

CITATION: *Kellie v Northern Territory of Australia*
[2026] NTCA 4

PARTIES: KELLIE, Tahnee Lee

v

NORTHERN TERRITORY OF
AUSTRALIA

TITLE OF COURT: NORTHERN TERRITORY COURT OF
APPEAL

JURISDICTION: APPEAL from SUPREME COURT
exercising Northern Territory
jurisdiction

FILE NO: AP 9 of 2024 (22428372)

DELIVERED: 29 April 2026

HEARING DATE: 23 June 2025

JUDGMENT OF: Grant CJ, Blokland & Brownhill JJ

CATCHWORDS:

APPEALS – Leave to appeal — ‘Exceptional circumstances’

Whether Supreme Court erred in concluding that leave to file appeal out of time was required – Whether Supreme Court’s decision to grant leave interlocutory in nature such that appellant requires leave to appeal – Decision interlocutory and leave required – Whether ‘correctness standard’ applies to decision to grant leave – Determination of ‘exceptional circumstances’ does not admit of only one legitimate and reasonable answer – Whether substantial injustice would be done by leaving erroneous decision unreversed – No substantial injustice having regard to overall justice of case – Whether Supreme Court erred in finding that suspension of time by r 3.04(1) of the *Supreme Court Rules* does not apply to appeal under s 19(1) of the *Local Court (Civil Procedure) Act* – Appeal period fixed by Act not

Rules – Notice of Contention dismissed – Whether Supreme Court erred in concluding that ‘exceptional circumstances’ were present for purposes of granting leave to appeal – Whether Supreme Court acted on a wrong principle and/or took into account irrelevant considerations and/or made a mistake of fact constituting error of law – Leave to appeal granted – Appeal dismissed

Local Court (Civil Procedure) Act 1989 (NT) s 19

Supreme Court Rules 1987 (NT) r 3.04, r 82.04

Alcan (NT) Alumina v Commissioner of Territory Revenue (2009) 239 CLR 27, *Becker v Marion City Corporation* [1977] AC 271, *Carr v Finance Corp of Australia Ltd (No 1)* (1981) 147 CLR 246, *Collins v The Queen* (1975) 133 CLR 120, *DZY (a pseudonym) v Trustees of the Christian Brothers* [2025] HCA 16, *Ex parte Britt* [1987] 1 Qd R 221, *GLJ v Roman Catholic Church* (2023) 414 ALR 635, *Hall v Nominal Defendant* (1966) 117 CLR 423, *House v The King* (1936) 55 CLR 499, *Jackamarra v Krakouer* (1998) 195 CLR 516, *Lamac Developments Pty Ltd v Devaugh Pty Ltd* (2002) 27 WAR 287, *Licul v Corney* (1976) 180 CLR 213, *Minister for Immigration v SZVFW* (2018) 264 CLR 541, *Nikac v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 65, *Northern Territory of Australia v Roberts* [2009] NTCCA 5, *Reid v Nairn* (1985) 60 ALR 419, *Re Luck* [2003] HCA 70, *Samios v DPP* [2002] VSCA 108, *Sanchez v Commissioner of Police* [2023] QCA 36, *Sanofi v Davis Pty Ltd* (1982) 149 CLR 147, *Sky City Darwin Pty Ltd v Groote Eylandt Aboriginal Trust Incorporated (Statutory Manager Appointed)* [2015] NTCCA 4, *Tampion v Anderson* (1973) 48 ALJR 11, *Trustees of the Christian Brothers v DZY (a pseudonym)* [2024] VSCA 73, *Warren v Coombes* (1979) 142 CLR 531, *Youngman v Melbourne Storage Co* (1885) 7 ALT 53, referred to.

APPEALS – Remittal to differently constituted court below – Opportunity to be heard

JUDGMENTS AND ORDERS – Reasons – Duty to give reasons – Whether necessary to give reasons

Whether Supreme Court erred in ordering that matter be remitted to Local Court differently constituted for rehearing – Supreme Court found miscarriage of complicated process of fact-finding including in relation to findings of credit – Remittal to differently constituted tribunal only course properly open – Whether Supreme Court erred in failing to provide appellant sufficient opportunity to be heard on remittal to Local Court differently

constituted – Matter raised expressly by respondent in notice of appeal and written submissions – Appellant had opportunity to address issue – Whether Supreme Court erred in failing to give reasons for ordering remittal to Local Court differently constituted for rehearing – Reasons adequately described in Supreme Court’s findings concerning Local Court’s miscarriage in reasoning – Appeal dismissed

Local Court (Civil Procedure) Act 1989 (NT) s 19(6)

Anderson v Sharpe [2023] VSC 559, *Australian National Industries Ltd v Spedley Securities Ltd (in liq)* (1992) 26 NSWLR 411, *Beale v Government Insurance Office of New South Wales* (1997) 48 NSWLR 430, *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] HCA 12, *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518, *Northern NSW FM Pty Ltd v Australian Broadcasting Tribunal & Anor* (1990) 26 FCR 39, *Ragogo v Minister for Immigration and Ethnic Affairs & Anor* (1995) 59 FCR 489, *Re Australian Railways Union & Ors; Ex parte Public Transport Corporation* (1993) 117 ALR 17, *Seltsam Pty Ltd v Ghaleb* [2005] NSWCCA 208, *Shields v Overland & Anor (No 2)* [2009] VSC 589, *Siddha Yoga Foundation Ltd v Strang & Anor* (Unreported, Federal Court of Australia, 9 February 1996, Jenkinson J), *Thorne v Kennedy* (2017) 263 CLR 85, *Vegco Pty Ltd v Gibbons* [2008] VSC 363, referred to.

REPRESENTATION:

Counsel:

Appellant:	K Foley SC with B Seignior
Respondent:	D McLure SC with T Moses

Solicitors:

Appellant:	Top End Women’s Legal Service Inc
Respondent:	Solicitor for the Northern Territory

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

Kellie v Northern Territory of Australia [2026] NTCA 4
No AP 9 of 2024 (22428372)

BETWEEN:

TAHNEE LEE KELLIE

Appellant

AND:

**NORTHERN TERRITORY OF
AUSTRALIA**

Respondent

CORAM: GRANT CJ, BLOKLAND & BROWNHILL JJ

REASONS FOR JUDGMENT
(Delivered 29 April 2026)

THE COURT:

- [1] This is an appeal from a decision of the Supreme Court delivered on 30 August 2024¹, allowing an appeal from a decision by the Local Court delivered on 13 December 2023.

Proceedings before the Local Court

- [2] The appellant brought a civil claim for battery against the respondent. The battery was alleged to have been constituted by a deliberate digital penetration of the appellant's vagina by a female police auxiliary

¹ *Northern Territory of Australia v Kellie* [2024] NTSC 73.

during a ‘pat down’ search at a police station which was conducted pursuant to s 144 of the *Police Administration Act 1978* (NT). The evidence in the trial was heard over three days between 19 and 21 September 2022. The parties made submissions on 7 November 2022. The decision of the Local Court was delivered on 13 December 2023. In those reasons, the Local Court found that the police auxiliary had committed battery of the appellant by intentionally inserting one or two fingers into the appellant’s vagina. The Local Court awarded the appellant damages in the sum of \$120,000.

Proceedings before the Supreme Court

- [3] The proceeding before the Supreme Court was an appeal from the decision of the Local Court pursuant to s 19 of the *Local Court (Civil Procedure) Act 1989* (NT). Under that provision, an appeal must be brought within 28 days or, with the leave of the Supreme Court, after the expiration of 28 days, and is restricted to an appeal on a question of law from a final order of the Local Court.
- [4] The Supreme Court found that the appeal had been lodged out of time but granted an extension of time on the ground that the circumstances of the delay were exceptional in nature. The respondent’s appeal to the Supreme Court was in relation to both liability and quantum. The Supreme Court found that the Local Court’s reasons for decision were inadequate in that they did not expose the path of reasoning to the ultimate conclusion, significant issues were left unresolved, and the

use made of intermediate findings was not disclosed in the final determination. Having made those findings, the Supreme Court did not deal finally with the other grounds of appeal. Those other grounds were that various material findings made by the Local Court were unreasonable and not supported by any evidence; that several findings were infected by error of law; and that the award of damages was manifestly excessive or unreasonable.

- [5] Having determined to allow the appeal on the ground of inadequate reasons, the Supreme Court ordered that the judgment of the Local Court be set aside, and the matter remitted to the Local Court differently constituted for a rehearing. Those orders were consistent with the relief sought by the respondent (who was the appellant in that proceeding) in the Notice of Appeal dated 19 January 2024. The Supreme Court did not seek or receive any further submissions from the parties in relation to the appropriate form of disposition before publishing its reasons and entering judgment in those terms.

Grounds of appeal and Notice of Contention

- [6] There is no challenge to the correctness of the Supreme Court's substantive conclusion that the reasons of the Local Court were inadequate, and no submission by the appellant to the effect that the reasons of the Local Court were adequate. The appeal against the decision of the Supreme Court is made on the following grounds:

- (a) the Supreme Court erred in concluding that ‘exceptional circumstances’ were present for the purpose of granting the respondent leave to appeal from the Local Court to the Supreme Court, by acting on a wrong principle and/or by taking into account irrelevant matters and/or by making a mistake of fact;
- (b) the Supreme Court erred in ordering the matter to be remitted to the Local Court differently constituted for rehearing;
- (c) the Supreme Court erred in failing to provide the appellant with sufficient opportunity to be heard on the question of whether the matter should be remitted to the Local Court differently constituted for rehearing; and
- (d) the Supreme Court erred in failing to give any reasons for ordering that the matter be remitted to the Local Court differently constituted for rehearing.

[7] The appellant seeks that the orders of the Supreme Court be set aside, and that leave to appeal from the Local Court to the Supreme Court be refused or, in the alternative, that the matter be remitted to the Local Court as originally constituted.

[8] The respondent has filed a Notice of Contention asserting that the Supreme Court erred in finding that r 3.04(1) of the *Supreme Court Rules 1987* (NT) does not apply to an appeal under s 19(1) of the *Local Court (Civil Procedure) Act*, and that the respondent therefore required

leave to appeal. This contention, if successful, would obviate the need to consider the appellant's challenge to the Supreme Court's finding of 'exceptional circumstances' for the purpose of granting leave to appeal outside the 28-day limitation period.

The grant of leave to appeal from the Local Court

- [9] The appellant's contention in the first ground of appeal is that the Supreme Court erred in concluding that 'exceptional circumstances' were present because it acted on a wrong principle and/or considered irrelevant matters and/or made a mistake of fact.
- [10] As already described, s 19 of the *Local Court (Civil Procedure) Act* requires an appeal to be brought within 28 days but allows the Supreme Court to grant leave for an appeal to be brought after the expiration of 28 days. That section goes on to provide:

The Supreme Court may grant leave under subsection (1)(b) and the appellant may proceed with the appeal if the Supreme Court:

- (a) is of the opinion that the failure to institute the appeal within the period referred to in subsection (1)(a) was due to exceptional circumstances; and
- (b) is satisfied that the case of any other party to the appeal would not be materially prejudiced because of the delay.²

- [11] The appeal was brought nine days out of time. There was no submission or suggestion in the Supreme Court that any other party to the appeal was or would be materially prejudiced by that delay.

² *Local Court (Civil Procedure) Act*, s 19(2).

[12] This ground of appeal gives rise to five preliminary questions, each of which is dealt with in turn below.

Whether the appellant requires leave to appeal

[13] The first preliminary question is whether the appellant now requires leave to appeal to this Court from the Supreme Court's decision to grant leave to appeal. That turns on whether the Supreme Court's decision to grant leave is interlocutory or final in nature. If it is interlocutory, the appellant requires leave to appeal.³ If it is final, the appeal is as of right.⁴

[14] The respondent says that it is only necessary to determine the first ground of appeal and the matter asserted in its Notice of Contention in the event this Court either grants leave to appeal or determines that leave to appeal is not required. In the respondent's submission, because the Supreme Court's decision to grant leave to appeal was interlocutory in nature, leave to appeal from that decision to this Court should only be granted if the appellant shows that the impugned decision is either wrong or attended by sufficient doubt to warrant the grant of leave.

3 *Supreme Court Act 1979* (NT), s 53.

4 There is a technical question arising from the fact that s 53(2) of the *Supreme Court Act* provides that an application for leave to appeal from an interlocutory judgment must be determined in the first instance on the papers by the Court of Appeal consisting of one Judge. On one argument, the Court of Appeal consisting of three Judges has no power to hear and determine an application for leave to appeal in the first instance. However, if the application is refused, the applicant is entitled to have the application determined by the Court consisting of three Judges. Neither party has taken issue with the Court of Appeal consisting of three Judges dealing with the matter of leave prior to a determination on the papers in circumstances where there is a dispute as to whether leave is required to prosecute this ground of appeal, and there are three other grounds of appeal as of right.

Moreover, because the Supreme Court's decision to grant leave to appeal was discretionary in nature, leave to appeal to this Court should be refused unless it can be shown that substantial injustice would otherwise result.

[15] The appellant says that leave to appeal is not required because the Supreme Court's decision was final in nature. That contention is put on the basis that allowing the appeal to be brought out of time was substantive rather than procedural in nature, because the appellant had accrued a substantive right to retain the judgment entered by the Local Court on the expiry of the 28-day appeal period without an appeal being lodged. The subsequent grant of leave to the respondent extinguished that right and, in that sense at least, finally determined the rights of the parties.

[16] The ordinary test of whether a judgment is interlocutory or final is if it finally disposes of the rights of the parties, not only as to the subject matter of the application but also as to the ultimate dispute between the parties.⁵ The rights of the parties in this context are the rights in the principal cause pending.⁶ The essential difference between an interlocutory decision and a final decision is that the former is a direction by the court in relation to the conduct of a proceeding

⁵ *Ex parte Britt* [1987] 1 Qd R 221 at 226; *Carr v Finance Corp of Australia Ltd (No 1)* (1981) 147 CLR 246; *Tampion v Anderson* (1973) 48 ALJR 11; *Licul v Corney* (1976) 180 CLR 213; *Becker v Marion City Corporation* [1977] AC 271.

⁶ *Hall v Nominal Defendant* (1966) 117 CLR 423 at 440, 443.

whereas the latter is the determination of the court either to grant or to refuse to grant the relief in respect of which the proceeding was brought. It has been recognised that there can sometimes be difficulty in applying that formula to a particular decision. However, most types of orders have now been the subject of authoritative decisions determining whether they are final or interlocutory in nature.

[17] The High Court has determined that an order granting leave to appeal is interlocutory and not final in nature. An order of that type does not dispose of substantive rights of appeal because it may be revoked at any time.⁷ It is therefore not dispositive in its legal effect, even if practically speaking reconsideration is improbable. Similarly, orders staying proceedings, refusing leave to issue process, dismissing proceedings for abuse of process and refusing an extension of time within which to bring proceedings⁸, have all been characterised as interlocutory in nature.⁹ Orders of that nature do not finally determine the legal rights of the parties. They do no more than grant or refuse leave for the purpose of bringing the suit necessary to have those legal

⁷ *Sanofi v Davis Pty Ltd* (1982) 149 CLR 147 at 153; see also *Reid v Nairn* (1985) 60 ALR 419 at 421.

⁸ *Hall v Nominal Defendant* (1966) 117 CLR 423.

⁹ See *Re Luck* [2003] HCA 70. Cf *Legal Profession Conduct Commissioner v Fittock* [2017] SASCFC 169 at [6]-[8] and *Cowie v State Electricity Commission of Victoria* [1964] VR 788 at 789 which draw a distinction between a 'procedural or interlocutory matter' and an interlocutory application, judgment or order.

rights determined. In the case of the grant of leave, there is no matter or action until leave is granted.¹⁰

- [18] The respondent submits further that the decision of the Supreme Court granting leave to appeal was a matter of practice and procedure calling for appellate restraint in the consideration of any application for leave to appeal from that decision. The respondent relies in that respect on the decision of the New South Wales Court of Appeal in *Ritson v Commissioner of Police*, in which it was stated:

A decision whether or not to grant leave to appeal is properly classed as a matter of practice and procedure: see *Collins v R* (1975) 133 CLR 120 at 122. As such, even greater caution and restraint is justified on the part of appellate courts than that which is appropriate when considering applications for leave to appeal from interlocutory decisions: *Adam P Brown Male Fashions Pty Ltd v Philip Morris Incorporated* (1981) 148 CLR 170 at 177; *PPK Willoughby v Baird* [2019] NSWCA 48. The rationale behind this dictate is that articulated by Sir Frederick Jordan in *In the matter of the Will of F B Gilbert (dec)* (1946) 46 SR (NSW) 318 at 323 (**Will of Gilbert**) that:

“.. there is a material difference between an exercise of discretion on a point of practice or procedure and an exercise of discretion which determines substantive rights. In the former class of case, if a tight rein were not kept upon interference with the orders of Judges of first instance, the result would be disastrous to the proper administration of justice. The disposal of cases could be delayed interminably, and costs heaped up indefinitely, if a litigant with a long purse or a litigious disposition could, at will, in effect transfer all exercises of discretion in interlocutory

10 *Hall v Nominal Defendant* (1966) 117 CLR 423 at 440-441, 444-445, 447; *Collins v The Queen* (1975) 133 CLR 120 at 122; *Lamac Developments Pty Ltd v Devaugh Pty Ltd* (2002) 27 WAR 287; *Sanchez v Commissioner of Police* [2023] QCA 36 at [12]; *Reid v Nairn* (1985) 60 ALR 419 at 421.

applications from a Judge in Chambers to a Court of Appeal.”¹¹

[19] It follows from authority which is binding on this Court that the Supreme Court’s order granting leave to appeal was interlocutory in nature and the appellant therefore requires leave to appeal to this Court on this first ground of appeal. It also follows from highly persuasive authority that the Supreme Court’s order granting leave to appeal was a matter of practice and procedure requiring an attitude of caution and restraint by this Court when considering the application for leave to appeal.

[20] The question whether leave should be granted or refused by this Court involves a consideration of the merits of the Supreme Court’s decision to grant leave to appeal. That is because ‘what must generally be shown by the applicant for leave is that the correctness of the judgment appealed from is sufficiently doubtful to justify the granting of leave’.¹² Where the appeal is from an interlocutory judgment in a matter of practice and procedure, leave may nevertheless be refused ‘unless it can be shown that substantial injustice will be done by leaving the erroneous decision unreversed’.¹³ The appellant’s position, in relation to both the correctness of the Supreme Court’s order

11 *Ritson v Commissioner of Police* [2020] NSWCCA 5 at [14].

12 *Northern Territory of Australia v Roberts* [2009] NTCCA 5 at [2].

13 *Sky City Darwin Pty Ltd v Groote Eylandt Aboriginal Trust Incorporated (Statutory Manager Appointed)* [2015] NTCCA 4 at [4]. See also *Decor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397 at 398-399.

extending time and the further requirement of substantial injustice propounded by the respondent, is that the decision was one to which the ‘correctness standard’ applied rather than discretionary in nature.

Whether the ‘correctness standard’ applies

[21] Accordingly, the second preliminary question arising under this proposed ground of appeal concerns the standard to be applied in assessing the correctness of the Supreme Court’s decision. The respondent says that the decision to grant leave to appeal was a discretionary judgment in a matter of practice and procedure to which the *House v The King*¹⁴ standard applies. In the application of that standard, the decision could only be disturbed if this Court found that the Supreme Court had acted upon a wrong principle, allowed extraneous or irrelevant matters to guide or affect it, mistaken the facts in the sense of making a factual finding that was not reasonably open, or not taken into account some material consideration.

[22] Conversely, the appellant says that the decision by the Supreme Court to grant leave to appeal was one to which the ‘correctness standard’ applied. In the application of that standard, it is the role of the appellate court to conduct a real review of the evidence to determine whether the court below fell into error, not confined to errors of the type described in *House v The King*.¹⁵ On that argument, the decision

14 *House v The King* (1936) 55 CLR 499 at 504-505.

15 See *Warren v Coombes* (1979) 142 CLR 531 at 551.

was not discretionary in nature¹⁶ and this Court is not precluded from substituting its own decision for that of the Supreme Court. The appellant says that is because a conclusion that the facts as found properly give rise to ‘exceptional circumstances’ falls into the same general category as a conclusion whether a party was negligent or a conclusion whether a trial will constitute an abuse of process.¹⁷ Decisions of that type admit of only one legally permissible answer in a way that the exercise of a discretion does not.

[23] The plurality reasons of the High Court in *GLJ v Roman Catholic Church* stated (footnotes omitted):

The line separating discretionary decisions (in which appellate review is confined to the *House v The King* standard) and other decisions (in which the “correctness standard” applies) was identified as that between questions lending “themselves to differences of opinion which, within a given range, are legitimate and reasonable answers to the questions” in which event “it would be wrong to allow a court of appeal to set aside a judgment at first instance merely because there exists just such a difference of opinion between the judges on appeal and the judge at first instance”, and questions to which there is but one legally permissible answer, even if that answer involves a value judgment.¹⁸

[24] In the final analysis, the High Court determined that whether a trial will constitute an abuse of process, such that a permanent stay of

¹⁶ *GLJ v Roman Catholic Church* (2023) 414 ALR 635 at [25]-[26]; cf. *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at [7].

¹⁷ See, for example, *GLJ v Roman Catholic Church* (2023) 414 ALR 635.

¹⁸ See, for example, *GLJ v Roman Catholic Church* (2023) 414 ALR 635 at [16]. In the earlier case of *Minister for Immigration v SZVFW* (2018) 264 CLR 541 at [49], Gageler J cautioned that the distinction between the two types of decision is not drawn by reference to whether the process of reasoning to reach the conclusion is characterised as evaluative.

proceedings must be ordered, admits of only one uniquely right answer. That is because the question concerns whether the parties are properly able to identify or respond to a claim, which is fundamental to the maintenance of the rule of law and the integrity of the adversarial system of justice. In answering that question, the focus must be on whether a trial could be conducted in accordance with the fundamental norms of the legal system, rather than on a subjective balancing of the competing interests between the parties. Accordingly, whether a trial will be necessarily unfair or oppressive because of an inability to conform with those norms must be determined in accordance with the ‘correctness standard’. The duty of the appellate court in those circumstances ‘is to decide the case – the facts as well as the law – for itself’.¹⁹

[25] The decision in *DZY (a pseudonym) v Trustees of the Christian Brothers*²⁰ is the most recent decision of the High Court concerning the issue to which reference was made during the hearing of this appeal. The determination under consideration in that case, also made under a statutory provision, was whether to make an order setting aside a settlement agreement. The power subsisted in circumstances where the court was satisfied ‘that it is just and reasonable to do so’. The term ‘just and reasonable’ was not defined in the statutory scheme. The

19 See *Warren v Coombes* (1979) 142 CLR 531 at 552. Neither *Warren v Coombes* nor *GLJ* deal with the situation in which the right of appeal is limited to questions of law.

20 *DZY (a pseudonym) v Trustees of the Christian Brothers* [2025] HCA 16.

Victorian Court of Appeal had held that the correctness standard applied to the primary judge's assessment of what is 'just and reasonable'. No submission to the contrary was made in the High Court, and nor did the High Court express any doubt about that conclusion.²¹

[26] The Victorian Court of Appeal's line of reasoning in coming to that conclusion was as follows.²² The purpose of the statutory provisions was to override the usual effect of a judgment or settlement in particular circumstances. The integrity of the adversarial system of justice is fostered by the certainty and finality produced by litigation outcomes. Judgments and consent orders represent the just conclusion of proceedings in that adversarial system and should be accorded a high degree of protection. Setting aside a judgment or consent order should only be done by reference to a clear legal rule, criterion or principle. The 'just and reasonable' test is not a mere gateway that enlivens a discretion whether to set aside a previous judgment or order, but a strict legal rule which will require the judgment or order to be set aside if satisfied. That satisfaction requires a finding that the judgment or order was obtained in circumstances incongruent with a fair adversarial system, which is amenable to only one answer.

21 So far as is relevant for these purposes, the High Court found that the Court of Appeal had not misapplied the correctness standard because the evaluative judgement undertaken correctly identified that the evidence did not allow satisfaction that it was just and reasonable to set aside the deed.

22 *Trustees of the Christian Brothers v DZY (a pseudonym)* [2024] VSCA 73 at [83]-[102].

[27] In the application of similar reasoning to the present circumstances, the grant of leave to appeal after the expiration of the 28-day appeal period is precisely a gateway that enlivens the Supreme Court's power to consider whether it should set aside the decision of the Local Court. It does not of itself have that effect. Although a grant of leave will bear on the finality of the litigation, the question of whether to do so does not implicate a fundamental norm of the legal system such that there can only be one correct answer. Moreover, the determination of 'exceptional circumstances' allows and requires a range of factors to be considered and weighed, including the interests of the parties and the risk of injustice. That process is one that lends itself 'to differences of opinion which, within a given range, are legitimate and reasonable answers to the questions'. So much is apparent from the description of the term by Wilcox J in *Nikac v Minister for Immigration and Ethnic Affairs*:

The term "exceptional circumstances" postulates a criterion which is both vague and subjective. Every case is different, so that there are always some aspects of a case which may be regarded as exceptional. The question inevitably arises: exceptional compared with what? Even if it be conceded that there is nothing very exceptional about drug offences appearing upon a list of convictions, there will always be differences in the circumstances of those offences. For example, I would not myself have thought that the particular offences committed by Mr Nikac were of such a nature as to constitute a reason for taking the unusual step of declining to accept the recommendation of the Tribunal, by whom both the offences and all the other relevant circumstances were considered. But it is impossible to categorise a different view as

being devoid of plausible justification. Like beauty, “exceptional circumstances” lies in the eye of the beholder.²³

[28] Unless the purpose of the power or the consequences of its exercise involve a fundamental issue beyond considerations personal to the parties, the determination of ‘exceptional circumstances’ does not admit of only one legitimate and reasonable answer. Even acknowledging the present uncertainty in this area of the law, in our opinion the determination of ‘exceptional circumstances’ and the consequential decision to grant leave to appeal out of time is discretionary in nature. However, for the reasons which are described further below, the result in this ground of appeal would be the same regardless of whether the ‘correctness standard’ or the *House v The King* standard has application.

Whether substantial injustice would be done

[29] The third preliminary question arising under this proposed ground of appeal concerns substantial injustice. If, as we have found, the appellant requires leave to prosecute its first proposed ground of appeal, and, as we have also found, the Supreme Court’s decision to grant leave to appeal was discretionary in nature, the appellant must establish both that the correctness of the Supreme Court’s decision to grant leave to appeal was ‘sufficiently doubtful’ and that substantial

23 *Nikac v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 65 at 81.

injustice would be done by leaving the erroneous decision unreversed.²⁴

That is because even if some doubt in the correctness of the interlocutory determination of ‘exceptional circumstances’ could be discerned, consideration must be given to the order or orders properly made in relation to that doubt.

[30] In the proceedings before the Supreme Court, the appellant expressly disavowed that it had suffered material prejudice within the meaning of s 19(2)(b) of the *Local Court (Civil Procedure) Act* because of the relatively brief delay in lodging the notice of appeal. Accordingly, no injustice of that type arose because of the Supreme Court’s determination to extend time. Further, and as already described at the outset, the appellant does not in this appeal contend that the Supreme Court’s substantive conclusion was incorrect or that the reasons of the Local Court were adequate. The only injustice which the appellant can identify is the loss of the time bar.

[31] It may be accepted that where the time for giving notice of appeal has elapsed a respondent has an interest in the order or judgment of the court which the applicant seeks to impugn, and this interest ought not

24 *Sky City Darwin Pty Ltd v Groote Eylandt Aboriginal Trust Incorporated (Statutory Manager Appointed)* [2015] NTCCA 4 at [4]; *Nationwide News Pty Ltd (t/as) Centralian Advocate and Ors v Bradshaw and Anor* (1986) 41 NTR 1 at 8, 11-12, 18-19; *Wright Engineers Pty Ltd and Anor v BTR Trading (Qld) Pty Ltd and Anor* [1987] NTCA 4; *Rogerson v Law Society of the Northern Territory* (1993) 88 NTR 1 at 5; *Northern Territory of Australia v GRD Kirfield Ltd & Anor* [2003] NTCA 01; *Iskandar v Merpati Nusantara Airline (No. 2)* (2006) 16 NTLR 22 at [16]; *Northern Territory of Australia v Roberts* [2009] NTCA 5 at [2]. See also *Decor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397 at 398-399.

to be disturbed unless there is good reason for doing so.²⁵ However, it does not follow that allowing the grant of leave to appeal by the Supreme Court to stand would be productive of substantial injustice. That will depend upon the overall justice and fairness of the case. In this case, if leave to prosecute the proposed first ground of appeal is refused the consequence will be a retrial of the matter in the Local Court. That would be the result regardless of whether the appellant succeeds on the other grounds of appeal and would leave the appellant's remedy open. Conversely, the grant of leave to appeal would permit the appellant to argue that the decision of the Local Court should stand notwithstanding the undisputed error identified by the Supreme Court. That position is difficult to reconcile in principle with the appellant's parallel submission that leave to appeal to this Court should be granted because allowing an erroneous decision to stand would be substantially unjust.

[32] The refusal of leave to appeal on the proposed first ground of appeal would also not have any broader ramifications for the administration of justice. The Supreme Court's decision to allow leave to appeal is concerned with the circumstances of this case and the filing of a notice of appeal nine days out of time. It does not give rise to any concern that the floodgates to applications to appeal out of time might thereby open.

²⁵ See *Youngman v Melbourne Storage Co* (1885) 7 ALT 53 at 54.

[33] For those reasons, we are not satisfied that substantial injustice would be done by leaving the Supreme Court’s grant of leave to appeal in place having regard to the overall justice of the case. However, even if this Court is satisfied that there would be no substantial injustice, that question only arises for consideration if the correctness of the Supreme Court’s decision was ‘sufficiently doubtful’. That determination involves largely the same analysis as whether the Supreme Court made a material error in granting leave to appeal out of time, although at a higher level of abstraction, and is most conveniently dealt with in that context.

The respondent’s Notice of Contention

[34] The fourth preliminary question arising under this proposed ground of appeal is the matter addressed in the respondent’s Notice of Contention, which asserts that the Supreme Court erred in finding that the suspension of time afforded by r 3.04(1) of the *Supreme Court Rules* does not apply to an appeal under s 19(1) of the *Local Court (Civil Procedure) Act*, and that the respondent therefore required leave to appeal. If the respondent is correct in that contention, the appellant’s challenge in the proposed first ground of appeal to the Supreme Court’s finding of ‘exceptional circumstances’ would fall away.

[35] Rule 3.04(1) relevantly provides that ‘in calculating the time fixed by these Rules ... the period from 24 December to 9 January next following shall be excluded, unless the Court otherwise orders’. Both

before the Supreme Court and on appeal in this Court, the basis for the contention that r 3.04(1) had application is that s 19(5) of the *Local Court (Civil Procedure) Act* provides that an appeal under that section ‘shall be brought in accordance with the Rules of the Supreme Court’.

- [36] Rule 82.04(2)(a) of the *Supreme Court Rules* provides that an appeal is to be commenced by filing a notice of appeal ‘within any period required for the commencement of the appeal under an Act’. The argument put by the respondent is that r 3.04(1) governed the operation of that provision and, by extension, the time fixed by s 19(5) of the *Local Court (Civil Procedure) Act*, so that the period from 24 December to 9 January was excluded from the calculation of time. Were that so, the appeal to the Supreme Court would have been brought within time.

- [37] The Supreme Court dealt with the argument in the following terms:

The appellant submitted that r 3.04(1) applies to this appeal and, when the period from 24 December to 9 January is excluded, the appeal is within time. It was argued that s 19 of the LCCPA sets a timeframe for taking an action, being the period of 28 days, but that r 3.04(1) of the SCR governs how that timeframe is calculated by excluding certain dates around Christmas. It was submitted that the provisions are capable of harmonious operation.

The difficulty with the appellant’s submission is that s 19(1)(a) of the LCCPA clearly states that the appeal must be commenced within 28 days. Rule 3.04(1) of the SCR, on its face, applies in circumstances where there is a time period fixed by the SCR as is apparent from the express reference to “calculating the time fixed by these Rules... the period from 24 December to 9 January next following shall be excluded...”. As the respondent submits, r 3.04(1) does not say “fixed by these Rules or by another Act”.

Here it is the section of the LCCPA, and not the SCR, which fixes the time for commencement of the appeal.

Insofar as guidance in relation to the calculation of time is required that is to be found in s 28 of the *Interpretation Act 1978* (NT) under the heading “Reckoning of time”. It is to be noted that s 28 provides additional time where the end of an appeal period falls on a public holiday or a Sunday but it does not provide for additional time over the Christmas vacation.

Further, r 3.04(1) appears in Chapter 1 of the SCR which chapter, by virtue of r 1.02(3A), is expressed to be applicable to any matter respecting an appeal “only to the extent provided by rule 82.03”. Rule 82.03, which appears in Chapter 2, provides that the rules in Chapter 1 apply “to any matter respecting an appeal not otherwise provided for in this Chapter (Chapter 2) with the necessary changes and to the extent that they are consistent with this Chapter”. The time within which an appeal may be lodged in the present circumstances is specifically provided for in Chapter 2 by operation of r 82.04(2)(a) as “any period required for the commencement of the appeal under an Act” which, in the present case, is s 19(1)(a) of the LCCPA. That subsection clearly provides that an appeal must be commenced within 28 days. In those circumstances, r 3.04(1) does not have application.²⁶

- [38] The respondent submits that the phrase ‘the time fixed by these Rules’ appearing in r 3.04(1) gives rise to a constructional choice. That is, the phrase may be interpreted to mean ‘the time fixed by these Rules and another Act’ or ‘the time fixed only by these Rules’. To render the contention in that way draws attention to the fact that the construction pressed by the respondent requires additional words to be read into the provision, whereas the alternative construction does not. The addition of the word ‘only’ adds nothing to the text as enacted. As the plurality observed in *Alcan (NT) Alumina v Commissioner of Territory Revenue*:

This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself.

26 *Northern Territory of Australia v Kellie* [2024] NTSC 73, [6]-[9].

Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention.²⁷

[39] In this exercise, there are no historical considerations or extrinsic materials which would support the existence of the constructional choice suggested by the respondent. While it may be accepted that the method to be applied in construing a statute is to ascertain the intended meaning of the words, and that a literal approach to construction should not be adopted if the result is improbable,²⁸ there is nothing improbable about a result which would see r 3.04(1) of the *Supreme Court Rules* operating with specific reference to time fixed by the *Supreme Court Rules* and not otherwise.

[40] There are several matters concerning the terms and operation of the statutory text which lead to the conclusion that the respondent's construction cannot be accepted. First, r 82.04(2)(a) of the *Supreme Court Rules* provides that a notice of appeal must be filed and served within the period 'required for the commencement of the appeal' by the Act creating the avenue of appeal. That period is required, and therefore 'fixed', by that Act. Second, r 82.04(2)(b) of the *Supreme Court Rules* provides that 'if no period is required' under the Act creating the avenue of appeal, a notice of appeal must be filed and

²⁷ *Alcan (NT) Alumina v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47].

²⁸ See *The Queen v A2* (2019) 269 CLR 507 at [32]; *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at [78]; *Saraswati v The Queen* (1991) 172 CLR 1 at 21.

served ‘within 28 days after the day the decision being appealed from is made’. The Act in this case does require a period and there is no room for the operation of the default period of 28 days ‘fixed’ by the *Supreme Court Rules*. Third, r 3.04(1) of the *Supreme Court Rules* is limited in its operation to the calculation of ‘time fixed by these Rules’. There is a plethora of provisions in the *Supreme Court Rules* ‘fixing’ time to which this provision has application in its terms. Fourth, the provision in s 19(5) of the *Local Court (Civil Procedure) Act* that an appeal under that section ‘shall be brought in accordance with the Rules of the Supreme Court’ is no more than a statutory direction that those parts of the appeal rules stipulating the formal requirements for the conduct of an appeal will govern appeals from the Local Court.

[41] The respondent’s submissions to contrary effect rely on the propositions that an appeal period may be fixed both by the Act creating the right of appeal and by the *Supreme Court Rules* in adopting that period, and the *Supreme Court Rules* need only provide a foundation for the fixing of the period rather than the sole or seminal foundation. That submission, inventive though it may be, does not alter the plain reading that r 82.04(2)(a) of the *Supreme Court Rules* operates only to stipulate that a notice of appeal must be filed and served within the period fixed by other legislation, rather than fixing or stipulating that period itself. Although that construction potentially

results in r 3.04(1) applying to the calculation of time for appeal periods fixed by the *Supreme Court Rules* but not those fixed by the legislation creating the avenue of appeal, that differential operation is not enough to displace a literal reading of the statutory text.

[42] The Notice of Contention is dismissed.

Appeal on a question of law

[43] The fifth preliminary question arising under this proposed ground of appeal concerns the nature and scope of the appeal. Section 19(1) of the *Local Court (Civil Procedure) Act* creates an avenue of appeal from the Local Court to the Supreme Court on a ‘question of law’. In *Wilson v Lowery*²⁹ this Court considered the nature of an appeal from the Supreme Court to the Court of Appeal in a workers compensation matter. The avenue of appeal from the Work Health Court (which was effectively the Local Court) to the Supreme Court was also limited to a ‘question of law’. The Court observed that although s 51 of the *Supreme Court Act* governs such appeals in a general sense, and does not restrict appeals from the Supreme Court to this Court to questions of law, this Court’s function on the hearing of an appeal from the Supreme Court should be confined in the same way as an appeal from the Local Court to the Supreme Court.³⁰ In other words, this Court is ordinarily confined to determining whether the Supreme Court was

²⁹ *Wilson v Lowery* (1993) 4 NTLR 79.

³⁰ *Wilson v Lowery* (1993) 4 NTLR 79 at 83-4.

right or wrong and does not revisit findings of fact made by the Local Court except to the extent they may be infected by error of law.

[44] Under this proposed ground of appeal, however, this Court is not being asked to determine whether the Supreme Court was right or wrong in its assessment of the correctness of the Local Court's decision. Rather, this Court is being asked to determine whether the Supreme Court fell into error in its primary determination that the respondent's failure to lodge an appeal from the decision of the Local Court within time was due to 'exceptional circumstances' and that leave to appeal should be granted. That avenue of appeal is not restricted to questions of law, and this Court may give such judgment as it thinks fit. That is subject to the qualification that the challenge to the finding of 'exceptional circumstances' is a matter to which the *House v The King* standard applies. That requires the demonstration of specific error in the form of: (a) acting on a wrong principle; (b) allowing extraneous or irrelevant matters to guide or affect the decision; (c) mistaking the facts; or (d) not taking into account some material consideration.³¹

The finding of 'exceptional circumstances'

[45] It falls then to consider the correctness of the decision to grant leave. The Supreme Court considered the meaning of 'exceptional circumstances' and noted that the determination whether there were

31 *House v The King* (1936) 55 CLR 499 at 504-505.

exceptional circumstances did not involve any consideration of the merits of the proposed appeal.³² The Supreme Court then went on to consider the circumstances in which the decision was delivered.³³ They included that it was delivered more than 13 months after final submissions, it was delivered without any prior notification to the parties, it was delivered as an attachment to an email from a Local Court Registry officer, and it was delivered shortly before the Christmas recess. The 28-day appeal period extended over the Christmas and New Year period and expired on 10 January 2024.

[46] The evidence was to the effect that the solicitor for the defendant (the respondent in the present matter) wished to obtain the advice of counsel prior to lodging appeal and erroneously understood that the period during which an appeal was required to be lodged was extended by operation of r 3.04 of the *Supreme Court Rules*. At the time the decision was ‘delivered’, counsel who had appeared at the trial was unavailable because he was away on leave over the Christmas period. Following that counsel’s return, advice was provided on 12 January 2024, the notice of appeal was settled by counsel on 18 January 2024, and the notice of appeal was filed in the Supreme Court registry on 19 January 2024.

32 *Northern Territory of Australia v Kellie* [2024] NTSC 73 at [14]-[15].

33 *Northern Territory of Australia v Kellie* [2024] NTSC 73 at [16]-[17].

[47] The relevant part of the Supreme Court’s decision to grant leave was in the following terms:

In support of its application for leave to appeal the appellant relied upon the cumulative effect of a number of matters including:

- (a) the Local Court, having reserved the decision for over a year, delivered judgment by email without any prior communication or notice to the parties;
- (b) the judgment was delivered shortly before Christmas with the appeal period substantially coinciding with a period of typically reduced activity due to the Christmas break;
- (c) the appellant, as a model litigant, did not wish to commence an appeal without first obtaining advice of counsel;
- (d) counsel who had appeared at the trial and was familiar with the proceedings was not immediately available due to other commitments and the time of year;
- (e) there were anticipated practical difficulties in briefing other counsel at that time of the year;
- (f) in relation to briefing fresh counsel the appellant informed this Court that the tender bundle, being the records before the Local Court other than pleadings and affidavits, numbered 767 pages and the Court Book comprising the pleadings and affidavits ran to 1103 pages. The CCTV and bodycam footage went for many hours;
- (g) when advice was obtained the appellant acted promptly upon that advice and commenced the appeal;
- (h) as is made clear by the argument in these proceedings there were legitimate issues to be resolved regarding the application of r 3.04(1) - a matter which has not previously been addressed by this Court. Differing views on the application of that provision were clearly open and although the solicitor concerned took a different view from that described above this does not mean that she was negligent or ignorant.

The respondent addressed each of the matters upon which the appellant relied and, ultimately, submitted that the failure arose from an erroneous belief on the part of the solicitor for the appellant as to the correct application of r 3.04(1). It was submitted that the failure arose from the making of an error “which is human but not exceptional”.

The failure arose in quite unusual circumstances. The significant delay in delivering judgment and the method by which the parties were informed of the decision by the Local Court, the time of the year, the unavailability of trial counsel because of the time of the year and other commitments and the unsettled state of the law all contributed to the appeal being lodged just out of time. Further, given the volume of materials to be considered and the time of the year, in my opinion, it was not practical to engage other counsel. The cumulative effect of the matters raised by the appellant is such as to justify a conclusion that exceptional circumstances are present in this case.³⁴

[48] Against that factual background, there is no novelty to the requirement that an applicant establish ‘exceptional circumstances’ before an extension of time within which to bring an appeal is granted. That requirement reflects that finality of litigation serves the community’s interests and legitimate expectations. Even in the absence of a statutory requirement in those terms, an extension of time will only be granted on substantial reasons.³⁵ Where the delay is lengthy, something more than ‘substantial’ reasons are required. Such terms as ‘special and substantial reasons’ and ‘exceptional circumstances’ have been used to describe that threshold even in the absence of a statutory stipulation in those terms.³⁶ Under those principles, there is only a requirement of exceptionality in the case of lengthy delay, and the greater the delay the more exceptional are the circumstances required.³⁷

34 *Northern Territory of Australia v Kellie* [2024] NTSC 73, [18]-[20].

35 See, for example, *Rhodes* (1910) 74 JP 380.

36 *Williams* (1911) 6 CAR 158; *R v Sunderland* (1927) 28 SR(NSW) 26 at 29; *R v Trew* (1979) Qd R 29 at 30; *R v Jefferies* (1949) NZLR 595; *R v Brown* (1985) 2 Qd R 126 at 132; *Green v The Queen* (1989) 95 FLR 301 at 312.

37 *R v Brown* (1985) 2 Qd R 126 at 130.

[49] However, overlying that consideration was the further principle that an extension of time would almost certainly be granted even where there had been lengthy delay if there appeared to be a ‘manifest miscarriage of justice’ or, on some formulations, where there were ‘such merits in the proposed appeal that it would probably succeed’.³⁸ Those various qualifications would appear to be displaced by the statutory language in this case. The requirement for ‘exceptional circumstances’ imposed by s 19(2) of the *Local Court (Civil Procedure) Act* would not appear to vary or be contingent upon such considerations as the length of the delay, the existence of a miscarriage of justice or the merits of the proposed appeal.

[50] As in the proceedings before the Supreme Court, the appellant contends that the respondent had not demonstrated ‘exceptional circumstances’ or even substantial reasons why an extension should be granted. The proper approach to the assessment of ‘exceptional circumstances’ was described in *R v Kelly* in the following terms:

We must construe ‘exceptional’ as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.³⁹

38 *R v Brown* (1985) 2 Qd R 126 at 132, 135; *R v Perry* (1970) 2 NSWLR 501 at 503; *R v Ollis & Anderson* (1986) 21 A Crim R 256 at 265; *R v O’Keefe* (1978) 23 ALR 246 at 250; *Varney v R* (1964) VR 143.

39 *R v Kelly* [2000] 1 QB 198 at 208.

[51] The Supreme Court applied that approach to the determination of ‘exceptional circumstances’ and the appellant does not dispute its correctness. Accordingly, the Supreme Court was determining a question of law when engaged in the process of deciding that the term took its ordinary meaning rather than a technical meaning but committed no error in that process. Determining the ordinary meaning of the term was a question of fact in which the Supreme Court also committed no error. Determining the question whether the facts as found by the Supreme Court fell within the statutory description was a question of fact which will only disclose specific error if: (a) the Supreme Court took into account irrelevant considerations; (b) the Supreme Court somehow misdirected itself in law; or (c) if the facts as found necessarily fell outside the statutory description in the sense that only one conclusion was reasonably open.⁴⁰

[52] The appellant has identified three errors which it says constituted error in the Supreme Court’s finding of ‘exceptional circumstances’. First, the appellant says that the Supreme Court failed to make any specific or operative finding of the reasons for which the appeal was not commenced within time. In the appellant’s submission, the operative, and in fact sole, reason for that failure was a mistaken belief on the part of the solicitor acting for the respondent as to the correct operation

40 *Australian Gas Light Company v Valuer-General* (1940) 40 SR (NSW) 126 at 138; *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 396-7; *Collector of Customs v Pozzolanic Enterprises Pty Ltd* [(1993) 43 FCR 280; *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at [27].

and application of r 3.04 of the *Supreme Court Rules*, which could not constitute ‘exceptional circumstances’. Second, the appellant says that the Supreme Court erroneously considered the broad contextual circumstances in which the failure to commence within time arose. Put in terms of the *House v The King* standard, that is an assertion of specific error in allowing extraneous or irrelevant matters to guide or affect the decision. Third, the appellant says that the Supreme Court erroneously found and took into account that the correct operation and application of r 3.04 of the *Supreme Court Rules* was unsettled. That is an assertion that the Supreme Court misdirected itself in law. Although not expressly advanced as a specific error, the contention that the facts as found necessarily fell outside the statutory description is implicit in the appellant’s submissions.

- [53] Section 19(2) of the *Local Court (Civil Procedure) Act* allows the Supreme Court to grant leave for an appeal to be brought after the expiration of 28 days if it is of the opinion that the failure to institute the appeal within time was due to exceptional circumstances. Although a single circumstance may not of itself be exceptional, there may be a combination of circumstances, by themselves unexceptional, which together constitute exceptionality. There is a causal limitation on the circumstances properly considered in that analysis. The circumstances constituting exceptionality must attach to the failure to file the notice of appeal within time. The discretion to grant leave is not concerned

with any situation generally with respect to the subject matter of the appeal or whether there has been a miscarriage of justice. Thus it was in *Samios v DPP* that the applicant's misunderstanding of the property forfeiture consequences of pleading guilty at the time the plea was entered, and the inadequacy of the advice he received at that time, were not properly taken into account in determining whether there were exceptional circumstances.⁴¹ That is because the enquiry must be directed to the circumstances subsisting between the delivery of the decision and the filing of the notice of appeal and application for leave to appeal.

[54] The Supreme Court found that the failure to institute the appeal was due to a compendium of circumstances. Although the use of the word 'due' in the statutory formulation imports the requirement of causality, it is unnecessary in that analysis to identify a single and operative reason. As the respondent submits, the reference in some cases to 'reasons' for failing to bring an appeal within time is convenient shorthand and not intended as a substitute for the statutory formulation. That statutory formulation admits a consideration of the 'circumstances' of the failure to institute the appeal within time without narrowing the test to a 'reason' or 'reasons'. The causal limitation is that the circumstances must relate to the explanation for

41 *Samios v DPP* [2002] VSCA 108 at [32]-[35].

the delay.⁴² The explanation will ordinarily extend beyond the bare reason, even if a single cause can be isolated.⁴³

[55] The Supreme Court found that the failure to institute the appeal within time in the present case was due to a compendium of circumstances in the sense that they all contributed in combination to the failure to institute the appeal within time. First, the way the judgment was delivered without notice or listing deprived the respondent of advance opportunity to make arrangements for the taking of advice in relation to any possible appeal. Second, the time at which the judgment was delivered shortly before Christmas deprived the respondent of the opportunity to take advice on prospects from trial counsel within a timely period and limited its prospects of securing alternative counsel for that purpose. The difficulty involved in briefing alternative counsel was exacerbated by the volume of materials which required consideration in providing any advice on the prospects of an appeal. Third, the unsettled state of the law concerning the operation of r 3.04 of the *Supreme Court Rules* meant that the respondent's solicitor did not attend to the matter with the urgency which might otherwise have been applied. Fourth, trial counsel did not return in time to allow advice to be provided prior to the expiry of the appeal period.

42 *Coulston v State Coroner of Victoria* [2018] VSC 103 at [35].

43 Moreover, the judicial approach to the exercise of discretions under procedural rules, such as the grant of extension of time, have moved from a rigid and technical approach to afford a measure of flexibility: see *Jackamarra v Krakouer* (1998) 195 CLR 516 at 541.

[56] It may be inferred from the time within which advice was provided and the notice of appeal lodged following that return that those steps would have been taken within time but for the manner and timing of the delivery of the decision and trial counsel's consequent unavailability. The Supreme Court did not fall into error in characterising that combination of circumstances as out of the ordinary course, unusual or uncommon. Given that complex of circumstances and the timeline of events between the delivery of the decision by the Local Court and the filing of the notice of appeal, the failure to lodge an appeal within time cannot be attributed solely to an erroneous belief on the part of the respondent's solicitor concerning the operation of r 3.04 of the *Supreme Court Rules*. In addition, that belief cannot be characterised as ignorance or negligence on the part of the respondent's solicitor and therefore incapable of constituting 'exceptional circumstances', either by itself or in combination with other matters. The operation of r 3.04 of the *Supreme Court Rules* had not previously been determined by the Supreme Court in this context, neither *Collins v Deflaw Pty Ltd*⁴⁴ nor *Isles v Lyons*⁴⁵ were concerned with the same statutory regime, and the view adopted by the respondent's solicitor during the appeal period and the construction advanced by the respondent in the Notice of Contention is clearly arguable.

44 *Collins v Deflaw Pty Ltd* (2000) 157 FLR 121.

45 *Isles v Lyons* (2016) 36 NTLR 161.

[57] Even if we are wrong in our finding that the *House v The King* standard governs the challenge to the Supreme Court's decision, and that the correctness standard properly applies, on our assessment of the evidence the Supreme Court did not fall into error for the reasons we have described.

[58] Although we are not entirely satisfied that substantial injustice would be done by leaving the Supreme Court's grant of leave to appeal undisturbed, the appellant's proposed ground of appeal raised a range of substantive issues which were fully argued in submissions and have been considered in the foregoing reasons. Accordingly, we have determined to grant leave to appeal on this ground, and for the reasons given in relation to those substantive issues we have determined to dismiss this ground of appeal.

Remittal to the Local Court differently constituted

[59] Grounds 2, 3 and 4 of the appeal are all concerned with the Supreme Court's order remitting the matter to the Local Court differently constituted for rehearing. The appellant's contention in the second ground of appeal is that the Supreme Court erred in ordering the matter to be remitted to the Local Court differently constituted. The appellant's contention in the third ground of appeal is that the Supreme Court erred in failing to provide sufficient opportunity to be heard on the question of the constitution of the Local Court for rehearing. The appellant's contention in the fourth ground of appeal is that the

Supreme Court erred in failing to give any reasons for ordering that the matter be reheard by the Local Court differently constituted.

[60] As described at the outset of these reasons, the relief sought by the respondent in its Notice of Appeal to the Supreme Court dated 19 January 2024 included that the matter be remitted to the Local Court differently constituted for a rehearing. That is unsurprising given the nature of the challenge to the Local Court's decision. The dispositive powers of appellate courts provided by statute typically specify the types of orders which may be made following appeal. One of the orders which may be made where the appeal is successful is an order remitting the matter to the tribunal below for reconsideration. The relevant provision in this case appeared in s 19(6) of the *Local Court (Civil Procedure) Act* in the following terms:

After hearing and determining the appeal, the Supreme Court may make such order as it thinks fit, including an order remitting the case for re-hearing to the [Local Court] with or without directions on the law.

[61] That power includes a discretion to order that the tribunal below be differently constituted when considering the matter remitted.⁴⁶ The general principle applied to the exercise of that discretion was described by the Full Federal Court in *Northern NSW FM Pty Ltd v Australian Broadcasting Tribunal & Anor*:

⁴⁶ *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518 at [4], [22], [60]-[62], [123].

If a decision has been set aside for error and remitted for rehearing, it will generally seem fair to the parties that the matter be heard and decided again by a differently constituted tribunal. This is because the member constituting the Tribunal in the ordinary enquiry or hearing will have already expressed a view upon facts which will have to be determined in the rehearing. The aggrieved party may think that a rehearing before the Tribunal as originally constituted could be worthless because the member's views have been stated.

...

Such a finding imports no criticism whatever of the member who originally constituted the Tribunal but simply recognises that, when decisions in judicial and administrative proceedings are set aside *in toto* and the matter remitted to be heard and decided again, justice is in general better seen to be done if the court or the tribunal is reconstituted for the purposes of the rehearing.⁴⁷

[62] That principle has been routinely applied.⁴⁸ Although the operation of the principle is in some circumstances founded on considerations similar to apprehension of bias, it is not the same. The focus is on the perception of the parties, and particularly the party which has been successful on appeal, rather than the hypothetical reasonably well-informed person in the street. As the Federal Court observed in *Siddha Yoga Foundation Ltd v Strang & Anor*:

This is a doctrine quite distinct from the doctrines relating to disqualification for bias, actual or apprehended. It is based on an indulgence to the irrational though sometimes quite

47 *Northern NSW FM Pty Ltd v Australian Broadcasting Tribunal & Anor* (1990) 26 FCR 39 at 42-43. See also *Repatriation Commission v Bushell* (1991) 23 ALD 13 at 16-17; *MA v Commissioner of Taxation* (1992) 37 FCR 225 at 229.

48 *Repatriation Commission v Malley* (1991) 24 ALD 43; *Roderick v Australian & Overseas Telecommunications Corporation Limited* (1992) 111 ALR 355; *Waldron v Comcare Australia* (1995) 37 ALD 471; *Blackman v Commissioner of Taxation* (1993) 43 FCR 449 at 455.

understandable reactions of persons who are not familiar with the processes of the law or of administration according to law.⁴⁹

[63] Although there will no doubt be cases in which a reasonable person in the shoes of the aggrieved party would or might think a rehearing before the original tribunal was worthless, that is not the touchstone.

As the Federal Court observed in *Vegco Pty Ltd v Gibbons*:

The guiding principle is that remittal will be to a differently constituted primary decision-maker where there is some feature of the conduct or reasons for decision of the primary decision-maker which would render it unfair to the successful party or give the appearance of unfairness to that party (whether arising from strongly expressed views on key issues, adverse findings on the credit of witnesses, apprehended bias or otherwise) if the matter were remitted to the same decision-maker or where it would be impracticable for the same decision-maker to redetermine the matter.⁵⁰

[64] The circumstances in which the matter will properly be remitted to the tribunal differently constituted will include where the tribunal has expressed a view or made findings on facts to be determined at the rehearing which are relevant to the ultimate determination or the exercise of any discretion; where the tribunal at first instance fully and firmly expressed views on the merits which were adverse to the appellant; where the tribunal at first instance made findings on the credibility of major witnesses; where strong views were expressed

49 *Siddha Yoga Foundation Ltd v Strang & Anor* (Unreported, Federal Court of Australia, 9 February 1996, Jenkinson J), p 4. The orders for rehearing by differently constituted tribunal were made in that case as a ‘tenderness for the minds of litigants’ to provide the ‘warm feeling that it will be better ... [to] get another tribunal’. Although that observation was directed to the parties generally, the principal consideration is obviously the perception of the aggrieved party which has been successful on appeal.

50 *Vegco Pty Ltd v Gibbons* [2008] VSC 363 at [33].

about the appellant or his or her evidence in the original decision; and where the tribunal at first instance has undertaken an extensive, lengthy and far-reaching consideration of the matter in reaching the determination subsequently impugned.

[65] On the other side of the equation, it may be appropriate to remit the matter to the same decision-maker where the original determination and any rehearing does not involve the issue of assessment of the credit of witnesses. Another case in which remittal to the original decision-maker may be appropriate is where there is evidence that rehearing by a differently constituted tribunal would be impossible, fundamentally inconvenient or unsuitable.⁵¹ A further case in which remittal to the original decision-maker may be appropriate is where the error of law identified on appeal has no bearing on how the tribunal at first instance went about determining the matter on the merits, such as whether the tribunal had jurisdiction to determine the matter.⁵² Even in those

51 In *Shields v Overland & Anor (No 2)* [2009] VSC 589, the defendant opposed an order remitting the application to a differently constituted tribunal on the basis that it required three members for its valid constitution and only four persons had been appointed as members, three of whom had constituted the tribunal at first instance. The Federal Court made the order on the understanding that the legislation permitted the Governor to appoint acting members to the tribunal if existing members were unable to perform the duties of the office.

52 See, for example, *Ragogo v Minister for Immigration and Ethnic Affairs & Anor* (1995) 59 FCR 489 at 500-501, in which the Federal Court found that the decision concerning jurisdiction which was set aside on appeal was not the decision that fell to be reconsidered by the tribunal below. In those circumstances it was a matter for the tribunal to determine by whom and by what means the application was to be determined in accordance with law.

circumstances, the course often adopted is for the matter to be determined on rehearing by a differently constituted tribunal.⁵³

[66] The first question for determination is whether the Supreme Court erred in remitting the matter to the Local Court differently constituted having regard to the foregoing principles. The errors asserted by the appellant in the second and fourth grounds of appeal are that the Supreme Court did not consider whether the nature of the error identified by it justified a rehearing before a different decision-maker and failed to give reasons in relation to that issue. Those assertions must be considered in light of the observations and findings made by the Supreme Court in the course of its reasons for decision. Those reasons make it plain that there had been a miscarriage of a complicated process of fact-finding, including in relation to findings of credit. The Supreme Court gave the following reasons in relation to the Local Court's findings concerning the credit of the appellant:

As noted above at [29], his Honour specifically found that the [appellant] had a history of dishonesty offences, that at the time of the search she was probably intoxicated by alcohol and amphetamines, and that she told a number of lies. In those circumstances, his Honour regarded her as having very little credibility. Notwithstanding that finding, the Judge referred to the video recording of the search and also the video of the [appellant's] later conduct in the holding cells which was

⁵³ See, for example, *Re Australian Railways Union & Ors; Ex parte Public Transport Corporation* (1993) 117 ALR 17 at 25, in which the High Court found that an award was unconstitutional and declined to order that if the matter was to go back before the Industrial Relations Commission a different bench should be constituted to hear it. The High Court considered that to be a matter for the parties and the Commission to determine. When the matter returned to the Commission, it determined that the Full Bench should be differently constituted to hear and determine the matter.

described as being “erratic at times”, and concluded that “the video evidence of [the police auxiliary’s] actions, and the [appellant’s] reaction, is consistent with the [appellant’s] allegation”. His Honour went on to make the findings set out at [39] above.

The [respondent] submits that, in so doing, no explanation was provided as to how or why the complaint of the conduct differed from earlier complaints and claims made by the respondent which his Honour accepted as lies. There was no attempt to explain why the spontaneous and elaborate claims of assault made by the [appellant] in the hours preceding the alleged assault, which were shown to be false, either by the video evidence or by her own admission, should not have been taken into account when deciding whether the allegation of assault she made against [the police auxiliary] was also false.

The [respondent] submitted that reference to the Supreme Court sentencing remarks relating to the [appellant], the body worn camera recordings of the arrest, the video recordings of the events in the watch-house and the evidence given by the [appellant] at the Local Court hearing revealed a range of claims by the [appellant] of assault upon her, of mistreatment of her, of outlandish claims against others made by her and a range of statements made by her which were later shown to be, and sometimes admitted by her to be, lies. The lies were not mere untruths but elaborate, sophisticated lies accompanied by supportive changes in demeanour.

The [respondent] submitted to the Local Court (and again to this Court) that reliance could not be placed upon the demeanour of the [appellant] and the dramatic changes in that demeanour during the course of the search in support of her claim, because of the demeanour displayed by her in the course of events leading up to the search. It was submitted that she told persecutory lies, she falsely reported abuses of her and she did so on multiple occasions. She did so to distract and manipulate others and, it was submitted, the allegation against [the police auxiliary] was a lie introduced to manipulate [the police auxiliary] into searching the respondent’s groin less thoroughly. It was submitted that this was the very kind of lie she had told repeatedly. Her demeanour changed to support the truth of her lies and consequently any shift in demeanour or emotional outburst in relation to the core issue was equally consistent with lying or telling an untruth. The dramatic shift in demeanour did not support truthfulness or reliability or distinguish honesty from dishonesty. The lies were sophisticated and based around a partial truth or verifiable fact.

Those claims and physical displays having been shown to be lies and unreliable, it was submitted, the same should apply to the complaint the subject of the proceedings or, at least, the reasons why they did not should have been addressed and exposed. His Honour failed to engage with this issue.

...

Having referred to some of the identified lies told by the [appellant] leading up to the alleged assault and thereafter, his Honour concluded that the [appellant] “told a number of lies on the day of her arrest and search” and went on to find that she had “very little credibility”.

Notwithstanding that finding, his Honour accepted the evidence of the [appellant] in relation to the core issue being the allegation of assault. It was incumbent upon the Judge to expose at least in broad terms why that was so and to engage with the issues concerning the reliability of the respondent canvassed in the hearing.

...

What was not addressed in the reasons is the detailed submission placed before the Local Court regarding the prior dishonest and dramatic conduct of the [appellant] and the impact of that conduct upon the assessment of the honesty and reliability of the [appellant] in relation to the crucial element of the case. Although the reasons do address the change in demeanour of the [appellant] at the relevant time there is no attempt by his Honour to compare or contrast that with the earlier conduct of the [appellant]. This was a vital consideration in determining the outcome of the proceedings and was not addressed at all. His Honour failed to engage with the detailed submissions of the respondent or with the issue at all.⁵⁴

[67] The Supreme Court also gave the following reasons in relation to the Local Court’s findings concerning the credit of the police auxiliary:

... His Honour provided a detailed description of the search and noted that [the police auxiliary] did not, as she had claimed in her affidavit, conduct a regular search of the [appellant]. Having determined not to accept the evidence of [the police auxiliary] in this regard the trial Judge did not refer to the matter again in relation to the issue of liability. Reference was made to the issue

⁵⁴ *Northern Territory of Australia v Kellie* [2024] NTSC 73 at [46]-[53], [65].

in assessing damages where it was said that this was “an intentional breach of the law – perhaps to avoid the effort of finding another female police officer to conduct a strip search, and avoid calling the Watch Commander to obtain a Court order”. The use of the word “perhaps” clearly indicates that this was not a finding but rather, simply, identifying one possibility. What use, if any, was made of these observations in making the ultimate findings was not disclosed.

His Honour also discussed the evidence regarding [the police auxiliary] removing her gloves and then replacing her gloves and concluded that he did not accept the explanation provided [the police auxiliary] in this regard. The reasons for so concluding were set out. However, having reached that conclusion his Honour did not discuss or seek to identify any other explanation for the conduct [the police auxiliary] removing and then replacing her gloves. The Judge did not address whether, and if so how, any of the information relating to the gloves was used in making the ultimate findings.

...

Having held that [the police auxiliary] had “concluded” that the [appellant] was not concealing drugs or jewellery, his Honour did not then elaborate upon, or explain how, this led to a finding that the reason was because one or more fingers had been inserted by [the police auxiliary] into the vagina of the [appellant]. [The police auxiliary] had given evidence that she did not think the [appellant] was “concealing” because of the lack of response from the wand. [The police auxiliary] provided a further, innocent, reason for her suspicion (not “conclusion”) that underwear was not being worn because, she said, of her experience of females as suspects reacting strongly to such searches where the suspect was not wearing underwear. His Honour did not refer to or in any way engage with those reasons but simply made the findings set out above without further explanation.

... By reference to what could be seen on the CCTV footage, his Honour rejected the claim by [the police auxiliary] that she was embarrassed and upset by the accusation made by the [appellant] and used humour to mask her hurt feelings but, rather, concluded that she was “willingly joking about inserting a finger to search the vagina of a suspect”. The evidentiary basis for that finding, being the CCTV footage, was identified.

However, his Honour did not go on to explain how the telling of that inappropriate joke led to a finding that [of the police auxiliary] did insert a finger or fingers into the vagina of the [appellant]. Accepting his Honour’s finding regarding the telling

of the off-colour joke, that does not necessarily lead to a conclusion that the offending conduct occurred. The joke may have resulted equally from that conduct in fact taking place or from a false complaint that the conduct took place. His Honour did not engage with this issue.⁵⁵

[68] Given the nature of the appeal from the Local Court to the Supreme Court and the flaws in the Local Court's reasoning and fact-finding processes, it was not open to the Supreme Court to determine the issue of liability. Although it may be accepted that there is no rule that every time reasons are found to be inadequate there must be a determination by a new decision-maker,⁵⁶ in this case the remittal of the matter to the Local Court differently constituted was the only order properly open having regard to the Supreme Court's conclusions concerning the manner in which the Local Court had addressed and assessed the credibility of the witnesses. As Mason P observed in *Seltsam Pty Ltd v Ghaleb*:

There can be cases where a complicated process of fact-finding has miscarried through a combination of factors. The interests of justice, including its appearance, may require that the new trial take place before a differently constituted court or tribunal. That is particularly so where, as in the present case, the first trial resulted in a judgement turning on credibility-based findings. To remit the matter for a new trial before a similarly constituted tribunal of fact would almost invariably trigger an application that the judge recuse in light of the principles in *Australian National Industries Ltd v Spedley Securities Ltd (in liq)* (1992) 26 NSWLR 411.⁵⁷

⁵⁵ *Northern Territory of Australia v Kellie* [2024] NTSC 73 at [57]-[62].

⁵⁶ *Anderson v Sharpe* [2023] VSC 559 at [58].

⁵⁷ *Seltsam Pty Ltd v Ghaleb* [2005] NSWCCA 208 at [13].

[69] As in *Wang*, the proper exercise of the power to make an order as to the constitution of the primary decision-maker on remittal in this case has ‘nothing to do with administrative convenience or efficiency’.⁵⁸ The effect of allowing the appeal for the reasons described was to vitiate the entire process of reasoning which led to the Local Court’s finding that a battery had been committed. The judgment could not stand independently of that process of reasoning, and nor was this a case in which there was some technical failure concerning a matter such as jurisdiction rather than a failure which implicated the credit assessments made by the Local Court. The inevitability of a retrial having regard to the flaws in the Local Court’s reasoning process was the very reason why the Supreme Court considered it ‘unnecessary and unhelpful’ to determine the other grounds of appeal, which included that various of the Local Court’s findings were unreasonable, not supported by any evidence and/or infected by error of law.

[70] Moreover, a remittal to the Local Court as originally constituted would have put the judicial officer in the embarrassing and invidious position of either conceding error or defending the original outcome. If the judicial officer determined in those circumstances to defend his original decision, that defence could only take the form of ‘reverse-engineering’ adequate reasons for what could only be characterised as a

58 *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518 at [4].

predetermined outcome.⁵⁹ The appellant's submission that the exercise of the power is guided and circumscribed by the nature of the error identified in the decision of the primary decision-maker may readily be accepted.⁶⁰ The features of the original decision identified by the Supreme Court would render the process unfair to the successful party or give the appearance of unfairness to that party, which is the guiding principle for remittal to a differently constituted primary decision-maker.

[71] As the High Court has observed, '[t]he content of [the] judicial duty to give adequate reasons will depend upon the circumstances of the matter being considered'.⁶¹ Those circumstances include whether the issue in question was in dispute during the course of the proceeding (which in this case was the appeal before the Supreme Court). For the reasons given further below in relation to the appellant's contention of a denial of procedural fairness, the form of the orders for remittal in the event the appeal was allowed was not put into dispute during the appeal.⁶² The appellant's assertion that the Supreme Court failed to give reasons for its decision to order the remittal to a differently constituted Local Court must also be considered with reference to the findings and

⁵⁹ *Australian National Industries Ltd v Spedley Securities Ltd (in liq)* (1992) 26 NSWLR 411.

⁶⁰ *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518 at [124].

⁶¹ *Thorne v Kennedy* (2017) 263 CLR 85 at [61].

⁶² As a general proposition, there is no obligation to give reasons explaining matters not actively in contest: see, for example, *Beale v Government Insurance Office of New South Wales* (1997) 48 NSWLR 430 at 442-444.

observations made by the Supreme Court concerning the miscarriage in the credit findings made by the Local Court as originally constituted.

In light of those findings and observations, no other course was properly open and the reasons for that were adequately described. This was a case in which the reasons for allowing the appeal from which the relief necessarily followed were also sufficient reasons for the form of the relief.

[72] That leaves the appellant's contention in the third ground of appeal that the Supreme Court erred in failing to provide her with sufficient opportunity to be heard on the question of whether the matter should be remitted to the Local Court differently constituted for rehearing. That assertion must be considered in light of the fact that the appropriate course to be adopted in the event the appeal was allowed, on whatever ground, was not a matter of dispute during the hearing of the appeal. As already noted, the respondent (as appellant in the proceedings before the Supreme Court) expressly sought remittal to a differently constituted Local Court in its notice of appeal. Moreover, in its written submissions in the proceedings before the Supreme Court, the respondent stated:

This appeal is substantially concerned with the inadequacy of the trial judge's engagement with the evidence and issues at trial. The published reasons failed to engage with, or even refer to the existence of, the [respondent's] submissions or to critical parts of the evidence which are contrary to the trial judge's findings. In the result, each step in the trial judge's reasoning is compromised, and the trial judge's ultimate finding that [the police auxiliary]

deliberately inserted a finger into the [appellant's] vagina cannot stand. The decision should be set aside. In its place, the matter should be remitted to the Local Court differently constituted for retrial according to law.⁶³

[73] The appellant (as respondent in the proceedings before the Supreme Court) did not address in either written or oral submissions the prayer for relief or the respondent's express written submission that because the Local Court's reasoning and findings were fatally compromised the matter was properly remitted to the Local Court differently constituted. That is unsurprising given the nature of the Local Court's decision, the nature of the challenge to that decision and the position ordinarily adopted when an appeal is allowed in those circumstances.

[74] At an empirical or anecdotal level at least, it is not the practice of appellate courts in this jurisdiction, or in Australia more generally, to make a determination as to whether the appeal should be allowed and the matter remitted to the tribunal below, and if so then to go back to the parties to afford them a further opportunity to make submissions on the question whether that remittal should be to the tribunal differently constituted.⁶⁴ That will ordinarily be the position. There are some exceptions to that ordinary practice. For example, when an appellate criminal court determines that a sentence should be set aside it may invite the parties to adduce further evidence and/or make further

⁶³ Appeal Book 101.

⁶⁴ See, for example, the approach adopted by the High Court in *Binsaris v Northern Territory of Australia* (2020) 270 CLR 549 at [112(d)].

submissions concerning the resentencing exercise if that matter has not been addressed.

[75] Another example may be found in the decision in *Vegco Pty Ltd v Gibbons*.⁶⁵ In that case the appellate court found that a medical panel had committed jurisdictional error. The decision was quashed and the matter was to be remitted to the primary decision-maker. The parties in that case had not had opportunity to address whether there was some feature of the conduct or reasons for decision of the primary decision-maker, such as findings on the credit of witnesses, which would render it unfair for the matter to be remitted to the same decision-maker notwithstanding that the error identified was jurisdictional in nature. As is apparent from the passages of the Supreme Court's decision which have been extracted above, the central issue under consideration in this case, and the matter to which submissions were primarily directed, was the Local Court's fact-finding and reasoning process in relation to the credibility of witnesses. The decision in *Vegco Pty Ltd v Gibbons* does not stand as authority for the proposition that following a decision on appeal the represented parties must necessarily be given an opportunity to address the constitution of the primary decision-maker before orders for remittal may be made.

⁶⁵ *Vegco Pty Ltd v Gibbons* [2008] VSC 363 at [33].

[76] The appellant was clearly on notice of the terms of the order sought by the respondent in that respect, and the grounds of appeal on which that order was sought. The appellant did not seek to make any submission as to the order appropriately sought in the event that one or other of the grounds of appeal was established, the appellant did not seek to reserve any right to make further submissions about the appropriate orders for remittal in the event one or other of the grounds of appeal was established, and the Supreme Court found in favour of the respondent in respect of one of those grounds. It was not in those circumstances incumbent on the Supreme Court to go back to the parties and afford a further opportunity to make submissions on the terms of the order for remittal, and there was no denial of procedural fairness in not doing so.

[77] The respondent submits that the determination to remit the proceedings to the Local Court differently constituted was a discretionary determination to which the *House v The King* standard had application. Regardless of whether the correctness standard or the *House v The King* standard applies, for the reasons given we consider that the remittal of the matter to the Local Court differently constituted was the only order reasonably open. It is necessary for this Court to give effect to that opinion. Even if the decision of the Supreme Court ordering remittal was to be set aside for paucity of reasons or denial of procedural fairness, it would still fall to this Court to remit the proceeding for further hearing and determination subject to such

directions as it considered appropriate. That is because there is no challenge to the correctness of the Supreme Court's substantive conclusion that the reasons of the Local Court were inadequate, and no submission by the appellant to the effect that the reasons of the Local Court were adequate. The requirement for this Court to make an order for remittal is also contemplated in the appellant's Notice of Appeal, which relevantly seeks that:

... the order of the Supreme Court delivered on 30 August 2024, that the matter be remitted to the Local Court differently constituted for a rehearing be set aside, and in lieu of that order the following order being made:

- (1) The matter be remitted to the Local Court as originally constituted.

[78] The appellant has during this appeal had opportunity to address why it says the matter should be remitted to the Local Court as originally constituted. We have concluded that an order in those terms would not be correct or properly open having regard to the principles which govern the exercise of an appellate court's power in that respect. One consequence of that conclusion is that any asserted failure to afford procedural fairness and/or provide adequate reasons, even if the assertion was accepted, was immaterial to the decision because the outcome would inevitably have been the same.⁶⁶

[79] For these reasons, grounds 2, 3 and 4 of the appeal are dismissed.

⁶⁶ *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] HCA 12 at [16].

Disposition

[80] The orders are:

1. The Notice of Contention is dismissed.
2. Leave to appeal on proposed ground 1 in the Notice of Appeal is granted.
3. The appeal is dismissed.

[81] We will hear the parties in relation to costs if need be.
