an oversight proved to be very costly indeed. The Lessee had sought orders that it did not need to pay "after hours air conditioning charges". In addition, a declaration that the Lessor had failed to provide a pre-lease disclosure statement was sought together with a declaration that the Lessor had engaged in unconscionable conduct.

Background Facts:

11. In 2015 the Appellant (Lessee) entered into a retail lease for premises in the Sydney CBD, for a small bar and restaurant at the bottom of the strata of a strata building used for commercial purposes.

12. The dispute between the parties centred on whether "after hours air-conditioning charges" were payable by the Lessee in circumstances where the Lessor (Respondent) had failed to provide the Lessee with a disclosure statement in accordance with s 11 of the RL Act. At issue was whether the after hours air-conditioning charges which were levied by the owner's corporation with respect to the leased premises were "outgoings" for the purposes of cl 14B of the lease. The lease stated that the Lessee was responsible for 100% of outgoings (cl 14A) and defined "outgoings" as:

"(e) all levies and contributions of whatsoever nature determined and / or levied by the owners corporation…"

13. The original use of the premises had been for commercial purposes. The Appellant Lessee sought to change the use of the premises to operate a small bar and restaurant, for which it gained approval from Council and that of the owner's corporation prior to execution of the lease. However, the parties do not appear to have understood the significance of the Note at the bottom of the special resolution made by the owners corporation at its AGM allowing the Lessor to alter common property so that the premises could be fitted out as a bar:

"Please Note – the amendment passed above requires the Owner to do the following:

-Pay for after-hours air-conditioning use:"

14. Previously the premises had been used for commercial purposes. Air conditioning of the building ceased at 6pm. In order to run the bar and restaurant the Lessee needed air-conditioning to run from 6pm to 1am week nights and at the weekend.

15. It would appear that neither party knew of the note in the special resolution at the time the lease was executed. Cl 14A of the lease estimated outgoings for 2014/2015 year at $31,000 per annum plus GST.

16. In 2017 the Lessor sent the Lessee an outgoings reconciliation for the 2016.2017 financial year itemising “after hours air-conditioning charge” of $35,359.92”. By the time the parties commenced litigation in NCAT in 2018, the charges in dispute amounted to $95,269.80.

17. The key issue was whether the Lessor’s failure to disclose the “after hours air-conditioning charge” in express terms in the lease unconscionable conduct ?

    Was there Unconscionable Conduct by the Lessor pursuant to s 62B of the RL Act?

    Legal Principles of Unconscionable Conduct in a statutory context:

18. Importantly, the Appeal Panel applied the recent High Court decision of *Australian Securities and Investment Commission v Kobelt* [2019] HCA 18 (in respect of s 12CB of the Australian Securities and Investment Commission Act 2001) and the Appeal Panel of the Tribunal in *Forbes v Wan* [2020] NSWCATAP 129 (in respect of s 21 of the Australian Consumer Law 2010).

19. In summary, unconscionable conduct is

    “… a standard that requires exploitation of disadvantage by a party in a stronger position by conduct that is well outside the bounds of what is generally seen to be moral, right, or acceptable commercial behaviour.” [68].

20. It is important to consider what it is not:

    “It is not every instance where a person in a stronger commercial position gains an advantage by reason of that position over a person in a weaker or disadvantaged position that is unconscionable. It is not enough that the dealing might be described as unfair or unreasonable. Rather, unconscionable conduct involves dealing with those who are vulnerable in a manner that exploits that vulnerability by engaging in conduct that may be plainly or obviously criticised when viewed through the lens of an understanding of proper commercial behaviour according to prevailing norms and standards.”[68]

21. As to the proper approach to the checklist:

    “In making the evaluation as to whether conduct is unconscionable, there must be regard to the non-exhaustive and non-prescriptive list in s 22 of the ACL, although the presence of one or more of those matters will not be determinative. However, the statutory list is to be considered for the purpose of determining whether the conduct was unconscionable. The nature of the list is such that it describes aspects that may be present in many types of commercial dealings. Ultimately, the statutory prescription is against

engaging in unconscionable conduct not against conduct which takes places in circumstances of the kind described in the list." [68]

22. The Appeal Panel found that the findings of the Tribunal correctly stated that the lessor was merely passing on a levy imposed by the owners corporation, and not a charge imposed at the whim of the lessor. Further, the lessor did not and could not know of the amount of the charge at the time the lease was entered into.[79]

(a) The comparatively even commercial bargaining power of the parties was a relevant consideration in the circumstances:

(b) The Appellant was not in a position of special disadvantage or vulnerability [82]

(c) The parties had engaged in extensive and lengthy negotiations regarding the premises being fitted out and legally capable of operation ad a bar and restaurant prior to the lease being signed [83]

(d) The Lessee had the advantage of legal advice [83]

(e) The Lessee was (even in the absence of a disclosure statement under s 11 of the RL Act), able to seek identification or particularisation of the charges prior to the lease being signed [83]

(f) The Lessee was capable of making its own enquiries and searches of the owners corporation special by-laws and the relevant note and consequent levied charges [83].

23. Held: No error of law established in regard to the Tribunal's findings. Leave to appeal was refused and the appeal dismissed.

24. There is a monetary limit on the Tribunal's jurisdiction:

Section 73 "Monetary limit on Tribunal's jurisdiction

(1) The Tribunal has no jurisdiction to make an order or orders in respect of a particular retail tenancy claim or an unconscionable conduct claim if the total of—

(a) the amount or amounts (if any) of money to be paid, and

(b) the amount or amounts (if any) of money to be declared not to be due or owing, and

(c) the value or values (if any) of the work to be done or the services to be performed,

under or by virtue of the order or orders would exceed $750,000 or such other amount as may be prescribed by the regulations, whether on a balance of account or after set-off or otherwise.

(2) The amount for the time being applicable under subsection (1) may be increased by regulation not more frequently than once each 3 years (disregarding any disallowed regulation or provision of a regulation).

(3) The amount resulting from an increase by regulation must not exceed the base amount, adjusted in line with movements in the Consumer Price

Index (All Groups Index) for Sydney and rounded up to the nearest $10,000. The base amount is the dollar amount for the time being specified in subsection (1), unaffected by any regulation under that subsection."

25. The RL Act does now apply to shopping centres: s5.

26. Retail shopping centre is defined in the Act as follows:

> ***retail shopping centre*** means a cluster of premises that has all of the following attributes:
>
> (a) at least 5 of the premises are used wholly or predominantly for the carrying on of one or more listed businesses,
> (b) the premises are all owned by the same person, or have (or would if leased have) the same lessor or the same head lessor, or comprise lots within a single strata plan under the *Strata Schemes (Freehold Development) Act 1973* or the *Strata Schemes (Leasehold Development) Act 1986*,
> (c) the premises are located in the one building or in 2 or more buildings that are either adjoining or separated only by common areas or other areas owned by the owner of the retail shops,
> (d) the cluster of premises is promoted as, or generally regarded as constituting, a shopping centre, shopping mall, shopping court or shopping arcade.

27. It can be seen that each of sections 71 and 71A provide for the Tribunal to have jurisdiction in relation to claims (whether retail tenancy or unconscionable conduct) brought by parties or former parties to a retail shop lease. A *'retail shop lease'* is defined in section 3 of the Act as follows:

> **retail shop lease** or **lease** means any agreement under which a person grants or agrees to grant to another person for value a right of occupation of premises for the purpose of the use of the premises as a retail shop:
>
> (a) whether or not the right is a right of exclusive occupation, and
>
> (b) whether the agreement is express or implied, and
>
> (c) whether the agreement is oral or in writing, or partly oral and partly in writing.
>
> Note. Sections 6, 6A and 84B limit the retail shop leases to which this Act applies.

28. The approach to be taken by the Appeal Panel in determining whether there is a *"retail tenancy dispute"* over which it has jurisdiction is:

a) *look at the lease to see what the permitted or agreed use of the premises;*

b) *if the agreement clearly defines what the use of the premises is to be, then the question as to whether or not the premises are a "retail shop" under section 3 of the Act will be determined by whether or not that use appears within Schedule 1;*

c) *if the permitted or agreed use is not clear or is uncertain, or the use covers a number of different types of business some of which are, or may be, within Schedule 1 described business, then an analysis is required of the actual use(s) of the premises to determine whether the predominant use(s) fall within one or more of the businesses prescribed in Schedule 1.* [2]

29. Where the lease expressly defines the scope of use, that statement will be conclusive unless there is compelling evidence that the parties did not mean what they said: *Thomson v Easterbrook* (1951) 83 CLR 467 at [481]-[2]; *Moweno Pty Ltd v Stratis Promotions Pty Ltd* [2002] NSWSC 1151; (2003) NSW Convr 56-050 at [11] (Barrett J).

30. "Commercial Offices" is not a listed business under Schedule 1 of the Act.

31. Evidence of the actual use of the Premises would only be relevant if the written agreement was uncertain: *Moweno Pty Ltd v Stratis Promotions Pty Ltd* [2002] NSWSC 1151 at [25]. The Appellant submits that the Commercial Lease is unambiguous and certain and therefore, the Tribunal should not consider any evidence beyond the Commercial Lease such as the actual use.

32. The onus is on applicant to satisfy the Tribunal that it has jurisdiction to entertain its application: *Honings Bakery Pty Ltd v Cerialis Pty Ltd* [2014] NSWCATCD 87 at [46].

33. A "retail shop" is defined in section 3 of the Act

retail shop means premises that:

(a) are used, or proposed to be used, wholly or predominantly for the carrying on of one or more of the businesses prescribed for the purposes of this paragraph (whether or not in a retail shopping centre), or

(b) are used, or proposed to be used, for the carrying on of any business (whether or not a business prescribed for the purposes of paragraph (a)) in a retail shopping centre.

Note 1. Section 5 limits the retail shops to which this Act applies.

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[2] As cited at [36]-[37] in *Honings Bakery Pty Ltd v Cerialis Pty Ltd* [2014] NSWCATCD 87 applying *Wood & Wilson v Bergman* [2003] NSWADT 82; and *Moweno Pty Limited v Stratis Promotions Pty Limited* (2002) NSWSC 1151 approved by the Court of Appeal in (2003) NSWCA 376.

Note 2. Clause 17 of Schedule 3 provides that the businesses specified in Schedule 1 are taken to be prescribed for the purposes of paragraph (a) of this definition until regulations prescribing businesses and repealing Schedule 1 are made.

34. The recent case of *Targeted Property Investments Pty Ltd v Look Up Technologies Pty Ltd* [2022] NSWCATAP 318 concerned the meaning of "retail shop" in the case of premises with multiple incidents of use or activities being carried out. The earlier decision of *Diamond Certification Laboratories Pty Ltd v The Trust Company Pty Ltd* (2015) NSWCATCD 122 was cited.

35. The appeal in that case was dismissed. The question before the Tribunal at first instance and Appeal Panel in an appellate context was whether there was a retail lease within the meaning of the RL Act in relation to premises said to constitute a retail shop for retail and repair of computers and associated products. The Tribunal had held that there was, the landlord appellant disputed this finding alleging a number of errors on alleged questions of law.

36. The main contention of the appellant was that the respondent's evidence did not establish the predominant use of the premises and there were a number of uses in addition to retail sale such as storage and warehousing. The three step approach to the determination of jurisdiction or the existence of a retail shop lease in *Hanave* was applied by Tribunal and endorsed by the Appeal Panel.

37. This involved first identifying the permitted or agreed use to see if the agreed use fitted within one of the prescribed businesses in Schedule 1. Second, if the agreed use covered a number of these prescribed items, a search for the predominant use was required. The agreed use in the lease was "retail and general offices for computers and associated products, repairs, general offices, storage and warehousing of computers and associated products."

38. The Tribunal found that this agreed use went beyond the relevant prescribed use in Schedule 1, "shops selling or renting any one or more of the following goods, …computer or computer products …". The Tribunal had found that the evidence supported the Tribunal having jurisdiction on the basis that the premises were being used as a retail shop without the need to consider percentages of use. In substance it was found that the various other non retail activities being carried out were ancillary or auxillary to retail computer sales.

Aspects of substantive law

39. In *Jamaican Coffee Kitchen Pty Ltd trading as Dushan and Shelby Trust* [2022] NSWCATAP 203, the Appeal Panel was concerned with retail shop premises at Parramatta. JCK the lessee sought relief in relation to retail shop premises against the head lessor M20 and the sub lessor Praxis. The lease was for the permitted use of restaurant/food outlet. The premises operated as a burger restaurant and bar. JCK commenced proceedings by way of a retail lease application.

40. Compensation was sought for breaches of s10, 62D, 62B of the RL Act and for abatement of rent amongst other relief. The Tribunal at first instance found no breach of s10 by non-disclosure of water leakage and any related structural defect, no s62D misleading and deceptive conduct, and no s62B unconscionable conduct.

41. The Tribunal at first instance found there was no reason for costs not to follow the cause pursuant to s 38 of the NCAT Rules. There was found to be a misrepresentation contrary to s10 or s62D that the premises were fitted with a new air conditioning unit: [185]. However, notwithstanding the assertion that had the representations not been made it would have found alternative premises in the Parramatta region, there was no such evidence adduced and so no loss was proved: [189].

42. In relation to the s62B unconscionable conduct claim, observations were made at [194] citing *Attorney-General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557 at [183] to the effect that unconscionability was a concept that required a high degree of moral obloquy. It is not merely an equivalent to what is ”fair” or “just”. Unconscionable conduct was not found even though it was found that the sublessor had breached the COVID-19 Regulation in certain respects and the failure to clean the toilets 7 days a week, because there was no evidence JCK was subject to a “special disadvantage” and no evidence M20 or PC knew or ought to have known of any special disadvantage of JCK: [210]. The breach of the COVID-19 Regulation concerned the requirement to renegotiate in good faith the terms of an impacted lease (essentially a lease in relation to which the lessee had qualified for jobkeeper and turnover in 2018-19 was less than $50 million. The reasoning and decision of Tobias JA in *Manly Council v Malouf* (2004) 61 NSWLR 394 that the objective of the RL Act was to protect tenants and was beneficial legislation that should not be construed narrowly was referenced at [258]. Notwithstanding these principles it was found that the Tribunal had no power under s72 of the RL Act to resolve disputes concerning the renegotiation process required by clause 7 of the COVID-19 Regulation in relation to the payment of rent: [260]-[263].

43. The costs principles applying under r38 of the NCAT Rules and r38A (appeals) allowing the Tribunal to award costs absent special circumstances where the amount claimed or in dispute is more than $30,000: [286]ff. The rule was applied and partial costs orders were made as there were clearly separable issues: [294].

44. The recent case of *Pizza Headquarters Pty Ltd v PCA Hunter Pty Ltd* [2022] NSWCATAP 288 discussed s11 of the RL Act: the lessee sought orders that it did not have to pay outstanding rent and similar orders. The appeal panel found that there was no error of law made by the tribunal in the first instance therefore denying the appellant leave to appeal under s 80(2)(b) of the NCAT Act, and otherwise with leave of the appeal panel.

45. This was notwithstanding that the Tribunal did not address certain of the lessee’s grounds below.

46. One of these alleged breaches as alleged in the appellant's pleadings at [3](5):

> "a finding that the lessor's disclosure statement was issued on 27 September 2017 and not provided to the lessee seven days prior to lease (sic) commencement date of 30 September 2017.

47. In its reasons for not finding this to be an error of law the Appeal Panel relied on the fact that s 11 of the RL Act which requires a disclosure statement to be provided within seven days to the lessee prior to the commencement of the lease contains its own penalty provision with a remedy allowing the lessee to terminate the lease within 6 months after the expiration of the lease, rather than resulting in an abatement of rent: [34].

48. Non-service of a Disclosure Statement in contravention of s 11 of the RL Act was argued in *Norsk and Pizza Headquarters Pty Ltd v PCA Hunter Pty Ltd* [2022] NSWCATAP 288, with the same reasons given for its lack of success. Namely, that s 11 provides a remedy for breach which is that the Lessee can terminate the lease within 6 months. In both cases neither Lessee utilised this remedy and therefore in both cases the Appeal Panel did not characterise the Tribunal's finding to this effect to be an error of law. Although not mentioned in either decision, a Note at the bottom of s 11 provides:

49. "The Tribunal also has power to order the rectification of a lessor's disclosure statement. See section 72AB."

50. The "takeaway" from *Pizza* and *Norsk* is that mere failure to serve a Disclosure Statement is not fatal to the validity of the retail lease after the first 6 months of its term have passed. And in the first 6 months ss 11(3) provides exceptions to termination.

Practice and procedure

51. Section 36(1) of the NCAT Act contains the "guiding principle" for proceedings in the tribunal which requires both the tribunal and the parties "... to facilitate the just, quick and cheap resolution of the real issues in the proceedings".

52. Section 128 of the *Evidence Act* 1995 does not apply as the Tribunal is not a Court, but equivalent directions can be sought under the NCAT Act to protect the substantive right against self-incrimination.

53. Internal appeals may be made as of right on a question of law and otherwise with leave of the Appeal Panel: s80(2)(b) of the NCAT Act.

54. An internal appeal is not an opportunity for a party to re-argue its case at first instance or a rehearing: *JCK* at [19] citing *Ryan v BKB Motor Vehicle Repairs Pty Ltd* [2017] NSWCATAP 39.

Costs

55. Section 60 of the Civil and Administrative Tribunal Act provides generally that there will be no order as to costs. Rule 38 of the *Civil and Administrative Tribunal Rules* 2014 provides for exceptions, including where the amount claimed or in dispute is more than $30,000. The meaning of this expression and its limitation to monetary amounts claimed rather than the value of the proceedings to a party was explained in *Hanave Pty Ltd v Wine Nomad* [2022] NSWCTAPD 361.

56. In *Freeman – Vagg v Oldstream Pty Ltd* [2022] NSWCATAP 198 the Appellant was ordered to pay the Respondent's costs.

Summary:

57. The facts of this case are unremarkable and display the usual messy circumstances concerning a stoush between the landlord and the lessee of a commercial property for unpaid rent. The property in Potts Point was on the ground floor of a block of serviced apartments and operated as a café restaurant. It is the statements of legal principle in the areas of: Drafting grounds of appeal, unreasonableness, bias, the tendering of fresh evidence, and the jurisprudence on the jurisdictional parameters of the Tribunal's discretion to make orders for costs against non-parties, which makes this case noteworthy.

Facts:

58. A 12 month retail lease was entered into in 2019. The Appellant (Lessee) ceased paying rent due under the lease and commenced proceedings unrepresented, asserting that the Respondent (Lessor) had breached the lease and owed her compensation (First Proceedings).

59. The Lessee subsequently vacated the premises and the Lessor then commenced proceedings in NCAT seeking rent arrears owing under the lease (Second Proceedings). The first proceedings were heard and at the conclusion the Lessee withdrew her claim and costs were reserved. The Lessee then commenced further proceedings again asserting that rent was not owed for arrears due to breach of the lease by the Lessor and sought compensation (Third Proceedings).

60. Both parties were legally represented at the hearing of the Second and Third Proceedings in 2021 and the Lessor was successful in both proceedings with the Tribunal ordering the Lessee to pay the Lessor $3646.36 and entitling the Lessor to the security bond (Principal Appeal). The Lessor made an application for costs in both proceedings and in relation to the Third Proceedings, it sought an order for costs against the Lessor's solicitor. The Tribunal published reasons and the Lessor is also appealing that decision (Costs Appeal).

61. Both the Principal Appeal and the Costs Appeal were heard together by the Appeal Panel.

Key Principles:

1)The Principal Appeal

a) Drafting Grounds of Appeal

62. Quoting an extra curial comment of former High Court Justice The Hon Michael McHugh AO QC (at [16]):

"The cardinal rule for drafting a notice of appeal is to be selective. If the appeal notice contains too many grounds, the best points are likely to be hidden in a thicket of weak points. The notice of appeal should identify only those errors of ultimate fact or law which affected the result, and the fewer the better. As Branson J has explained (*Sydneywide Distributors Pty Ltd & Anor v Red Bull Australia Pty Ltd & Anor* (2002) 55 IPR 354 at 355-356):

'Not every grievance entertained by a party, or its legal advisors, in respect of the factual findings or legal reasoning of the primary judge will constitute a ground of appeal. Findings as to subordinate or basic facts will rarely, if ever, found a ground of appeal. Even were the Full Court to be persuaded that different factual findings of this kind should have been made, this would not of itself lead to the judgment, or part of the judgment, being set-aside or varied. This result would be achieved, if at all, only if the Full Court were persuaded that an ultimate fact in issue has been wrongly determined. The same applies with respect to steps in the primary judge's process of legal reasoning. Although alleged errors with respect to findings as to subordinate or basic facts, and as to steps in the process of legal reasoning leading to an ultimate conclusion of law, may be relied upon to support a ground of appeal, they do not themselves constitute a ground of appeal.'"

63. The Appeal Panel found that the grounds of Appeal in the Lessee's (Appellant's) Principal Appeal did not follow this advice [17] rather they extended to 28 pages and were described as:

64. "…discursive, disjointed and describe a host of grievances and a multitude of subordinate and basic facts. They do not, or at least not in any clear fashion, isolate the errors of ultimate fact or law said to be erroneous and which allegedly affected the result of the case. Many grounds and paragraphs do not state any recognised appellable error, whether raising a question of law or otherwise."

b) Fresh Evidence

65. The Appellant read an affidavit sworn by her solicitor and tendered the documents attached to it without objection. However the Appeal Panel rejected this evidence because the Appellant failed to establish that this was new evidence not reasonably available to the appellant at the time of the hearing before the Tribunal at first instance as required by cl 12(1)(c) of Schedule 4 of the NCAT Act. [23]

c) Unreasonableness

66. The Appellant asserted that the Tribunal's decision was unreasonable because it found that the Appellant did not provide any evidence of unconscionable and deceptive conduct by the Respondent.

67. The Appeal Panel provides a lengthy summary of the meaning of "unreasonable" in this context summarising the principles in the High Court decision of *Minister for Immigration and Citizenship v Li* (2013)249 CLR 332:

68. "Li stands for the proposition that a decision may be erroneous because it is affected by what is sometimes called legal unreasonableness. This unreasonableness, put simply, refers to a conclusion reached in a decision that is considered to lack an evident and intelligible justification – *Li* at [76] per Hayne, Kiefel (as her Honour then was) and Bell JJ." (at [74])

69. This definition of the principle sets a high standard for a finding of unreasonableness and in this instance it was not surprising that the Appeal Panel found that this ground was not established by the Appellant having very carefully considered the reasoning in the Tribunal's decision at first instance (see [77] – [78]).

d) Bias

70. The Appellant claimed that the Tribunal erred in law for breach of procedural fairness for bias against the Appellant and her solicitor [119].

71. The Appeal Panel addressed this ground on the assumption that the Appellant was pleading actual rather than apprehended bias quoting Gleeson JA in *Collier v Country Women's Association of New South Wales* [2018] NSWCA 36 as authority for the relevant principles which are summarised as follows:

- An allegation of actual bias must be distinctly made and clearly proved
- It should not be made lightly
- Cogent evidence is required
- The question is not whether a decision-maker's mind is blank; it is whether it is open to persuasion

72. Several distinct elements underlying the assertion that a decision-maker has pre-judged or will prejudge an issue are:

- The decision-maker has an opinion on a relevant aspect of the matter in issue in the case
- The decision-maker will apply that opinion to the matter in issue
- The decision-maker will do so without giving the matter fresh consideration in light of the facts and arguments.[121]

- The Appeal Panel explained in the judgment that although the Tribunal had expressed dissatisfaction with various aspects of the presentation of the appellant's case, such a view was not cogent evidence of bias. [123]

2) Costs Appeal

a) Discretion to award costs

73. The Appeal Panel carefully stated the relevant principles for exercising its power to award costs (at [160]):

"In general terms, since the power to award costs is discretionary, the "constrained" or "deferential" standard of appellate review adopted in *House v The King* applies – *McInnes v Rheem Australia Pty Limited* [2021] NSWCA 89 per Gleeson JA, with whom Bell P (as his Honour then was) and Payne JA agreed, at [22]. To establish such an error, it is not enough that an Appeal Panel might conclude that it would have exercised the discretion differently if the discretion had been conferred on it in the first instance."

74. In summary the Appeal Panel stated that it may award costs even in the absence of special circumstances and it followed the ordinary rule that "costs follow the event" in the absence of a finding of disentitling conduct by the successful party ([174]-[175])

75. The Appeal Panel then proceeded to consider whether costs should be awarded on an ordinary of indemnity basis:

b) Indemnity Costs

76. The principles justifying an order for indemnity costs were quoted from Mendonca, and can be summarised as follows [177]:

(i) The unreasonable refusal of a genuine offer of settlement

(ii) When a case is commenced or continued where there is no chance of success

(iii) Where the claim is without substance, groundless, fanciful or hopeless or so weak as to be futile

(iv) Where the proceedings amount to an abuse of process

(v) Unreasonable conduct such as unnecessarily prolonging the proceedings

(vi) Disregard of court orders

(vii) Perverse persistence by an unrepresented litigant with a hopeless application

(viii) Misconduct of a serious nature such as fraud, perjury, contempt, or dishonest conduct.

77. The Respondent alleged many aspects of the Appellant's conduct in commencing the First and Third Proceedings fell foul of (v) in that it was unreasonable, as well as (iii) without substance and (viii) misconduct [179] – [180].

78. The Appeal Panel found that no error was demonstrated in the Tribunal's decision however it was up to the Appeal Panel to decide the strength of the appeal and in their opinion they did not regard it as so weak that indemnity costs were justified. Accordingly, the Appellant was ordered to pay costs on an indemnity basis [182].

79. The next question was whether on the Respondent's application the Appellant's solicitor should be jointly and severally liable for those costs.

c) Costs orders against a non-party

80. The NCAT Act authorises the Tribunal to "determine by whom and to what extent costs are to be paid." (s 60(4)(a) NCAT Act):

"(4) If costs are to be awarded by the Tribunal, the Tribunal may—

(a) determine by whom and to what extent costs are to be paid, …"

81. The Appeal Panel dedicated 60 paragraphs to a discussion on the parameters of the Tribunal's statutory jurisdiction to award cost orders in s 60(4) of the NCAT Act against non-parties to proceedings offering a detailed outline of the relevant jurisprudence. [184] – [244]

82. It found that there had only been 4 other judgments in the history of NCAT on this very topic and those are referred to in the judgment.

83. Significant reservations against the Tribunal making cost orders against a non-party were stated by Parker J in the Supreme Court on appeal from NCAT in *Preston v Diaspora Holdings* [2019] NSWSC 651 ([193]). Parker J observed that s 60 states primarily that each party pays their own costs (s 60(1)). This position can only be departed from if the Tribunal is satisfied that there are special circumstances present (s 60(2)) which are listed in s 60(3) (a) to (g). In His Honour's view the exceptions to the rule listed in s 60(3) concerned the nature of the proceedings and the conduct of the parties and in that regard Parliament was only contemplating costs between the parties… [193]. Parker J indicated that the matter warranted further debate as he ultimately did not need to make a finding on this point.

84. The Appeal Panel canvassed both arguments for and against. [186]-[203]

85. Ultimately the Appeal Panel found that it did have power to make cost orders against a non-party relying on the majority decision in *Knight v FP Special Assets Ltd* (1992) 174 CLR 178. By analogy the Hight Court found that the Supreme Court of Queensland was authorised to make such costs orders against non-parties by reason of the Supreme Court Rules. The relevant rule was admittedly different to s 60(4) but the Appeal Panel took the view that the reasoning of Mason CJ and Deane J was "…equally applicable…" [209].

86. The Appeal Panel did not make a cost order against the Appellant's solicitor on the basis that the proceedings (Third Proceedings and subsequent Appeals) were not brought unreasonably and were not "obviously hopeless". [236]

87. The Appeal Panel reasoned that by analogy with the Supreme, District and Local Courts of NSW taking into account the desirability of coherence in the law, it should apply the same principles applicable to those Courts namely those in s 99(1) of the Civil Procedure Act (**CP Act**).[221]

Discussion

88. Section 99 enables a Court to make an order for a barrister or solicitor to pay costs to indemnify parties. Something that the Appeal Panel did not address in its judgment was the fundamental difference between NCAT being a Tribunal and the other curial bodies referred to in the Civil Procedure Act which are all "Courts". NCAT is a tribunal and it has its own unique practice and procedure in the NCAT Act. It is not a Court. It is subordinate to the Courts.

89. As mentioned earlier, its jurisdiction is limited to claims up to $750,000 (s 73 NCAT Act).

90. It was set up to deal with matters in dispute between parties or an opportunity for an appeal against a decision on the basis that it was easy to access and less formal in its practice and procedure than courts. The objective of NCAT was to provide minimal barriers to parties seeking access to justice to resolve a dispute or obtain a review of a decision that may have adversely affected them. With respect to the Appeal Panel, for all of these reasons there is significance in the CP Act only expressly referencing Courts and not Tribunals.

91. In the words of the Attorney General at the time, The Honourable Greg Smith in the second reading speech supporting the NCAT Bill (in NSW the Legislative Council), the purpose of NCAT, apart from bringing together some 22 different tribunals, was to address a need:

> "…Tribunals perform an invaluable role within the justice system. They provide timely, efficient and flexible points of access for citizens seeking to resolve disputes or to have a review of executive action. They are also cheaper, faster and less formal than court proceedings."(Hansard 22 November 2012, p 101)

92. Section 3(d) of the objects of the NCAT relevantly refers to the purpose of the establishment of NCAT:

> "to enable the Tribunal to resolve the real issues in proceedings justly, quickly, cheaply and with as little formality as possible…"

93. There are also policy reasons for Parliament deliberately giving NCAT its own unique practice and procedure in the NCAT Act. This was to make

access to the Tribunal less onerous for parties and with the objective in mind that they could be self-represented. It is easy to appreciate that with relatively small sums at stake in some cases such as in the current case unpaid rent claimed was in the thousands (and not tens or hundreds of thousands), the cost of legal representation would significantly exceed the value of the claim.

94. Notwithstanding the detailed legal reasoning presented in this decision, with respect, there is remains real question as to whether the Tribunal should be looking to adopt an expanded understanding of its jurisdiction by adopting the practice and procedure of the Courts, rather than staying within the statutory jurisdiction of the NCAT Act, lest it depart from the objectives for which it was first established. The non discouragement principle should on one view loom large in relation to the costs jurisdiction.

Enforcement

95. Section 72(3) of the NCAT Act provides that contravention of an order of the Tribunal without reasonable excuse renders a person liable to a civil penalty. Section 77 provides that the civil penalty may be a maximum of $22,000 for a corporation and $11,000 for an individual.

96. An order of the Tribunal to pay a sum of money may be the subject of a registrar's certificate which can then be registered as a judgment debt in a court of competent jurisdiction: s78(3).

CLIFFORD IRELAND

13 Wentworth Chambers

14 March 2023