

AUSTRALIA / JUDGMENT

Lavoise v Bertsch [2024] NSWCATAP 238

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Civil and Administrative Tribunal

New South Wales

Medium Neutral Citation: Lavoise v Bertsch [2024] NSWCATAP 238

Hearing dates: 14 November 2024

Date of orders: 22 November 2024

Decision date: 22 November 2024

Jurisdiction: Appeal Panel

Before: G Sarginson, Deputy President

PH Molony, Senior Member

Decision: (1) Previous stay orders of the Appeal Panel are lifted immediately.

(2) Leave to extend time to file the appeal is refused.

(3) Appeal dismissed.

Catchwords: APPEALS – extension of time – discretion to extend time – no basis established to extend time

LEASES AND TENANCIES – bond – repayment to tenant

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW)

Civil and Administrative Tribunal Regulation 2022 (NSW)

Civil and Administrative Tribunal Rules 2014 (NSW)

Residential Tenancies Act 2010 (NSW)

Cases Cited: Alexandria Landfill Pty Ltd v Transport for NSW (2020) 103 NSWLR 479; [2020] NSWCA 165

Bimson, Roads & Maritime Services v Damorange Pty Ltd [2014] NSWSC 734

Brahmbhatt v Osorio [2023] NSWCATAP 188

Carbery v Warringah Rugby Club Ltd [2021] NSWCATAP 153

Choi v Khan [2022] NSWCATAP 76

Collins v Urban [2014] NSWCATAP 17

Ferella & Anor v Chief Commissioner of State Revenue [2014] NSWCA 378

FVA v Commissioner for Police, NSW Police Force [2024] NSWCATAP 127

Haritos v Federal Commissioner of Taxation (2015) 233 FCR 315; [2015] FCAFC 92

Hopkins v NSW Land and Housing Corporation [2024] NSWCATAP 198

Jackson v New South Wales Land and Housing Corporation [2014] NSWCATAP 22

Kostas v HIA Insurance Services Pty Ltd (2010) 241 CLR 390; [2010] HCA 23

Kudrynski v Orange City Council [2024] NSWCA 33

Macionis v Franklin [2021] NSWCATAP 367

Merrick v Hines [2021] NSWCATAP 108

Nayar v Uren [2024] NSWCATAP 47

Orr v Cobar Management Pty Limited (2020) 103 NSWLR 36; [2020] NSWCCA 220

Pancio v Crompton & Jennings [2015] NSWCATAP 110

Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69

Ryan v BKB Motor Vehicle Repairs Pty Ltd [2017] NSWCATAP 39

Schwartz Family Co Pty Ltd v Capitol Carpets Pty Ltd [2017] NSWCA 223

Secretary, Department of Family and Community Services v Smith (2017) 95 NSWLR 597

Thomas and Naaz Pty Ltd v Chief Commissioner of State Revenue [2023] NSWCA 40

Unique Commercial Group Pty Ltd v Cusumano [2024] NSWCATAP 204

Vasales v Li [2021] NSWCATAP 295

Texts Cited: None cited

Category: Principal judgment

Parties: Helene Lavoise (Appellant)

Scott Bertsch (Respondent)

Representation: Appellant (self-represented)

Respondent (self-represented)

File Number(s): 2024/00327155

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Decision under appeal Court or tribunal: Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Citation: Not applicable

Date of Decision: 01 August 2024

Before: R Block, General Member

File Number(s): 2024/00262883

REASONS FOR DECISION

1. This is an appeal from a decision of the Tribunal dated 1 August 2024 in proceedings under the Residential Tenancies Act 2010 (NSW) (RT Act).
2. Both parties appeared at the appeal hearing on 14 November 2024. The appellant appeared in person. The respondent appeared by audio-visual link as he now resides in the United States of America. A Russian interpreter was engaged for the benefit of the appellant, and interpreted at the appeal hearing.
3. Both parties indicated they were ready to proceed and were not seeking an adjournment of the appeal for any reason. At the appeal hearing, we indicated to both parties the documents and submissions of the parties that would be considered, and that very late additional documents (which were copious) filed by the landlord on 13 November 2024 would not be taken into account. To do so would not be procedurally fair to the tenant and inconsistent with prior orders of the Appeal Panel, when previous extensions of time sought by the landlord were refused.
4. The dispute involved an application by the respondent to the appeal for payment of a bond in the amount of \$7,000.
5. 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.

Background

1. In 2019, the parties entered into a written residential tenancy agreement that was extended by a further agreement in 2023. The rented premises were a freestanding house located on the north shore of Sydney; and the premises were rented in a furnished condition. The landlord did not have a licensed real estate agent managing the tenancy on behalf of the landlord.
2. It was not in dispute that:

1. There was a residential tenancy agreement between the parties, irrespective of complaints raised by the landlord at the appeal hearing regarding purported (but not established) inconsistencies in documents provided by the tenant.
 2. In 2019 the tenant paid the landlord a bond amount (which was identified in contemporaneous emails by the landlord as a "deposit") of \$1,500.
 3. In February 2023, the tenant paid a further bond amount of \$5,500.
 4. The landlord did not perform an ingoing inspection report (s 29 RT Act; Hall v Hawkins [2015] NSWCATAP 197).
 5. The landlord did not deposit the bond amounts with NSW Fair Trading (s 162 RT Act).
 6. In February 2023, the tenant vacated the property. The tenant had notified the landlord by way of email that they were vacating the property due to the tenant being recalled back to the United States of America by his employer and family issues. The tenant paid the landlord a break fee in accordance with cl. 51.4 of the lease.
 7. The landlord did not return the bond to the tenant.
 8. The landlord did not serve the tenant with an outgoing inspection report.
1. On 17 July 2024, the tenant commenced proceedings in the Tribunal seeking payment of the bond under s 175 of the RT Act. The application identified email and postal addresses of the landlord.
 2. On 1 August 2024, the matter was listed at the Tribunal for a conciliation and hearing (group list).
 3. There was no appearance by the landlord. Neither party in the appeal provided a sound recording or transcript of the hearing. However, the Tribunal gave brief written reasons. In the written reasons of the Tribunal, the Member sets out why the Tribunal was satisfied the landlord was reasonably aware of the hearing.
 4. The Tribunal determined it appropriate to hear and determine the bond claim, and ordered the landlord pay the tenant \$7,000, as there was no basis for the landlord not repaying the bond. From the reasons of the Tribunal, it can be discerned that the tenant's evidence was that there were no outstanding rent or utility amounts; and the tenant had left the premises in a reasonably clean and undamaged condition.
 5. The landlord filed an appeal on 4 September 2024.
 6. The landlord asserted at the appeal hearing that she was not notified on the hearing on 1 August 2024. The landlord asserted that the tenant provided the wrong contact details for her. However, her evidence and submissions on this issue were unclear about when she was notified of the Tribunal proceedings and the hearing date.

7. The appeal did not indicate when the landlord asserts she had received a copy of the Tribunal orders regarding payment of the bond. However, we are satisfied from the information contained in the appeal that the landlord was notified of the orders of the Tribunal by no later than 6 August 2024 when there was an email exchange between the tenant and the landlord about payment of the Tribunal order amount.
8. Accordingly, we are satisfied the appeal has been filed outside the 14 day period in r 25(4)(b) of the Civil and Administrative Tribunal Rules 2014 (NSW) (*Hopkins v NSW Land and Housing Corporation* [2024] NSWCATAP 198 at [56]-[63]). In those circumstances, the landlord bears the onus of satisfying us that an extension of time should be granted under s 41 of the Civil and Administrative Tribunal Act 2013 (NSW) (NCAT Act) to file the appeal in accordance with the applicable legal principles set out in the decision of *Jackson v New South Wales Land and Housing Corporation* [2014] NSWCATAP 22 at [22] (Jackson).
9. The Notice of Appeal contains a bundle of documents relied upon by the landlord. In essence, the landlord asserts that there were two different written residential tenancy agreements between the parties, and the tenant had relied upon a document which was not the correct document. The landlord also makes a number of assertions about the tenant in respect of the tenant allegedly altering documents, and being untruthful. An allegation was also made that a cleaning invoice obtained by the tenant for the tenant engaging a professional cleaner to clean the premises at the end of the tenancy was false because, according to the landlord, the company did not exist.
10. We are not satisfied that any of those matters have any proper factual basis. The allegations are without merit and do not extend beyond the subjective beliefs of the landlord.
11. A further issue raised by the landlord is that the correct name of the landlord in the Tribunal application should have been the landlord's company; or alternatively the company that facilitated the original short term rental agreement (which was subsequently extended). That company was not a licensed agent identified on any version of the written residential tenancy agreements provided in the appeal documents of the parties. The landlord's assertion is without any legal basis. The written documents clearly identify the appellant as the landlord, not some other legal entity.
12. On 11 and 20 September 2024, the Appeal Panel of the Tribunal made orders for the filing and serving of documents in the appeal, and also granted a stay on the money order that the landlord pay the tenant the bond amount of \$7,000.
13. There were various procedural applications by the landlord where she sought to rely upon further documentary evidence. Those applications were dealt with by Blake SC PM on 1 October 2024 and 29 October 2024. Blake SC PM refused to grant the landlord an extension of time to file and serve further documents in the appeal.

14. On the morning of the appeal hearing, the landlord emailed various further documents to the Appeal Panel. No leave had been granted the landlord to rely upon those documents. We viewed those documents. Those documents do not establish any proper basis to vary the previous procedural directions of the Appeal Panel, nor are they documents that have any relevance to the issues raised in the appeal such that they would affect the outcome of the appeal, or our decision whether or not to extend time.
15. The tenant filed a bundle of documents in the appeal on 24 October 2024 with a copy served on the landlord. Those documents are supportive of the tenant's version of events that there was a residential tenancy agreement between the parties; he paid the landlord an original bond amount of \$1,500 in 2019; and then when a further residential tenancy agreement was entered into in respect of the same property, he paid the landlord a further \$5,500. The tenant's documents included bank records showing payment of the bond amounts; a tax invoice for professional cleaning at the end of the tenancy; and payment of the amount to the cleaner.
16. The position of the tenant was that the premises had been returned in the same condition it had been rented (fair wear and tear excepted), and there was no basis for any deduction from the bond. This is consistent with what we understand to be the tenant's evidence to the Tribunal at the hearing.
17. Neither party provided a sound recording or transcript of the hearing in accordance with the previous procedural directions of the Appeal Panel.

Scope and Nature of Appeals

1. An appeal to the Tribunal's Appeal Panel does not simply provide a losing party in the Tribunal below with the opportunity to run its case again, nor is it sufficient for an appellant to disagree with the outcome and to contend there should have been a different outcome: *Ryan v BKB Motor Vehicle Repairs Pty Ltd* [2017] NSWCATAP 39 at [10]; *Brahmbhatt v Osorio* [2023] NSWCATAP 188 at [27]-[28].
2. To succeed in an appeal, an appellant must demonstrate either an error by the Tribunal below 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).
3. An appellant to an internal appeal brought under s 80(2)(b) of the NCAT Act must identify with precision a question of law said to be raised by the appeal: *Ferella & Anor v Chief Commissioner of State Revenue* [2014] NSWCA 378 at [6], [22]; *Schwartz Family Co Pty Ltd v Capitol Carpets Pty Ltd* [2017] NSWCA 223 at [13]. Whether a question is one of law must be approached as a matter of substance: *Haritos v Federal Commissioner of Taxation* (2015) 233 FCR 315; [2015] FCAFC 92 at [62](6), [94], [203]; *Kudrynski v Orange City Council* [2024] NSWCA 33 at [50]. Each question must be a pure question of law (*Orr v Cobar Management Pty Limited* (2020) 103 NSWLR 36; [2020] NSWCCA 220 ("*Orr v Cobar*") at [44], [49]; and *Thomas and Naaz Pty Ltd v Chief Commissioner of State Revenue* [2023] NSWCA 40 at [71]).

In *Orr v Cobar* at [109] it was said by Bathurst CJ and Bell P (as the Chief Justice then was) with Garling, Johnson and Lonergan JJ agreeing:

"Those questions of law should be, in our opinion, what are sometimes described as 'pure questions of law.' They should not draw the Court of Criminal Appeal into questions of fact. Moreover, they must be questions whose character as a question of law can be recognised on the face of the question, and not depend upon the answer given to the question. This does not include a question which may ultimately disclose an error of law depending on an analysis of the facts but where this cannot be known without scrutiny of the facts. The construction accords with the cases we have referred to at [48] and [70] above."

1. Examples of pure questions of law include:

1. Denial of procedural fairness (*Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 at [13](4)); *FVA v Commissioner for Police, NSW Police Force* [2024] NSWCATAP 127 at [83]-[84]).
 2. A constructive failure to exercise jurisdiction, which includes the failure to consider and address a material issue raised by a party in the proceedings that is within the jurisdiction of the Tribunal to determine (*Alexandria Landfill Pty Ltd v Transport for NSW* (2020) 103 NSWLR 479; [2020] NSWCA 165 at [8]-[12] and [413]). This category of error also includes a failure by the Tribunal to engage with a clearly articulated argument put to it.
 3. Acting on the application of the wrong legal principle which materially affected the outcome (*Bimson, Roads & Maritime Services v Damorange Pty Ltd* [2014] NSWSC 734 at [38]-[53]).
 4. No evidence to support a factual finding (*Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390; [2010] HCA 23 at [91])
1. The principles governing an application for leave to appeal under the NCAT Act are well-established and are 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 only if the decision is attended with sufficient doubt to warrant its reconsideration on appeal will leave be granted. Ordinarily it is appropriate to grant leave where there is an issue of principle, a question of public importance or an injustice which is reasonably clear, in the sense of going beyond what is merely arguable: *Secretary, Department of Family and Community Services v Smith* (2017) 95 NSWLR 597 at [28]. As explained in *Collins v Urban* at [84], it is not sufficient merely to show that the Tribunal below was arguably wrong or that there was a bona fide challenge to an issue of fact.
 2. Further, the circumstances in which the Appeal Panel may grant leave to appeal from decisions made in the Consumer and Commercial Division of this Tribunal under s 80(2)(b) of the NCAT Act 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).

3. In *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."

1. The legal principles regarding error on a question of law and leave to appeal are set out in detail in *Unique Commercial Group Pty Ltd v Cusumano* [2024] NSWCATAP 204 at [28]-[44].

Consideration

1. No application to set-aside the Tribunal orders was made by the landlord under r 9(1)(b) of the Civil and Administrative Tribunal Regulations 2022 (NSW) (NCAT Regulation). Rather, the landlord filed an appeal under s 80 of the NCAT Act. The principles applicable to an appeal and a set aside application under r 9(1)(b) of the NCAT Regulation are different.
2. The mere failure of a party to appear at the hearing does not means the hearing is procedurally unfair (*Merrick v Hines* [2021] NSWCATAP 108; *Nayar v Uren* [2024] NSWCATAP 47).
3. It Is well established that a bond is the tenant's property, and a landlord is under the obligation to return the bond to the tenant at the end of the tenancy unless there is a proper legal basis for any of the bond amount to be withheld and retained by the landlord, such as rent arrears, or failure by the tenant to comply with their obligation to return the property in the same condition it was rented, less fair wear and tear, and in a reasonably clean condition, under s 51(3) of the RT Act.
4. Under s 51(3) of the RT Act, the tenant has obligations at the end of the tenancy, including returning the property in the same condition it was rented (fair wear and tear excepted). "Fair wear and tear" is the normal damage or deterioration of the premises through ordinary day to day use, rather than careless or negligent use of the premises by the tenant. The test is objective and not from the perspective of a "fastidious landlord" (*Pancio v Crompton & Jennings* [2015] NSWCATAP 110 at [24]; *Choi v Khan* [2022] NSWCATAP 76 at [20]; *Macionis v Franklin* [2021] NSWCATAP 367 at [45]-[46]; *Carbery v Warringah Rugby Club Ltd* [2021] NSWCATAP 153 at [34]-[35]; *Vasales v Li* [2021] NSWCATAP 295 at [29]-[31]).
5. There is nothing before us that satisfies us that the landlord was denied procedural fairness or that there is an error on a question of law in the Tribunal's decision. Nor is there a basis established for leave to appeal to be granted.

6. The grounds raised by the landlord, are in our view, a product of the landlord being dissatisfied with being ordered to pay the tenant \$7,000, rather than any legal error in the decision. We are not satisfied that the landlord was not given a reasonable opportunity to be heard at the conciliation and group list (hearing) on 1 August 2024. In any event, the landlord has not provided any cogent argument or evidence to indicate the landlord had an arguable case to oppose the tenant being refunded the full bond amount.
7. To be granted leave to extend time to lodge the appeal under s 41 of the NCAT Act, the landlord has to satisfy us of the principles set out in Jackson. The principles are set out in [22] as follows:

The considerations that will generally be relevant to the Appeal Panel's consideration of whether to grant an extension of time in which to lodge a Notice of Appeal include:

- (1) The discretion can only be exercised in favour of an applicant upon proof that strict compliance with the rules will work an injustice upon the appellant - Gallo v Dawson [1990] HCA 30, 93 ALR 479 at [2], Nanschild v Pratt [2011] NSWCA 85 at [38];
- (2) The discretion is to be exercised in the light of the fact that the respondent (to the appeal) has already obtained a decision in its favour and, once the period for appeal has expired, can be thought of as having a "vested right" to retain the benefit of that decision - Jackamarra v Krakouer (1998) 195 CLR 516 at [4], Nanschild v Pratt [2011] NSWCA 85 at [39] and, in particular, where the right of appeal has gone (because of the expiration of the appeal period) the time for appealing should not be extended unless the proposed appeal has some prospects of success - Jackamarra at [7];
- (3) Generally, in an application for an extension of time to appeal the Appeal Panel will be required to consider:
 - (a) The length of the delay;
 - (b) The reason for the delay;
 - (c) The appellant's prospects of success, that is usually whether the applicant has a fairly arguable case; and
 - (d) The extent of any prejudice suffered by the respondent (to the appeal),
- Tomko v Palasty (No 2) (2007) 71 NSWLR 61at [55] (per Basten JA) but note also [14], Nanschild v Pratt [2011] NSWCA 85 at [39] to [42]; and
- (4) It may be appropriate to go further into the merits of an appeal if the explanation for the delay is less than satisfactory or if the opponent has a substantial case of prejudice and, in such a case, it may be relevant whether the appellant seeking an extension of time can show that his or her case has more substantial merit than merely being fairly arguable - Tomko v Palasty (No 2) (2007) 71 NSWLR 61 at [14] (per Hodgson JA, Ipp JA agreeing at [17]) and Molyneux v Chief Commissioner of State Revenue [2012] NSWADTAP 53 at [58] - [59].

1. In this matter, we are not satisfied the landlord has provided an adequate explanation for the delay in lodging the appeal. Even if an explanation that was adequate had been provided, there is clear prejudice or unfairness to the tenant in extending time because the tenant now resides in the United States of America.
2. Further, even if we extended time, there is nothing in the landlord's appeal that satisfies us that the landlord has a fairly arguable case that the landlord is not liable to refund the tenant the bond amount of \$7,000.

ORDERS

1. Accordingly, we make the following orders: –
 1. Previous stay orders of the Appeal Panel are lifted immediately.
 2. Leave to extend time to file the appeal is refused.
 3. Appeal dismissed.

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

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