Civil and Administrative Tribunal
New South Wales

Medium Neutral Citation:	**Bhandari v Laming [2015] NSWCATAP 224**
Hearing dates:	18 September 2015
Date of orders:	16 October 2015
Decision date:	16 October 2015
Jurisdiction:	Appeal Panel
Before:	J Redfern, Principal Member D Goldstein, Senior Member
Decision:	Appeal dismissed
Catchwords:	APPEAL - Civil and Administrative Tribunal (NSW) – residential tenancy dispute – residential premises fit for habitation – nature of obligation – defects outside control of the landlord – whether breach – mitigation of loss
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Residential Tenancies Act 2010 (NSW)
Cases Cited:	Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27 Banco de Portugal v Waterlow and Sons [1932] AC 452 Bannister v Cheung [2014] NSWCATCD 105 Collins v Urban [2014] NSWCATAP 17 Fordham v Davies [2014] NSWCATAP 60 Karacominakis v Big Country Developments Pty Ltd (2000) NSWCA 313 Kostas v HIA Insurance Services Pty Ltd (2010) 241 CLR 390 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 Summers v Salford Corporation [1943] AC 283 TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd (1963) 180 CLR 130

Texts Cited:	Anforth, Christenson & Brentwood, Residential Tenancies Law & Practice NSW 6th Ed
Category:	Principal judgment
Parties:	Dr Raj Bhandari (Appellant) Ms Lynette Laming (Respondent)
Representation:	B Morris, agent (Appellant) L Laming (self)
File Number(s):	AP 15/33977
Publication restriction:	Nil
Decision under appeal	Civil and Administrative Tribunal
Court or tribunal:	
Jurisdiction:	Consumer and Commercial Division
Citation:	NA
Date of Decision:	5 May 2015
Before:	S De Jersey, Member
File Number(s):	RT 15/13015

REASONS FOR DECISION

Introduction

1 The respondent, Ms Lynette Laming, was a tenant of rental premises at Potts Point. She made an application to the Consumer and Commercial Division of the Tribunal on 15 March 2015 for orders that the landlord, Dr Raj Bhandari, who is the appellant, carry out certain repairs to the premises. She also sought an order that all or part of the rent be paid to the Tribunal until the work had been completed by Dr Bhandari.

2 The repairs sought related to the ingress of smoke into Ms Laming's apartment from the apartment below. There is no dispute that this was an ongoing issue, which eventually led to Ms Laming vacating the premises on 15 May 2015.

3 On 5 May 2015, the Tribunal ordered, by consent, that the residential tenancy agreement between Dr Bhandari and Mr Laming be terminated immediately and that possession be suspended until 15 May 2015. The Tribunal also ordered, after a contested hearing, that Dr Bhandari pay Ms Laming on before 12 May 2015 $11,681 as compensation for breach of the residential tenancy agreement.

4 Dr Bhandari lodged an internal appeal with the Tribunal on 19 May 2015 challenging

the compensation order. He also applied for a stay of the order. An 'interim' stay was granted until the call over and directions were made about the filing and service of submissions and material in support of the stay. The stay was opposed by Ms Laming. The application was determined on 16 July 2015. Continuation of the stay was refused and the appeal was listed for hearing, with directions about the exchange of submissions and evidence.

5 Dr Bhandari was represented in the proceedings before the Tribunal at first instance and the internal appeal by his managing agents. Ms Laming represented herself.

6 The Appeal Panel dismissed the appeal on the day of the hearing. Our reasons follow.

Background to the dispute and decision at first instance

7 The originating application was lodged by Ms Laming under the *Residential Tenancies Act 2010* (NSW) (the RTA). The RTA sets out the obligations between a landlord and tenant in relation to residential tenancies. Relevantly, the RTA provides for statutory obligations which are incorporated into the residential tenancy agreement. The RTA also provides for remedies for breach of a residential tenancy agreement, including rectification orders and compensation.

8 By the time of the hearing there was agreement between the parties that Ms Laming would be allowed to vacate the premises by mid May 2015 without the penalty of a break fee. The issue in dispute, as recorded in the reasons for decision, was whether Ms Laming should be awarded compensation for the alleged breach of the residential tenancy agreement by Dr Bhandari in failing to provide premises that were fit for habitation, in breach of s 52 of the RTA. According to the reasons for decision, Ms Laming made a claim for compensation of $16,950.97, comprising rent reduction, the costs of packing and an agreed refund for blinds.

9 Ms Laming and the managing agent for Dr Bhandari gave evidence and both parties relied on a bundle of documents. The Tribunal recorded its findings, much of which were not in contest. The key issues in dispute in the proceedings at first instance and in this appeal were whether there was a breach of section 52 of the RTA by Dr Bhandari and if so, was the compensation awarded appropriate.

10 Ms Laming moved into the two-bedroom apartment at Potts Point with her 13-year-old daughter in early December 2014. Soon after moving into the apartment, a condition report was completed. It was noted in the report as follows:

> smell throughout apartment – possibly smoke residue – hopefully will improve when blinds are replaced.

11 It is clear from the documents provided by Dr Bhandari in support of the appeal, being the documents that were also provided at first instance, that the smoke ingress problem did not improve and the issue of the tobacco smell was raised by Ms Laming on 11 and

18 December 2014. Ms Laming attempted to deal directly with the manager of the building but also raised the matter with the managing agent for Dr Bhandari from at least 29 January 2015. In an email dated 29 January 2015 to the building management, which was copied in to the agent, Ms Laming stated as follows:

> As per discussions, prior to me occupying and again today, since taking possession of the above apartment in early December there has been an intermittent very strong smell of toxic cigarette smoke permeating into apartment 401. I'm not sure how it is able to enter into our apartment, but it is most prominent in my kitchen area at no given time each day, just off on and last for quiet (sic) a while once it occurs.
>
> At times we are unable to even be in the apartment and this 3rd party smoke is becoming unbearable to live with, not to mention an extremely health hazard to myself, daughter and guests. I personally [am] also starting to develop allergic reactions to these omissions.
>
> ….
>
> I suggest that urgent action must now be taken. I realise you cannot stop someone from smoking within their own lot, but you have a duty to stop dangerous chemical from common areas permeating into another lot. We now require this dangerous health issue to be rectified immediately or the health Department may need to be notified.

12 There is no dispute that the smoke was emanating from the apartment below where an elderly, sick occupant, who was chain smoking, resided. It was noted in correspondence that owner of the apartment below was apparently reluctant to evict the tenant or stop her from smoking given her ill health. Smoking was allowed in the apartments and the Owners Corporation declined to intervene. It was not accepted that this was a common property fault and lawyers for the Owners Corporation suggested that Dr Bhandari commence proceedings against the owners of the apartment below.

13 There is evidence that Dr Bhandari's agent corresponded with the managers for the building and the Owners Corporation following the email of 29 January 2015 but there was apparently no satisfactory resolution of the problem and by 30 March 2015, in advance of the first Tribunal hearing, the agent advised Ms Laming that Dr Bhandari would allow her to break the lease without penalty. Ms Laming was urged to find alternative accommodation although it was noted that the agent did not have any appropriate alternative accommodation at that time. It was further noted that Ms Laming recently had a major back operation and that the location of the apartment was "essential for her at this time". According to an email from the managing agent to the building manager, Ms Laming was reluctant to move at that moment and the agent was on notice that Ms Laming was proposing to proceed with a large compensation claim.

14 The Tribunal accepted that there was a problem with the structure of the building which had led to the smoke ingress into Ms Laming's apartment. The Tribunal also accepted that Ms Laming had done everything she could, except move, to alleviate the problem.

15 Relevantly, the Tribunal found as follows:

> Although I accept the submission of the agent that smoking is not illegal, and the landlord has almost no option to try and fix the problem, because it is a strata issue, the fact remains that most people accept that tobacco smoke is a health hazard and most people especially if they don't smoke, would be concerned about their health if they were taking in smoke fumes on a regular basis. I am satisfied that most afternoons and evenings the leased premises were affected by smoke from downstairs and to quite a considerable extent. I am satisfied that somehow there is a mechanical problem in the internal ventilation passages of the strata that is allowing the smoke to pass from the downstairs unit into the inside areas of the upstairs unit through those passages. Obviously it is going to be a complex problem to rectify and probably expensive. However, this does not lessen the landlord's responsibility to provide premises which are fit for habitation (section 52(1) of the Residential Tenancies Act).
>
> Based on the evidence I am satisfied that the premises were not fit for habitation. It is unacceptable for a tenant and a child to live in an environment which smells of tobacco smoke, and particularly where the smoke is so strong it is causing the tenant and her child to feel unwell. I accept the tenant as a witness who was not exaggerating the severity of the smell to improve the prospects of success of her claim. I accept that this was a unit she would have much rather lived in, than had to leave, and this explains all the steps she took prior to bringing this application. I note that the application originally sought repairs, which indicated she had not brought the application to terminate or seek compensation. Her desire was clearly to try and stay there if she could.
>
> ……..
>
> In summary I am satisfied that the landlord has breached his obligation under section 52(1) of the Residential Tenancies Act to provide the premises fit for habitation by the tenant. Although this was of no fault of his own, he still has the responsibility to undertake the necessary steps to ensure that he can meet his obligations under the Act. This could mean a claim for example against the downstairs occupant under the Strata Schemes Management Act; a motion for voting at a general meeting of owners regarding smoking; an action against the Owners Corporation to undertake repairs to common property to prevent passage of smoke. None of these steps were taken, even though there were a considerable amount of emails to the strata to try and resolve the problem. I make the above compensation orders pursuant to section 187(1)(d) of the Residential Tenancies Act.

16 Ms Laming had claimed compensation of $14,249.97 by way of rent reduction, representing a reduction of two thirds of the rent from the commencement of the lease. She also claimed removal and packing costs based on $240.00 per hour. While both these claims were accepted the Tribunal reduced the amount ordered for compensation. The Tribunal ordered damages of $11,681.00, comprising $7,980.00 for a rent reduction of 40% from the commencement of the lease until the date of the hearing, packing costs totalling $1,801.00, removalist costs of $1,000.00 (at the rate of $125.00 per hour) and an agreed refund for blinds of $900.00.

Grounds of appeal and submissions of the parties

17 Dr Bhandari's grounds of appeal were set out in his amended Notice of Appeal. This was expanded in written submissions and oral argument at the hearing.

18 Dr Bhandari was represented by his managing agents who are not legally qualified.

The grounds of appeal expressed in the Notice of Appeal were not entirely clear but after questioning Dr Bhandari's representative, the Appeal Panel identified the following grounds of appeal:

(1) The Tribunal erred in law in finding that Dr Bhandari had breached s 52 of the RTA in circumstances where the alleged failure to provide premises fit for habitation was outside Dr Bhandari's control and where he, through his agents, had made reasonable attempts to resolve the issue. The Tribunal found that Dr Bhandari had the responsibility to take "all necessary steps" to meet his obligations and this was in error. He was only required to take "reasonable steps".

(2) The Tribunal had erred in "incorrectly import[ing] into the landlord's obligations under s 50(1) of the RTA, relating to "quiet enjoyment", an obligation to undertake "all necessary steps" rather than "all reasonable steps" as provided by s 50(3) of the RTA.

(3) Even if Dr Bhandari was under an obligation to take positive action there was no evidence he could have successfully taken the action against third parties identified by the Tribunal in its reasons. As such, there should have been no finding of breach.

(4) The Tribunal erred in that it incorrectly applied the test for when premises were fit for habitation. The test was objective rather than subjective. Furthermore, Ms Laming occupied the premises for 6 months, giving rise to the implication that the premises were fit for habitation. It was also relevant that Ms Laming did not seek an order under s 52 in her original application.

(5) The Tribunal erred in making the order for compensation because Ms Laming failed to mitigate her loss. As an experienced real estate agent, Ms Laming should have taken steps to mitigate her loss by moving out of the premises as soon as possible. Further, the managing agent offered Ms Laming a number of comparable rentals but she refused to accept them and elected to stay.

(6) The Tribunal erred in making an order for the packing and removal costs as these were cost Ms Laming would have incurred in any event, the residential tenancy agreement being for a fixed term.

19 Ms Laming contended that the appeal should be dismissed. She had taken all possible steps to resolve the issue and initially had wanted to stay in the premises. However, the smoke ingress had become unbearable. When it was clear this could not be easily resolved, she vacated the premises. Finding alternative accommodation was difficult and her move was delayed by her back surgery. In these circumstances, the order of the compensation was reasonable.

Nature and scope of the appeal

20 The *Civil and Administrative Tribunal Act 2013* (NSW) (the CAT Act) provides for internal appeals as of right on any question of law, and with leave of the Appeal Panel on any other ground: see s 80(2)(b) of the CAT Act.

21 The Appeal Panel in *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 considered the requirements for establishing an "error of law" giving rise to an appeal as of right. Without expressing exhaustively possible questions of law, the Appeal Panel in *Prendergast* gave examples of matters that would constitute errors of law at [13] as including, relevantly, where the wrong principle of law has been applied or where the decision-maker makes a finding of fact when there was no evidence to support the finding.

22 Clause 12 of Schedule 4 of the CAT Act provides that the Appeal Panel may grant leave only if it is satisfied that the appellant may have suffered a “substantial miscarriage of justice” because the decision was not fair and equitable, against the weight of evidence or because significant new evidence had arisen, which was not reasonably available at the hearing.

23 The principles to be applied by an Appeal Panel in determining whether or not leave to appeal should be granted are well settled. In *Collins v Urban* [2014] NSWCATAP 17 the Appeal Panel of the Tribunal conducted a review of the relevant cases at [65] - [79] and concluded 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.

24 Dr Bhandari, or his agents, did not complete the Notice of Appeal form correctly in that it was not indicated whether or not Dr Bhandari was seeking leave to appeal. In opening argument, the representative for Dr Bhandari clarified that the key issue of concern was the finding by the Tribunal that Dr Bhandari had breached s 52 of the RTA in circumstances where the ingress of smoke to the apartment was outside Dr Bhandari's control. It was not his fault and therefore unfair to impose liability. This was

said to raise an error of law because it was not accepted s 52 imposed a strict obligation on the landlord. Nor was he obliged to take "all necessary steps" to comply. According to Dr Bhandari's representative, the requirement to provide premises that were fit for habitation was limited to an obligation to take "all reasonable steps" to ensure the premises were fit. It was clear that Dr Bhandari, or his representatives, had taken all reasonable steps and therefore there was no relevant breach of s 52 of the RTA. This contention was encompassed by Grounds 1 and 3.

25 These grounds raise a question of law because they relate to the construction of s 52 of the RTA and the nature and scope of the obligation imposed on the landlord under that section. Dr Bhandari therefore does not seek leave to appeal on this ground. He has a right of appeal.

26 Ground 2, as expressed in the Notice of Appeal, was difficult to understand because the Tribunal made no finding about s 50 of the RTA and Ms Laming did not allege breach of this provision. Dr Bhandari's representative did not advance any argument about this ground at the hearing. Accordingly, we reject this ground.

27 Ground 4, on the face of it, may raise an error of law because it is asserted that the Tribunal applied the wrong test for assessing whether the premises were fit for habitation. However, when this ground, and the submissions made by Dr Bhandari at the appeal hearing are examined, it is apparent Dr Bhandari contended there was no, or insufficient, objective evidence that the premises were not fit for habitation. This may raise an error of law if the contention is that there was no evidence capable of supporting such a finding (*Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390) or an error, requiring leave, if the contention is that the finding was against the weight of evidence.

28 Ground 5 raises an error of law if it is contended that the Tribunal failed to consider mitigation, or an error, requiring leave, if it is contended there was insufficient evidence of mitigation or that the decision was not fair and equitable having regard to the circumstances. In oral submissions, Mr Bhandari's representative raised both issues. This ground therefore raises both a question of law and an error requiring leave to appeal.

29 Ground 6 was not included in the Notice of Appeal or the amended Notice and was raised for the first time in oral submissions. The Tribunal at first instance found that removal and packaging costs were damages that reasonably flowed from the breach of s 52 of the RTA because Ms Laming was not planning to move and these costs were reasonably incurred because of Ms Laming's recent back surgery. Dr Bhandari's representative took issue with these findings.

Grounds 1 and 3: nature and scope of s 52 of the RTA

30 Section 52(1) of the RTA provides:

> A landlord must provide the residential premises in a reasonable state of cleanliness and fit for habitation by the tenant.

31 This is a term of every residential tenancy agreement (s 52(4) RTA).

32 Dr Bhandari contended that the obligation of the landlord to provide residential premises fit for habitation was to take reasonable steps in respect of those premises, not all necessary steps. He should therefore not be responsible for matters affecting the residential premises that were outside his control.

33 The principles in relation to the construction of statutory provisions was summarised by the High Court in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27: [2009] HCA 41 at [47] as follows:

> This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.
>
> [citations omitted]

34 Having regard to those principles, it is relevant to consider the text of the provision, the language used, the legislative context and any mischief the provision is seeking to remedy.

35 Section 52 imposes two obligations on the landlord. One obligation is to provide the residential premises in a reasonable state of cleanliness and the other is to provide residential premises that are “fit for habitation”.

36 To “provide” means to “furnish” or “supply” (Macquarie Dictionary online). The term “residential premises” is defined in s 3 of the RTA and means “any premises or part of premises (including any land occupied with the premises) used or intended to be used as a residence”. The residential premises are not confined to the physical or structural parts of the unit, such as the walls, ceiling and fixtures or fittings, but must include the environment within the unit such as the air. The expression “fit for habitation” is not defined in the RTA but as noted by the Tribunal in *Bannister v Cheung* [2014] NSWCATCD 105 at [20] the test of whether residential premises are fit for habitation is a difficult one to establish and should not be lightly found. The test is objective and residential premises may not be fit for habitation even where the defect is latent or the landlord is unaware of the defect.

37 It is clear the obligation arises at the commencement of the residential tenancy (Anforth, Christenson & Brentwood, Residential Tenancies Law & Practice NSW 6th Ed at [2.52.1] to [2.52.3] and the cases cited). Whether the residential premises are fit for

habitation must therefore be assessed at the commencement of the residential tenancy agreement. If premises become unfit for habitation, the tenant's remedies for breach will lie under one of the other provisions in the RTA, depending on the circumstances.

38 The obligation to provide residential premises fit for habitation is mandatory and, according to language used in the provision, unqualified. Relevantly, the obligation is not expressed to be contingent on reasonable steps or to be dependent on the landlord being at fault or having control over the event or circumstance affecting the state of the premises. This is in contrast with the obligation on the landlord to provide and maintain the residential premises in a reasonable state of repair (s 63 RTA) and the obligation that arises in respect of the tenant's entitlement to quiet enjoyment of the residential premises (s 50 RTA). The landlord's obligations under sections 50, 63 and 52 (in relation to the state of cleanliness of the residential premises) are mandatory and ongoing but qualified by the concept of reasonableness.

39 Section 52 is expressed in clear and unqualified terms because the fitness, or otherwise, of residential premises for habitation is at the core of the subject matter of the agreement. Imputing the concept of reasonable steps or reading down the provision is not only inconsistent with the clear language of s 52 but may lead to an unfair outcome. This can be illustrated by the effect that reading down or qualifying the obligation would have on a tenant, who finds themselves bound by a fixed term lease where there is a defect, albeit outside the control of the landlord, which makes the residential premises uninhabitable. The tenant would have no satisfactory or clear available remedy under the RTA. For instance, the rent abatement provisions (ss 43(2) and 45 RTA) apply to supervening events where premises become wholly or partly uninhabitable, *otherwise* than as a result of breach [emphasis added]. Relevantly, the remedy for reduction of rent under s 43(2) is expressly stated in s 45 to arise in respect of the frustration of a residential tenancy agreement. Accordingly, this provision would not apply in circumstances where the premises are unfit at the outset. Moreover, a residential tenancy agreement for a fixed term (which this agreement was) may only be terminated by the Tribunal on application by the tenant if the landlord has breached the agreement (s 103 RTA) or for hardship (s 104 RTA). The hardship provisions do not provide for the tenant to be compensated for loss, only the landlord.

40 Thus, if the obligation to provide residential premises fit for habitation is qualified or read down to include reasonable steps, as contended by Dr Bhandari's representative, this would leave a tenant in Ms Laming's position without remedies other than the limited remedy available under s 104. This construction is not supported by the text of the provision, it is inconsistent with the use of the language qualifying other obligations of the landlord under the RTA and would produce an unfair result, which is inconsistent with the scheme of the RTA to balance rights and obligations between landlords and

tenants.

41 In this case, the evidence accepted by the Tribunal (and there appears to be no dispute about this) was that there was a mechanical problem in the internal ventilation passages of the building allowing smoke to pass from the unit below through the internal passages into Ms Laming's unit. The Tribunal accepted the evidence of Ms Laming that this smoke ingress made the residential premises unfit for habitation. The smoke ingress was caused by a defect in the building which was exacerbated by the fact that the downstairs tenant was a chain smoker, the neighbouring landlord was not prepared to regulate her smoking and the Owners Corporation was not prepared to change the rules to ban smoking or take responsibility for the defect. Dr Bhandari had an obligation to provide residential premises that were fit for habitation. They were not fit because they were affected by the defect, which, in the present circumstances, allowed the residential premises to be seriously affected by smoke.

42 When the issue was raised as early as December 2014, but certainly by 29 January 2015 when Ms Laming's correspondence recorded that the smoke was becoming "unbearable", Dr Bhandari had an obligation to rectify the breach. We accept that Dr Bhandari, through his agents, attempted to stop the smoke ingress by calling on others to take action. This did not resolve the issue, again this is not in dispute, and the contention raised by Dr Bhandari is it is unfair that he should thereby be liable for compensation for breach of s 52 in these circumstances.

43 Relevantly, Dr Bhandari contended that he could not have been expected to take the action against third parties as referred to in the reasons for decision as these actions were, in summary, speculative and unsubstantiated. When read in context it is clear the Tribunal was illustrating the absolute nature of the obligation by giving these examples rather than making findings about the action that could or should have been available to Dr Bhandari. As such, there was no evidence about these matters, nor was this necessary.

44 However, it is nonetheless relevant to note, as outlined by the Tribunal in its reasons, that Dr Bhandari does have other remedies available to address any loss he has sustained, remedies that may not have been equally available to Ms Laming. The contended unfairness is somewhat ameliorated by these available remedies. Dr Bhandari could sue the owner of the unit below or the Owners Corporation. In particular, we note that the correspondence from the lawyers acting for Owners Corporation (dated 28 April 2015) denying liability on the basis that "it is not obliged to upgrade common property or fixtures and fittings comprised in the common property when that property or fixtures and fittings have not fallen into disrepair" fails to engage with the complaint made. It does not appear that the structural problem was an issue about disrepair but rather defective design or construction. It would be inconceivable

that an owner is unable to secure residential premises in an apartment block against smoke or other odours passing through common property or indeed against other structural problems causing residential premises to be uninhabitable.

45 While we have sympathy for Dr Bhandari's position, for the reasons we have explained above, we reject the contention that s 52 should be construed as contended by Dr Bhandari. The provisions of s 52 are clear and, in any event, consistent with the statutory regime under the RTA.

46 Accordingly, we find that the Tribunal did not err in concluding that there was a breach of s 52 even though Dr Bhandari was not responsible for the smoke ingress, his agents had attempted to resolve the issue and any actions against third parties were likely to be complicated. In other words, we accept the finding of the Tribunal that these matters "did not lessen the landlord's responsibilities to provide premises which are fit for habitation". The Tribunal's interpretation of the nature and effect of s 52 of the RTA was correct and according to law.

47 As such, Grounds 1 and 3 must fail.

Ground 4: fit for habitation

48 Dr Bhandari's representative submitted that Mr Laming's evidence was not supported by any evidence from an independent source. The test applied by the Tribunal was therefore subjective, rather than objective, or in the alternative, there was no or insufficient evidence to establish that the premises were not fit for habitation within the meaning of s 52. The fact that Ms Laming occupied the premises for six months gave rise to the implication that the premises were fit for habitation.

49 It is apparent from the reasons for decision that the Tribunal applied an objective test when assessing whether the residential premises were fit for habitation. The Tribunal relied on the uncontroverted evidence of Ms Laming about the smoke, which was supported by contemporaneous correspondence from her to the agent and the agent managing the property. Ms Laming gave an account of the smoke and described how the residential premises were affected on a daily basis and over a period. She gave evidence about factual matters, from which the Tribunal made inferences and findings. The Tribunal did not rely on or simply accept Ms Laming's opinion that the residential premises were not fit for habitation. The reasons for decision disclose that the Tribunal weighed up the evidence and was satisfied that the residential premises were not fit for habitation.

50 The fact that Ms Laming occupied the premises for six months does not establish that the premises were fit (Bannister v Cheung at [16] citing *Summers v Salford Corporation* [1943] AC 283 that "premises may be unfit for human habitation even though it is physically possible for a tenant to reside in the premises"). It was clear that Ms Laming

continued to occupy the premises under sufferance and continued complaint.

51 We therefore reject Dr Bhandari's submission that the Tribunal applied the wrong test.

52 Nor is this a case where there was no evidence to support the finding made. As observed by the Appeal Panel in *Fordham v Davies* [2014] NSWCATAP 60 at [22] citing the relevant authorities, "once there is some evidence for a finding, any error is one of fact not law".

53 Ground 4 therefore does not establish an error of law and Dr Bhandari needs leave to appeal the factual finding that the premises were not fit for habitation on the basis of cl 12, Schedule 4 of the CAT Act.

54 We have set out above the principles stated in *Collins v Urban*. For leave to appeal to be granted, an appellant 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. Ordinarily it is appropriate to grant leave to appeal only in matters that involve issues of principle, questions of public importance or matters of administration or policy which might have general application, an injustice which is reasonably clear, a factual error that was unreasonably arrived at and clearly mistaken; or that the Tribunal went about its fact finding process in such an unorthodox manner that it produced an unfair result.

55 We are not satisfied that Dr Bhandari has established any of these matters and to the extent leave is required, it is refused.

Ground 5: mitigation

56 It is well established that a landlord will not be liable for compensation or damages if the tenant has not taken reasonable steps to mitigate his or her loss (refer Anforth, Christenson & Brentwood at [2.187.10] to [2.187.12] and the cases cited). The onus is on the defendant to show the plaintiff acted unreasonably (*TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd* (1963) 180 CLR 130) although it should be noted that when an innocent party is required to take steps to mitigate, the steps required will not be set too high (*Banco de Portugal v Waterlow and Sons* [1932] AC 452 at 506). Damages "will be reduced to the extent to which, had [the plaintiff] acted reasonably, his loss would have been less (*Karacominakis v Big Country Developments Pty Ltd* (2000) NSWCA 313 at [187])

57 While the Tribunal did not expressly refer to mitigation in its written reasons for decision it is implicit that the Tribunal considered action taken by Ms Laming in response to the breach. Relevantly, the Tribunal noted as follows:

> The tenant has done everything she can (except move) to try and alleviate the problem with the smoke - she has informed the agent promptly; spoken to the concierge, tried to obtain the co-operation with the occupant downstairs (who seems to be largely

> uncooperative) and spoken with the strata manager;
>
> The trail of emails demonstrates that this problem was reported promptly (first in the condition report), and her endeavours to have the landlord or the strata undertake the legal steps open to them, have been constant;

58 In his amended Notice of Appeal, Dr Bhandari contended that Ms Laming failed to mitigate her loss because "the landlord offered her a number of comparable rentals but she refused to accept them and elected to stay in the premises". This is not referred to in the written reasons for decision and the only evidence relating to this issue before the Tribunal at first instance was an email from Dr Bhandari's managing agent to Ms Laming dated 30 March 2015 urging her to move, advising Dr Bhandari would not insist on a break fee but noting that the agency did not have "any appropriate alternative accommodation at the moment". As such, there was no evidence before the Tribunal, nor were we referred to such evidence, to support Dr Bhandari's contention that Ms Laming was offered a number of comparable rentals which she had rejected.

59 Relevantly, there was a further email, also dated 30 March 2015, from the managing agent to the manager of the building, noting as follows:

> We have offered the tenant permission to leave the property without any fees, however, she has recently had a major back operation and the location of the apartment is essential to her.

60 This email suggests that the managing agent was on notice of Ms Laming's difficulties and did not press the issue about alternative accommodation at that time.

61 We accept that once Dr Bhandari offered to allow Ms Laming to leave the residential premises without penalty on 30 March 2015, it would have been reasonable for Ms Laming to take steps to find alternative accommodation. However, in assessing what steps should have been taken it is relevant to take into account that Ms Laming had recently had major back surgery and it would have taken some time to find suitable alternative accommodation. The Tribunal's order for compensation comprised 40% reduced rental from the commencement of the residential tenancy agreement to the date of the hearing, which was five weeks after Dr Bhandari's agents advised Ms Laming Dr Bhandari would not seek a break fee. Ms Laming apparently found alternative accommodation and moved on 15 May 2015. This is not unreasonable having regard to the circumstances.

62 In conclusion, we are not satisfied that Ms Laming failed to take reasonable steps to mitigate her loss or that the Tribunal erred in failing to take this into account in the order for compensation. There was no error of law. Nor are we satisfied, having regard to the principles in *Collins v Urban*, that leave to appeal should be granted.

63 We therefore reject this ground.

Ground 6: compensation ordered for packing and removal costs unreasonable

64 Dr Bhandari contended this compensation was unreasonable and did not result from the breach because Ms Laming would have incurred these costs in any event, the lease being for a fixed term on 12 months. Ms Laming contended that extra costs were incurred because of her back injury, she would not have moved but for the breach and these matters were considered by the Tribunal in the written reasons.

65 The Tribunal made the following findings in respect of these claims:

> In terms of removal costs, the tenant seeks these because she was not planning on moving and they are costs that arise from the breach. I accept that they reasonably flow from the breach, as the tenant has little option but to move in circumstances where the problem cannot be rectified in the foreseeable future. As the tenant has recently had back surgery, I will allow the packing and unpacking claim which was provided in the form of a written quote. There was no documentary evidence from the agent to rebut the quantum of that claim. During the hearing I did not consider that $240 an hour for 3 men to undertake the move was reasonable; the agent made some inquiries of an established moving franchise and their quote was $125 per hour for 3 men. There was no evidence to rebut the 8 hour estimate, so I allow 8 hours at a rate of $125 per hour.

66 The Tribunal clearly discounted Ms Laming's claim for removal costs but allowed her claim for packing costs based on quotations and taking into account her back injury. These findings were open to the Tribunal on the evidence.

67 Accordingly, we are not satisfied that the Tribunal erred in ordering this compensation or that leave should be given to appeal on this ground. This is not a case were Dr Bhandari has established any of the matters set out in *Collins v Urban*. For instance, we are not satisfied that there is an injustice which is reasonably clear, a factual error that was unreasonably arrived at and clearly mistaken; or that the Tribunal went about its fact finding process in such an unorthodox manner that it produced an unfair result.

68 As such, this ground fails.

Conclusion

69 Having regard to the foregoing matters, the Appeal Panel determined to dismiss the appeal.

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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

Decision last updated: 16 October 2015