

AUSTRALIA / JUDGMENT

Plesko v Murphy [2024] NSWCATAP 266

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Civil and Administrative Tribunal

New South Wales

Medium Neutral Citation: Plesko v Murphy [2024] NSWCATAP 266

Hearing dates: 11 December 2024

Date of orders: 23 December 2024

Decision date: 23 December 2024

Jurisdiction: Appeal Panel

Before: S de Jersey, Principal Member

J McAteer, Senior Member

Decision: (1) Time for filing the appeal is extended to 9 September 2024.

(2) Leave to appeal is refused.

(3) Appeal dismissed.

Catchwords: LEASES AND TENANCIES -- damages to premises by water flow – landlords' compensation claim – tenants' rent reduction claim - failure to afford procedural fairness - decision not fair or equitable – decision against the weight of evidence – significant new evidence not reasonably available at time of hearing

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

Civil and Administrative Tribunal Rules 2014 (NSW)

Residential Tenancies Act 2010 (NSW)

Cases Cited: Collins v Urban [2014] NSWCATAP 17

Cominos v Di Rico [2016] NSWCATAP 5

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

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

Texts Cited: Nil

Category: Principal judgment

Parties: Heidi Plesko (First Appellant)

Sanjay Parasher (Second Appellant)

Jessica Murphy (First Respondent)

Joseph Struthers (Second Respondent)

Representation: Appellants (self-represented)

Respondents (self-represented)

File Number(s): 2024/00333038

Publication restriction: Nil

Decision under appeal Court or tribunal: NSW Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Date of Decision: 09 August 2024

Before: P Harris, General Member

File Number(s): 2023/369470 and 2023/368348

REASONS FOR DECISION

Introduction

1. This is an internal appeal pursuant to s 81 of the Civil and Administrative Tribunal Act 2013 (NSW) (the NCAT Act) from a decision of the Consumer and Commercial Division of the Tribunal dated 9 August 2024 (Decision).
2. The parties entered into a residential tenancy agreement dated 7 April 2023 regulated by the provisions of the Residential Tenancies Act 2010 (NSW) (the RT Act).
3. In these reasons, the appellants are referred to as the tenants and the respondents are referred to as the landlords.
4. The tenants appeal the following parts of the Decision:
 1. Order 3 – which required the tenants to pay the landlords the sum of \$13,149.18 for compensation caused by water damage, by 6 September 2024.
 2. Order 4 – which dismissed the tenants' application for a rent reduction.
1. The amount of \$13,149.18 comprised the following:

* Drying invoice \$2337.50;

* Second drying invoice \$1936.00

* Repairs invoice \$8875.68

* Total \$13, 149.18.

1. The appeal hearing took place by video with both tenants attending and Ms Murphy attending for the landlords.

Background to the appeal

1. By an application lodged with the Tribunal on 26 October 2023 (2023/2023/36947) the landlords sought an order for compensation against the tenants based on the tenants' failure to return the premises at the end of the tenancy in similar condition as to the beginning of the tenancy, fair wear and tear excepted (s 51(3)(b) of the Act). Part of the leased premises was damaged by a water flow from the front bathroom on 12 October 2023, which the landlords claim was caused by the negligence of the tenants.
2. By an application lodged with the Tribunal on 7 November 2023 (2023/368348) the tenants sought an order for rent to be reduced under s 45 of the RT Act on the basis that part of the premises was unusable or uninhabitable as a result of the damage arising from the water.
3. The tenants claimed that the water escaped from the front bathroom as the local council had temporarily cut water supply to the premises and neighbouring premises whilst undertaking work to the water mains in the area. The tenants claim that the council had not advised them of the interruption to the service nor advised them that when the water would be turned back on there would be a surge of water through the tap. The tenants claim that it was this surge that caused the water to flow out from the bathroom onto the floors of the other parts of the premises.
4. Both applications were heard together on 28 June 2024 and 2 August 2024.
5. On 9 August 2024 the Tribunal published the Decision with orders and reasons.
6. We summarise the salient parts of the Decision as follows - the Tribunal found the tenants were negligent by leaving the bathroom tap in the "on" position when the water supply had been turned off on 12 October 2023 and were therefore liable for the damage caused to the leased premises from the water flow incident on that day. The Tribunal ordered the tenants to pay the landlords the full compensation amount being claimed. The Tribunal dismissed the tenants' claim for a rent reduction for the reason that the tenants should not be able to benefit from their own negligent actions.
7. The tenants filed an application for a stay of Order 3 (payment of \$13,149.18) on 9 September 2024, which application was dismissed at the Appeal callover on 2 October 2024.
8. Directions were made on 2 October 2024 for the parties to provide their documents relied on in the appeal to the Appeal Registry and the other party by specified dates.

Documents filed in this appeal

1. The following documents have been filed in this Appeal:
 1. Notice of appeal (with documents attached) filed by the tenants on 9 September 2024;
 2. Reply to appeal (with documents attached) filed by the landlords on 30 September 2024;
 3. The tenants' submissions and documents filed 28 October 2024;
 4. The landlords' submissions and documents filed 11 November 2024.
1. Neither party has provided a transcript of the hearing before the Tribunal. The tenants said at the hearing of the Appeal that they could not meet the costs of obtaining a transcript.

Scope of internal appeals

1. As explained to the parties at the hearing, an appeal is not an opportunity for the party who was unsuccessful before the Tribunal to run their case again: *Ryan v BKB Motor Vehicle Repairs Pty Ltd* [2017] NSWCATAP 39 at [10].
2. To succeed in an appeal, an appellant must demonstrate either an error by the Tribunal 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. In *Unique Commercial Group Pty Ltd v Cusumano* [2024] NSWCATAP 204 at [24]-[40], the Appeal Panel set out the principles concerning questions of law within s 80 of the NCAT Act. An appellant is required to identify a pure question of law which then becomes the subject matter of the appeal and it must be articulated with precision.
4. Cl 12(1) of Schedule 4 of the NCAT Act, requires that for the Appeal Panel to grant leave to appeal from a decision of the Consumer and Commercial, it must be satisfied that the appellant may have suffered a substantial miscarriage of justice for any one of the following reasons:
 1. the decision was not fair and equitable – cl 12(1)(a); or
 2. the decision was against the weight of evidence – cl 12(1)(b); or
 3. significant new evidence has arisen, being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with – cl 12(1)(c).
1. Even if an appellant from a decision of the Consumer and Commercial Division has satisfied any or all the requirements of cl 12(1) of Schedule 4, the Appeal Panel must still consider whether it should exercise its discretion to grant leave to appeal under s 80(2)(b).
2. *Collins v Urban* [2014] NSWCATAP 17 sets out the principles regarding leave to appeal decisions of the Consumer and Commercial Division.
3. The Appeal Panel in *Collins v Urban* set out the following principles at [76] – [77]:

[76] Accordingly, it should be accepted that a substantial miscarriage of justice may have been suffered because of any of the circumstances referred to in cl 12(1)(a), (b) or (c) 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.

[77] As to the particular grounds in cl 12(1)(a) and (b), without seeking to be exhaustive in any way, the authorities establish that:

- (1) If there has been a denial of procedural fairness the decision under appeal can be said to have been "not fair and equitable" - *Hutchings v CTTT* [2008] NSWSC 717 at [35], *Atkinson v Crowley* [2011] NSWCA 194 at [12].
- (2) The decision under appeal can be said to be "against the weight of evidence" (which is an expression also used to describe a ground upon which a jury verdict can be set aside) where the evidence in its totality preponderates so strongly against the conclusion found by the tribunal at first instance that it can be said that the conclusion was not one that a reasonable tribunal member could reach - *Calin v The Greater Union Organisation Pty Ltd* (1991) 173 CLR 33 at 41-42, *Mainteck Services Pty Limited v Stein Heurtey SA* [2013] NSWSC 266 at [153].

1. In *Collins v Urban*, the Appeal Panel set out the following principles at [84]:

The general principles derived from these cases can be summarised as follows:

- (1) In order to be granted leave to appeal, the applicant must demonstrate something more than that the primary decision maker was arguably wrong in the conclusion arrived at or that there was a bona fide challenge to an issue of fact: *BHP Billiton Ltd v Dunning* [2013] NSWCA 421 at [19] and the authorities cited there, *Nakad v Commissioner of Police, NSW Police Force* [2014] NSWCATAP 10 at [45];

(2) Ordinarily it is appropriate to grant leave to appeal only in matters that involve:

- (a) issues of principle;
- (b) questions of public importance or matters of administration or policy which might have general application; or
- (c) an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand;
- (d) a factual error that was unreasonably arrived at and clearly mistaken; or
- (e) the Tribunal having gone about the fact finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed,

1. It may be difficult for self-represented appellants to clearly express their grounds of appeal. In such circumstances it is appropriate for the Appeal Panel to review an appellant's stated grounds of appeal, the material provided on the appeal and the decision of the Tribunal to examine whether it is possible to discern grounds that may either raise a question of law or a basis for leave to appeal: see *Cominos v Di Rico* [2016] NSWCATAP 5 at [13]. We have followed that process in this case.

Notice of Appeal and the tenants' submissions

1. In the Notice of Appeal, the only issue that we consider the appellants rely on to claim there was an error on a question of law is the ground of procedural fairness. Specifically, they claim there was a lack of procedural fairness because of the Tribunal's:

handling of the evidence and its decision to dismiss certain aspects of the tenants case without sufficient consideration or explanation.

1. The tenants also seek leave to appeal for all three reasons set out in cl 12 Schedule 4 of the NCAT Act:

1. the decision was not fair or equitable;
2. the decision was against the weight of evidence;
3. there was significant new evidence available now that was not reasonably available at the time of the hearing.

1. We summarise the tenants' submissions as follows:

1. The sudden water surge was an unforeseeable event outside the tenants' control and this factor should have mitigated or negated the tenants' liability;
2. In finding the tenants were negligent for leaving the bathroom tap in the on position the Tribunal did not assess whether a reasonable person in the tenants' position would have foreseen the risk of damage from a water surge following the water mains work by the council;
3. There was no evidence to suggest that tap was left on or for how long;
4. The Tribunal incorrectly dismissed the tenants' plumbing reports and evidence which supported the tenants' argument that the water damage was due to factors beyond their control such as the plumbing design in the bathroom and the water surge, rather than their negligence;
5. There were multiple pre-existing defects in the property, such as improper floor gradient and excessive water flow rates;
6. The Tribunal did not sufficiently scrutinise the landlords' claimed repair costs and the amount awarded did not reflect a fair assessment;

7. In dismissing the tenants' claim for a rent reduction, the Tribunal did so without properly considering the period in which the property was uninhabitable due to the water damage;
8. Even if the tenants were partly responsible for the water damage, the Tribunal should have assessed whether they were entitled to a reduction in rent for the period the premises were unfit for occupancy;
9. The Tribunal did not fairly consider the role of the local council's actions in causing the water damage;
10. The Decision was not fair or equitable because it did not adequately consider the substantial evidence provided by the tenants regarding the landlords' failure to maintain the property in original state of repair;
11. The Decision was against the weight of evidence as the Tribunal heavily relied on the initial email dated 14 October 2023 from Ms Plesko to the agents, which described the incident after it occurred but this email was treated as an admission of negligence when it was an informal communication without legal advice and did not constitute an accurate account of events;
12. The tenants said at the hearing and also in their statutory declarations sworn 3 September 2024, that the email dated 14 October 2023 was sent from both of them;
13. The Tribunal ignored subsequent sworn evidence in the form of a statutory declaration of Mr Parasher that provided additional context to the events of 12 October 2023;
14. The Tribunal dismissed the plumbing reports provided by the tenants due to issues such as lack of signatures and incorrect licences. However, the content of these reports was relevant to the cause of the water damage. By dismissing them, the Tribunal did not reflect the weight of all evidence available.
15. The landlords did not provide any invoices or quotes to substantiate their claimed repair costs.
16. The tenants did not delay the repairs and there was no evidence to establish this fact.
17. There was no visible damage initially and therefore there was nothing to report to the agency at the date of the incident, it was only later that the tenants noticed some damage to the floor and promptly notified the agents.
1. The tenants also contend that there is significant new evidence now available that was not reasonable available at the time of the hearing, in the form of the statutory declarations of each of the tenants dated 3 September 2024. The tenants claim this evidence is significant as it clarifies and substantiates the actual events.

2. The tenants claim that their statutory declarations were not available at the time of the hearing because they were not aware that it was necessary to provide them. They claim that it was not indicated to them that focus would be placed so heavily on a single email.
3. The tenants state in their statutory declarations sworn 3 September 2024 that the circumstances surrounding the incident on 12 October 2023 were as follows:
 1. On 12 October 2023 the council conducted work to the water mains but did not give the tenants prior notice that the water would be turned off or that there could be a sudden surge when water was restored to the premises;
 2. Ms Plesko was using the bathroom basin when water supply stopped completely; believing it was a temporary interruption she turned off all taps and left the house for the rest of the day, assuming normal water service would resume safely when the work was completed by the council;
 3. Mr Parasher who was at home all day, turned the bathroom tap on during the day, not knowing that there would be an unexpected powerful surge of water in the bathroom basin which would result in water escaping from the bathroom;
 4. Ms Plesko returned to the property later that evening;
 5. The tenants could not foresee the surge of water would happen;
 6. They took all steps to mitigate the damage by cleaning up the excess water, airing the property and notifying the agents as soon as they noticed the damage a day or so later.

Reply to Appeal and the landlords' submissions

1. The landlords support the Decision.
2. We summarise the main submissions of the landlord as follows:
 1. The council's work on the main water supply was standard; all neighbours were notified of the work beforehand; and there were no issues with the work that was done on the day;
 2. The landlords' insurer declined to cover the loss under the insurance policy because it assessed the cause of the damage to be the result of the tenants' negligence;
 3. The property, including tapware, was fully compliant as it was a new build in 2020;
 4. The house was built to code, has all third party compliance certificates and no pre-existing issues with drainage or plumbing;
 5. There was no back flow from the drain as claimed by the tenants as the water which escaped from the bathroom was clean tap water;
 6. The Tribunal reviewed the tenants' plumbing reports and found them to be inconclusive;
 7. The landlords minimised the repair cost and provided the tenants with quotes and invoices;

8. The landlords matched the flooring as best as they could, but it is still mismatched which detracted from the value of the property on sale;
9. The rent should not be reduced given that the tenants' negligence caused the damage;
10. Over 2 lengthy hearings the Tribunal considered all evidence and timelines and submissions and reached a well-considered decision based on facts;
11. The initial email from the tenants dated 14 October 2023 was the true account of what had happened;
12. The statutory declarations of the tenants relied upon in the appeal are false.

Issues

1. The issues to be decided in this Appeal are:
 1. Should time be extended for filing the appeal?
 2. Did the Tribunal make an error on a question of law?
 3. If so, should the appeal be allowed?
 4. Have the tenants established a basis for leave to appeal to be granted?
 5. If so, should leave to appeal be granted?

Extension of time

1. As this is an appeal in relation to a tenancy agreement, cl 25(3) of the Civil and Administrative Tribunal Rules 2014 (NSW) requires the appeal to be filed within 14 days of the Decision. As the Decision was dated 9 August 2024, the appeal was required to be filed by 23 August 2024, but it was filed out of time on 9 September 2024. The tenants seek an extension of time under s 41 of the NCAT Act until 9 September 2024.
2. The tenants' submission on the extension of time application are as follows;
 1. The tenants initially believed it was a 28 day period to appeal relying on research of a number of sources which said 28 days was the period for NCAT appeals;
 2. As the Decision was for a fixed money order, extending the time would have minimal impact on the landlords;
 3. The appeal has substantial merits;
 4. The tenants have acted in good faith and promptly in preparing for the appeal.
1. The extension of time claim is opposed by the landlords. The landlords state that they emailed the tenants multiple times to advise them that the 28 day period to pay the money order was about to expire.

2. Under s 41 of the NCAT Act the Tribunal may extend time for the lodgement of an appeal or initiating process. In *Jackson v NSW Land & Housing Corporation* [2014] NSWCATAP 22 the Appeal Panel dealt with the matters to be considered when determining whether time should be extended. These matters included the length of the delay, the reason for the delay, the appellant's prospects of success and the extent of any prejudice suffered by the respondent.
3. We consider that the reason for the delay in filing is understandable as the tenants are self-represented, that the extent of the delay is relatively short and the landlords have not been able to establish any prejudice by the delay. Although we have ultimately decided to dismiss the appeal, we are satisfied that it is appropriate to grant leave to extend time for filing the appeal and make this order.

Consideration

1. The tenants submit that there was a denial of procedural fairness as the Tribunal decided to dismiss certain aspects of the tenants case without sufficient consideration or explanation.
2. The tenants submit that the Decision was not fair or equitable because:
 1. The Tribunal did not fairly consider the role of the local council's actions in causing the water damage; the council turned the water off and when the water was restored it caused a surge that led to water leakage, which was beyond the tenants' control;
 2. The Tribunal overlooked the tenants' lack of negligence and intent to cause the damage;
 3. The Tribunal dismissed the tenants' rent reduction claim without adequately considering the uninhabitable condition of the premises following the water damage; the Tribunal ought to have assessed they were entitled a rent reduction whilst the premises were unfit for occupancy.
1. The tenants submit that the Decision was against the weight of evidence because:
 1. There was undue reliance by the Tribunal on the tenants' first email dated 14 October 2023 which described the incident immediately after it occurred and was treated as an admission of negligence; the Tribunal ignored subsequent evidence that provided additional context to this first email;
 2. Greater weight should have been given to the tenants' later sworn evidence which provided a fuller account of the circumstances and highlighted the unexpected nature of the water surge together with actual professional evidence;
 3. The condition of the premises played a substantial role in the damage such as inadequate drainage systems and faulty plumbing;

4. The Tribunal dismissed the tenants' plumbing reports due to lack of signatures and incorrect licenses, but the content of the reports were relevant to the cause of the water damage, as the reports said the cause was due to a sudden surge in water pressure combined with plumbing design flaws which could have contributed significantly to the damage;
5. By dismissing the tenants' plumbing reports, the Decision did not reflect the weight of evidence;
6. The landlords did not provide invoices or quotes to substantiate the repair costs.
7. The Tribunal did not give the tenants an opportunity to respond to the claims that they delayed the tradesmen from entering the premises.
8. There was no factual evidence to suggest a tap was left on or for how long other than the initial email;
9. The Tribunal did not assess whether a reasonable person in the tenants' position would have foreseen the risk of damage from a water surge following the water mains work by the council
1. As noted above, the tenants also submitted that there was significant new evidence which was not reasonably available at the hearing and rely on the statutory declaration of each of the tenants dated 3 September 2024.

Have the tenants established that the Tribunal made an error on a question of law?

1. S 38(5)(c) of the NCAT Act requires the Tribunal to ensure that the parties have a reasonable opportunity to be heard or otherwise have their submissions considered in the proceedings. A failure in this regard would be a failure to afford procedural fairness and an error on a question of law.
2. The tenants have contended in the Notice of Appeal that the Tribunal failed to afford procedural fairness by not adequately considering the role of the local council's actions which was switching off and then restoring the water mains which caused the water surge that led to the damage.
3. The tenants have not provided a transcript of the hearing as directed on 2 October 2024 and as such we can not ascertain what oral evidence was before the Tribunal in relation to this issue.
4. Also the tenants confirmed at the appeal hearing that they had not filed in this appeal all of their documentary evidence relied upon in the hearing before the Tribunal, despite being directed to do so on 2 October 2024.
5. We note that in paragraph 11 of the Decision the Tribunal records one of the agreed facts as: "The local council had temporarily cut water supply to the premises, and other nearby properties prior to the water escaping to undertake mains work".

1. We consider that this establishes that the Tribunal knew that the council undertook mains work on the day of the event. Given other reasons set out in the Decision it is clear to us that the Tribunal did not consider that it was the council's work which caused the flow of water from the bathroom, but the fact that the tap was left in the on position whilst the mains water was off (paragraph 25).
2. We are not satisfied from the material before us that the tenants were not given sufficient opportunity at the hearing to give evidence and make submissions about the council's position.
3. We are not satisfied that the tenants have established the Tribunal failed to afford the tenants procedural fairness as submitted by them. From the material before us we do not consider the submissions or evidence establish any other error on a question of law. It follows that this ground of appeal does not succeed.

Have the tenants established a basis for leave to appeal?

Was the decision not fair and equitable

1. The tenants contend that the Tribunal did not fairly consider the role of the local council's actions in causing water damage. There is no material before us to establish that there was a fault on the part of the council in carrying out the work on 12 October 2023 or that the work was defective in some way and could have contributed to the cause of the water over flow from the bathroom basin across the floor of the bathroom to outside the bathroom. We are satisfied that it was open on the evidence before the Tribunal to determine that the tenants were responsible for the flow of water from the bathroom to other parts of the premises on 12 October 2023 and therefore liable for the cost to repair the damage.
2. The tenants contend that the Tribunal did not properly assess the tenants' plumbing reports. There is no transcript of the hearing to inform us of the extent of the tenants' submissions before the Tribunal regarding their reports. However, the reasons to the Decision establish that the Tribunal did consider each of the reports because reasons are given by the Tribunal as to why the reports did not satisfy the Tribunal that it was the plumbing facilities which may have caused or contributed to the extent of water damage.
3. The tenants contend that the Decision to dismiss their rent reduction claim was not fair or equitable because even if the tenants were partially responsible they were entitled to a reduction in rent for the period the premises were unfit for occupancy.
4. S. 43(2) of the RT Act provides that
 - (2) Premises unusable The rent payable under a residential tenancy agreement abates if residential premises under a residential tenancy agreement are--
 - (a) otherwise than as a result of a breach of an agreement, destroyed or become wholly or partly uninhabitable, or

- (b) cease to be lawfully usable as a residence, or
 - (c) appropriated or acquired by any authority by compulsory process.
 - (3) Access to purchasers The landlord and tenant may agree to reduce the rent payable for premises during periods when access to the residential premises is required to be given to prospective purchasers of the premises.
 - (4) Effect of section This section does not limit the rights of landlords and tenants to agree to reduce the rent payable under a residential tenancy agreement.
 - (5) This section is a term of every residential tenancy agreement.
1. As the Tribunal found that the tenants had acted negligently in leaving the tap on, we are satisfied that this was a breach under the tenancy agreement for the purposes of s 43(2)(a) and therefore it was not unfair or inequitable to dismiss the tenant's rent reduction claim for the reasons given in paragraph 26 of the Decision, namely that the Tribunal was satisfied that the tenants were in breach of the tenancy agreement.
 2. The tenants contend that the decision was not fair or equitable because it did not adequately consider the evidence provided by the tenants regarding their claim that the landlord failed to maintain the property in a reasonable state of repair. At the hearing of the appeal we were not taken to any such evidence.
 3. The tenants contend that the Decision overlooked the tenants' lack of negligence or intent in causing the damage and dismissed the rent reduction claim. It is clear from the Decision that the Tribunal was satisfied from the tenants' email dated 14 October 2023 that one of the tenants had left the bathroom taps turned on when the water mains was off, which is what caused the water to flow and cause the damage when water supply was resumed. This finding was open on the evidence before the Tribunal (being the 14 October 2023 email), and as such the Tribunal found in paragraph 25 that the tap was negligently left on while the mains water was off and this resulted in the damage when water was restored. We consider it was open to the Tribunal in paragraph 25 of the Decision to find the tenant's explanation given at the hearing to be implausible given the amount of water required to do the resultant damage. Was the Decision against the weight of evidence.

The decision was against the weight of evidence

1. On the issue of liability the tenants contend that the Tribunal relied heavily on the email from Ms Plesko dated 14 October 2023 which stated as follows:

"I am writing to inform you about an unfortunate incident that occurred at the property on 12 October. I kindly request your assistance in addressing the resulting water damage issue. While cleaning the bathroom sink on the above date, the main water supply was switched off by Council. Shortly after, I noticed that the water had completely stopped flowing from all taps...at around 10am. Assuming it was a temporary interruption, I left the house for the day and returned

around 11pm...To my surprise, upon my return, I discovered that one of the taps had been left in the "on" position when the Council turned the water back on. This resulted in the basin sink becoming blocked and overflowing onto the tiles, and subsequently seeping into the bedroom floorboards. I turned off the tap and commenced the clean up process, using towels and mops to remove the excess water...To aid in the drying process , we ran the airconditioner unit throughout the night and opened all windows".

1. At the hearing of the appeal Mr Parasher said both he and Ms Plesko drafted this email.
2. At the hearing before the Tribunal the tenants then relied on a statutory declaration of Mr Parasher sworn 28 November 2023. The tenants confirmed at the hearing of the appeal that the evidence in Mr Parasher's statutory declaration sworn 28 November 2023 gave similar evidence in effect to the contents of the statutory declarations of the tenants dated 3 September 2024 filed in the appeal as new evidence. A copy of Mr Parasher's statutory declaration sworn 28 November 2023 is contained in the landlords' appeal documents.
3. We consider that it was open to the Tribunal to find that the contents of the email of 14 October 2023 and the statutory declaration of Mr Parasher sworn 28 November 2023 were "greatly different" (paragraph 19). The email says Ms Plesko says she noticed the mains water had been turned off whilst cleaning the bathroom sink, so left the house for the day but to her surprise when she returned, she discovered one of the taps had been left in the on position so when the council turned the water back on this resulted in the basin becoming blocked and overflowing onto the tiles and seeping into the bedroom floorboards. She says in this email that she turned off the tap and commenced cleaning up.
4. We consider that the explanation provided in the tenants statutory declarations, namely that when Mr Parasher turned the bathroom tap on during the day, the water surged and caused a water flow from the bathroom to be so different from the events set out in the email, that it was a matter for the Tribunal member to determine on the balance of probabilities which version of events he considered to be more reliable. It was open to the Tribunal to find that the email of 14 October 2023 correctly reflected the events which occurred. The Tribunal member has given a reason for which evidence he has preferred, being that he considered the tenants' explanation to be implausible given the amount of water required to do the damage (paragraph 25).
5. The tenants contend that the 3 plumber reports they relied on to establish that they did not breach the tenancy agreement, were not accepted. The Tribunal has given reasons in paragraphs 21-25 as to why these reports did not persuade the Tribunal on the issue of liability. We consider that the finding to reject the 3 reports was available to the Tribunal and was not against the weight of evidence,
6. On the issue of quantum, we consider it was open to the Tribunal to find from the evidence before it, and in particular the tenants' email dated 16 October 2023 (a copy is at page 84 of the landlords' Reply to Appeal) that the tenants had delayed the repairs by not co-operating on access until an agreement was reached, and this resulted in increased costs. The parties

agreed at the appeal hearing that the landlord's invoices were before the Tribunal, and copies are at pages 59-63 of the Notice of Appeal. We are satisfied that it was open to the Tribunal to find the landlords' evidence on quantum to be more accurate and reliable and to therefore find the tenants liable for the landlords' total compensation claim of \$13,149.18.

Significant new evidence not available at the hearing.

1. The tenants contend that their 2 statutory declarations dated 3 September 2024 is significant new evidence which was not available for the hearing because they were unaware that it was needed because they did not know that the Tribunal would rely so heavily on the tenants' email dated 14 October 2023.
2. As both tenants confirmed at the appeal hearing that each of them gave oral evidence before the Tribunal regarding the events in similar terms as described in the 3 September 2024 statutory declarations, which the tenants also agreed at the appeal hearing was in similar terms to the 28 November 2023 statutory declaration of Mr Parasher (which was before the Tribunal) we consider that the effect of the evidence in the 3 September 2024 statutory declarations was before the Tribunal at the time of the hearing and is therefore not new evidence which was not available at the time.
3. The tenants said at the appeal hearing that the Tribunal member said that if the statutory declarations had been provided it would have been a different situation. The tenants have not provided any transcript to establish that this comment was made and accordingly we reject it as a submission. Also, we note that the 28 November 2023 statutory declaration was before the Tribunal.
4. This basis as a ground for leave to appeal does not succeed. For the reasons set out above we decline to receive the further evidence of the 3 September 2024 statutory declaration.

Conclusion and Orders

1. The tenants have not established an error on question of law.
2. Nor have the tenants established that the Decision was not fair and equitable or against the weight of the evidence or there was significant new evidence that was not reasonably available at the time of the hearing. We therefore find that the tenants have not established a basis to seek leave to appeal under cl 12 Schedule 4 of the NCAT.
3. We make the following orders:
 1. Time for filing the appeal is extended to 9 September 2024.
 2. Leave to 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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Decision last updated: 23 December 2024

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