

CITATION: *Pepperill and Anor v CEO Housing (Costs)* [2024] NTSC 1

PARTIES: PEPPERILL, Joanne

and

STAFFORD, Jamesie

v

CHIEF EXECUTIVE OFFICER
(HOUSING)

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising Territory
Jurisdiction

FILE NO: 2022-01304-SC

DELIVERED: 2 January 2024

HEARING DATE: 17 November 2023

JUDGMENT OF: Barr J

CATCHWORDS:

COSTS – Application for leave to appeal to Supreme Court from Civil and Administrative Tribunal – Application successful – Costs order made in favour of applicants/appellants in respect of application for leave – Court declines to make costs order ‘here and below’ – General principle in Tribunal is that parties bear their own costs – Tribunal best placed to take into account statutory considerations justifying departure from the general principle

APPEALS – Successful appeal to Supreme Court from Civil and Administrative Tribunal – Question of law – Appellants sought remitter to differently constituted Tribunal – Applicants submit that is the ‘ordinary course’ – Order made for remitter – Court declines to specify constitution of Tribunal

Northern Territory Civil and Administrative Tribunal Act 2014, s 131, s 132, s 133, s 141

Comcare v Broadhurst [2011] FCAFC 39, 192 FCR 497; *DWN042 v Republic of Nauru* [2017] HCA 56, 92 ALJR 146; *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518; *Northern NSW FM Pty Ltd v Australian Broadcasting Tribunal* (1990) 26 FCR 39, considered.

Pepperill and Anor v CEO Housing [2023] NTSC 90, referred to.

REPRESENTATION:

Counsel:

Applicants:	M Albert
Respondent:	T Moses

Solicitors:

Applicants:	Australian Lawyers for Remote Aboriginal Rights
Respondent:	Minter Ellison

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Pepperill and Anor v CEO Housing (Costs) [2024] NTSC 1
No. 2022-01304-SC

IN THE MATTER of an application
for leave to appeal, pursuant to
s 141(2) *Northern Territory Civil and
Administrative Tribunal Act 2014*

BETWEEN:

JOANNE PEPPERILL
First Applicant

AND:

JAMESIE STAFFORD
Second Applicant

AND:

**CHIEF EXECUTIVE OFFICER
(HOUSING)**
Respondent

CORAM: BARR J

REASONS FOR DECISION IN RELATION TO COSTS
(Delivered 2 January 2024)

- [1] In my reasons for decision published to the parties on 2 October 2023, I stated that the application for leave to appeal was allowed; that the appeal itself was allowed on ground 1(a); and that I proposed to set aside the Tribunal's decision on account of the error(s) of law identified in par [47] of

the reasons.¹ I did not make final orders at the time but stated that I would hear the parties in relation to specific orders, consequential orders and costs. I directed that the appellants file and serve a minute of proposed orders consistent with the reasons.

- [2] The matter was listed for further argument on 17 November 2023 because the parties had not reached agreement in relation to the orders to be made, including as to costs.
- [3] Both parties have provided drafts of the orders they contend should be made. The two areas in respect of which they disagree are (1) costs and (2) whether the matter should be remitted to a differently constituted Tribunal.
- [4] In relation to costs, the appellants seek orders that the respondent pay their costs of the application/appeal in this Court and the internal review proceedings before the Tribunal.
- [5] I consider that the appellants are entitled to the costs of the application/appeal in this Court. It had already been determined by the Tribunal that the ‘uranium issue’ should be determined as a preliminary question, not as to the merits, but as to whether s 48(1) *Residential Tenancies Act 1999* required the respondent, as the appellants’ landlord, to ensure the quality of the water supplied to the appellants’ residence in circumstances where legal responsibility for the supply of water rested with the Power and Water Corporation. That was a discrete issue. Member

¹ *Pepperill and Anor v CEO Housing* [2023] NTSC 90 at [53] – [55].

O'Reilly had held that, with respect to the level of uranium in the water supplied to the appellants' residence, the respondent could not be in breach of s 48(1) of the Act. After conducting a review, the Tribunal determined to confirm Member O'Reilly's formal dismissal of a number of applications, including that of the appellants.

[6] In my reasons for decision, I held that the Tribunal erred in law in holding that the quality of drinking water supplied to the appellants' residence was not an issue of habitability for the purposes of s 48(1) *Residential Tenancies Act 1999*; as a consequence, that the Tribunal erred in law in confirming Member O'Reilly's formal dismissal of the applications.²

[7] I determined to grant leave to appeal and to allow the appeal on ground 1(a). I did not decide the proposed ground 1(b) or ground 2, for reasons given in [51] of the primary judgment.

[8] The respondent's principal argument against an award of costs in this appeal is that the respondent may yet succeed in the Tribunal in relation to the merits of the 'uranium issue', that is, establish that the concentration of uranium in the water supplied to the appellants' residence (and other residences) did not pose a threat to the health or safety of the occupants of those residences so as to result in a breach by the respondent of s 48(1) of the Act.

² *Pepperill and Anor v CEO Housing* [2023] NTSC 90 at [47].

- [9] Although I accept that the ‘uranium issue’ has not yet been determined on the merits, the habitability issue under s 48(1) of the Act was identified in the Tribunal as a discrete preliminary issue, and was argued on that basis both in the Tribunal and in this Court. The appellants’ contentions were strongly contested and the appeal hearing in this Court took the best part of a day.
- [10] In the circumstances, I am not persuaded by the respondent’s arguments that the appellants’ costs should be conditional on their success in relation to the merits of the ‘uranium issue’ in the Tribunal, or that consideration of the issue of costs should be adjourned until after completion of the Tribunal proceedings.
- [11] I therefore propose to order that the respondent pay the appellants’ costs of and incidental to the application for leave to appeal.
- [12] The appellants also seek an order from this Court that the respondent pay the appellants’ costs of the review proceeding in the Tribunal. The order sought is sometimes called a ‘costs here and below’ order. There is power to make such an order under SCR 63.04(5). However, I decline to make the order sought. The general rule is that parties bear their own costs in proceedings before the Tribunal.³ The Tribunal nonetheless has the power to make a costs order, taking into account the matters set out in s 132(2) *Northern Territory Civil and Administrative Tribunal Act 2014* and, in the case of a

3 *Northern Territory Civil and Administrative Tribunal Act 2014*, s 131.

review, the considerations in s 133 of the Act. The latter considerations include whether a party genuinely attempted to enable and assist the decision-maker to make the original decision on its merits and whether the decision-maker genuinely attempted to make the original decision on its merits. I consider that the Tribunal is in a much better position than this Court to take into account and properly assess the relevant statutory considerations. For that reason, I decline to make a ‘costs here and below’ order. Moreover, I note that the Tribunal expressly stated ‘no order as to costs’.⁴ The grounds of appeal to this Court did not involve or include an appeal from any costs order made by the Tribunal.

[13] In relation to remitter, both parties agree that this Court should order a remitter pursuant to s 141(3)(c)(ii) *Northern Territory Civil and Administrative Tribunal Act 2014*. However, the appellants seek an order that the matter be sent back to a differently constituted Tribunal, whereas the respondent contends that power to remit to a differently constituted tribunal is to be used sparingly and that the Tribunal need not be differently constituted.

[14] Counsel for the appellants submits that “the weight of authority, including from the High Court, supports the view that the ordinary course is to remit matters to a differently constituted decision-maker”⁵. In my opinion, that cannot be accepted as an accurate statement of ‘the ordinary course’, or even

⁴ *Various Applicants from Laramba v Chief Executive Officer (Housing)* [2022] NTCAT 3, at [79].

⁵ Appellants’ Submissions on Orders dated 13 November 2023, par 9.

that there is such a thing as ‘the ordinary course’. In relation to whether a direction should be given that an application be reheard before a differently constituted tribunal, I adopt, with respect, the following statement made by Kirby J in *Minister for Immigration and Multicultural Affairs v Wang*:⁶

Such a direction is not uncommon in the exercise of appellate or judicial review jurisdiction where a conclusion is reached that a rehearing by the same decision-maker would be *unlawful* (where a decision is set aside for reasons of actual or apparent bias) or otherwise *undesirable* (in the interests of justice).⁷

- [15] The only High Court decision relied on by the appellants’ counsel is *DWN042 v Republic of Nauru*.⁸ The appellant in that case had applied for refugee status under s 5 of the *Refugees Convention Act 2012* (Nauru) but the relevant Departmental secretary and subsequently the Refugee Status Review Tribunal had dismissed the appellant’s application. The appellant then brought an appeal in the nature of judicial review. The Supreme Court of Nauru – incorrectly, as was later conceded – struck out two of the appellant’s grounds of appeal. Shortly before final judgment on the appellant’s remaining grounds was delivered, the appellant filed a notice of motion to reinstate the grounds which had been incorrectly struck out. However, final judgment was delivered without the Supreme Court of Nauru hearing the appellant’s motion. The High Court, in a unanimous decision (Keane, Nettle and Edelman JJ), held that the Supreme Court of Nauru had

⁶ *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518 at [123]. Kirby J was in dissent, but not in relation to the proposition cited.

⁷ Ibid, italic emphasis part of the decision.

⁸ *DWN042 v Republic of Nauru* [2017] HCA 56; 92 ALJR 146.

denied procedural fairness to the appellant because the court had not permitted the appellant to argue his motion.⁹ The High Court made an order remitting the matter to the Supreme Court of Nauru, to a judge other than the primary judge.¹⁰ The reason the remitter excluded the primary judge was that he had been directly involved in the denial of procedural fairness in not permitting the appellant's solicitors to appear by telephone to argue the appellant's motion, and also by proceeding to hand down judgment before the motion had been heard.¹¹ There is no suggestion in the High Court's judgment that the 'ordinary course' was to remit matters to a differently constituted decision-maker. Indeed, it would appear from the High Court's reasoning in justifying the exclusion of the primary judge that the matter was exceptional, and that the exclusion order was related to the primary judge's conduct in that particular case.

[16] The other authority relied on by counsel for the appellants for the submission in [14] above is *Comcare v Broadhurst*,¹² in which Tracey and Flick JJ discussed possible circumstances in which it is appropriate to direct that the matter be remitted to a 'differently constituted' tribunal.¹³ Their Honours referred to several cases in which it had been *said* that the "usual position is that remission to a differently constituted tribunal is the ordinary

9 Ibid, at [36] referring to the first ground of appeal set out in [16].

10 Ibid, at [36].

11 The relevant events are described at [10]-[13] of the High Court's judgment. Not only were the appellant's solicitor's precluded from appearing by phone-in, but the judge proceeded to hand down his judgment notwithstanding the reasonable expectation of the appellant's solicitors that the notice of motion would be adjourned to be heard on another date.

12 *Comcare v Broadhurst* (2011) 192 FCR 497.

13 Ibid, at [90].

way to proceed”¹⁴. However, they did not approve that proposition, instead observing that there *may* be circumstances in which it is appropriate for a tribunal to be differently constituted in order that justice be seen to be done. After referring to *Northern NSW FM Pty Ltd v Australian Broadcasting Tribunal*,¹⁵ their Honours continued:

It may thus be appropriate for the Tribunal to be differently constituted where, for example, the decision of the Tribunal has been set aside by reason of an apprehension of bias on the part of a Tribunal member or where findings of fact had been made by the Tribunal which may need to be revisited.

[17] Those observations appear to reflect the statement of Kirby J extracted in [14] above. Tracey and Flick JJ made the further observation that, on occasions other than those specifically referred to, there may be “no reason why the Tribunal whose decision is under appeal should be constituted in any different manner when an appeal is allowed and the matter remitted to it for further consideration”.¹⁶

[18] In the same case, Downes J held that reversal on a question of law would rarely justify a rehearing by a Tribunal differently constituted.¹⁷

[19] Nothing submitted to this point persuades me that I should make an order remitting the matter to a differently constituted Tribunal. The issue determined by Member O’Reilly and the Tribunal on review was a narrow

¹⁴ Ibid, at [89].

¹⁵ *Northern NSW FM Pty Ltd v Australian Broadcasting Tribunal* (1990) 26 FCR 39 at 42, per Davies and Foster JJ.

¹⁶ *Comcare v Broadhurst* (2011) 192 FCR 497 at [91].

¹⁷ Ibid, at [30].

issue of law. That issue of law having been clarified by this Court on appeal, there is no reason why this Court should order that the Tribunal be differently constituted when the case resumes before the Tribunal. It will be up to the Tribunal to determine its own composition. The interests of justice simply do not call for remittal to a differently constituted Tribunal.¹⁸

[20] The final argument made by counsel for the appellants is that Member (now President) O'Reilly is said to have made credibility assessments of "each of the tenants in a different decision"¹⁹, that is, in a decision other than that considered by me in the application for leave to appeal. I have not been provided with evidence of the President's actual findings or assessments, but I do not think that it would be fruitful to pursue that issue any further. In brief, it is none of my business. There were no credibility findings made by any Tribunal members in the specific decisions which fell for consideration by this Court on the application for leave to appeal. In the circumstances, I simply observe that it is for the appellants, if so advised, to apply to President O'Reilly to seek his recusal if the hearing of the merits of the 'uranium issue' is listed before him. I am not prepared to speculate about any decision which might then be made.

[21] I decline to make an order that the matter be remitted to a differently constituted Tribunal.

[22] My orders are set out in [24] below.

¹⁸ *Seltsam Pty Limited v Ghaleb* [2005] NSWCA 208 at [12], [13], per Mason P.

¹⁹ Appellants' Submissions on Orders dated 13 November 2023, par 10.

[23] If necessary, I will hear the parties in relation to the costs of preparation of submissions and appearing in court on 17 November 2023 to argue the issues of costs and consequential orders. However, I indicate my preliminary view that the parties should bear their own costs of those further matters. The respondent was unsuccessful in persuading me that a costs order should not be made until sometime in the future, if at all, after completion of proceedings in the Tribunal. On that basis, I might well have ordered that the respondent pay the costs of the further argument, save for the fact that the applicants were unsuccessful in persuading me that I should make a ‘costs here and below order’ and that I should direct that the Tribunal be differently constituted. I appreciate that costs are an indemnity, not a punishment (for example, for making submissions which are not supported by the authorities), but in my opinion neither party is fairly entitled to be indemnified by the other in respect of whatever costs may be payable for the matters dealt with in this decision.

Orders

[24] I make orders as follows:

1. Kennedy Brown, Anita McNamara and Johnny Jack be joined as applicants to this proceeding.
2. Leave be granted to appeal the decision of the Northern Territory Civil and Administrative Tribunal made on 13 May 2022.
3. The appeal be allowed.

4. Pursuant to s 141(3)(c) of the *Northern Territory Civil and Administrative Tribunal Act* 2014 (NT);
 - a. the decision of the Tribunal in respect of file numbers:
 - i. 2020-02694-CT, 2020-02701-CT and 2020-02700-CT made on 13 May 2022; and
 - ii. 2019-02699-CT, 2019-02718-CT and 2019-02722-CT made on 29 July 2020are set aside; and
 - b. the matter is sent back to the original jurisdiction of the Tribunal for reconsideration in accordance with the recommendation that the applications in the above proceedings be determined consistently with this Court’s judgment in *Pepperill and Anor v CEO Housing* [2023] NTSC 90, especially at paragraph [47].
5. The respondent pay the applicants’ costs of and incidental to the application for leave to appeal, to be taxed on the standard basis in default of agreement.
6. That the question of costs of and incidental to the hearing on 17 November 2023, in relation to the costs of the application for leave to appeal and consequential orders, be reserved.
