CITATION:	*Chief Executive Officer (Housing) v Young & Anor (Costs)* [2026] NTCA 8
PARTIES:	CHIEF EXECUTIVE OFFICER (HOUSING) v YOUNG, Enid and CAVANAGH, Petria in her capacity as Administrator of the Estate of Robert Conway (Deceased)
TITLE OF COURT:	NORTHERN TERRITORY COURT OF APPEAL
JURISDICTION:	APPEAL from SUPREME COURT exercising Northern Territory jurisdiction
FILE NO:	AP 9 of 2020 (22031505)
DELIVERED:	1 September 2026
HEARING DATE:	On the papers
JUDGMENT OF:	Grant CJ, Huntingford J & Riley AJ

CATCHWORDS:

COSTS – Party/Party – Appeals

Whether application under slip rule futile and/or inappropriate – No adjudication on merits – Whether appellant acted unreasonably in bringing application – Application dismissed – No order as to costs

ASC v Aust-home Investments Ltd (1993) 44 FCR 194, *Bailey v Marinoff* (1971) 125 CLR 529, *Collins v The Queen* (1975) 133 CLR 120, *Hatton v Harris* [1892] AC 547, *Lexcray Pty Ltd v Northern Territory* (2003) 13

NTLR 154, *JT Stratford and Son Ltd v Lindley and Others (No 2)* (1969) 3 All ER 1122, *Newmont Yandal Operations Pty Ltd v The J Aron Corporation* (2007) 70 NSWLR 411, *Re Minister for Immigration and Ethnic Affairs; ex parte Lai Qin* (1997) 186 CLR 622, *Sheehan v McDonell (No 2)* [1992] NSWCCA 228, referred to

REPRESENTATION:

Counsel:

Appellant:	H Baddeley
Respondents:	M Albert

Solicitors:

Appellant:	Mills Oakley
Respondents:	Daniel Kelly

Judgment category classification:	B
Number of pages:	13

IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Chief Executive Officer (Housing) v Young & Anor (Costs)
[2026] NTCA 8
No. AP 9 of 2020 (22031505)

BETWEEN:

CHIEF EXECUTIVE OFFICER (HOUSING)
Appellant

AND:

ENID YOUNG
First Respondent

AND:

PETRIA CAVANAGH IN HER CAPACITY AS ADMINISTRATOR OF THE ESTATE OF ROBERT CONWAY (DECEASED)
Second Respondent

CORAM: GRANT CJ, HUNTINGFORD J & RILEY AJ

REASONS FOR JUDGMENT
(Delivered 1 September 2026)

THE COURT:

[1] This matter involved an appeal by the appellant from a decision of the Supreme Court[1] allowing in part an appeal from a determination by the Northern Territory Civil and Administrative Tribunal (**Tribunal**)

1 *Young & Conway v Chief Executive Officer, Housing* [2020] NTSC 59.

concerning the entitlement to compensation pursuant to s 122(1) of the *Residential Tenancies Act 1999* (NT) for breaches of various obligations alleged to have been committed in the course of two residential tenancies.[2] This appeal has been determined, and the sole remaining issue is whether the respondents should be awarded their costs of and incidental to a summons filed by the appellant seeking a variation of one of the orders mistakenly made by this Court in disposing of the appeal, and the disposition of that summons.[3]

[2] So far as is relevant for present purposes, the Tribunal: (a) found that the appellant's obligation to ensure that the premises were 'habitable' required the respondents to establish that the relevant defect presented a threat to the tenant's health and safety; (b) found that various defects alleged by the respondents did not constitute compensable breaches on the part of the respondent; (c) found that various other defects alleged by the respondents did constitute compensable breaches on the part of the appellant; and (d) awarded the respondents monetary compensation for loss and damage caused by the breaches which had been established.

---

2 *Various Applicants from Santa Theresa v Chief Executive Officer (Housing)* [2019] NTCAT 7.

3 Although this substantive appeal was decided by the Court differently constituted, with the consent of the parties the costs of the summons was referred by the Associate Judge for determination to the Court as constituted for the purpose of determining the related appeal in AP 8 of 2020, and the costs issues arising out of that appeal.

[3] The respondents brought an appeal to the Supreme Court asserting that the Tribunal made various errors of law in its determination. So far as is relevant for present purposes, the Supreme Court: (a) found that the Tribunal erred in construing the term 'habitable'; (b) remitted the habitability issue to the Tribunal for determination in accordance with law; (c) found that the Tribunal erred in finding that the failure to furnish the first respondent's premises with a back door did not constitute a compensable breach; and (d) awarded compensation in the amount of $10,200 for distress and disappointment caused by the failure to provide secure premises.[4]

[4] The appellant brought this appeal from the decision of the Supreme Court on various grounds which included, so far as is relevant for present purposes:

(a) that the Supreme Court erred in construing s 48(1)(a) of the *Residential Tenancies Act* by holding that the term 'habitable' requires an overall assessment of humaneness, suitability and reasonable comfort of the premises judged against contemporary standards; and

(b) that the Supreme Court erred in finding that the tenancy agreement between the CEO and the first respondent was an agreement whose object was to provide enjoyment, relaxation or freedom from molestation and was therefore governed by the second limb of the

4 *Young & Conway v Chief Executive Officer, Housing* [2020] NTSC 59, [82]-[93].

principle in *Baltic Shipping*[5] concerning damages for distress and disappointment for breach of contract.

[5] At the same time, the first respondent brought a separate appeal from the decision of the Supreme Court to this Court contending that the Supreme Court erred in its approach to the calculation of compensation and, or in the alternative, that the amount of compensation awarded was manifestly inadequate.[6] That appeal concerning the assessment and adequacy of compensation was held in abeyance pending the determination of this appeal brought by the appellant.

[6] This Court found on appeal that the Tribunal had erred in its approach to the construction of the term 'habitable' and that the Supreme Court had been correct in ordering the remittal of the matter to the Tribunal for reconsideration (subject to some refinement of the test of habitability).[7] In dealing with the second ground of the appeal, this Court found that the Supreme Court had in fact awarded damages under the second limb in *Baltic Shipping* (which had been disputed by the respondents), albeit on what had been described by the Supreme Court

---

5 *Baltic Shipping Co v Dillon* (1993) 176 CLR 344.

6 AP 8 of 2020.

7 *Chief Executive Officer (Housing) v Young & Anor* [2022] NTCA 1, [30]-[51].

as a 'heavily calibrated' basis,[8] and that the Supreme Court had fallen into error in doing so.[9]

[7] The respondents brought an appeal to the High Court from the second of those findings by this Court. The High Court allowed the respondents' appeal. The *ratio* of the High Court decision is that the availability of compensation under the *Residential Tenancies Act* is a matter of statutory interpretation 'having regard to the nature and purpose of the particular obligation with which there has been failure to comply'. That question is not answered by whether damages for distress and disappointment would have been available in an action for breach of contract at common law.[10] In the circumstances of this case, any resultant distress or disappointment arising from feelings of insecurity which the appellant suffered as a result of the landlord's failure to ensure the premises were reasonably secure would be compensable.

[8] As part of the High Court's determination, order 4 made by this Court was set aside. That order (or declaration) was that the Supreme Court erred in finding that the tenancy agreement was one for which damages could be recovered for disappointment and distress independently of any physical inconvenience. The effect of the High Court's order in

---

8 *Chief Executive Officer (Housing) v Young & Anor* [2022] NTCA 1, [52]-[53].

9 *Chief Executive Officer (Housing) v Young & Anor* [2022] NTCA 1, [54]-[69].

10 *Young v Chief Executive Officer (Housing)* (2023) 278 CLR 208, [20]-[25], [29], [35]-[36].

that respect was to recognise, in accordance with the *ratio* of the decision, that the recoverability of compensation for disappointment and distress following a breach of s 49(1) of the *Residential Tenancies Act* is not governed by common law principles of contract, and in particular by the *Baltic Shipping* formulation.

[9] In addition, an order was made by consent at the commencement of the hearing in the High Court to set aside order 5 made by this Court in determining this appeal. That order had mistakenly set aside order 5 made by the Supreme Court assessing compensation for the claim under s 49(1) of the *Residential Tenancies Act* in the sum of $10,200. The purpose and effect of the High Court's order in that respect was to leave extant the first respondent's pending appeal in this Court concerning the quantification of compensation, and to stay the operation of the relevant Supreme Court order pending determination of the appeal. That appeal was subsequently determined, the relevant part of the order of the Supreme Court set aside, and the matter remitted to the Tribunal for the assessment of compensation in accordance with law.[11]

[10] On 12 April 2022, the appellant made an application by summons seeking to have the orders made by this Court in disposition of the appeal varied by: amending order 5 to leave the Supreme Court's

11 *Young v Chief Executive Officer (Housing)* [2025] NTCA 5.

assessment of compensation in place pending the determination of the first respondent's challenge to that assessment in AP 8 of 2020; and adding a new order 8 to adjourn the making of final orders in relation to order 5 until the determination of the appeal in AP 8 of 2020. The parties to this appeal were in agreement that it had been premature to set aside the Supreme Court's assessment of compensation prior to the determination of that other appeal.

[11] The respondents contend that they should have their costs of and incidental to the summons on the basis that the relief sought was 'futile and/or inappropriate' at the time of the application was made. The respondents say that at the time the mistaken effect of this Court's order became apparent, it proposed a joint approach to this Court to have the terms of the order rectified before any application for special leave to the High Court on the substantive *Baltic Shipping* ground was made. The respondent says that it received no adequate response to that proposal prior to the expiry of time for making an application for special leave. In the absence of a response, one of the three grounds which special leave was sought was the erroneous form of order setting aside the Supreme Court's assessment of compensation.

[12] The respondent says further that on 28 March 2022 the appellant conceded the ground that the order had been made in error. In the respondents' submission, that concession meant that the High Court could resolve the matter by consent, which it did at the outset of the

final hearing of the appeal on 16 March 2023 by reference to consent orders filed by the parties. The respondents say that despite that being the position obtaining from 28 March 2022, the appellant issued the summons in this Court on 12 April 2022, by which time the matter was both beyond the jurisdiction and power of this Court and the subject of consent in the High Court. In the respondents' submission, it was tantamount to an abuse of process to bring an application before this Court in relation to the terms of an order subject to an appeal, or at least an application for special leave to appeal, in the High Court.

[13] The respondents say they invited the appellant to abandon the summons on the basis that it was not appropriate to have two courts dealing with the same order at the same time. The appellant declined to do so, and a single Judge of the Supreme Court made orders for the parties to file and serve submissions as to how the summons should be dealt with. The appellant pressed for the summons to be dealt with by this Court. The respondents submitted that the summons should be adjourned pending the High Court's response to the position which had been adopted by consent in the special leave application. Although not express in any orders made, it would appear that the single Judge adopted that course and the summons was held in abeyance.

[14] In the respondents' submission, the relief sought by the summons is now otiose given the High Court's determination by consent, the filing of the summons was almost inevitably futile in the circumstances

which presented on 12 April 2022, the summons should be dismissed, and costs should follow the event.

[15] The summons is now obviously redundant and there has been no adjudication on the merits. Subject to the qualification addressed further below, that attracts by analogy the principles which have application in circumstances where a proceeding is discontinued by consent with no adjudication on the merits. In particular, (a) it would be inappropriate for the court determining costs to seek to determine the merits or the outcome of a hypothetical hearing of the application;[12] (b) if both parties have acted reasonably in commencing and defending the application until it became futile then it is generally appropriate for no order as to costs to be made;[13] and (c) the applicant may be ordered to pay costs where the respondent has offered the substance of the relief claimed before the application was made or where the applicant could have pursued some other course at less expense.

[16] The potential qualification relates to the costs of interlocutory applications. The costs of an interlocutory application are to be 'costs in the proceeding' unless the Court otherwise orders.[14] That is, the ordinary position is that the party which is ultimately successful in the

---

12 See, by analogy, *ASC v Aust-home Investments Ltd* (1993) 44 FCR 194, 201; *JT Stratford and Son Ltd v Lindley and Others (No 2)* (1969) 3 All ER 1122; *Re Minister for Immigration and Ethnic Affairs; Ex Parte Lai Qin* (1997) 186 CLR 622, 624.

13 See, by analogy, *Re Minister for Immigration and Ethnic Affairs; Ex Parte Lai Qin* (1997) 186 CLR 622; *JT Stratford and Son Ltd v Lindley and Others (No 2)* (1969) 3 All ER 1122.

14 *Supreme Court Rules 1987* (NT), r 63.18.

substantive proceeding will thereby be entitled to the costs of the interlocutory application, whatever the result of the application might have been. That default position is subject to any order to the contrary. The general approach to the provision is that something in the nature of special circumstances are required before the court will make a contrary order. Those circumstances include where a party has acted unreasonably, where the application has been unnecessarily burdensome, and where the applicant is seeking the indulgence of the court. That provision does not govern this question. First, it appears in Chapter 1 of the *Supreme Court Rules* and has no necessary application to appeal proceedings. Second, it is difficult to characterise an application under the slip rule as 'interlocutory' in nature where it is directed to orders for the final disposition concerning the rights of the parties. Even if the provision did have application, it would not alter the principles which have application to the situation where there has been no adjudication on the merits.

[17] There are two preliminary issues requiring consideration for these purposes. The first relates to the timing of the application under the slip rule and the circumstances in which it was made. The erroneous order was made by this Court on 4 February 2022. The orders, including the erroneous order, were authenticated on 16 February 2022. The respondents apprised the appellant of the error on 18 February 2022 and proposed an application to this Court under the slip rule. On

4 March 2022, the respondents filed the application for special leave to appeal to the High Court to comply with the 28-day time limit. On 24 March 2022, the parties reached agreement as to the form of wording necessary to amend the orders, and the respondents indicated a preference to resolve the matter by way of consent orders in the High Court. On 28 March 2022, the appellant filed its response to the respondents' application for special leave in which it stated expressly that order 5 made by the Supreme Court had been set aside in error; that the parties were agreed on the form of the amendment required; and that the appellant 'is hopeful that this amendment can be made by the [Northern Territory Court of Appeal] under the slip rule and prior to the hearing of the [application for special leave to appeal]'. As already described, the application under the slip rule was filed by summons dated 12 April 2022. The hearing of the application for special leave and the grant of special leave did not take place until 16 September 2022.

[18] The second issue relates to the lawfulness and appropriateness of making an application under the slip rule in relation to an order or issue which is the subject of an appeal. As the appellant has identified, there is authority for the proposition that it is strongly preferable for a slip rule correction to be made on application to the court in which the order was made, rather than it being a matter addressed on appeal.[15] As

15 *Sheehan v McDonell (No 2)* [1992] NSWCCA 228; *Hatton v Harris* [1892] AC 547.

an adjunct to that proposition and preference, delay in making corrections to orders should be avoided if possible.[16] Those principles are not limited to the period before an appeal is lodged. By way of example, in *Sheehan* the New South Wales Court of Appeal adjourned the appeal proceeding to allow an application to be made under the slip rule before the court from which the appeal had been brought.[17] Similar observations were made in *Hatton*.[18] The court below is not without jurisdiction to correct an error in those circumstances because the slip rule is an exception to the *functus officio* principle.[19] Nor is it an abuse of process or otherwise improper to bring an application of that type and in these circumstances before an appeal is lodged. Even were that not so, until such time as special leave is granted, an application for special leave to appeal to the High Court does not constitute a proceeding *inter partes* before the Court, whether opposed or not.[20]

[19] Although it is neither necessary nor appropriate for this Court to determine what the outcome of the appellant's application under the slip rule would have been, the authorities described above make plain that it was not irregular. In circumstances where there are persuasive

---

16 *Newmont Yandal Operations Pty Ltd v The J Aron Corporation* (2007) 70 NSWLR 411, [182].

17 *Sheehan v McDonell (No 2)* [1992] NSWCCA 228, 4. It may also be noted in this respect that at least one of the Judges hearing the application for special leave to appeal was under the assumption that the parties would seek rectification of the order in this Court: *Young & Anor v Chief Executive Officer (Housing)* [2022] HCA Trans 159, 6.

18 *Hatton v Harris* [1892] AC 547, 557-561, 563.

19 *Bailey v Marinoff* (1971) 125 CLR 529, 531-532, 534-535; *Lexcray Pty Ltd v Northern Territory* (2003) 13 NTLR 154, [33].

20 *Collins v The Queen* (1975) 133 CLR 120, 122.

dicta in favour of the course pursued by the appellant, it cannot be said that the appellant acted unreasonably in commencing the application or that it was futile *ab initio*. Nor can it be said, or is it suggested, that the respondents acted unreasonably in defending or resisting the application. The application did not become futile until such time as it was effectively put into abeyance by a single Judge in or about May 2022, and it was not pressed by the appellant after that time. This is also not a case in which it can be said that the appellant was offered the substance of the relief claimed before the application was made. For the reasons already described, the appellant reasonably took the view that the appropriate course was to seek rectification in the court in which the order was made.

[20] In the circumstances, each party should properly bear its own costs of and incidental to the summons filed on 12 April 2022. The appropriate means of giving effect to that result is specified by r 63.02 of the *Supreme Court Rules* that there be 'no order as to costs'.

Disposition

[21] The orders are:

1. The appellant's summons filed on 12 April 2022 is dismissed.
2. There is no order as to costs of and incidental to the summons filed on 12 April 2022.

———————————————