

AUSTRALIA / JUDGMENT

Ullah v Halabi

[2025] NSWCATCD 139

COURT

Civil and Administrative Tribunal

DECIDED

25 September 2025

BEFORE

H Woods, Senior Member

CASE / FILE NUMBER

2024 / 00331761

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Civil and Administrative Tribunal New South Wales

Medium Neutral Citation: Ullah v Halabi [2025] NSWCATCD 139

Hearing dates: 16 June 2025

Date of orders: 25 September 2025

Decision date: 25 September 2025

Jurisdiction: Consumer and Commercial Division

Before: H Woods, Senior Member

Decision: (1) Declare that pursuant to s 11 of the Residential Tenancies Act 2010 (NSW) that the Standard Occupancy Agreement made between the applicant and the respondent and dated 11 October 2023 under which the applicant occupied premises at Parramatta is not a residential tenancies agreement.
(2) The Application is otherwise dismissed.

Catchwords: LEASES AND TENANCIES — Residential Tenancies Act 2010 (NSW) — Exception — Agreement under which a person boards or lodges

Legislation Cited: Residential Tenancies Act 2010 (NSW)
Boarding Houses Act 2012 (NSW)

Cases Cited: Ballesfin v Jung & SJ Super Holdings Pty Ltd [2022] NSWCATAP
Construction Forestry Maritime Mining and Energy Union v Personnel Contracting Pty Ltd (2022) 27 CLR 165; [2022] HCA 1
Hong Kong Pty Ltd atf the Hong Kong Trust v Hamilton [2022] NSWCATP 321
Pryor v Costa & Maroulis (tenancy) [2005] NSWCTT 555
Pupuke v Stratford [2016] NSWCATAP 7
Shapkin v The University of Sydney [2023] NSWCATAP 2
Shapkin v The University of Sydney [2024] NSWSC 1091
Shapkin v The University of Sydney [2025] NSWCA 100

Category:	Principal judgment
Parties:	Fahad Ullah (Applicant) Sid Halabi (Respondent)
Representation:	Self-represented (Applicant) Jasmine So, Exclusive Real Estate (Respondent)
File Number(s):	2024 / 00331761
Publication restriction:	Nil

REASONS FOR DECISION

INTRODUCTION

These proceedings concern a dispute as to whether the applicant's occupation of a one bedroom studio apartment (the Premises) in a building situated in Parramatta (the Property) was pursuant to a residential tenancy agreement for the purpose of the Residential Tenancies Act 2010 (NSW) (RT Act) and if so, whether the respondent breached the residential tenancy agreement, and subject to whether the respondent breached the agreement, the relief, if any, that should be ordered. The respondent contends that the relevant agreement was an agreement under which the applicant boarded or lodged with the respondent and was not covered by the RT Act. THE HEARING AND THE DOCUMENTS RELIED ON BY THE PARTIES The applicant appeared for himself. Jasmine So, the respondent's property manager / agent, appeared for the respondent. The documents relied on by the applicant comprised: Documents filed 13 September 2024 (AB1) which included a request for amendments to the application which had been filed on 7 September 2024. Documents filed on 28 October 2024 (AB2) which included: a statement of the applicant; annexures to the statement, including: a copy of an agreement signed by the applicant and for the respondent headed "Standard Occupancy Agreement for general boarding houses under the Boarding Houses Act 2012" (the Standard Occupancy Agreement); correspondence between the applicant and the respondent's "property manager /agent, Exclusive Real Estate" (the Agent); a table of compensation / damages claimed by the applicant for alleged breaches of a residential tenancy agreement; a chronology; and various photos. Affidavits of YOUNICA EUNICE dated 13 October 2024 and the applicant's wife, SAHANI RIFTHIE dated 10 October 2024. The respondent relied on documents filed on 14 May 2025 which comprised: A short statement of Ilham El Hadba, an employee of the Agent; and An indexed bundle of documents (RB1) that included: the Standard Occupancy Agreement including attachments; the applicants email / letter "Re: Termination of Tenancy Agreement"; electricity, cleaning and pest control invoices; a notice of determination of Parramatta City Council; an email to the applicant and his wife dated 9 October 2023; an unpublished decision of the Tribunal in respect of a different matter; correspondence between the applicant and the Agent in respect of mould; correspondence from the Agent to the applicant and his wife after the applicant vacated the Premises; and ingoing and outgoing condition reports. Ms Al-Hadba was cross-examined. Following the hearing, I made directions for the parties to file and serve any further written submissions. Thereafter, the

Tribunal received a document headed “Applicant’s Outline of Oral Submissions” and the Respondent’s “Written submission”. IDENTIFICATION OF THE ISSUES The Application filed 7 September 2024 stated: under the heading “Orders Sought”: I am writing to bring to your attention a matter regarding the breach of my lease agreement, which has compelled me to seek a full refund of my rental bond and compensation for related damages. I am requesting the return of my rental bond amounting to \$1,680 and a waiver of the break fee typically associated with early lease termination. I terminated the lease after completing 75% of the agreement due to the landlord/agents breach of Section 31 of the Boarding House Act 2012. This breach resulted in severe [mould] issues and inadequate facilities, which significantly affected my living conditions. The impact of these issues has been profound, affecting my health and well-being. I have incurred costs for medical treatment and travel, and my personal belongings have been damaged due to the mould. Attached to this email, you will find documentation supporting my claims, including medical reports photographs of the damage, and receipts for related expenses under the heading “Reasons for the Order(s)”: The landlord/agent violated section 31 of the Boarding Houses Act 2012. Furthermore, The termination letter contravened sections 50, 52, and 63 of the [RT Act]. As noted above, AB1 lodged on 16 September 2024 included a request for amendments to the application. It: Sought an evaluation / clarification of whether the applicant was occupying the property under a residential tenancy agreement; Alleged that the respondent had breached sections 50, 52 and 63 of the RT Act (AB1). Sought a return of a bond of \$1680.00; Sought a waiver of a break fee; and Claimed compensation for losses including damages to personal property and medical expenses. On 16 October 2024, the Tribunal made orders that included granting leave to the applicant to amend the application. At page 106 of AB2 the applicant identified the “Compensation for damages and claims for expenses” as being: a Medical expense \$200 b Moving expense \$300 c Cost of time and food Expenses in the absence of microwave \$4000 d Refund whole bond \$1680 e Refund 25% of the rent paid \$3000 f Remediation for clothes \$2000 g Compensation for privacy breach, health issues, emotional distress \$5500 Total \$16,180 The orders of the tribunal made 5 December 2024 included that: The tenant is seeking orders there is a tenancy agreement between the parties and as a result claims compensation of \$15,000 for breaches of sections 50, 52 and 63 of the [RT Act]. Underlying the applicants claim, is that the applicant contends he occupied the Property pursuant to a residential tenancy agreement under the RT Act. In summary, the applicant contends to the effect that: the agreement pursuant to which he and his wife occupied the Premises was a residential tenancy agreement that arose from a conversation with the respondent’s property manager before the 9 October email, the 9 October email, and the payment of a deposit of \$420.00; and that: the Standard Occupancy Agreement is a sham, and having regard to an email dated 9 October which attached the Standard Occupancy Agreement referring to a “Lease”, “fortnightly rental”, payment of “rent” of \$840.00, a “bond” of \$1680.00, less “a deposit” of \$420.00, the position was misrepresented to him, and he believed that he was entering and in fact entered a residential tenancy agreement; and that in any event mindful of the signed Standard Occupancy Agreement: the specific form of the agreement does not determine the parties legal interests; and having regard to the true nature of the applicant’s occupation of the Premises, he did not board or lodge but occupied the Premises pursuant to a residential tenancy agreement. The respondent: Contends to the effect that: The

applicant was emailed the Standard Occupancy Agreement on 9 October; The applicant had the Standard Occupancy Agreement for several days before its signing and commencement; The Standard Occupancy Agreement is clearly headed “Standard Occupancy Agreement For general boarding houses under the Boarding Houses Act 2012” and details the parties’ rights and obligation; The applicant occupied the premises pursuant to the Standard Occupancy Agreement under which the applicant boarded or lodged; and Relies on s 8 (1) (c) of the RT Act which relevantly provides that the RT Act does not apply to “an agreement under which a person boards or lodges with another person”. Mindful that the application is brought in reliance on the RT Act and that the RT Act does not apply to an agreement under which a person boards or lodges with another person, the issues for consideration are: Identification of the relevant agreement. To the extent the relevant agreement is the signed Standard Occupation Agreement, whether is a residential tenancies agreement for the purposes of the RT Act, or otherwise a sham. Whether the applicant otherwise occupied the Premises pursuant to a residential tenancy agreement, or whether the applicant occupied the premises pursuant to an agreement under which he boarded or lodged with the respondent. Subject to my consideration of (1), (2) and (3), if the applicant occupied the premises pursuant to a residential tenancy agreement, whether the respondent breached the RT Act or the agreement, and if so, the relief, if any, that should be ordered.

JURISDICTION Section 11 of the RT Act provides the Tribunal power to make an order declaring that a specified agreement is, or is not, a residential tenancy agreement to which the RT Act applies, or that specified premises are, or are not, premises to which the RT Act applies. Section 190 of the RT Act empowers a tenant to apply to the Tribunal for an order in relation to a breach of a residential tenancy agreement. Sections 187 (1) of the RT Act provides that the Tribunal may, on application by a tenant, make orders including for the payment of an amount of money or an order as to compensation. I am satisfied that the Tribunal has jurisdiction to hear and determine the application. I will however firstly determine whether the applicant occupied the premises pursuant to an agreement under which he boarded or lodged with the respondent, because, if he didn’t, the Tribunal does not have jurisdiction to hear and determine the claims that are made for breach of the RT Act.

CONSIDERATION OF WHETHER THE APPLICANT OCCUPIED THE PREMSIES PURSUANT TO A RESIDENTIAL TENANCY AGREEMENT

Background facts

A Notice of Determination of Development Application for the Property dated 31 August 2021 from City of Parramatta Council approved “alterations and additions to convert an existing heritage listed building to establish a boarding house with a total of 9 rooms and 1 on site car space”. The Property: has 7 or 8 studio units that are accessed by an electric code, button locking system; and a shared common area and laundry for the occupants. On 9 October 2023, the Agent emailed the applicant’s wife with subject “APPROVAL – XXX St, Parramatta, NSW 2150 (9 October email). The 9 October email stated: Congratulations! Your tenancy application for the above property has been approved with the following conditions: Lease to commence from 13/10/23 for a fixed term period 52 Weeks, at a Fortnightly rental rate of \$840.00 on Direct Debit. Options for lease signing

1. Lease to be signed electronically...

2. lease to be signed on 13/10/23... .. Item Amount Rent \$840.00 Bond \$1,680.00 Total \$2520 Less Deposit \$420 Please pay now Balance Due \$2100 Also attached you will find a body of the Occupancy Agreement (draft version this is not an actual lease agreement), Additional Terms and Special Conditions that you can read through prior to coming to our office for lease signing.” The email attached a PDF copy of the proposed Standard occupancy Agreement. Between 9 and 10 October 2025, the applicant paid a deposit of \$420.00. On about 11 or 13 October 2023, the applicant and the Agent signed the Standard Occupancy Agreement dated 11/10/2023. As noted above, it was titled: STANDARD OCCUPANCY AGREEMENT For general boarding houses under the Boarding Houses Act 2012 The Standard Occupancy Agreement provided, amongst other matters, as follows: Proprietor Sid Halabi Resident Younica Younis & Fahad Ullah No: of Occupants 2 Commencement date 13/10/23 End date 10/10/24 Occupancy fee \$840 To be paid W2 AGREEMENT TERMS Condition of the premises (Refer to occupancy principle 1- See annexure 1) The proprietor agrees to provide and maintain the premises so that they are in a reasonable state of repair, a reasonably clean and reasonably secure. House Rules (Refer to occupancy principle 2) The resident agrees to comply with the House Rules of the boarding house, which are listed on the attached “Statement of House Rules”. House Rules may not be inconsistent with the Occupancy Principles stated in an Annexure 1 and are not enforceable if they are inconsistent. Quiet Enjoyment (Refer to occupancy principle 2) The Proprietor agrees to take all reasonable steps to enable the residents quiet enjoyment of their premises. Inspection and Access (Refer to occupancy principle 5) My inspect boarding house common areas at any reasonable time. Repairs, cleaning and maintenance of common areas can be carried out at reasonable times The proprietor may only enter the resident’s room, at a reasonable time, with reasonable notice and on reasonable grounds. Agreed access and notice periods are set out below... Reason For Access Suggested Notice Period examples of reasonable notice periods – this notice period applies in the next column is left blank Notice is to be given under this occupancy agreement (if different) In an emergency, or to carry out emergency repairs or inspections Immediate access Immediate access To clean the Premises 24 hours To carry out repairs 24 hours To show the room to a prospective resident 24 hours To carry out inspections 48 hours 24 hours Security Deposit (Refer to occupancy principle 5) A security deposit of \$840.00 is payable to the proprietor, this amount being no more than the sum of two (2) weeks occupancy fee. A Cleaning deposit of \$840.00 is payable to the proprietor, this amount being no more than the sum of two (2) weeks occupancy fee. Termination (Refer to occupancy principles 9 and 10) The resident is entitled to know why and how this Occupancy Agreement may be terminated, and how much notice will be given before termination. The resident may not be evicted without reasonable written notice from the proprietor. ... This agreement can also be terminated by the resident by written notice given it to the proprietor. Agreed reasons for termination and notice periods are set out below. If the third column is left blank, the suggested notice periods set out in the second column will apply ... (NOTE: Any term of this Agreement is not enforceable if it is inconsistent with the Occupancy Principles set out in Schedule 1 of the Boarding Houses Act 2012. Occupancy principals are attached at Annexure1.) The notice periods for termination

by the respondent as the proprietor ranged from: immediate for violence, threat of violence, wilful damage to property or using the Premises for an illegal purpose; to 1 day for continued and serious breach of the Agreement, or the house rules following a warning letter; 2 days for non-payment of the occupancy fee; 1 week for continued and minor breach of the Agreement, or the house rules following a warning letter; and 2 weeks for any other reason, including vacant possession required and “no grounds” termination. The notice periods for termination by the applicant ranged from: 1 day for serious breach of the Agreement by the proprietor; to 1 week for minor breach by the proprietor; and 3 weeks for a no grounds / any other reason termination. Attached to the Standard Occupancy Agreement were: Annexure 1 “Occupancy Principles”, Annexure 2 “SCHEDULE OF ADDITIONAL CHARGES”; Additional Terms and Conditions; and A Fair Trading “Living in a Boarding House” information sheet. Each page of the Standard Occupancy Agreement, Annexures 1 and 2, the Additional Terms and Conditions and the Fair Trading “Living in a Boarding house” information sheet were signed by the applicant and on behalf of the respondent. Following the execution of the Standard Occupancy Agreement, the applicant was provided the codes required to enter the Premises and moved into the Premises on about 13 October 2024. The respondent provided limited evidence as to the Premises, with the evidence as to a description of the Premises primarily coming from the applicant, the condition reports provided by the respondent or the Standard Occupancy Agreement. The Premises comprise a one bedroom (with a built in wardrobe) studio unit with a fridge and microwave oven. The Premises and the other units could be accessed by secure password locks. The main front and rear entrances of the Property had shared password locks. The Property included a common area and laundry facility that was shared by all occupants of the Property. Inspection and maintenance notices were typically communicated by email at least 7 days in advance. Although, not relevant to the question of whether there was a residential tenancy agreement, the applicant says that he started experiencing nasal congestion and allergy symptoms, saw a doctor on 29 January 2024 for persistent wheezing, nasal congestion, difficulty breathing, and throat irritation which the applicant says was caused by mould in the premises, emailed the Agent on 16 June 2024 “about an urgent issue related to mould” and “requested an inspection and remediation of the mould”. Thereafter the applicant and the Agent communicated by email regarding the asserted mould, and in June 2024 the applicant also raised an electrical issue with the Agent and thereafter communicated with the Agent with respect to the electrical issue and an electricity bill for \$357.00 that the applicant thought was too high. Although also not relevant to a consideration of whether the relevant agreement was a residential tenancy agreement, the applicant says that on 3 June 2024, someone knocked on the door while the applicant was with his wife, that because they were not expecting anyone they did not answer, and that a person entered without their permission using the door codes with the applicant and his wife being “naked”, and that the person telephoned the “landlord”, and informed the applicant he was from the bank and was there for an inspection. On 25 August 2024, the applicant issued a letter signed by the applicant and his wife to the Agent stating: Re: Termination of tenancy agreement for XXXX, Parramatta NSW 2150 I am writing to formally

notify you of the termination of the tenancy agreement for the property located at XXXX. This termination is due to breaches of the Residential Tenancies Act 2010, specifically concerning sections 63 and section 50. ... Please consider this letter as official notice that I will be vacating the property and providing vacant possession on 1st September 2024. (the Termination letter) On 28 August 2025, the Agent emailed a letter to the applicant that referred to the Termination letter and stated: As you are vacating the premises prior to the expiration of the lease, you are liable for the following break lease fee in addition to rent monies owed as applicable and in line with your lease agreement: 4 weeks rent if less than 24% of the fixed term has expired 3 weeks rent if 25% or more but less than 50% of the fixed term has expired; 2 weeks rent if 50% or more but less than 75% of the fixed term has expired 1 week's rent if 75% or more of the fixed term has expired Rent up to and including the vacate date ... The Application was filed with the Tribunal on 7 September 2024 On 20 September 2024, the Agent emailed the applicant attaching ingoing and outgoing property inspection reports and identifying costs being claimed by the respondent. The applicant's submissions In support of his position, the applicant submits to the effect that: The 9 October 2023 email (AB2 p 51), before the signing of the "Standard Occupancy Agreement", the respondent's property managers ledger "tenant history" for the applicant (AB2 p 101) and "Final Inspection Guide" (AB2 p 103), 26 August 2024 email (AB2 p 105) and 3 September 2024 referred to or identified: the proprietor as the "landlord" the applicant and his wife as "tenants"; a lease agreement; amounts payable as "rent"; payment of a break lease fee with amounts consistent with the RL Act; a requirement for the applicant to keep the Premises "clean and tidy" and return them to the state in which they were received upon vacation; a bond of 4 weeks rent of \$1680.00 being payable, with such a bond being impermissible if the BH Act applied. Consistent with s 10 of the RT Act the agreement identified the premises to be leased, the parties, the start date and the rent payable. That the specific form of an agreement does not determine the nature of the parties' legal interests in the contract. That, relying on a decision of the former Residential Tenancy Tribunal: *Kelly & Griffiths v Bailey* [2000] NSWRT 25 (3 March 2000) that: the registration of a property as a boarding house under planning law does not automatically make the occupants boarders when interpreting a contract, an explicit statement by the parties as to the nature of their relationship is important but not determinative; the interpretation should ultimately reflect the overall intention of the agreement, following established construction rules. The Property: had seven units each with a private bathroom with the amenities including a fridge and a microwave; could be accessed through the front and rear doors with individual unit entrances secured by password lock, and that while the main entrance passwords were shared amongst all the residents, individual bedroom doors had unique passwords for privacy; and included a common area and laundry facility for all tenants. No owners or caretakers lived on site at the Property. Mindful that although s 8 (1) (c) of the RT Act states that the Act does not cover "an agreement where an individual boards or lodges with somebody", the RT Act does not define what is meant by "a person who boards or lodges with another person" so that the meaning of somebody who boards or lodges with another person must be determined by case law. In a residential tenancy matter, *Ellis v City Women's*

Hostel (RTT 974/022789, 15 June 1998) 7, the Tribunal member stated: “I am of the view that a “lodger” ... is a person who has been granted the right, for value, to occupy... premises... for their use as a residence, ...in circumstances where the owner remains in position and occupation (either personally or by his servant), and retains the character of master of the house and with the owner exercising control and dominion over the whole.” That mindful of the introduction of the Boarding Houses Act 2012 (NSW) (BH Act): The BH Act applies to occupancy agreements, but occupancy agreements do not include residential tenancy agreements, see section 27 of the BH Act; and That, referring to *Pupuke v Stratford* [2016] NSWCATAP 7, the provisions of the BH Act do not author the test in *Pryor v Costa* that for an occupant to be a border or lodger, the owner “must remain in possession and retain his quality as master of the house, reserving to himself the general control and dominion over the whole, although he may have agreed to give to the other exclusive enjoyment of the occupation or part”. Respondent’s Submissions In support of its position, the respondent submits to the effect that: The Property was registered as a boarding house. The 9 October email attached a PDF “Occupancy Agreement” headed “Standard Occupancy Agreement for general boarding houses under the Boarding Houses Act 2012”. The applicant had time to read through the “Standard occupancy Agreement” before signing it. The applicant signed the Standard Occupancy Agreement, and by doing so is bound by its terms. The applicant was clearly on notice that he was signing an Occupancy Agreement under the BH Act. The Standard Occupancy Agreement which is signed by the applicant details the rights and obligations of the parties refers to: it being under the BH Act; it being between the Proprietor and a Resident; the payment of an Occupancy fee; it being made up of “key occupancy principles”, including inspection and access pursuant to occupancy principle 6, and termination pursuant to occupancy principles 9 and 10. notice periods with respect to access and inspections in accordance with the occupancy principles; the payment of a security deposit of \$840.00 and a cleaning deposit of \$840.00; notice periods for termination in accordance with the occupancy principals; The definition of “Boarding House” for the purposes of land tax Exemptions, being premises that are not used and occupied by persons who are subject to a Residential tenancy Agreement under the [RT Act]. Two separate agreements cannot exist. Referring to an unpublished decision of the Tribunal (*Quaife v Almora Estate Pty Ltd* in matter 2024 / 389738) that the Tribunal determined that the applicant boarded or lodged under an agreement in the same form as is being considered here. Residential Tenancies Act, Boarding Houses Act and relevant authorities Section 6 of the RT Act provides that it: ... applies to residential tenancy agreements in respect of residential premises... Section 13 of the RT Act defines a ‘residential tenancy agreement’: Agreements that are residential tenancy agreements

- (1) A residential tenancy agreement is an agreement under which a person grants to another person for value a right of occupation of residential premises for the purpose of use as a residence.

- (2) A residential tenancy agreement may be express or implied and may be oral or in writing, or partly oral and partly in writing.
- (3) An agreement may be a residential tenancy agreement for the purposes of this Act even though—
 - (a) it does not grant a right of exclusive occupation, or
 - (b) it grants the right to occupy residential premises together with the letting of goods or the provision of services or facilities. Note. See section 8 for agreements that are not covered by this Act. Section 7 sets out premises not covered by this Act. Section 3 of the RT Act defines residential premises to mean: ... any premises or part of premises (including any land occupied with the premises) used or intended to be used as a residence. Section 7 of the RT Act identifies a range of premises to which the Act does not apply. None of those premises apply here. Section 8 of the RT Act then identifies agreements to which the RT Act does not apply, including: an agreement under which a person boards or lodges with another person. The phrase “a person who boards or lodges with another person” is not defined in the RT Act. In *Pryor v Costa & Maroulis (tenancy)* [2005] NSWCTT 555 at [32]- [34] (Pryor) the Tribunal, in considering the meaning of “a person who boards or lodges” under the earlier Residential Tenancies Act, 1987 said at [32] to [34], following a review of previous authorities:
- 32. The term lodger is not defined in the 1987 Act and its meaning is to be derived from case law.
- 33. In *Ellis v City Woman’s Hostel* (RTT 97/022789, 15 June 1998) Member Hopkins brought together the decisions to that time to articulate the fundamental elements of what makes an occupier of premises a lodger by stating: “.. I am of the view that a “lodger” ... is a person who has been granted the right, for value, to occupy ... premises ... for the purpose of their use as a residence, ... in circumstances where the owner remains in possession and occupation (either personally or by his servant), and retains the character of master of the house and with the owner exercising control and dominion over the whole.” By so viewing a lodger, Member Hopkins was following the previous decision of Chairperson Rustin in *Walker v Puvesi* (RTT 86/6) who stated, after examining the relevant cases spanning over a century, that in order for an occupier to be seen as a lodger, the distinguishing factor is the nature of the owner’s occupation: ... the owner ... must remain in possession and retain his quality as master of the house, reserving to himself the general control and dominion over the whole, although he may have agreed to give to the other exclusive enjoyment of the occupation of part.
- 34. In summary, the occupier must have been granted, in consideration for value, the right to occupy premises, part of which may be exclusive, while the owner still retains, personally or by a servant, power to reprove all occupants who do not submit to the owner’s will with regard to any matter touching upon the premises. The owner must remain the constant, conspicuous and prevailing authority over the premises on all matters. Following Pryor, the

BH Act was introduced in 2012. The object of the BH Act is specified s 3 to be to establish an appropriate regulatory framework for the delivery of quality services to residents of registrable boarding houses, and for the promotion and protection of the wellbeing of such residents, including by providing for a registration system for registrable boarding houses, and providing for occupancy principles to be observed in the provision of accommodation to residents of registrable boarding houses and for mechanisms for the enforcement of those principles. Section 4 of the BH Act defines: Boarding premises to mean: premises (or a complex of premises) that--

- (a) are wholly or partly a boarding house, rooming or common lodgings house, hostel or let in lodgings, and
- (b) provide boarders or lodgers with a principal place of residence, and
- (c) may have shared facilities (such as a communal living room, bathroom, kitchen or laundry) or services that are provided to boarders or lodgers by or on behalf of the proprietor, or both, and
- (d) have rooms (some or all of which may have private kitchen and bathroom facilities) that accommodate one or more boarders or lodgers. Proprietor, in relation to premises, means:
 - (a) in the case of premises that are leased—a tenant or sub-tenant who is entitled to immediate possession of the premises, or
 - (b) in any other case—an owner of the premises. Part 3 of the BH Act is concerned with occupancy agreements and principles applicable to registerable boarding houses. Section 27 is an interpretive provision which relevantly provides:
 - (1) In this Part and Schedule 1: occupancy agreement, in relation to a registrable boarding house, means a written or unwritten agreement:
 - (a) that is between a proprietor of the boarding house (or a person acting on behalf of the proprietor) and a resident of the house (or a person acting as an authorised representative of the resident), and
 - (b) under which the resident is granted the right to occupy, for a fee or reward, one or more rooms in the boarding house as a resident of the house, but does not include a rental agreement between a proprietor and resident of a registrable boarding house (or any persons acting on their behalf). occupancy fee means an amount payable by or for a resident of a registrable boarding house for the right to occupy one or more rooms in the boarding house as a resident of the house during the term of an occupancy agreement. rental agreement means:
 - (a) a residential tenancy agreement within the meaning of the Residential Tenancies Act 2010, or

- (b) a lease to which the Landlord and Tenant (Amendment) Act 1948 applies The effect of s 27 is that the BH applies to occupancy agreements, but occupancy agreements do not include residential tenancy agreements under the RT Act. *Pupuke v Stratford* [2016] NSWCATAP 7 (7 January 2016) (Pupuke) at [27]. Section 30 makes provision with respect to occupancy principles. It states:
- (1) The occupancy principles in relation to registrable boarding houses are the principles set out in Schedule 1.
 - (2) The occupancy principles apply for the purposes of this Division only in relation to residents of registrable boarding houses under occupancy Note—The definition of occupancy agreement in section 27 (1) excludes any rental agreement between a proprietor and resident of a registrable boarding house (or any persons acting on their behalf). Accordingly, the occupancy principles do not apply in relation to a person who is entitled to reside in a registrable boarding house under a rental agreement. There are 12 occupancy principles set out in Schedule 1, the first five of which provide: 1 State of premises A resident is entitled to live in premises that are:
 - (a) reasonably clean, and
 - (b) in a reasonable state of repair, and
 - (c) reasonably secure. 2 Rules of registrable boarding house A resident is entitled to know the rules of the registrable boarding house before moving into the boarding house. 3 Penalties for breaches of agreement or house rules prohibited A resident may not be required to pay a penalty for a breach of the occupancy agreement or the rules of the registrable boarding house. 4 Quiet enjoyment of premises A resident is entitled to quiet enjoyment of the premises. 5 Inspections and repairs A proprietor is entitled to enter the premises at a reasonable time on reasonable grounds to carry out inspections or repairs and for other reasonable purposes. Occupancy principle 8 is concerned with security deposits which are not to exceed two weeks occupancy fee. Occupancy Principles 9 and 10 concern Information about occupancy Termination and Notice of Eviction. Mindful that the BH Act was introduced after *Pryor*, the Appeal Panel, said in *Pupuke* at [23] and [24]:
23. However, in our view the provisions of the BH Act do not alter the test set out in *Pryor*, namely for an occupant to be a boarder or lodger the owner “must remain in possession and retain his quality as master of the house, reserving to himself the general control and dominion over the whole, although he may have agreed to give to the other exclusive enjoyment of the occupation of part”.
24. Consequently, it is necessary for the Appeal Panel to consider whether or not the Agreement constitutes a residential tenancy agreement within the meaning of the RT Act or whether it merely grants to the appellants a right to occupy the premises as boarders or lodgers. In *Ballesfin v Jung & SJ Super Holdings Pty Ltd* [2022] NSWCATAP 50 (*Ballesfin*) at [40], the Appeal Panel after repeating relevant section of the BH Act said:

40. ... What is clear from the definition of occupancy agreement is that that it does not include a residential tenancy agreement within the meaning of the RTA. Whether an agreement falls within either of those definitions is [a] matter of judgement in the light of the circumstances, which includes the terms of the agreement. While the conclusion as to which applies is one of law, it may well involve questions of fact that have to be decided before a legal conclusion can be reached. In *Hong Kong Pty Ltd atf the Hong Kong Trust v Hamilton* [2022] NSWCATP 321, with respect to a document headed “Share Accommodation Agreement” in relation to occupancy of rooms in what had once been a backpackers property, the appeal panel said at [52] that the starting point is the agreement itself: The starting point is the Agreement itself, which provided that it was a “Share Accommodation Agreement”. As we have noted above, the Agreement: provided that the appellant could inspect the house common areas at any reasonable time; provided that Mr Hamilton agreed to comply with “House Rules”. referred to resolving disputes in accordance with the Occupancy Principles. This we find is a reference to Occupancy Principles set referred to in s 30 and Sch 1 of the Boarding House Act 2012 (NSW). In *Shapkin v The University of Sydney* [2023] NSWCATAP 2 (9 January 2023) (Shapkin), the Appeal Panel, after a detailed consideration of s 8(1) of the BH Act and authorities relevant to whether an occupant boards or lodges, at [90], summarised the principles in relation to the construction and application of s 8(1)(c) of the RT Act as follows:
- (1) For an occupant to be a boarder or lodger the owner must remain in possession and retain his quality as “master of the house”, reserving to him or herself the general control and dominion over the whole, although the owner may have agreed to give to the other exclusive enjoyment of the occupation of part: *Pupuke* at [23].
 - (2) The lack of provision of food or meals is not determinative of the issue although a boarder, as opposed to a lodger, is more likely to be provided with food or meals as part of the living arrangement.
 - (3) Labels are not determinative of, nor relevant to, the process of characterising the agreement. Determination of the character of the parties’ relationship requires an evaluation of the parties’ rights and obligations: *Personnel* at [63] - [64].
 - (4) A physical presence is not a requirement of a lodging arrangement. It is the legal right to possession, not the physical fact of exclusive “possession” or occupation, that is decisive: *Swan v Uecker* [2016] VCAT 483; (2016) 50 VR 74 at [36] (Croft J quoting McHugh J in *Western Australia v Ward* (2002) 213 CLR 1 at [502] – [504]).
 - (5) If the parties’ rights and duties are comprehensively committed to a written contract, the legal rights and obligations established by the written contract will determine the character of the relationship between the parties: *Personnel* at [43]-[44]. The exception to this will be where the validity of the written contract is challenged as a sham, or where there is an assertion that the terms of the contract have been subsequently varied or waived or are the subject of an estoppel: *Personnel* at [43].

- (6) An agreement may be a lodger arrangement even if the lodger has exclusive enjoyment over part of the premises. What is relevant is whether the owner reserves to him or herself the “general control and dominion” over the whole of the premises, even if the other person has exclusive enjoyment of part of the premises: *Pupuke* at [23]. “Personnel” is a reference to *Construction Forestry Maritime Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 27 CLR 165; [2022] HCA 1. On appeal, in *Shapkin v The University of Sydney* [2024] NSWSC 1091 (27 August 2024), Campbell J agreed with the Appeal Panel in its consideration of s 8(1)(c) of the RT Act, concluding at [43]: The factors considered by the Appeal Panel referable to the terms of the residential agreement, amply supported the Appeal Panel’s conclusion that the agreement was one under which Mr Shapkin lodged with the University. The Appeal Panel’s reasons were comprehensive and carefully crafted in an appropriate way and I am not persuaded that they fell into an error of law in arriving at their conclusion. I am not satisfied their decision is otherwise affected by a question of law. I would dismiss the s 8(1) (c) grounds. An application for leave to appeal Campbell J’s Judgment was refused. *Shapkin v The University of Sydney* [2025] NSWCA 100.

DETERMINATION

Because: the 9 October email stated that a tenancy application had been approved and attached the Standard Occupancy Agreement which was still to be signed; that the codes to the door lock to the Premises were not to be provided until after the Standard Occupancy Agreement had been signed; it was the attached Standard Occupancy Agreement that clearly set out the terms and conditions of the applicants occupation of the Premises; the applicant had the Standard Occupancy Agreement before signing it; the Standard Occupancy Agreement was clearly marked “.... For general boarding houses under the [BH Act]”; the Standard Occupancy Agreement and the attached Annexures 1 and 2, Additional Terms and Conditions and Fair Trading “Living in a Boarding House” information sheet were all signed by the applicant; in my view, a plain reading of the Standard Occupancy Agreement would have alerted the reader that it was issued as an occupancy agreement under the BH Act and that it contained the terms and conditions by which the respondent as proprietor would be providing accommodation to the applicant. I am not satisfied that: a combination of a conversations before the 9 October email, the 9 October email and the payment of a deposit of \$420.00 gave rises to an agreement for the applicant to occupy the Premises; or that the Standard Occupancy Agreement was a sham; or to the extent that it is alleged, that the applicant was somehow mislead into thinking that he was signing or entering a residential tenancy agreement. It follows that the relevant agreement is the Standard Occupation Agreement dated 11 October 2023. In considering, whether the applicant lodged or boarded at the Premises: The parties subjective belief as to whether the Standard Occupation Agreement was in fact a residential tenancy agreement or whether the applicant otherwise occupied the Premises pursuant to a residential tenancy agreement or lodged or boarded there is not relevant. The content of the parties post contract communications following the applicants Termination letter are not relevant. Labels are not determinative of, nor relevant to, the process of characterising the agreement. Determination of the character of the parties’ relationship

requires an evaluation of the parties' rights and obligations. If the parties' rights and duties are comprehensively committed to a written contract (which they are), having found that I am not satisfied that it is a sham, then the legal rights and obligations established by the written contract will determine the character of the relationship between the parties. A physical presence is not a requirement of a lodging arrangement. It is the legal right to possession, not the physical fact of exclusive "possession" or occupation, which is decisive. The lack of provision of food or meals is not determinative of the issue although a boarder, as opposed to a lodger, is more likely to be provided with food or meals as part of the living arrangement. Mindful that the parties are not legally represented: I do not place any weight on the consideration of the facts and the relevant agreement in the unpublished decision of *Quaife v Almora Estate Pty Ltd*; but consider the question of whether the Standard Occupancy Agreement was an agreement under which the applicant boarded or lodged at the Premises, by applying the principles identified by the Appeal Panel to the Standard Occupancy Agreement and the facts of this case. Relevant to my consideration of the relationship and the agreement under which the applicant occupied the Premises: The Property has development approval as a boarding house. I am satisfied that the Premises are wholly or partly a boarding house, provide boarders or lodgers with a principal place of residence, and have shared (common area and laundry) facilities, and have rooms that accommodate one or more boarders or lodgers. I am therefore satisfied that the Property is a Boarding Premise within the meaning of the BH Act. The Standard Occupancy Agreement; Is titled "Standard Occupancy Agreement for general boarding houses under the BH Act" and was, on its face, consistent with the standard form occupancy agreement provided for in the BH Act; Identifies the respondent as "Proprietor"; Identifies the applicant as "Resident"; Refers to the amounts payable as an "occupancy fee"; Provides that the respondent (as the Proprietor) may inspect the Properties' common areas and may perform repairs, cleaning and maintenance of the common areas at any reasonable time and enter the Premises at reasonable times on reasonable notice Contains terms in accordance with Occupancy Principles 1, 2, 4, 5, 6, 7, 8, 9 and 10, 11 and 12, including: The resident's agreement to the house rules, although I note that a copy of the referred to house rules was not put into evidence; Notice for inspection requirements ranging from 24 to 48 hours; The time for notice of termination ranging from immediately to 2 weeks where vacant possession is required and a "no grounds termination"; The requirement of a security deposit of \$840.00 and a cleaning deposit of \$840.00; Attached a copy of the Occupancy Principals as Annexure 1, a Schedule of Additional Charges (in addition to the Occupancy Fee) as Annexure 2, Additional Terms and Conditions 1 which included terms and conditions and a fair trading "Living in a boarding house" all of which were signed by the applicant and for the respondent; Contained terms in respect of the payment of a security deposit, the form of a notice of termination, the time for the giving of notices of termination, access to the Premises, occupation fee increases which were all inconsistent with an agreement under the RT Act. The respondent Proprietor's entitlement to inspect and perform repairs to the common areas at any reasonable time and to enter the Premises at reasonable times on reasonable notice are consistent with the respondent having the legal right to possession, and there is nothing about the relationship that indicates to me that the respondent did not have the legal right to possession even if he did not have the physical fact of exclusive "possession" or occupation. The respondent

therefore had general control and dominion over the Property. I am therefore satisfied and find that: The parties' rights and duties are comprehensively set out in the written Standard Occupancy Agreement and the attachments to it. Following Shapkin, having rejected the applicant's submission that the Standard occupancy Agreement is sham, it follows the legal rights and obligations established by the written contract determine the character of the relationship between the parties. In my view each of the above matters is consistent with and points to the applicant occupying the Premises pursuant to an agreement under which he boarded or lodged with the respondent proprietor and there is nothing about the relationship that in my view is inconsistent with such an arrangement. I therefore find that the applicant occupied the Premises pursuant to an agreement under which he boarded or lodged with the respondent and that the relevant agreement, being the Standard Occupancy Agreement signed by the parties is not a residential tenancy agreement. I therefore declare that pursuant to s11 of the RT Act that the Standard Occupancy Agreement dated 11 October 2023 is not a residential tenancy agreement. It follows that the application will be dismissed because it seeks relief under the RT Act and because the RTA Act does not apply, the Tribunal does not have jurisdiction to determine the application.

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 DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated. Decision last updated: 27 November 2025

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Prepared on 29 October 2026 · Esheria