

AUSTRALIA / JUDGMENT

Rosen v Louey

[2026] NSWSC 1048**COURT**

Supreme Court

DECIDED

08 September 2026

BEFORE

Griffiths AJ

CASE / FILE NUMBER

2026/00156703

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Supreme Court

New South Wales

Medium Neutral Citation: Rosen v Louey [2026] NSWSC 1048**Hearing dates:** 3 September 2026**Date of orders:** 8 September 2026**Decision date:** 08 September 2026**Jurisdiction:** Common Law**Before:** Griffiths AJ

Decision:

1. The plaintiff have leave to appeal from the decision and orders of the Appeal Panel made on 10 April 2026 in Rosen v Louey [2026] NSWCATAP 112.
2. The appeal be allowed.
3. The orders made by the Appeal Panel on 10 April 2026 be set aside.
4. The appellant's application under s 80(2) of the Civil and Administrative Tribunal Act 2013 (NSW) be remitted to the Appeal Panel for reconsideration according to law.
5. There be no order as to costs.

Catchwords: APPEALS — Procedural fairness — Hearing rule — Whether Appeal Panel of NSW Civil and Administrative Tribunal erred in law in holding that the Tribunal at first instance was entitled to disregard, without consideration, the plaintiff's evidence because he did not attend the hearing to tender that material or make himself available for cross-examination — Whether Appeal Panel erred in law in holding that the Tribunal was justified in disregarding the plaintiff's written submissions — Whether Appeal Panel erred in determining that the failure to consider the plaintiff's evidence and submissions was immaterial — Leave to appeal granted and appeal allowed

Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) ss 36, 38, 80, 83 Civil and Administrative Tribunal Regulation 2022 (NSW) cl 9 Civil and Administrative Tribunal Rules 2014 (NSW) r 35 Civil Procedure Regulation 2017 (NSW) cl 11 Residential Tenancies Act 2010 (NSW) s 81 Uniform Civil Procedure Rules 2005 (NSW) rr 7.36, 7.41
Cases Cited:	Bronze Wing International Pty Ltd v SafeWork NSW [2017] NSWCA 41 Chen v Owners – Strata Plan No 55792 [2020] NSWSC 151 Davis v NSW Land and Housing Corporation (2016) 18 BPR 36,459; [2016] NSWCA 325 Dokas v Gallagher (No 2) [2024] NSWCA 236 Dr N Kalokerinos Pty Ltd v Jain [2024] NSWSC 1069 Dr N Kalokerinos Pty Ltd v Jain [2025] NSWCA 137 Kostas v HIA Insurance Services Pty Ltd (2010) 241 CLR 390; [2010] HCA 32 LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (2024) 280 CLR 321; [2024] HCA 12 Nu-Stone Building Pty Ltd v McInerney [2023] NSWSC 940 Rosen v Louey [2026] NSWCATAP 112 Schwartz v Health Care Complaints Commission [2026] NSWCA 162 The Owners - Strata Plan No 70871 v Turek [2020] NSWSC 1027
Category:	Principal judgment
Parties:	Dan Rosen (plaintiff) Katherine Louey (defendant)
Representation:	
Counsel:	C J C Shamsabad (plaintiff)
Solicitors:	Solve Legal (plaintiff)
File Number(s):	2026/00156703
Publication restriction:	Nil

JUDGMENT

By a further amended summons filed 13 August 2026, the plaintiff, Mr Dan Rosen, seeks leave to appeal from the decision and orders of the Appeal Panel of the NSW Civil and Administrative Tribunal (NCAT) in *Rosen v Louey* [2026] NSWCATAP 112 (AP). The Panel dismissed an internal appeal from a decision of the Consumer and Commercial Division of NCAT brought under s 80(2) of the Civil and Administrative Tribunal Act 2013 (NSW) (CAT Act).

The proceedings in NCAT concerned a dispute between Mr Rosen and the defendant, Ms Katherine Louey. Mr Rosen was the head tenant of residential premises in Sydney and the landlord under a residential sub-tenancy agreement with Ms Louey. At first instance, the Tribunal ordered Mr Rosen to pay Ms Louey the sum of \$3,335.71 within 14 days, comprising \$2,500 in compensation for loss of quiet enjoyment and \$835.71 as the balance of the rental bond.

Mr Rosen is represented pro bono by Mr Shamsabad in the present proceeding, following a referral made by Dhanji J on 25 June 2026 pursuant to rr 7.36 and 7.41 of the Uniform Civil Procedure Rules 2005 (NSW) (UCPR). Ms Louey represented herself in the present proceeding.

Mr Rosen did not participate in the hearing before the Tribunal at first instance on 29 July 2025. The Tribunal proceeded in his absence pursuant to r 35 of the Civil and Administrative Tribunal Rules 2014 (NSW) (CAT Rules), which provides:

35 Ex parte proceedings in Consumer and Commercial Division

- (1) This rule applies to proceedings for the exercise of functions of the Tribunal that are allocated to the Consumer and Commercial Division of the Tribunal.
- (2) Where a hearing is held for proceedings to which this rule applies, the Tribunal may proceed to hear the proceedings in the absence of a party who has failed to attend the hearing if—
 - (a) the Tribunal is satisfied that notice of the hearing was duly served on the party, or
 - (b) the Tribunal, being satisfied that service of notice of the hearing on the party has been duly attempted or having given directions under rule 15 to bring it to the notice of the party, considers that justice requires that the matter be dealt with in the absence of the party.
- (3) If proceedings to which this rule applies are adjourned by the Tribunal in the absence of a party, a registrar is to give notice (or direct that notice be given) of the time and place of the adjourned hearing to the absent party.

The Tribunal did not take into account Mr Rosen's evidence and submissions, which were presented in a tabular form and were filed before the hearing: AP [20]-[24], [58]. On appeal (when Mr Rosen represented himself), the Appeal Panel concluded that "the failure of the Tribunal to have regard to the evidence and submissions filed by the appellant prior to the hearing was not a denial of procedural fairness in the circumstances of this case": AP [65]. This finding is now challenged in Mr Rosen's further amended summons.

Ms Louey had legal representation before both the Tribunal at first instance and the Appeal Panel.

Leave to appeal

Mr Rosen relied upon two affidavits sworn by him and dated 11 May 2026 and 20 July 2026 respectively, which were both read without objection. Ms Louey did not file any evidence in the present proceeding.

Leave to appeal is required by s 83(1) of the CAT Act, which provides:

A party to an external or internal appeal may, with the leave of the Supreme Court, appeal on a question of law to the Court against any decision made by the Tribunal in the proceedings.

As McColl JA (Meagher and Leeming JJA agreeing) said in *Davis v NSW Land and Housing Corporation* (2016) 18 BPR 36,459; [2016] NSWCA 325 at [77], “the existence of a question of law is not merely a qualifying condition to the right of appeal, but the question of law alone is the subject matter of the appeal”. It is not open to the Supreme Court to engage in a merits review of the Appeal Panel’s decision.

McColl JA added at [78] that an appeal under s 83(1) of the CAT Act:

... is in the nature of a judicial review in which it is necessary to examine for legal error what has been done in the Appeal Panel. That will almost inevitably require consideration of the Tribunal’s findings to determine whether the Appeal Panel’s conclusion on the question of law identified in respect of the Tribunal’s reasons was open.

A question of law cannot be manufactured merely by drafting the proposed grounds of appeal with a formula such as “The Tribunal erred in law in/by ...”: see *Schwartz v Health Care Complaints Commission* [2026] NSWCA 162 at [3]-[9] per Leeming JA (Adamson JA and Griffiths AJA agreeing). Moreover, in this State, a mixed question of fact and law is not a question of law: *Schwartz* at [65].

Identification of a question of law is not the end of the inquiry. For leave to appeal to be granted, the proposed appeal must also raise an issue of principle, a question of public importance, or seek to address a reasonably clear injustice arising from a misapprehension which goes beyond something that is merely arguable: *Dokas v Gallagher (No 2)* [2024] NSWCA 236 at [36] per Kirk JA and Griffiths AJA (dealing with a summons seeking leave to appeal under s 83(1) of the CAT Act which had been incorrectly commenced in the Court of Appeal); and *Chen v Owners – Strata Plan No 55792* [2020] NSWSC 151 at [37] per Wright J.

The Appeal Panel’s reasons summarised

Relevant aspects of the hearing before the Tribunal at first instance were summarised by the Appeal Panel in its reasons at AP [18]-[24]. The Panel noted that:

the Tribunal was satisfied that Mr Rosen had been duly served with the notice of hearing and could hear the matter in his absence pursuant to r 35 of the CAT Rules: AP [18]-[23];

the Tribunal said that “if [Mr Rosen] is not here then he is not in a position to tender his materials, so we’re looking at [Ms Louey’s] material only”: AP [22]; and

the Tribunal stated in its *ex tempore* reasons delivered at the conclusion of the hearing that:

[Mr Rosen] is not present at the hearing, therefore no submissions made as to the tender of those documents [i.e. documented lodged by Mr Rosen on 25 July 2025], [his] documents were therefore not taken into account in arriving at the findings that I do that are set out in these reasons.

Before the Appeal Panel, it was common ground that the Tribunal did not have regard to any of the evidence or submissions filed by Mr Rosen: AP [20]-[21]. Mr Rosen contended that if the Tribunal had considered that material, this would have produced a different outcome. However, he did not challenge the Tribunal's decision to proceed in his absence. Nor did he contend that he did not receive notice of the hearing. Instead, Mr Rosen said that he had overlooked the hearing because of a "calendar glitch": AP [58].

At AP [59], the Appeal Panel noted that r 35 of the CAT Rules (set out above at [4]) empowers the Consumer and Commercial Division of the Tribunal to proceed to determine a matter in the absence of a party if satisfied that the party who has failed to attend was served with the notice of hearing or if satisfied that notice of the hearing was duly attempted to be served on the party and justice requires that the matter be dealt with in the absence of the party. The Panel also referred to cl 9(1) of the Civil and Administrative Tribunal Regulation 2022 (NSW) (CAT Regulation), which states:

- (1) In addition to a power that is expressly conferred on the Tribunal by the Act or enabling legislation to set aside or vary its decisions, the Tribunal may order that a decision it has made that determines proceedings be set aside or varied if—
 - (a) all of the parties to the proceedings have consented to the making of the order to set aside or vary the decision, or
 - (b) the decision was made in the absence of a party and the Tribunal is satisfied that the party's absence has resulted in the party's case not being adequately put to the Tribunal.

The Panel noted that there was no dispute that Mr Rosen had been served with notice of the hearing or that the Tribunal exercised its discretion under r 35 of the CAT Rules. The Panel also noted that Mr Rosen had not made an application to set aside the decision under cl 9 of the CAT Regulation. Rather, the appeal turned on whether the Tribunal ought to have had regard to the documents and submissions filed by Mr Rosen when it proceeded with the hearing in his absence: AP [61].

At AP [62], the Panel set out s 38 of the CAT Act which was relied upon by Mr Rosen. That section relevantly provides:

38 Procedure of Tribunal generally

- (1) The Tribunal may determine its own procedure in relation to any matter for which this Act or the procedural rules do not otherwise make provision.
- (2) The Tribunal is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice.

...

- (4) The Tribunal is to act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.
- (5) The Tribunal is to take such measures as are reasonably practicable—
 - (a) to ensure that the parties to the proceedings before it understand the nature of the proceedings, and
 - (b) if requested to do so—to explain to the parties any aspect of the procedure of the Tribunal, or any decision or ruling made by the Tribunal, that relates to the proceedings, and
 - (c) to ensure that the parties have a reasonable opportunity to be heard or otherwise have their submissions considered in the proceedings.
- (6) The Tribunal—
 - (a) is to ensure, as far as practicable, that all relevant material is disclosed to the Tribunal so as to enable it to determine all of the relevant facts in issue in any proceedings, and
 - (b) may require evidence or argument to be presented orally or in writing, and
 - (c) in the case of a hearing—may require the presentation of the respective cases of the parties before it to be limited to the periods of time that it determines are reasonably necessary for the fair and adequate presentation of the cases.

At AP [63], the Appeal Panel accepted Ms Louey’s submission that the Tribunal was justified in rejecting Mr Rosen’s evidence on the basis that he could not attest to the veracity of his evidence or confirm that he relied on the bundle he had provided. The Panel noted that Mr Rosen’s material contained “contentious evidence” of correspondence with Ms Louey and his opinions about Ms Louey’s mental health and character. The Panel reasoned:

Without the appellant attesting to this evidence and making himself available for cross-examination, this evidence was unduly prejudicial and could not be given any weight. To allow untested evidence to be relied on and, more relevantly, to be taken into account in circumstances where the party seeking to tender the material has not attended the hearing and has not exposed themselves to cross examination or scrutiny, is procedurally unfair to the opposing party.

The Appeal Panel also noted that Mr Rosen had filed submissions in a tabular format, but those submissions also included assertions of fact which constituted untested evidence. The Panel explained at AP [64] that:

Insofar as the submissions were purely contentions about the proceedings, we accept these contentions were not considered by the Tribunal but there was significant overlap between those parts of the table that was a submission and those parts of the table that made assertions of fact, that the Tribunal’s failure to have regard to the whole of the table, particularly when the appellant was not there to present his case, was justified.

The Panel then made the following key finding at AP [65]:

In our view, the failure of the Tribunal to have regard to the evidence and submissions filed by the appellant prior to the hearing was not a denial of procedural fairness in the circumstances of this case. As contended by the respondent, it was a consequence of the appellant failing to attend the hearing. The appellant had the opportunity to attend the hearing to present his case, but he did not do so. He submits that he did not attend the hearing because of a calendar glitch. Even if the hearing did not appear in his calendar, the appellant does not explain why he did not attend or how he could have forgotten about this when he made an application for adjournment six days before the hearing, lodged his documents after this and served the documents on the respondent's lawyer only three days before the scheduled hearing.

The Appeal Panel accepted Ms Louey's additional submission that Mr Rosen's evidence was either irrelevant to the determinative issues or supported Ms Louey's case: AP [66]. The Panel's reasoning was as follows:

The critical issues for determination were whether Mr Rosen had wrongly terminated Ms Louey's tenancy a week earlier than permitted under the notice served by him and, if so, whether Ms Louey was entitled to compensation: AP [67].

The evidence about Mr Rosen's good character, Ms Louey's character, and the allegations that Mr Rosen was entitled to terminate the tenancy immediately because of alleged false employer references, Ms Louey's alleged wrongful breaches of strata by-laws and Mr Rosen's medical condition, was irrelevant: AP [68]. That is because Mr Rosen's evidence on these matters did not prove that any of the grounds for terminating a residential tenancy, as set out in s 81 of the Residential Tenancies Act 2010 (NSW), apply: AP [68]-[71].

Mr Rosen's termination of the tenancy and lock out of Ms Louey were unlawful. Even if his evidence had been considered by the Tribunal, it would not have changed the outcome: AP [71].

It is not likely that the evidence or submissions of Mr Rosen concerning the compensation claimed by Ms Louey for non-economic loss would realistically or materially change the outcome, given that Ms Louey had put on evidence that Mr Rosen had deactivated her security card and denied her access to the premises and thereby interrupted her quiet enjoyment of the premises: AP [73].

The Appeal Panel concluded that it was not satisfied that there was procedural unfairness. The Panel also found that Mr Rosen's evidence was not relevant to the issues in dispute or carried little weight and therefore would not have been material to the outcome. Nor did the failure to consider that material deprive Mr Rosen of a realistic possibility of a different outcome: AP [75].

Proposed grounds of appeal

In his further amended summons, Mr Rosen sets out four questions which are said to arise on the appeal:

On the proper construction of ss 36 and 38 of the CAT Act and r 35 of the CAT Rules, does a party's failure to attend the hearing, without more, entitle the Tribunal to disregard evidence and submissions filed and served pursuant to its directions?

Did the Appeal Panel err in holding that personal attendance, oral tender and availability for cross-examination were conditions precedent to consideration of the plaintiff's filed material?

Did the Appeal Panel err in holding that the Tribunal could disregard the plaintiff's written submissions consistently with s 38(5)(c)?

Did the Appeal Panel apply the correct test in determining whether the failure to consider the plaintiff's filed documents was material to the outcome?

The first and fourth questions adequately identify questions of law for the purposes of s 83(1) of the CAT Act. Mr Rosen raises the following three grounds of appeal:

The Appeal Panel erred in law at AP [63]-[65] in holding that the Tribunal was entitled to disregard, without consideration, Mr Rosen's evidence because he did not attend the hearing to tender that material or make himself available for cross-examination.

The Appeal Panel erred in law at AP [64]-[65] in holding that the Tribunal was justified in disregarding Mr Rosen's written submissions.

The Appeal Panel erred in law at AP [66]-[75] in determining that the failure to consider Mr Rosen's evidence and submissions was immaterial.

Consideration and determination

Leave to appeal should be granted under s 83(1) of the CAT Act as the proposed grounds of appeal disclose a reasonably clear injustice arising from a misapprehension which goes beyond something that is merely arguable. The circumstances which give rise to Mr Rosen's claim of procedural unfairness raise an issue of principle which has the potential to affect other litigants in NCAT.

(i) Grounds 1 and 2

Mr Rosen submits that although a party's absence from the hearing may affect the weight attributed to their evidence, it is not without more a basis upon which the Tribunal can disregard the party's evidence and submissions altogether, as occurred here. Although r 35 of the CAT Rules allows the Tribunal (specifically, the Consumer and Commercial Division of NCAT) to determine proceedings in the absence of a party (if the Tribunal is "satisfied that notice of the hearing was duly served on the party"), it does not prescribe any requirement for the "automatic exclusion of filed materials where ... not formally 'tendered' or 'read' into evidence".

Nothing in ss 36 and 38 of the CAT Act or r 35 of the CAT Rules justifies the Tribunal paying no regard to the submissions or evidence filed by a party merely because the party fails to attend the hearing. And merely because a party does not make themselves available for cross-examination does not mean that their evidence and/or submissions can be disregarded entirely. The fact of absence goes to weight, not to admissibility. The Tribunal should assess the filed material sufficiently to identify its nature and relevance and determine its weight.

The ability of NCAT to “determine its own procedure” (CAT Act s 38(1)) and the mandate for proceedings in NCAT to be determined in a “just, quick and cheap” manner (CAT Act s 36(1)) with “as little formality as the circumstances of the case permit” (CAT Act s 38(1)) does not detract from the Tribunal’s obligation to afford procedural fairness to those whose interests may be affected by its decision-making. As French CJ observed in *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390; [2010] HCA 32 at [16] in relation to one of the predecessors of NCAT (the Consumer, Trader and Tenancy Tribunal), “[t]here are qualifications upon the Tribunal’s procedural freedom. One qualification, which is explicit, is the requirement to observe procedural fairness”. This is reflected in s 38(2) of the CAT Act, which refers to the Tribunal being “subject to the rules of natural justice”, and also s 38(5), which requires the Tribunal to “take such measures as are reasonably practicable ... to ensure that the parties have a reasonable opportunity to be heard or otherwise have their submissions considered in the proceedings” (emphasis added).

The Appeal Panel’s finding that Mr Rosen’s evidence was “unduly prejudicial and could not be given any weight” (see at AP [63]) is also not to the point. Although ultimately that characterisation may be apposite, the Tribunal at first instance needed to consider Mr Rosen’s material in order to form a view as to its relevance and the weight (if any) to be given to it. The Tribunal did not do so, it being common ground between the parties that the Tribunal did not pay any regard to Mr Rosen’s evidence (or his written submissions): AP [20]-[21], [58].

It was also erroneous for the Appeal Panel to find that the Tribunal’s failure to have regard to Mr Rosen’s submissions was “justified” since those submissions were intermingled with “assertions of fact” constituting “untested evidence”: AP [64]. The Tribunal ought to have considered that material in its totality. It was open to the Tribunal to form an adverse view about the veracity of Mr Rosen’s assertions of fact and to reject his submissions, but the Tribunal needed to consider those matters first in compliance with its procedural fairness obligations. The material could not simply be ignored by the Tribunal and given no weight without the material being properly assessed.

It follows that grounds 1 and 2 are established. Mr Shamsabad accepted, however, that Mr Rosen must also succeed on ground 3 in order to succeed on the present appeal.

(ii) Ground 3

Ground 3 challenges the Appeal Panel’s finding that Mr Rosen’s evidence “was not relevant to the issues in dispute or carried little weight and therefore would not have been material to the outcome and did not deprive [him] of a realistic possibility of a different outcome”: AP [75]

(emphasis added). And at AP [71], the Panel stated: “The termination and lock out was unlawful and even if the appellant’s evidence had been considered by the Tribunal, it would not have changed the outcome” (emphasis added). Furthermore, at AP [73]-[74], the Panel stated that it accepted the following submission by Ms Louey’s solicitor (emphasis added):

... in these circumstances, it is not likely that the evidence or submissions of the appellant would have realistically or materially changed the outcome.

Mr Rosen submits that the Panel engaged in the wrong counterfactual inquiry because the correct question is “whether the decision that was in fact made could, not would, ‘realistically’ have been different had there been no error”: see *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 280 CLR 321; [2024] HCA 12 at [16] per Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ (emphasis in original). That submission should be accepted. Although in *LPDT* the Court was addressing the need in a judicial review proceeding for an error to be material for it to be a jurisdictional error, I consider that both the requirement of materiality and the related test are the same on an appeal on a question of law.

The following observations of the plurality in *LPDT* are also relevant:

The descriptor, “realistic”, distinguishes the assessment of the possibility of a different outcome from one which is improbable or fanciful. Although the judicial review applicant must demonstrate to the Court that the materiality threshold is met, that threshold is neither demanding nor onerous (at [14]).

Where there has been a denial of procedural fairness due to the administrative decision-maker’s failure to put the applicant on notice of a fact or issue, the Court may readily be able to infer that, if the applicant had been put on notice of that fact or issue, he or she might have addressed it by adducing further evidence or putting on further submissions, and that the decision-maker would have approached that new material with an open mind. In those circumstances, “it is ‘no easy task’ for the court to be satisfied that the loss of such an opportunity did not deprive the person of the possibility of a successful outcome” (at [15]).

In the present case, the procedural unfairness arises not because of the Tribunal’s failure to put Mr Rosen on notice of a fact or issue, but because it failed to consider at all the submissions and evidence that he had in fact filed. The relevant question for the Appeal Panel to determine was whether or not there was a realistic possibility that the Tribunal’s decision could have been different had it considered Mr Rosen’s submissions and evidence. Instead, the Panel erroneously applied a higher threshold test by asking whether the consideration of that material would have changed the outcome: see AP [71], [73] and [75].

Although the Appeal Panel used the words, “realistically” and “realistic possibility of a different outcome” in AP [73] and [75] respectively, which might indicate that the Appeal Panel was aware of the test of materiality as described in *LPDT*, the Appeal Panel in fact applied a higher threshold test as is reflected by its use of the expressions, “would have” and “would not have” (as opposed to “could have” and “could not have”) when identifying the test at AP [71], [73] and [75].

This erroneous test was applied by the Appeal Panel in reaching two primary findings:

First, the finding at AP [71] that Mr Rosen's material did not "prove that any of the grounds set out in s 81 are established and, as such, the evidence filed by him was not relevant to the issues in dispute in the proceedings at first instance". By asking whether the excluded material established Mr Rosen's position, the Appeal Panel substituted a higher test requiring demonstrated success as opposed to the lower threshold of a realistic possibility that the material could have affected the outcome.

Secondly, the Appeal Panel found at AP [73]-[74] that it was not likely that Mr Rosen's material "would have realistically or materially changed the outcome" relating to the quantum of compensation claim by Ms Louey for non-economic loss. I accept Mr Shamsabad's submission that while Mr Rosen's material may not rise to the level of a full defence, it was nevertheless realistically capable of affecting the assessment of compensation in one or more of the following ways:

It disputed the alleged attempted entry and explained that the communications with Ms Louey's parents occurred because Ms Louey had blocked his number, because her belongings remained at the premises, and to arrange their retrieval. It contextualised the lockdown in a materially different factual manner: Mr Rosen had recently undergone spinal surgery; he said that he had become concerned for his safety following reports of multiple unidentified visitors, drug use and possible breaches of the building by-laws; rent remained unpaid; and Ms Louey had ceased communicating her intended departure date.

The material also established the limited duration and practical consequences of the lockdown. Access was deactivated on 12 February 2025. Mr Rosen alleges that he contacted Ms Louey and her parents immediately. Ms Louey responded by email on 13 February, her father nominated Saturday, 15 February 2025 as the earliest convenient collection date, and Ms Louey then attended with her parents and retrieved all her belongings. Ms Louey's own case described the relevant period as four days and separately quantified the rent attributable to it as \$485.71. Mr Rosen's rebuttal placed the period at three to four days and recorded that arrangements for collection were made promptly.

The Tribunal ordered repayment of \$835.71 as the balance of the bond after allowing only the rent conceded by Ms Louey: AP [28(7)-(8)]. The excluded material included:

a photograph of a broken door handle;

invoices totalling \$86.39 concerning the Sheridan towels;

material concerning rent and the rental ledger; and

submissions concerning cleaning, repairs, replacement items and unpaid rent.

Acceptance, for example, of any part of the claimed rent, repair or replacement costs would necessarily have altered the amount ordered to be repaid from the bond.

Conclusion

In the further amended summons, the Court is invited, in effect, to step into the shoes of the Appeal Panel and allow Mr Rosen's internal appeal after setting aside the orders of the Tribunal at first instance on 31 July 2025. Mr Rosen also asked for the Court to remit the proceedings to the Consumer and Commercial Division of NCAT, differently constituted, to be heard and determined according to law and the reasons of the Court.

Although I have determined to grant leave and to allow the appeal, I do not consider that it is appropriate, for the purposes of s 83(3) of the CAT Act, for the Court to step into the shoes of the Appeal Panel and determine the internal appeal. That is primarily the Appeal Panel's function, not the Court's. As Basten JA stated in *Bronze Wing International Pty Ltd v SafeWork NSW* [2017] NSWCA 41 at [10], "the right of appeal to the Supreme Court under s 83 was confined to the decision of the Appeal Panel", as opposed to the Tribunal at first instance.

Mr Shamsabad pointed to the fact that, in *The Owners - Strata Plan No 70871 v Turek* [2020] NSWSC 1027, Adamson J stated at [79] that "it does not follow that this Court is obliged to remit the matter to the Appeal Panel or to the Tribunal and cannot make the orders which the Appeal Panel could have made". Her Honour reasoned that because an Appeal Panel is empowered to vary or set aside orders of the Tribunal on appeal, so also could the Court under s 83(3), as long as leave to appeal has been granted and a question of law arises.

In *Turek*, Adamson J set aside an order made by the Tribunal at first instance and substituted an order that the costs of the hearing in the Tribunal be reserved. The Tribunal had ordered that costs be costs in the cause.

The circumstances in *Turek* were unusual. That is because it was not disputed that order 4 did not correspond with the Tribunal's reasons. The Appeal Panel accepted that there was a disparity but it did not correct the Tribunal's orders. It is unsurprising that in these circumstances her Honour took the course which she did. The order was appropriately made in circumstances where there was only one reasonably available answer to the issue (see also *Dr N Kalokerinos Pty Ltd v Jain* [2024] NSWSC 1069 at [89] per Campbell J; appeal dismissed in [2025] NSWCA 137).

The position is more complicated in the present case and it cannot be said that there is only one possible outcome. I regard the circumstances as more akin to those in *Nu-Stone Building Pty Ltd v McInerney* [2023] NSWSC 940 at [91] where Wright J found that he was not in a position to determine what the outcome of the appeals before the Appeal Panel there should have been.

The Appeal Panel is in a better position to determine the factual issues which arise in assessing the weight to be given to Mr Rosen's material in applying the correct test concerning materiality and to determine whether or not that test is satisfied. As Mr Shamsabad correctly acknowledged in oral argument, it is possible that the Appeal Panel may come to the same conclusion when assessing Mr Rosen's material against the correct test of materiality.

I see no reason why the matter should be remitted to a differently constituted Appeal Panel.

There is material before the Court which indicates that Mr Rosen is experiencing financial hardship. This fact should be drawn to the attention of the Registrar, who has the power under cl 11(1) of the Civil Procedure Regulation 2017 (NSW) to direct, by order in writing, that the whole or part of a fee payable to the Registrar be waived, postponed or remitted. The Registrar may well think it appropriate to make such an order in respect of the filing fees paid by Mr Rosen in the present proceeding, in the light of his financial hardship as recorded in his affidavit filed on 20 May 2026 in support of his successful application for a pro bono referral: see *Rosen v Louey* (Supreme Court, Dhanji J, 25 June 2026, unrep).

Given the relatively modest amount of money at stake in these proceedings, I reiterate what I said at the end of the oral hearing when I urged the parties to take a sensible and practical approach to the question whether the parties' grievances can be resolved other than by way of further litigation.

As to the issue of costs, normally they would follow the event but Mr Shamsabad, who appeared pro bono for Mr Rosen, admirably stated that there should be no order as to costs.

For the reasons given above, the Court will make the following orders:

The plaintiff have leave to appeal from the decision and orders of the Appeal Panel made on 10 April 2026 in *Rosen v Louey* [2026] NSWCATAP 112.

The appeal be allowed.

The orders made by the Appeal Panel on 10 April 2026 be set aside.

The appellant's application under s 80(2) of the Civil and Administrative Tribunal Act 2013 (NSW) be remitted to the Appeal Panel for reconsideration according to law.

There be no order as to costs.

The Court expresses its gratitude to Mr Shamsabad who accepted the pro bono referral and provided valuable assistance to the Court.

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Decision last updated:

08 September 2026

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