

CITATION: *Milatos v Esparagoza & Ors* [2024]
NTSC 101

PARTIES: MILATOS, George
Appellant

AND

ESPARAGOZA, Raquel
First Respondent

AND

WRIGHT, Ryan
Second Respondent

AND

GEDDES, Tanya
Third Respondent

AND

WRIGHT, Sharon
Fourth Respondent

AND

HOOK, Jesse William
Fifth Respondent

AND

COMMISSIONER OF RESIDENTIAL
BUILDING DISPUTES
Sixth Respondent

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising Territory jurisdiction

FILE NO: 2023-03901-SC

DELIVERED: 5 December 2024

HEARING DATES: 16 January 2024

JUDGMENT OF: Blokland J

CATCHWORDS:

Building Regulations Appeal – *Northern Territory Civil and Administrative Tribunal Act – Building Act* – consumer guarantee dispute – whether right of review of liability against Commissioner when previous review unsuccessful – whether mandatory review of compensation to owners calls for review of liability to determine apportionment – whether residential builder denied procedural fairness – whether NTCAT should have transferred proceedings to a court when it did not have jurisdiction to determine apportionment – whether Commissioner has exclusive jurisdiction – appeal dismissed.

Building (Resolution of Residential Building Works Disputes) Regulations 2012 (NT), 27, 31, 32, 34, 74, 85, 86,
Building Act 1993 (NT), ss 54AC, 54AD, 54B, 54BA, 54BC, 54FB, 54FC, 54FD, 54FE, 54FF
Building Amendment (Residential Building Consumer Protection) Act 2012 (NT)
Northern Territory Civil and Administrative Tribunal Act 2014 (NT) ('NTCAT Act') ss 46, 50, 51, 52, 53, 54, 99A, 141,
Proportionate Liability Act 2005 (NT), ss 4, 6, 11.
Proportionate Responsibility Act 2005 (NT)
Supreme Court Act 1979 (NT), s 51

Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd [2013] HCA 10; 247 CLR 613; *Jesse William-Hook v George Milatos*, No. 2019-05141; *Kheirs Financial Service Ltd v Aussie Homes Loans Ltd* (2010) 31 VR 46; *Miletech v Murchie* [2012] FCA 1013; *Phillis v J Anderson Constructions Pty Ltd & Ors*; *Stephan & Anor v J Anderson Constructions Pty Ltd & Ors*; *Stephan & Anor v J Anderson Constructions Pty Ltd & Ors* ('Anderson') [2020] NTCAT; *Pringle v Pringle v GMIT Pty Ltd* [2019] NTCAT; *Raquel Esparagoza v George Milatos*, No 2019-02837; *Ryan Wright v George Milatos*, No. 2019-06542; *Sharon Wright v George Milatos*, No. 2019-

06773; *Tanya Geddes v George Milatos*, No. 21906542; *Trippe Investments Pty Ltd and Others v Henderson Investments Pty Ltd* ('*Trippe*') (1990) 101 FLR 261; *Yates v Mobile Marine Repairs Pty Ltd & Anor* [2001] NSWSC 1463 cases referred to.

REPRESENTATION:

Counsel:

Appellant/ Appellant:	NJ Floreani KC/ J Thompson
Respondents:	Not represented
Intervener:	C Ford SC/ E Lymberis/ M Moloney

Solicitors:

Appellant/ Appellant:	Thompson & Associates
Respondents:	Not represented
Intervener:	Solicitor for the Northern Territory

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

Milatos v Esparagoza & Ors [2024] NTSC 101
No. 2023-03901-SC

BETWEEN:

GEORGE MILATOS

Appellant

AND

RAQUEL ESPARAGOZA

First Respondent

AND

RYAN WRIGHT

Second Respondent

AND

TANYA GEDDES

Third Respondent

AND

SHARON WRIGHT

Fourth Respondent

AND

JESSE WILLIAM HOOK

Fifth Respondent

AND

**COMMISSIONER OF RESIDENTIAL
BUILDING DISPUTES**

Sixth Respondent

CORAM: BLOKLAND J

JUDGMENT

(Delivered 5 December 2024)

Background

- [1] This is an application for leave to appeal against a decision of the Northern Territory Civil Administrative Tribunal ('NTCAT'). The questions concern whether the presiding Member made errors of law when determining the compensation to be paid to applicants in a consumer guarantee dispute which had been referred to NTCAT by the Commissioner of Residential Building Disputes. The proposed grounds are set out in the application for leave to appeal which are reproduced later in these reasons.
- [2] The relevant NTCAT decision was made on 18 October 2023. The reasons for Decision ('Reasons') were published on the same date.¹
- [3] In broad terms, the applicant, (with leave granted will be referred to as 'the appellant') contends NTCAT's approach to compensation under the *Building (Resolution of Residential Building Works Disputes) Regulations 2012* (NT) ('the Regulations') was in error. The Member generally agreed with a delegate ('the Delegate') of the Commissioner of Residential Building Disputes ('the Commissioner') about the outcome of a consumer guarantee dispute. The dispute was between the appellant in this matter, Mr George Milatos and the five respondents.

¹ *Various Applicants v Milatos*, No's. 2023-02557-CT; 2023-02558-CT; 202302559-CT; 2023-02560-CT; 23-02560; 23-0561-CT ('*Various Applicants v Milatos*') Member McCrimmon.

- [4] In the previous processes before the Delegate and NTCAT, the respondents to the current application were not represented. In this appeal the Commissioner for Consumer Affairs has intervened to present relevant submissions. The individual respondents did not seek to be separately heard at the appeal hearing.
- [5] In short, the appellant contends NTCAT misconstrued its own jurisdiction in the sense of misapprehending the scope of its jurisdiction. The appellant suggests such a misapprehension is evident in a series of alleged errors which will be discussed later in these reasons. For example, it is claimed that the Member mischaracterised the issue of apportionment as an issue of liability, rather than one of quantum which had adverse consequences on the applicant's case. The appellant submitted the way the NTCAT approached apportionment denied him the opportunity of raising proportionate liability as a legitimate claim under the *Proportionate Liability Act 2005* (NT). As a result of the way the matter progressed before the Delegate and NTCAT, the appellant submitted he was denied procedural fairness. Denial of procedural fairness was suggested to be the ultimate error constituting an error of law which should enliven the jurisdiction of this Court.²
- [6] The result of the alleged errors was said to have led to NTCAT's decision to dismiss Mr Milatos's application for an extension of time within which to file complex submissions, which if accepted would have enabled him to

² Leave to appeal is required by s 141(2) of the *Northern Territory Civil and Administrative Tribunal Act 2014* (NT). The appeal is confined to questions of law: s 141(1).

make a case under the *Proportionate Liability Act*. Effectively the appellant argues he was wrongly shut out of putting his case on the question of proportionate liability which, he argued, was relevant to the compensation NTCAT was considering at the hearing of the matter now under appeal.

- [7] The appellant contended that once NTCAT was aware there was potential for the liability of other parties, it should have transferred the matter to the Local Court or to this Court as NTCAT did not have jurisdiction to determine that issue itself.

History of the process

- [8] The respondents in this Court had each previously made separate applications to the Commissioner under s 54FC of the *Building Act* 1993 (NT) which permits an application to be made against a residential builder when it is alleged there have been contraventions of consumer guarantees in the residential building setting.
- [9] The respondents were all owners of properties within a development in Bellamack. Mr Milatos constructed their houses, and a number of other houses. In total 18 houses were constructed between September 2012 and April 2014 under a contract with the developer Bellamack Pty Ltd.³ The respondents each purchased one of those houses.
- [10] At different dates throughout 2019 the respondents each sought relief through the mechanisms provided under the *Building Act* to resolve their

³ *Raquel Esparagoza v George Milatos*, No 2019-02837, Decision Notice at [4].

consumer guarantee disputes.⁴ They claimed *interalia* structural damage and other forms of reasonably significant damage. It is common ground that throughout 2020-2022 there were delays in obtaining technical inspections due to COVID-19 and other reasons.

[11] The Delegate's first Decision in relation to each of the five applications indicates that structural and design issues were evident from 2015 and that various investigations were undertaken as to rectification and responsibility for the same. The consequences of the structural defects and other faults included such things as rain water leaking into the bedrooms of the homes and other rooms, corrosion of steel elements, some houses shaking in response to mild stimulation and window eaves which were too short for the overall structure.

[12] As mentioned, each of the respondents sought relief under s 54FC of the *Building Act* in the light of the defects which they contended amounted to contraventions of consumer guarantees. For comprehension of these reasons it is necessary to set out some of the statutory provisions.

[13] Section 54FC of the *Building Act* reads:

54FC Application to Commissioner for decision

- (1) A current owner of a residential building may, in the approved form and within the prescribed effective period, apply to the

⁴ Applications have also been made with respect to most of the other houses which is mentioned in *Esparagoza v George Milatos*, No 2019-02837, Decision Notice at [94].

Commissioner for a decision about a consumer guarantee dispute.

- (2) A consumer guarantee dispute is a dispute between a current owner of a residential building and a residential builder who has carried out prescribed residential building work in relation to the building:
 - (a) About an alleged contravention of a consumer guarantee by the residential builder; and
 - (b) In circumstances specified by regulation.

[14] As part of the initial process the Commissioner engaged Acer Forrester Pty Ltd to carry out technical inspections and produce reports as envisaged by s 54FB(4) of the *Building Act* and Reg 27(b). Section 54FB provides:

54FB Technical inspection and report

- (1) This section applies if a current owner of a residential building:
 - (a) alleges that prescribed residential building work carried out on the building by a residential builder is defective; and
 - (b) makes the allegation:
 - (i) in an application to the Commissioner under section 54FC(1); or
 - (ii) to the residential builder, either verbally or in writing, without making an application under section 54FC(1).
- (2) If the current owner makes the allegation as mentioned in subsection (1)(b)(i), the Commissioner may take action under subsection (4) at any time during the consideration of the application under section 54FC(1).

- (3) If the current owner makes the allegation as mentioned in subsection (1)(b)(ii), the current owner or the residential builder may apply to the Commissioner to take action under subsection (4).
- (4) The Commissioner may appoint a person with relevant qualifications and expertise to conduct a technical inspection of the residential building and give the Commissioner a report as to whether the prescribed residential building work is defective.
- (5) A regulation may prescribe matters for this section, including any of the following:
 - (a) the procedures for the appointment of a person to conduct the inspection and make the report;
 - (b) the qualifications of that person;
 - (c) the types of inspections that may be made;
 - (d) the matters to be taken into account in reporting whether prescribed residential building work is defective;
 - (e) fees payable for an inspection and report.

[15] Reg 27 provides:

27 Conducting proceeding

Without limiting regulation 67(2), the Commissioner may do any of the following at any stage of a proceeding for a consumer guarantee dispute application:

- (a) with the agreement of the parties – arrange for a conference to be held to facilitate the negotiated agreement process;
- (b) on the application of a party and payment of the prescribed fee – appoint a qualified person to conduct a technical inspection

and give a technical report relating to any of the alleged defective work specified in the application;

- (c) hold a directions hearing;
- (d) adjourn the proceeding until conditions fixed by the Commissioner are met;
- (e) fix a period within which an action in the proceeding is to be taken;
- (f) extend a period within which an action in the proceeding is to be taken, whether or not the period has expired;
- (g) allow an amendment of an application or another document as the Commissioner considers appropriate;
- (h) fix a time and place for hearing the application.

[16] Section 54FD of the *Building Act* provides for dispensing with more formal procedures at hearings before the Commissioner when dealing with a consumer guarantee dispute. The rules of natural justice continue to apply:

54FD Consumer guarantee dispute procedures generally

- (1) The hearing of an application relating to a consumer guarantee dispute must be conducted by the Commissioner with as little formality and technicality, and with as much expedition, as a proper consideration of the matter permits.
- (2) The rules of evidence do not apply in relation to a consumer guarantee dispute.
- (3) The rules of natural justice apply in relation to a consumer guarantee dispute.

[17] On 30 June 2022, the Delegate made findings in respect of liability in the first respondent's matter.⁵ On 8 June 2022, findings were made in respect of the fifth respondent's matter⁶ and on 15 July 2022 the Delegate made findings on the liability of Mr Milatos on each of the remaining applications.⁷

[18] Each Decision Notice included Orders which were made at the conclusion of detailed reasons given by the Delegate. Each Decision Notice is accompanied by a statement which advised the parties to each dispute that the decision is a reviewable decision and that either party may apply to the NTCAT. For example, the Decision Notice in *Raquel Esparagoza v George Milatos*⁸ is expressed as follows:

Decision

1. I am satisfied the Respondent has contravened the following consumer guarantees set out in s 54B of the Act:
 - (a) the residential builder will carry out the building work in a proper and workmanlike manner and in accordance with the plans and specifications:
 - (i) specified in the building permit for the work; and
 - (ii) if there is a residential building contract for the work – specified in the contract;

⁵ *Raquel Esparagoza v George Milatos*, No.2019-02837.

⁶ *Sharon Wright v George Milatos*, No. 2019-06773.

⁷ *Tanya Geddes v George Milatos*, No. 21906542; *Ryan Wright v George Milatos*, No. 2019-06542; *Jesse William-Hook v George Milatos*, No. 2019-05141.

⁸ 2019-02837; 30 June 2022.

- (b) all materials supplied by the residential builder will be good and suitable for the purpose for which they are to be used;
- (d) the residential builder will carry out the building work in accordance with this Act, the Regulations and other laws in force in the Territory;
- (e) the residential builder will carry out the building work with reasonable care and skill.

I note that this decision is a “reviewable decision” under r 74 and Schedule 2 of the Dispute Regulations and either party may apply to the Northern Territory Civil and Administrative Tribunal for a review of this decision.

[19] The Decisions Notices are expressed in the same or similar terms in the case of the remaining four respondents.⁹

[20] Mr Milatos was found to be in the business of the construction of the houses and to have contravened the consumer guarantees set out in s 54B(1)(a),(b),(d) and (e) of the *Building Act*. Those consumer guarantees are expressed as follows in the Act:

54B Consumer guarantees

- (1) The following guarantees (consumer guarantees) apply to all prescribed residential building work carried out by a residential builder:
 - (a) the residential builder will carry out the building work in a proper and workmanlike manner and in accordance with the plans and specifications:

⁹ 2019-06820 *Tanya Geddes v George Milatos*, 15 July 2022; 2019-06542 *Ryan Wright v George Milatos*, 15 July 2022; 2019-06773, *Sharon Wright v George Milatos*, 15 July 2022; *Jesse Williams-Hook v George Milatos*, 2019-05141, 8 July 2022.

- (i) specified in the building permit for the work; and
 - (ii) if there is a residential building contract for the work – specified in the contract;
- (b) all materials supplied by the residential builder will be good and suitable for the purpose for which they are to be used;
- (c) all materials supplied by the residential builder will be new unless:
 - (i) the residential builder is an owner-builder or developer; or
 - (ii) if there is a residential building contract for the work – the contract for the work specifies otherwise;
- (d) the residential builder will carry out the building work in accordance with this Act, the Regulations and other laws in force in the Territory;
- (e) the residential builder will carry out the building work with reasonable care and skill;
- (f) the residential builder will complete the work:
 - (i) if there is a residential building contract for the work – by the date, or within the period, specified in the contract; or
 - (ii) otherwise – within a reasonable period;
- (g) any other guarantee specified by regulation.

[21] The Orders made for each matter were expressed in the same or similar terms, but with different timeframes fixed for the provision of submissions. An example from the *Esparagoza* case is as follows:¹⁰

Orders

1. The parties are to provide submissions with any supporting evidence concerning the appropriate amount of compensation that should be payable by the Respondent to the Appellant in accordance with the following timetable:
 - (a) By 26 August 2022, the Appellant filed their submissions and supporting evidence and;
 - (b) By 9 September 2022, the Respondent file their submissions and supporting evidence in reply;
 - (c) By 23 September 2022, the Appellant file any submissions in reply.
2. I will consider the further submissions and proceed to make a decision on the papers as to the final orders in relation to the Application.
3. There by Liberty to apply for the parties concerning any extensions of time to comply with Order [1].

Delegate of the Commissioner of Residential Building Disputes

[22] Plainly, the Delegate found Mr Milatos contravened the consumer guarantees set out in s 54B as particularised in each matter. As above the Delegate then made programming orders for filing material to assess compensation.

10 *Raquel Esparagoza v George Milatos*, 2019-02837 at [93].

[23] The Delegate made clear to the parties in each case that in terms of relief, a Delegate is only able to make an order for compensation up to the maximum limit of \$100,000 governed by Reg 34(2). Regulation 34 provides:

34 Orders relating to defective work

- (1) If a dispute decision relates to a contravention of a consumer guarantee because of defective work, the Commissioner may order the respondent to rectify the work, including rectification in a way recommended by:
 - (a) the technical report given by a qualified person; or
 - (b) any other person who gave evidence about the matter to the Commissioner.
- (2) However, if the Commissioner is satisfied there are circumstances that make an order for rectification impracticable, the Commissioner may order the respondent to pay a specified amount, not exceeding \$100 000, as compensation to the appellant.
- (3) If the dispute decision orders the respondent to rectify the defective work, the Commissioner may also require:
 - (a) the appellant to engage a suitably qualified person to inspect the rectified work; and
 - (b) the respondent to pay the reasonable costs of the inspection incurred by the appellant.
- (4) A respondent who is ordered by the Commissioner to rectify defective work may comply with the requirement by engaging another suitably qualified residential builder to complete the work.

[24] As pointed out by the Delegate in the Decision Notices, if the compensation was assessed to be more than \$100,000, the Delegate was required to refer the decision to NTCAT under Reg 32(3). Regulation 32 is as follows:

32 Dispute decisions generally

- (1) The Commissioner may make one of the following decisions in a consumer guarantee dispute application (a dispute decision):
 - (a) the respondent has contravened all of the consumer guarantees as alleged in the application;
 - (b) the respondent has contravened some of the consumer guarantees as alleged in the application;
 - (c) the respondent has not contravened any of the consumer guarantees as alleged in the application and the application is dismissed.
- (2) A dispute decision made under sub-regulation (1)(a) or (b) may include any of the orders mentioned in regulations 33 to 35 as relevant.
- (3) The Commissioner must refer a dispute decision made under sub-regulation (1)(a) or (b) to the Tribunal if:
 - (a) the Commissioner has decided it is appropriate in the circumstances to make an order for the respondent to pay compensation to the appellant; and
 - (b) the amount of compensation assessed to be payable exceeds \$100 000.

- [25] Each of the respondents sought compensation for more than \$100,000, save that at the time of the Decision Notices, assessments were not complete.¹¹
- [26] On August 9 2022, Mr Milatos sought a review of the Delegate’s decisions in NTCAT. Two of the applications were filed out of time, which required an application to extend time. That application was filed on 8 November 2022. The application for an extension of time was refused by NTCAT and those cases were referred back to the Delegate for determination of quantum.¹²
- [27] On April 28 2023, NTCAT made orders with respect to the remaining applications for review filed by Mr Milatos. NTCAT dismissed the applications, confirmed the Delegate’s determinations and referred the matters back to the Delegate to assess compensation.¹³
- [28] Mr Milatos did not appeal that decision, and the compensation was assessed by the Delegate accordingly.
- [29] On 12 July 2023, in each of the matters, the Delegate assessed compensation payable by Mr Milatos in separate Decision Notices as follows:

11 *Raquel Esparagoza v George Milatos*, No. 2019-02837, at [252], for \$300,000; *Jesse Williams-Hook v George Milatos*, No. 2019-05141 at [237] for \$200,000; *Tanya Geddes v George Milatos*, No. 2019-06820 at [204], ‘TBD’ but rectification work was not considered reasonable or practical; *Ryan Wright v George Milatos*, No. 2019-06542 at [237]-[238], between \$170,000 and \$455,000; *Sharon Wright v George Milatos*, No. 2019-06773, at [207], \$160,000.

12 *George Milatos v Jesse Williams-Hook*, No. 2022-02112-CT; *George Milatos v Raquel Esparagoza*, No. 2022-02112-CT.

13 *George Milatos v Tanya Geddes and Commissioner of Residential Building Disputes*, File No. 2022-02110-CT, Member Perry, 28 April 2023.

No. 2019-02837, Raquel Esparagoza, \$497,000

No. 2019-05141, Jesse Williams-Hook, \$620,400

No. 2019-06820, Tanya Geddes, \$475,800

No. 2019-06542, Ryan Wright, \$475,800

No. 2019-06773, Sharon Wright, \$480,000

[30] As a result of the assessments being over \$100,000 in each case, the Commissioner referred the applications to NTCAT as required by Reg 32(3)(b).

[31] On 18 October 2023, NTCAT made the decision the subject of this application for leave to appeal.

[32] The NTCAT Member agreed with the approach to compensation adopted by the Delegate.¹⁴ As a result of a change in the amounts the appellants were entitled to, the Member varied the amounts under s 50(1)(b) of the *NTCAT Act*. Simultaneously, an Ordinary Application of George Milatos filed on 19 September 2023 for an extension of time to file certain submissions was dismissed. The compensation was varied to award the following amounts:

No. 2019-02837, Raquel Esparagoza, \$495,800

No. 2019-05141, Jesse Williams-Hook, \$722,480

No. 2019-06542, Ryan Wright, \$497,300

14 *Various Applicants v Milatos* at [57].

No. 2019-6820, Tanya Geddes, \$497,300

No. 2019-06773, Sharon Wright, \$497,300

[33] As is the usual course for NTCAT, no order for costs was made.

[34] In the reasons for decision, the Member carefully documented the history of the matter. He recalled NTCAT had previously dismissed Mr Milatos's application for review. The matters of *Milatos v Williams-Hook and Commissioner of Residential Building Disputes*¹⁵ and *Milatos v Esparagoza and Commissioner of Residential Building Disputes*¹⁶ were previously dismissed as being out of time. An application by Mr Milatos to re-open those proceedings was also dismissed.¹⁷ In relation to the balance of the matters, the Member recalled that NTCAT had previously confirmed the decision of the Delegate and that all cases were referred back to the Delegate for a determination of the quantum of compensation to be awarded.

[35] The Member proceeded on the basis that liability was not before him. NTCAT was on that occasion dealing only with the compensation proceedings given liability had been determined by the Delegate and such liability had been confirmed at the previous review. In terms of considering the scope of NTCAT's review jurisdiction arising out of the mandatory

¹⁵ File No. 2022-02112-CT, 1 December 2022.

¹⁶ File No. 2022-02113-CT, 1 December 2022.

¹⁷ *Various Applicants v Milatos* at [7].

referral under Reg 32(3) of the Regulations, the Member relied on what was said by President Bruxner in *Pringle v Pringle v GMIT Pty Ltd* ('*Pringle*'):¹⁸

There is no obvious, or logical reason why NTCAT jurisdiction in respect of the decision referred under Reg 32(3) should extend beyond the *only* facet of such a decision that makes the referral mandatory. Conversely, it would make little sense if the mere fact that compensation is assessed in an amount exceeding \$100,000 were necessarily to open up an inquiry into all of the decisions of the Commissioner is required to make before there is any occasion for such an assessment.

In all circumstances, and acknowledging that the matter is not without doubt, it is my view that NTCAT jurisdiction in respect of a dispute decision referred under Reg 32(3) *Building (Resolution of Residential Building Work Disputes)* Regulations 2012, whilst undoubtedly review jurisdiction, is confined to a review of the Commissioner's assessment of compensation and the making of orders consequent upon that review (which may, of course, involve amounts in excess of \$100,000).

[36] The Member concluded that the fact NTCAT had previously exercised its review jurisdiction with respect to the liability proceedings, put the matter beyond doubt.¹⁹ In other words, not attended by the possible doubt referred to by the President in *Pringle*.

[37] The Member also considered the Ordinary Application dated 19 September 2023. That application was for one week's extension of time in which to file submissions in the compensation proceedings. The date of filing the submissions was not compliant with the programming orders made at a directions hearing on 17 August 2023. The Member explained that he had

¹⁸ [2019] NTCAT 20 at [40]-[41].

¹⁹ *Various Applicants v Milatos* at [7].

advised the parties he would deal with the extension of time matters raised in the Ordinary Application at the beginning of the compensation hearing.

[38] After consideration, the Member dismissed the Ordinary Application for an extension of time. The Member found that the matters raised in the Ordinary Application related only to the question of Mr Milatos's liability rather than the question of proportionate liability which would cover a proceeding which engages the *Proportionate Liability Act*. It was submitted before the Member that the question of proportionate liability remained a live issue in the compensation proceedings notwithstanding the fact that a decision on liability had been made by the Delegate and had already been confirmed on review by NTCAT on 28 April 2023.

[39] The Member reiterated that NTCAT's jurisdiction to conduct a review of the Delegate's decision on liability arose pursuant to Reg 74.²⁰ The jurisdiction to conduct a review of the Delegate's decision in the current matter arose pursuant to Reg 32(3).²¹ The Member confirmed that he considered the proceedings before him were compensation proceedings. They were not the same as the proceedings on liability and as mentioned the Member cited *Pringle* as authority in support of that approach.²² The appellant was

20 Reg 74 refers to decisions and affected persons listed in Schedule 2, including a 'Dispute decision under reg 32(1)' by 'a party to a consumer guarantee dispute application'.

21 Reg 74 refers to decisions and affected persons listed in Schedule 2, including a 'Dispute decision under reg 32(1)' by 'a party to a consumer guarantee dispute application'.

22 [2019] NTCAT 20.

particularly critical of the following passage of the reasons for decision at [15]:²³

Secondly, in the exercise of the Tribunal's review jurisdiction pursuant to regulation 32(3) of the Building Disputes Regulations, the Tribunal has no jurisdiction to re-open the Tribunal's review decision on the question of liability. The decisions on liability arose in the Tribunal's review jurisdiction.²⁴ The *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) ('*NTCAT Act*') only allows for an internal review of the decision of the tribunal in exercise of its original jurisdiction.²⁵ There is no internal review of a decision made in the Tribunal's review jurisdiction. If Mr Milatos wished to challenge the Tribunal's decisions on liability, his recourse was to the Supreme Court pursuant to Part 5, Division 2 of the *NTCAT Act*.

[40] At the heart of the appellant's overall complaint is that he should have been permitted to bring proceedings against other parties who ought to be considered in some measure blameworthy for the defects found.

Alternatively, as NTCAT does not have jurisdiction to make findings pursuant to the *Proportionate Liability Act* when dealing with a consumer guarantee dispute, NTCAT should have referred the matter to the Local Court or to this Court.

[41] While a number of the observations made by senior counsel for the appellant about the legislative machinery and the interaction between the various relevant Acts may be correct, those observations do not answer the problem at hand. Mr Milatos exercised his right to a review of the Delegate's

²³ *Various Applicants v Milatos* at [15]; Ground 1 of the application seeking leave to appeal.

²⁴ *Northern Territory Civil and Administrative Tribunal Act 2014*, s 33(1).

²⁵ *Northern Territory Civil and Administrative Tribunal Act 2014*, Part 5, Div 1.

decisions on contraventions of a building guarantee. Each application for review stated: ‘I seek a review of the decision of the Delegate ... that I contravened consumer guarantees set out in s 54B of the *Building Act*’.²⁶

That review by NTCAT, as above, confirmed the decision of the Delegate on 28 April 2023.

- [42] The operation and construction of the *Building Act*, the relevant regulations and the relevant review powers of NTCAT cumulatively point to a framework designed to assist consumers to pursue relief for non-compliance with consumer guarantees in processes which are less burdensome and costly than court procedures. That does not mean the residential builder is without a remedy against parties who may also be at fault or blameworthy or bear some responsibility relevant to compensation of the person aggrieved. The operation of the relevant legislation means the residential builder will need to pursue others who may be blameworthy separately. As discussed further, this appears to be the way the legislation was designed to operate. The overall objective is to provide a remedy for the consumer in a less costly and formal setting against a residential builder. The residential builder may then pursue other remedies if necessary.

²⁶ Reproduced in Submissions of Commissioner of Residential Building Disputes, 9 January 2024 at [13].

NTCAT's Jurisdiction

- [43] The appellant submitted there was significance in the different ways NTCAT becomes seized of its jurisdiction. For instance, when Mr Milatos sought the Reg 74 review, the review jurisdiction of NTCAT was engaged.
- [44] When the Delegate determined compensation to be in excess of \$100,000 and referred the matter to NTCAT as required by Reg 32(3)(b), it was submitted the NTCAT was exercising its original jurisdiction. I am not convinced this last proposition is correct. While it is a mandatory referral to NTCAT under Reg 32(3), it is not a process commenced by application and in essence has many of the hallmarks of a review. It is a referral of a decision that compensation be paid in a sum greater than \$100,000. It is a review of the amount of compensation in the context of a particular jurisdictional limit the Delegate must work within. In the end, the nature of the review is not decisive as Mr Milatos had previously exercised his right to a review on the question of liability.
- [45] Reference was made to Part 3, Division 3, Subdivision 4 of the *NTCAT Act*. A review is by way of rehearing, which is a restriction which does not apply to matters dealt with in NTCAT's original jurisdiction. It was pointed out that NTCAT, when exercising its original jurisdiction must also consider whether it is appropriate to deal with a matter at all, or whether it is a matter which more appropriately should be dealt with by a court of record, capable of applying the common law.

[46] Section 99A of the *NTCAT Act* provides the President may make such an order to transfer proceedings to a Court because of lack of jurisdiction or because of the novelty or complexity of the matter. It would seem contrary to the legislative and regulatory framework which specifically provides for redress in the circumstances of building guarantee disputes to utilise a generally expressed mechanism in cases where other parties, not parties to the consumer guarantee dispute may be at fault. It can be readily envisaged that such a circumstance of other parties being at fault would be present in many residential building guarantee cases. Counsel gave the example of engineers or developers who might share responsibility. An approach which required transfer of any dispute under the Act because of potentially multiple parties would undermine the very purpose of establishing a process to deal with consumer guarantees in a relatively simple way. A residential builder is not without remedy against other parties.

[47] The *Pringle* decision has stood since 2019. There has been no amendment to the regulatory framework since then. There is no reason to doubt its correctness, notwithstanding there are some curious features about the regulatory provisions. In the final analysis, a referral under Reg 32(3)(b) does not bear the features of a matter which can be said to enliven NTCAT's original jurisdiction. The referral is not commenced by an application before NTCAT. It is a referral of two decisions. The referral is prefaced first on a decision already having been made on liability and a second decision that compensation will be more than \$100,000.

[48] In *Pringle*, President Bruxner distinguished referrals under Reg 32(3) from Reg 86 which read with Reg 31(2) enables the Commissioner to refer complex proceedings to NTCAT for hearing. Clearly in that instant NTCAT is exercising original jurisdiction. I agree with President Bruxner's reasoning in *Pringle*²⁷ which identifies how the Regulations under consideration modify the operation of aspects of NTCAT's review jurisdiction. To consider Reg 32(3)(b) properly, requires consideration of its context distinguishing it from other relevant review regulations. President Bruxner provided the following extensive analysis:

14. Apart from NTCAT's review jurisdiction referred to in regulation 74, the *Building (Resolution of Residential Building Work Disputes) Regulations 2012* also contemplate that the tribunal will exercise jurisdiction in certain matters referred to it by the Commissioner under regulation 31, which provides as follows:

31 Referrals to Tribunal

- (1) At any stage of a proceeding for a consumer guarantee dispute application, including during the hearing, the Commissioner may refer a question of law to the Tribunal for its determination.
- (2) At any stage of a proceeding for a consumer guarantee dispute application, other than at the hearing, the Commissioner may refer the application to the Tribunal for its consideration and decision if:
 - (a) the application involves complex questions of fact or law (or both); and

²⁷ *Pringle* at [14]-[42].

- (b) the Commissioner is of the opinion that the application should be dealt with by the Tribunal.
- (3) The Commissioner must:
 - (a) give a notice of a referral under this regulation to the parties to the application; and
 - (b) give the Tribunal all the relevant information about the proceeding.
- 15. NTCAT's role, and its powers, in respect of matters referred under regulation 31 are set out in regulations 85 and 86 of the *Building (Resolution of Residential Building Work Disputes) Regulations 2012* as follows:

85 Questions of law

- (1) This regulation applies if, under regulation 31(1), the Commissioner refers a question of law in a consumer guarantee dispute application to the Tribunal for its determination.
- (2) After making the determination, the Tribunal may:
 - (a) refer the matter back to the Commissioner to continue dealing with the application; or
 - (b) if the Tribunal considers the complexity of the application warrants it:
 - (i) decide to deal with the application; and
 - (ii) give the Commissioner a notice of the decision.

86 Complex proceedings

- (1) This regulation applies if:

- (a) under regulation 31(2), the Commissioner refers a consumer guarantee dispute application to the Tribunal; or
 - (b) under regulation 85(2)(b)(i), the Tribunal decides to deal with a consumer guarantee dispute application.
- (2) In dealing with the application, the Tribunal may exercise the powers of the Commissioner under these Regulations.
- (3) However, if the Tribunal's decision includes an order that the builder must pay compensation to the current owner, the amount ordered to be paid may exceed \$100 000.
- (4) To avoid doubt, if the Tribunal's decision includes an order mentioned in regulation 35(3)(a), the builder must give the notice about compliance to the Commissioner and not to the Tribunal.
- (5) The Tribunal must give the Commissioner a copy of its decision.
- 16. There is nothing in the *Building (Resolution of Residential Building Work Disputes) Regulations 2012* to suggest that NTCAT's jurisdiction in respect of matters referred under regulation 31 is anything other than original jurisdiction. At the time of such a referral, there is no decision for NTCAT to review.

Referrals under regulation 32(3)

- 17. Regrettably, the (otherwise) clear demarcation in the *Building (Resolution of Residential Building Work Disputes) Regulations 2012* between matters in NTCAT's review jurisdiction and matters in its original jurisdiction does not extend to dispute decisions referred to the tribunal under regulation 32(3).
- 18. Such matters do not come to NTCAT because a party (or an 'affected party') wishes to challenge a dispute decision.

19. Instead, and as is the case with matters under regulation 31, they are the product of a referral by the Commissioner.
20. However, unlike a referral under regulation 31, the referral is not one about which the Commissioner has any choice (it ‘must’ occur); nor does a regulation 32(3) referral happen in a context where the Commissioner has not made a decision. On the contrary, and commonly with matters under regulation 74, the referral occurs after a decision has been made and in a context where that decision will likely have been the product of substantial proceedings before the Commissioner.
21. Moreover, a referral under regulation 32(3) necessarily occurs in circumstances where the Commissioner has *not* referred a consumer guarantee dispute application to NTCAT under regulation 31(2). In other words, a matter that reaches NTCAT via regulation 32(3) is unlikely to involve the sort of legal or factual complexity that would permit the Commissioner to refer it under regulation 31(2).
22. Both the appellant and the respondent, as well as the Commissioner (who was asked to make submissions on the issue), submit that the tribunal’s jurisdiction in respect of a dispute decision referred under regulation 32(3) is review jurisdiction.
23. Such a conclusion is consistent with a tentative view I expressed in *Pastrikos v Morus-Huws* [2016] NTCAT 388.
24. It also finds some support in the text of the *Building (Resolution of Residential Building Work Disputes) Regulations 2012*.
25. First, regulation 32(3) speaks of the referral of a ‘decision made under regulation 32(1)’. This stands in contrast to the reference in regulation 31(2) to the referral of an ‘application’.
26. Secondly, the express conferral of review jurisdiction in regulation 74, read with Schedule 2, extends to review of a ‘[d]ispute decision under regulation 32(1)’.

27. Conversely, there is no direct support in the text of the regulations for a conclusion that a referral under regulation 32(3) triggers NTCAT's original jurisdiction. Most notably, and in marked contrast to regulation 31(2), regulation 32(3) is concerned with the referral of a 'decision' and not an 'application'. Moreover, any possibility that the reference to a 'decision' is erroneous is ruled out by the fact that regulation 32(3) clearly contemplates that the Commissioner will have decided two things²⁸: first that compensation should be paid and secondly that the amount of compensation is more than \$100,000.
28. The unavoidable conclusion is that NTCAT exercises review jurisdiction in respect of referrals under regulation 32(3).
29. The Commissioner's submissions acknowledge that such a conclusion 'is not without some interpretive difficulties'.
30. I agree.
31. The main difficulty stems from the fact that, in the exercise of review jurisdiction, NTCAT is required to review reviewable decisions by conducting a rehearing (which may involve the consideration of additional evidence) with a view to producing the correct or preferable decision.²⁹ In the usual course, the rehearing is to involve consideration of the *entire* decision that is under review.
32. Such a requirement in respect of a decision referred under regulation 32(3) would lead to absurdity and inconvenience.
33. In order to understand the absurdity and inconvenience, it is first necessary to recognise that the *only* facet of a decision under regulation 32(1) that triggers the requirement for a referral to NTCAT under regulation 32(3) is an assessment of compensation in an amount exceeding \$100,000. Such an assessment only occurs, if at all, at the very end of a series of

28 In addition to having decided under regulation 32(1) that there have been contraventions of the consumer guarantees.

29 See sections 45 and 46 of the *Northern Territory Civil and Administrative Tribunal Act 2014*.

other decisions by the Commissioner (regarding contravention of the consumer guarantees and the appropriate remedy).

34. The requirement for a referral is not triggered merely because the *value* of work required to rectify proven contraventions of the consumer guarantees may exceed \$100,000. That fact does not prevent the Commissioner from ordering the completion or rectification of work under regulations 33(1) and 34(1) respectively.
35. Moreover, regulations 33 and 34 make it clear that the Commissioner's power to order the payment of compensation instead of an order for completion or rectification is limited only by the cap of \$100,000 on the amount that may be the subject of an *order*. In addition, when regulations 33 and 34 are read in light of regulation 32(3) it is clear that the \$100,000 cap on orders does not in any way obviate the requirement for the Commissioner to *assess* the compensation payable.
36. The Commissioner submits that, in the usual course, it might be expected that matters potentially involving awards over \$100,000 will have the sort of legal or factual complexity that will warrant a referral to NTCAT under regulation 31.
37. Although that might be true of some matters, it is by no means clear that a matter will be 'complex' (to adopt the terminology of the regulations) just because it happens to involve contraventions that will cost substantial sums of money to complete or rectify.
38. In any case, the possibility of a referral under regulation 31(2) is no answer to the situation in the present case where, self-evidently, the Commissioner's delegate did not seek to invoke NTCAT's original jurisdiction.
39. It can finally be noted that the fact of a referral to NTCAT under regulation 32(3) in no way prevents an 'affected person' from also invoking the tribunal's review jurisdiction under regulation 74 of the *Building (Resolution of Residential Building Work Disputes) Regulations 2012*.

40. There is no obvious, or logical, reason why NTCAT's jurisdiction in respect of a decision referred under regulation 32(3) should extend beyond the *only* facet of such a decision that makes the referral mandatory. Conversely, it would make little sense if the mere fact that compensation is assessed in an amount exceeding \$100,000 were necessarily to open up an inquiry into all of the decisions the Commissioner is required to make before there is any occasion for such an assessment.
41. In all the circumstances, and acknowledging that the matter is not without doubt, it is my view that NTCAT's jurisdiction in respect of a dispute decision referred under regulation 32(3) of the *Building (Resolution of Residential Building Work Disputes) Regulations 2012*, whilst undoubtedly review jurisdiction, is confined to a review of the Commissioner's assessment of compensation and the making of orders consequent upon that review (which may, of course, involve amounts in excess of \$100,000).
42. In the way just described, the *Building (Resolution of Residential Building Work Disputes) Regulations 2012* (which takes their ultimate force from the *Building Act 1993*) relevantly modify the operation of the *Northern Territory Civil and Administrative Tribunal Act 2014* (see section 5(2)).

[49] The original jurisdiction of NTCAT is governed by Part 3, Division 2 and Part 4, Division 1 of the *NTCAT Act*. Counsel for Mr Milatos observed that when exercising both its review jurisdiction and its original jurisdiction, NTCAT is determining the substantial merits. That is not a controversial observation, save that it must always be borne in mind that NTCAT has a number of procedural mechanisms which allows or encourages a certain degree of informality, flexibility and cost efficiency.³⁰ The *NTCAT Act* also

30 Northern Territory Civil and Administrative Tribunal Act 2014 (NT), s 53.

makes clear that NTCAT must comply with the rules of natural justice.³¹ It has not been shown that NTCAT did not so comply.

[50] Attention was also drawn to Subdivision 5 of Division 3 of Part 3 of the *NTCAT Act* which deals with the range of orders NTCAT can make on review and the effect of determinations made on review.³² After reviewing a decision in its review jurisdiction, NTCAT must either: confirm the decision; or vary the decision; or set aside the decision and substitute its own decision; or send the matter back to the decision maker for reconsideration; or make a different decision if permitted by the relevant Act. NTCAT may make any consequential orders it thinks appropriate. If NTCAT confirms the decision, no further review can be sought by the same person. If NTCAT varies or substitutes the decision, the decision is taken to be that of the decision maker and, unless NTCAT orders otherwise, has effect from the time the original decision would have had effect. A varied or substituted decision is not a reviewable decision.

[51] In exercising its review jurisdiction, NTCAT must produce the correct or preferable decision.³³ It is to achieve this by acting fairly and according to the substantial merits of the matter,³⁴ must comply with the rules of natural justice,³⁵ may inform itself in any way it considers appropriate and is not

31 *Northern Territory Civil and Administrative Tribunal Act 2014* (NT), s 53(2)(a).

32 *Northern Territory Civil and Administrative Tribunal Act 2014* (NT), ss 50 and 51.

33 *Northern Territory Civil and Administrative Tribunal Act 2014* (NT), s 46(1).

34 *Northern Territory Civil and Administrative Tribunal Act 2014* (NT), s 53(1).

35 *Northern Territory Civil and Administrative Tribunal Act 2014* (NT), s 53(2)(a).

bound by the rules of evidence,³⁶ must act with as little formality and technicality and with as much speed as required for a proper consideration of the matter,³⁷ must ensure, so far as practicable, that all relevant material is disclosed to it to enable it to decide the proceeding with all relevant facts,³⁸ accept any document into evidence despite non-compliance with a time limit or service requirements relating to the document,³⁹ take all reasonable steps to ensure parties have had the opportunity in a proceeding to be heard or otherwise have their submissions received,⁴⁰ and must take all reasonable steps to ensure that all relevant material is disclosed to NTCAT so as to enable it to decide all the relevant facts in issue in a proceeding.⁴¹

[52] On behalf of Mr Milatos, it was submitted to be ‘utterly inimical to the purpose of the *NTCAT Act*, particularly in review proceedings to find, as NTCAT did, that its review jurisdiction was confined to a review of the compensation decision because the earlier decision on liability was provisional only.’ While the appellant has rightly emphasized the role and expectation a party should have before NTCAT, drawn from the *NTCAT Act*, NTCAT is first obliged to follow not only its own Act but to apply the provisions of the various Acts and Regulations which confer jurisdiction.

36 *Northern Territory Civil and Administrative Tribunal Act 2014* (NT), s 53(2)(b).

37 *Northern Territory Civil and Administrative Tribunal Act 2014* (NT), s 53(2)(c).

38 *Northern Territory Civil and Administrative Tribunal Act 2014* (NT), s 52(2)(a).

39 *Northern Territory Civil and Administrative Tribunal Act 2014* (NT), s 55(3).

40 *Northern Territory Civil and Administrative Tribunal Act 2014* (NT), s 55(a).

41 *Northern Territory Civil and Administrative Tribunal Act 2014* (NT), s 55(b).

- [53] The relevant Regulations were considered extensively by Luppino AsJ, albeit in a different litigious context in *Phillis v J Anderson Constructions Pty Ltd & Ors*; *Stephan & Anor v J Anderson Constructions Pty Ltd & Ors*; *Stephan & Anor v J Anderson Constructions Pty Ltd & Ors* ('Anderson').⁴²
- [54] In *Anderson* an initial question arose on the pleadings which was essentially whether action in 'respect of certain consumer guarantees' could be brought in this Court, as opposed to a 'consumer guarantee dispute' which must be dealt with by the Commissioner. His Honour found there was a 'consumer guarantee dispute' no matter how the issue was pleaded and the Commissioner had exclusive jurisdiction.⁴³
- [55] His Honour observed the relevant principles of statutory interpretation were that the legislation was beneficial or remedial, should be broadly interpreted in the event of ambiguity but that the beneficial construction principle does not operate to 're-word legislative provisions'.
- [56] He emphasized the point that the provisions of the *Building Act* should be read to avoid a multiplicity of proceedings which is undesirable.⁴⁴ Importantly, he also kept in mind that the jurisdiction of the courts should not be ousted unless the intention is clear. In terms of whether the Commissioner had exclusive jurisdiction in the case of residential building

⁴² [2020] NTSC 70.

⁴³ *Anderson* at [27].

⁴⁴ *Anderson* at [12](b).

guarantee disputes, Luppino AsJ took into account a number of features of the regulatory framework including:

- The Regulations limit the jurisdiction of the Commissioner to \$100,000, therefore on one argument, if an appellant was claiming more, the appellant would need to bring more than one action. This was not determinative because of the mandatory review under Reg 32 (3) to NTCAT which has no limit.
- NTCAT may in any event transfer such proceedings to this Court but that does not negate the exclusivity of the Commissioner's jurisdiction.
- Although the Commissioner may reject an application summarily, such a decision is capable of review to NTCAT.
- The Commissioner may reject an application on the grounds of complexity which does not necessarily point to non-exclusivity.
- Section 54BC preserves other rights under the laws relating to the provisions of goods and services with respect to building work which are not affected by the Act.
- Section 54BA(2)(b) voids a provision in a contract which requires a dispute in relation to the contract to be referred to arbitration. Once analysed, his Honour considered this not to be a significant factor as it applied only to an agreement to arbitrate made after the dispute has arisen.
- That NTCAT is effectively the final arbiter for this category of dispute, akin to a specialist tribunal which favours a finding of exclusivity.
- The Regulations which deal with possible mediation, conciliation, the ability to commission technical reports and broad powers to deal generally with the disputes point to exclusivity.

- Notwithstanding the processes under the Regulations ousted the jurisdiction of the courts, his Honour concluded the processes to be exclusive to the Commissioner.

[57] While his Honour's analysis does not answer all of the questions relevant to this appeal, particularly whether NTCAT should have referred the matter to a court, or considered the same, it does in my view represent the approach which should be taken when applying and construing the relevant parts of the Act and Regulations.

[58] In this matter, further material relevant to interpretation was provided on behalf of the Intervener which supports the approach taken by his Honour in *Anderson*, the NTCAT decision of *Pringle* and the matter determined by Member McCrimmon.

[59] The Intervener points out that the Regulations were part of the 'Residential Building Cover Package' of 2012 in which the Legislative Assembly sought to introduce consumer protection measures to homeowners following the collapse of a number of residential builders.⁴⁵

[60] The Act and Regulations together create 'consumer guarantees' by 'residential builders' enforced through the processes of a 'consumer guarantee dispute' to be determined by a 'dispute decision'.⁴⁶

⁴⁵ Second Reading Speech, *Building Amendment (Residential Building Consumer Protection) Bill* 2011. The package included *Building Amendment (Registration and Other Matters) Act* 2012; *Building Amendment (Financial Assets and Residential Building Contracts) Regulations* 2012; *Building Amendment (Residential Building Consumer Protection) Act* 2012; *Building (RBI and Fidelity Fund Schemes) Regulations* 2012; *Building (Resolution of Residential Building Work Disputes) Regulations* 2012.

⁴⁶ *Building Act*, ss 54FC(2), Reg .32(1).

- [61] The relevant Regulations are made under the *Building Amendment (Residential Building Consumer Protection) Act* which amended the Act. The Act creates mandatory ‘consumer guarantees’⁴⁷ imposed on a ‘residential builder’⁴⁸ in favour of a ‘current owner’,⁴⁹ requires residential builders to have an authorised insurance policy or fidelity certificate,⁵⁰ establishes the Commissioner and the process to deal with a ‘consumer guarantee dispute’⁵¹ and grants the Minister the power to make Regulations.⁵²
- [62] As observed by Luppino AsJ in *Anderson*, the Act expressly preserves all other rights an owner has under laws dealing ‘with the protection of the rights of consumers in relation to the provision of goods or services in connection with building work’.⁵³
- [63] The comprehensive nature of the legislative and regulatory package, and the relevant statutory construction decisions thus far in both NTCAT and this Court tend against the procedure which the appellant urges was the appropriate course. In short, that the appellant should have been given the opportunity of a second review before NTCAT and that despite the

⁴⁷ *Building Act*, ss 54BA, 54B(1).

⁴⁸ *Building Act*, s 54AC(1).

⁴⁹ *Building Act*, s 54AD.

⁵⁰ *Building Act*, s 54AC(1).

⁵¹ *Building Act*, ss 54FC(2), 54FC, FD, FE.

⁵² *Building Act*, s 54FF.

⁵³ *Building Act*, s 54BC.

regulatory regime, he should have had the opportunity to put a case based on the *Proportionate Responsibility Act*.

[64] Against that background and the considerations thus far, the proposed grounds will be dealt with.

Proposed grounds of appeal

Ground 1

At Reasons [15], the Member erred as a matter of law in finding that the Appellant's recourse against the Delegate's decision on liability was to the Supreme Court pursuant to Part 5, Division 2 of the Act:

- 1. When an appeal to the Supreme Court under s 141 of the *NTCAT Act* is subject to section 51(1) of the *Supreme Court Act 1979* which requires there to be a 'judgement given', the operative act being a 'pronouncement' or 'giving' of a judgement, finally disposing of the matter, not a provisional judgement which was the effect of the Commissioner's Delegate separate decision in this matter; and**
- 2. On a proper construction of section 141(1) of the Act, in the light of section 51(1) of the *Supreme Court Act 1979*, a provisional decision, without orders, such as that given by the Delegate in the earlier decisions cannot be considered to be "a judgement given in proceedings" for the purpose of section 51(1) of the *Supreme Court Act 1979*; and**

3. And so, it follows, that an appeal could not be brought to the Supreme Court under the Member’s decision made on 18 October 2023.

- [65] In fairness, it should be understood senior counsel for the appellant acknowledged at the outset that s 51(1) of the *Supreme Court Act* had no direct application. It is acknowledged the inclusion of s 51(1) was a simple mistake. I have set out the ground in full, not to embarrass, but to indicate an element which persists, namely the submission that no right of appeal to this Court arose from the Delegate’s decision on liability as no ‘judgement’ was given or no ‘pronouncement’ made which could enliven the appellate jurisdiction of this Court.
- [66] Reliance was placed on *Trippe Investments Pty Ltd and Others v Henderson Investments Pty Ltd*⁵⁴ (‘*Trippe*’) where the Court of Appeal confirmed that a right of appeal arises from “a judgement given” in a proceeding. The Court there was considering s 51(1) of the *Supreme Court Act* in circumstances where it considered the trial judge had not finalised anything when giving initial remarks at the close of a case. The Court held it was only when orders at a later date were pronounced that judgement was formally and finally pronounced that it could be said that ‘judgement [was] given’. Nader ACJ and Angel J held:⁵⁵

54 (1990) 101 FLR 261.

55 *Trippe Investments* at 265.

The appeal is from “a judgement given” in a proceeding or a part of a proceeding. The “giving” of a judgement or the “pronouncing” of a judgement is quite distinct from the “passing” of a judgement, the “entering” of a judgement or, under the new Rules, the “authenticating” of a judgement: see *Holtby v Hodgson* (1989) 24 QBD 103 at 107; *Turner v Manier No 1* [1958] VR 350; and *Antoniadis v Ramsay Surgical Ltd* [1972] VR 323. It is also quite distinct from giving or delivering of reasons for judgement: see *Blackmore v Flexhide Pty Ltd* [1979] 1 NSWLR 103. The learned Judge, having delivered his reasons for judgement and having stood the proceedings over for minutes to be brought in and for argument on costs, it cannot be said that judgement was given or pronounced until those matters were finalised.

[67] The appellant cannot succeed on this ground. First, it may be observed the appeal provision relevant to an appeal from NTCAT to this Court permits an appeal against ‘a decision’.⁵⁶ As mentioned, s 51(1) of the *Supreme Court Act* has no application.

[68] The first liability decision was not ‘provisional’ as suggested on behalf of the appellant. The Delegate made the first decision on liability and as discussed above the decision was reviewed by Member Perry of NTCAT upon the application of Mr Milatos.⁵⁷ There was nothing provisional about the Delegate’s decision. The delegate’s decision was reviewed, but that does not mean it was provisional. NTCAT on that occasion made four decisions (1) Mr Milatos’s review application was dismissed. (2) The Delegate’s decision was confirmed. (3) The matter was referred back to the delegate for determination of the quantum of compensation. (4) No order as to costs. Each of those decisions could have been the subject of appeal to this Court,

⁵⁶ *Northern Territory Civil and Administrative Tribunal Act* 2014 (NT), s 141(1).

⁵⁷ *Tanya Geddes v George Milatos*, 28 July 2023.

if they raised a question of law as required by s 141(1) of the *NTCAT Act*.

There was nothing ‘provisional’ about those decisions.

[69] Clearly the decisions of the Delegate of 15 July 2022 on liability were reviewable decisions. They were ‘dispute decisions’ as comprehend by Reg 32(1), set out above. Reg 74, read with Schedule vests review of such decisions with NTCAT. As has been noted, it was the appellant who invoked the review jurisdiction of NTCAT which led to the decision of Member Perry. At that time the appellant could have applied to appeal to this Court but did not do so.

[70] The formal part of the Delegate’s decisions are set out above. The decisions were clearly ‘dispute decisions’ and included orders determining the amount of compensation and advice as to review rights to NTCAT. The Delegate determined contraventions of a number of consumer guarantees, findings he was authorised to make pursuant to Reg 32(1).

[71] There was nothing ‘provisional’ about the decision of the Delegate, nor NTCAT on 28 April 2023.

[72] Ground one will not be upheld.

Ground 2

In any event, the Member’s decision that the scope of NTCAT’s review jurisdiction arising out of a mandatory referral under regulation 32(3) is confined to the issue of compensation is wrong as a matter of law:

- 1. Properly construed, a review under a mandatory regulation 32(3) referral is a proper review, involving liability and quantum;**
- 2. There is nothing in the drafting of regulations 32(3) or 74 that points to the review being so limited;**
- 3. A review jurisdiction so limited defeats the purpose of regulations 32(3) or 74; and**
- 4. To the extent to which the decision in *Pringle & Pringle v GMIT Pty Ltd* [2019] NTCAT 20 limits the review jurisdiction (as the Member determined), the decision is wrong as a matter of law.**

[73] Regulation 32(3)(b), set out above mandates a review of a ‘dispute decision’ only when the compensation ordered is above \$100,000. As above the appellant contends that to restrict the review to compensation is inimical to the purpose and objectives of the *NTCAT Act*. When the Regulations are read as a whole, in the context of this being consumer protection legislation and bearing in mind that in many of the conceivable cases there would, as here, be an opportunity for the builder to exercise a right to a review on liability through Reg 74, as an ‘affected person’, I am drawn to the same conclusion as the NTCAT in *Pringle* and indeed the Member here.

- [74] As discussed above, the decision of the Delegate on liability was not provisional and in any event was confirmed on review. It was treated as final by all parties including as far as can be ascertained, by the appellant.
- [75] Contrary to the submissions made on behalf of the appellant, there would be little or no utility in revisiting the Delegate's findings on liability which in this case had already taken place through the previous review before Member Perry.
- [76] While it is the case that there is nothing on the face of Reg 32(3)(b) and Reg 74 to restrict a review to compensation, it is through considering the Regulations as a whole, in context, and understanding the operation of the scheme which produces the results as explained in *Pringle*.
- [77] Even if the conclusion here about the nature of a review under Reg 32(3)(b) is in error, the applicant had already exercised his right to review of the liability question. He was unsuccessful in that review before NTCAT. He did not appeal that decision. It is understood that at the time Mr Milatos was not represented. If so, that was unfortunate. Perhaps he was unaware of his right to bring an application for leave to appeal after an unsuccessful review. Nevertheless, it cannot be the case that the regulatory framework for consumer protection legislation envisaged or provided for two reviews of liability in the context of consumer guarantee disputes. That would be extraordinary and that proposition should be rejected. Such an approach would undermine the regulatory framework.

[78] Ground 2 will not be upheld.

Ground 3

The error alleged in Ground 1 and 2 caused the Member to deny the Appellant procedural fairness (itself an error of law) because it formed the basis of the Member's refusal to:

- 1. Grant an extension of time to the Appellant to file further material;**
- 2. Permit the Appellant to raise, as part of his case, an apportionment under the *Proportionate Liability Act 2005* and seek to have the matter transferred to this Court under section 99A of the Act to determine the issue of apportionment (or contribution) be determined in respect to the developer, Bellamack Pty Ltd, all the other parties involved in the design, engineering and construction of the buildings in dispute, including the Appellant's former company, San Industries Pty Ltd, which was a party to the agreement with the development (not the Appellant personally).**
- 3. The denial of procedural fairness alleged in Ground 2 was compounded by the Member's artificial separation of the liability and compensation hearing, when, to the extent there is a separation between the two (2) hearings, the separation is procedural only and could not affect the Appellant's substantive right to raise apportionment (or contribution) against the developer or the other**

parties involved in the design, engineering and construction of the buildings in dispute, including San Industries Pty Ltd.

- [79] The conclusion here is that there was no denial of procedural fairness as the appellant had already exercised, albeit unsuccessfully his right to a review of liability and the proceedings from that time could only be relevant to compensation. Neither is there material before this Court which would tell the Court how the outcome would be different if the appellant was given an extension to make submissions on apportionment. Nevertheless, the appellant submits apportionment was never dealt with and should have been.
- [80] The appellant contends he sought to raise the question of proportionate liability and should have been permitted to agitate it before NTCAT. It was submitted to Member McCrimmon on behalf of Mr Milatos that the question of proportionate liability remained a live issue in the compensation proceedings, notwithstanding the fact that the decision on liability of the delegate had been confirmed by the Tribunal in the first review decision. The appellant argued before this Court that even though the question of contravention of the consumer guarantees had been determined within the regulatory regime, the compensation issue necessarily gave rise to an issue of apportionment and should have considered the blameworthiness of others.
- [81] The appellant contends NTCAT mischaracterised apportionment as a liability issue. Given the regulatory regime does not permit arguments about proportionate liability, it was submitted NTCAT should have exercise its

powers to transfer the matter to the Local Court or should have heard argument on transfer pursuant to s 99A of the *NTCAT Act*:

99A Transfer of proceeding to Local Court or Supreme Court

- (1) The President may make an order (a *transfer order*) that a matter be transferred to the Local Court or the Supreme Court (the *recipient court*).
- (2) The President may make a transfer order if satisfied that:
 - (a) the matter is not within the Tribunal's jurisdiction; or
 - (b) because of the circumstances of the case, the proceeding would be more appropriately heard by the recipient court.

Example for subsection (2)(b)

Circumstances that might be relevant include the following:

- (a) *the complexity of the matter, or the proceeding;*
 - (b) *the difficulty or novelty of the issues raised;*
 - (c) *the unsuitability of the Tribunal's powers and procedures for dealing with the matter;*
 - (d) *that the matter is closely related to a cause of action between the same parties that is before the Local Court.*
- (3) The President may make a transfer order on application by a party or on the President's own initiative.
- (4) The President may make a transfer order:
 - (a) even if the matter is not within the Tribunal's jurisdiction; but
 - (b) only if it appears to the President that the matter is, or when transferred will be, within the jurisdiction of the recipient court.

Note for subsection (4)(b)

In relation to the jurisdiction of the Local Court or Supreme Court for transferred matters, see section 13A of the Local Court Act 2015 or section 16A of the Supreme Court Act 1979.

- (5) The President must not make a transfer order unless satisfied that doing so would be in the interests of justice.
- (6) The President, when making a transfer order, and the recipient court when dealing with the transferred matter, may make any orders the President or

court thinks appropriate for facilitating the orderly transfer of the matter to the court.

- (7) A recipient court may refuse to accept the transfer of a matter if:
 - (a) the matter is within the Tribunal's jurisdiction; and
 - (b) the recipient court is satisfied that:
 - (i) because of the circumstances of the matter, the proceeding would be more appropriately heard by the Tribunal; and
 - (ii) it is in the interests of justice to do so.
- (8) If a recipient court refuses to accept a transfer of a matter:
 - (a) the transfer order is of no effect; and
 - (b) the President must not make another transfer order in relation to the matter.
- (9) For section 13A of the *Local Court Act 2015*, if a transfer order is made to transfer to the Local Court a matter that is within the Tribunal's jurisdiction:
 - (a) jurisdiction to deal with the claim mentioned in that section is taken to be conferred on the Local Court as well as the Tribunal; and
 - (b) the Act under which the jurisdiction is conferred on the Tribunal applies:
 - (i) as if references in it to the Tribunal were references to the Court; and
 - (ii) with any other necessary changes.

Note for section 99A

For the transfer of proceedings from the Local Court or Supreme Court to the Tribunal, see section 44A of the Local Court Act 2015 or section 16 of the Supreme Court Act 1979.

[82] Had NTCAT transferred the proceedings, the appellant argues the Local Court could have given consideration on the question of whether there were other parties who were blameworthy in terms of compensation to be assessed. On this argument, it is suggested it may be open for the Local

Court to determine liability. Regardless of whether that is the case, the appellant submitted that the liability finding could stand but on the compensation question the Local Court could consider the blameworthiness of others, even if NTCAT could not. The appellant submitted that by NTCAT mischaracterising apportionment as an issue of liability rather than apportionment of damage as an appropriate remedy, denial of procedural fairness was compounded. The suggested mischaracterisation denied the appellant the opportunity to raise proportionate liability as a defence, which would have enabled him to ventilate the issue, if not in NTCAT then by transfer or at least the consideration of the same under s 99A of the *NTCAT Act*.

[83] The problem with the appellant's argument is that it fails to properly characterise the proceedings as a 'consumer guarantee dispute' under the Act and Regulations⁵⁸ which as discussed by Luppino AsJ at length in *Anderson* has particular consequences for relevant or associated litigation.

[84] For the reasons given by Luppino AsJ summarised above and considering the type of legislation, its context and the intention to resolve 'consumer guarantee disputes' efficiently, it is concluded here that the Commissioner has exclusive jurisdiction over 'consumer guarantee disputes'. NTCAT has the review function exclusively. The legislative intent is clear. The

58 *Building Act*, s 54FC.

‘consumer guarantee disputes’ are disputes between the ‘residential builder’ and the owner.

[85] As acknowledged by the appellant, Reg 4 expressly excludes the operation of the *Proportionate Liability Act*: ‘Compensation does not include damages as defined in section 3 of the *Proportionate Liability Act*.’ To suggest that because NTCAT is excluded from considering proportionate liability it should transfer proceedings (or consider it) would undermine the operation of the legislative mechanism to deal with these particular disputes.

[86] In any event, even if proceedings were transferred to the Local Court, the Local Court would have no jurisdiction to consider apportionment for a ‘consumer guarantee dispute’. A transfer would be pointless.

[87] An apportionable claim is defined as a claim for ‘damages’ under s 4(2)(a) of the *Proportionate Liability Act* ‘arising from a failure to take reasonable care’. Significantly, s 13(1)(a) of the *Proportionate Liability Act* refers to a ‘concurrent wrongdoer’ with the court having regard to the extent of the ‘defendant’s responsibility for’ the loss or damage. Section 6(1) refers to a ‘concurrent wrongdoer’ whose acts ‘caused’ the loss the subject to the damages claim. Those sections and the procedural mechanisms available

under the Act⁵⁹ all point to apportionment as a matter which is to be considered at the liability stage as it concerns causation.⁶⁰

[88] As counsel for the Intervener pointed out, in the circumstances of this dispute, to determine proportionate liability of other parties would require re-opening the proceedings to determine again the elements of proportionate liability of other parties. Here the injury is the defects of the buildings. Under the *Proportionate Liability Act*, the Local Court would be required to determine the causes of the defects (the injury) and the entity responsible for the injury. The Court would be required to determine the responsibility for each defect which necessarily would occur at the liability stage.

[89] In *Hunt & Hunt Lawyers v Mitchell* ('*Hunt & Hunt*') the High Court emphasized the requirement to consider the cause of the injury when considering the 'concurrent wrongdoer' and the extent of their responsibility. While giving an example not connected to the facts of that case, their Honours considered the case of the negligent construction of a house where inadequacies could be attributed to a number of wrongful acts and stated:⁶¹ although these acts were independent of each other, the end result is that the house is defective and needs to be underpinned. Their Honours said 'The act or omission of each wrongdoer was a *cause* of that damage' (emphasis added). The Court went on to indicate the two relevant

59 *Proportionate Liability Act*, s 11 dealing with joinder; s 12 dealing with notice to the concurrent wrongdoer.

60 *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10; 247 CLR 613.

61 *Hunt & Hunt* at [11].

questions in relation to proportionate liability. First, what is the damage and loss that is the subject of the claim? And second, is there a person, other than the defendant, whose acts or omissions also *caused* that damage or loss?⁶² (emphasis added).

[90] In *Yates v Mobile Marine Repairs Pty Ltd & Anor*⁶³ Palmer J, considered similar principles in the *Civil Liability Act 2002* (NSW) when dealing with apportionment. His Honour said apportionment was intended to visit on each concurrent wrongdoer, only that amount of liability which the Court considers “just” having regard to the comparative responsibilities of all wrongdoers for the plaintiff’s loss. To determine what is “just” requires the exercise of a wide discretionary judgement found upon the facts of each case. The policy is to determine who the wrongdoer is in a real and pragmatic sense, and determine if they are more blame for the loss than another wrongdoer and should bear more liability.⁶⁴ Accordingly, to determine apportionment on a case-by-case basis will require consideration of the facts at the outset.

[91] In *Kheirs Financial Service Ltd v Aussie Homes Loans Ltd*⁶⁵ the Victorian Court of Appeal emphasized causation must be determined for the purposes of apportionment in order to determine what is just. Similarly *Miletech v*

62 *Hunt & Hunt* at [19].

63 [2007] NSWSC 1463.

64 At [93].

65 (2010) 31 VR 46.

*Murchie*⁶⁶ held a plaintiff must show the occurrence of an act or omission and a causal connection between the act or omission and the loss.

- [92] Even if apportionment could be raised, it was required to be raised at the time of the assessment of liability. As above it could not be raised as a matter of law in a ‘consumer guarantee dispute’. To suggest NTCAT should have transferred proceedings to the Local Court to allow an apportionment proceeding would undermine the purpose and intent of the regulatory regime.
- [93] A residential builder in the position of Mr Milatos who wishes to proceed against other parties is free to do so, but not within the ‘consumer guarantee dispute’ regime.
- [94] I agree with the conclusions in *Anderson* to the effect that the Commissioner has exclusive jurisdiction over a ‘consumer guarantee dispute’. A Court could go no further than the Commissioner and potentially an issue of estoppel could be raised in any attempt to agitate proportional liability if it could have been raised before the Delegate or NTCAT.
- [95] To open a ‘consumer guarantee dispute’ to apportionment and court proceedings could have the effect of sabotaging the consumer protection features and operation of the Act and Regulations.
- [96] Ground 3 will not be upheld.

⁶⁶ [2012] FCA 1013.

Orders

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. The decision made by the NTCAT (Member McCrimmon) on 18 October 2023 is confirmed.
4. If any party is seeking costs, that party should contact my Chambers within 28 days and directions may be given on the filing of submissions.
