

CITATION: *The Estate of Kwementyaye Conway & Anor v Chief Executive Officer (Housing)* [2026] NTSC 75

PARTIES: THE ESTATE OF KWEMENTYAYE
CONWAY

and

MATTHEW WAYNE YOUNG IN HIS
CAPACITY AS ADMINISTRATOR OF
THE ESTATE OF KWEMENTYAYE
YOUNG

v

CHIEF EXECUTIVE OFFICER
(HOUSING)

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: APPEAL from the NORTHERN
TERRITORY CIVIL AND
ADMINISTRATIVE TRIBUNAL
exercising Territory jurisdiction

FILE NO: 2026-00442-SC

DELIVERED: 10 September 2026

HEARING DATE: 17 August 2026

JUDGMENT OF: Kelly J

CATCHWORDS:

Leave to appeal – Residential tenancies – Compensation – Whether the tribunal failed to consider physical inconvenience in assessing compensation under s 122 of the *Residential Tenancies Act 1999* – Whether compensation was required to be assessed by reference to separate common law heads of damage – No error of law – Ground 1 – Leave to appeal refused.

Whether tribunal erred in imposing a “reasonable steps” test – Whether the tribunal was bound by *Chief Executive Officer (Housing) v Pepperill & Ors* – Whether findings as to reasonable steps were questions of fact – Ground 2 part 1 – Question referred to Full Court – Ground 2 part 2 – Leave to appeal refused.

Whether the tribunal limited compensation by reference to agreed rent – Whether compensation was manifestly inadequate – Whether the tribunals discretion miscarried – No error or miscarriage of discretion – Ground 3 – Leave to appeal refused.

Whether the NTCAT President erred in refusing leave for internal review of a cost’s decision – whether President denied applicants natural justice by not seeking further submissions from applicants – no duty to seek further submissions – no error demonstrated - Ground 4 – Leave to appeal refused.

Cross-appeal - Whether the tribunal erred in refusing the respondent’s limitation defence – Whether the tribunal misunderstood evidence concerning the tenancy management – respondent indicated cross appeal to be abandoned if leave to appeal not granted - Cross-appeal not considered – To be revisited if leave is granted on proposed ground 2 part 1 by Full Court

Northern Territory Civil and Administrative Tribunal Act 2014 (NT), s 53, s 53(2)(a), s 53(2)(b), s 53(2)(c), s 140, s 140(2), s 140(5), s 141, s 141(1)

Residential Tenancies Act 1999 (NT), s 3(d), s 48, s 48(1), s 48(1)(a), s 48(2), s 48(2)(b), s 49, s 49(1), s 57, s 57(1), s 57(2), s 122, s 122(1), s 122(1)(a), s 122(3)

Supreme Court Act 1979 (NT), s 20

Alice Springs Town Council v Mpweteyerre Aboriginal Corporation (1997) 94 LGERA 330, *Badari & Ors v Minister for Territory Families and Urban Housing & Anor*; *Badari & Ors v Minister for Housing and Homelands & Anor*; *Nadjamerrek & Ors v Chief Executive Officer (Housing)* [2025] NTCA 1, *Bailey v Bullock & Ors* [1950] 2 All ER 1167, *Baltic Shipping v Dillon* (1993) 176 CLR 344, *Booth v An Assessor & Anor* [2019] NTSC 89, *B & L Linings Pty Ltd v Chief Commissioner of State Revenue* [2008] NSWCA 187; (2008) 74 NSWLR 481, *Brown & Ors v Chief Executive Officer (Housing)* [2025] NTSC 72, *Chief Executive Officer (Housing) v Pepperill & Ors* [2024] NTCA 10, *Chief Executive Officer (Housing) v Young and Anor* (2022) 43 NTLR 196; [2022] NTCA 1, *Development Consent Authority v Phelps* [2010] NTCA 3; (2010) 27 NTLR 174, *DWN042 v Republic of Nauru* [2017] HCA 56, *Furnell v Whangarei High Schools Board* [1973] AC 660, *House v The King* (1936) 55 CLR 499, *HWE Contracting Pty Ltd v Young* (2007) 20 NTLR 83; [2007] NTSC 42, *Kellie v Northern Territory of Australia* [2026] NTCA 4, *Kioa v West* [1985] 159 CLR 550, *King v Commissioner for Consumer Protection* [2018] WASCA 194, *Leichhardt Municipal Council v Seatainer Terminals Pty Ltd* (1981) 48 LGRA 409, *McCauley v McCauley* (1910) 10 CLR 434, *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475, *Moore v Scenic Tours* (2020) 268 CLR 326, *Nepean Country Club Ltd v Paterson* [2009] VSC 436, *Northern Sandblasting Pty Ltd v Harris* [1997] HCA 39; (1997) 188 CLR 313, *Richmond Football Club Ltd v Verraty Pty Ltd* [2019] VSC 597, *Sandy v Sananikone and Do* [2015] NTRTCmr 1, *Stead v State Government Insurance Commission* (1986) 161 CLR 141; [1986] HCA 54, *Stone v Chappel* (2017) 128 SASR 165, *The Estate of Conway, Young v Chief Executive Officer (Housing)* [2026] NTCAT 1, *The Estate of Conway, Young v Chief Executive Officer (Housing) (No 2)* [2026] NTCAT 6, *Thomas v Powercor Australia Limited* [2011] VSC 586, *Thorpe v Lochel* [2005] WASCA 85, *Young and Conway v Chief Executive Officer, Housing* (2020) 355 FLR 290; [2020] NTSC 59, *Young v Chief Executive Officer (Housing)* [2023] HCA 31, referred to.

REPRESENTATION:

Counsel:

Applicant:	M Albert
Respondent:	T Moses

Solicitors:

Applicant:	Australian Lawyers for Remote Aboriginal Rights
Respondent:	Mills Oakley

Judgment category classification: B
Judgment ID Number: Kel2607
Number of pages: 56

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

*The Estate of Kwementyaye Conway & Anor v
Chief Executive Officer (Housing) [2026] NTSC 75
No. 2026-00442-SC*

BETWEEN:

**THE ESTATE OF KWEMENTYAYE
CONWAY**

First Applicant

AND:

**MATTHEW WAYNE YOUNG IN HIS
CAPACITY AS AMINISTRATOR OF
THE ESTATE OF KWEMENTYAYE
YOUNG**

Second Applicant

AND:

**CHIEF EXECUTIVE OFFICER
(HOUSING)**

Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 10 September 2026)

- [1] This is an application for leave to appeal from the decision of the Northern Territory Civil and Administrative Tribunal (“the Tribunal”) on 16 January

2026 in *The Estate of Conway, Young v Chief Executive Officer (Housing)*¹

ordering the respondent:

- (a) to pay to the Estate of Kwementyaye Conway the sum of \$5,000 by no later than 4.00pm on 13 February 2026; and
- (b) to pay to Matthew Wayne Young in his capacity as the Administrator of the Estate of Kwementyaye Young the sum of \$31,265 by no later than 4.00pm on 13 February 2026.

[2] The application is brought pursuant to s 141 of the *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) (“the NTCAT Act”), which provides:

Appeal to Supreme Court

- (1) A party to a proceeding may appeal to the Supreme Court against a decision of the Tribunal on a question of law.
- (2) A person may appeal only with the leave of the Supreme Court.
- (3) On hearing an appeal, the Supreme Court must do one of the following:
 - (a) confirm the decision of the Tribunal;
 - (b) vary the decision of the Tribunal;
 - (c) set aside the decision and:
 - (i) substitute its own decision; or
 - (ii) send the matter back to the Tribunal for reconsideration in accordance with any recommendations the Supreme Court considers appropriate;
 - (d) dismiss the appeal.

¹ [2026] NTCAT 1 (“the Second Tribunal Decision”)

[3] An appeal brought under that provision is therefore confined to a question of law and requires the leave of this Court.

[4] The applicant has filed an Application for Leave to Appeal dated 13 February 2026 annexing a proposed Notice of Appeal and has filed an Amended Notice of Appeal dated 6 July 2026. That document pleads a number of proposed grounds of appeal:

The Northern Territory Civil and Administrative Tribunal's decisions were infected by error as follows:

(1) The Tribunal:

- (a) failed to perform its statutory task of compensating the Appellants in accordance with s 122 of the *Residential Tenancies Act 1999* (NT); and/or
- (b) erred by failing to deal with the claims or deal with an issue of significance raised by each Appellant of a claim for compensation

for physical inconvenience, despite undisputed and uncontradicted evidence before the Tribunal of accepted breaches giving rise to physical inconvenience for each Appellant.

(2) The Tribunal erred by misconstruing s 48 of the *Residential Tenancies Act 1999* (NT) namely by:

- (a) adding a 'reasonable steps' qualification which is absent from the terms of that obligation on a landlord; or
- (b) alternatively, construing the 'reasonable steps' qualification to be satisfied in the absence of evidence or without identification of evidence of any steps being taken by the landlord prior to notification of an issue by the tenant.

(3) The Tribunal failed to perform its statutory task of compensating the Appellants in accordance with s 122 of the *Residential Tenancies Act 1999* (NT) and/or erred in its quantification of each order of compensation to each Appellant:

- (a) by reason that it limited each order by reference to the value of the contract, being the agreed rent; or
- (b) alternatively, in that each order was manifestly inadequate having regard to the findings of the Tribunal and decisions of

Courts concerning quantifying compensation for disappointment or distress.

- (4) The Tribunal denied the Applicants natural justice and/or breached the statutory mandate imposed on the Tribunal by s 53(2)(a) of the *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) by determining an application for leave for an internal review of the decision of the Tribunal regarding costs without first hearing from the Applicants.

Question of Law

- [5] The function of the Court hearing an appeal limited to a question of law was considered by Grant CJ in *Booth v An Assessor & Anor.*²

- [33] An appeal restricted to a question of law invokes the original jurisdiction of this Court rather than its appellate jurisdiction. As counsel for the respondents submits, the subject matter of the appeal must be the question of law itself, rather than some mixed question of fact and law or a matter which merely “involves” a question of law. The formulation extends to both jurisdictional errors and non-jurisdictional errors of law.
- [34] The Court’s function is to determine whether there has been an error of law and, if so, to describe the nature, content and effect of that error. The dispositive powers of the Court extend to confirming or varying the decision below, or setting aside the decision below and either substituting its own decision or remitting the matter back to the Tribunal for determination in accordance with law. Before any intervention will be made, this Court must be satisfied that the error of law was such as to vitiate the decision below. While this Court may substitute its own decision in that event, that does not require or authorise this Court to make findings of fact or to determine questions of mixed fact and law. The Court will only substitute its own decision in circumstances where the correct answer to the question of law is of itself determinative of the matter.

[citations omitted]

² [2019] NTSC 89 (“*Booth*”) at [33]-[34]; See also *B & L Linings Pty Ltd v Chief Commissioner of State Revenue* [2008] NSWCA 187; (2008) 74 NSWLR 481; *Nepean Country Club Ltd v Paterson* [2009] VSC 436, cited by Grant CJ in *Booth*.

[6] What must be shown for the court on appeal to be satisfied that an error of law was such as to vitiate the decision below was considered by the Northern Territory Court of Appeal in *Development Consent Authority v Phelps*:³

[11] It is not in dispute that, in order to succeed in an appeal, an appellant needs to identify an error of law that vitiates the decision concerned: see *Leichhardt Municipal Council v Seatainer Terminals Pty Ltd* (1981) 48 LGRA 409 at 419 per Moffitt P; *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation* (1997) 94 LGERA 330 at 342 per Mildren J, Martin CJ agreeing at 332 and *HWE Contracting Pty Ltd v Young* (2007) 20 NTLR 83, [2007] NTSC 42 at [57] per Riley J, Martin CJ agreeing at [1].

[7] Following a review of the relevant authorities, the Court concluded:⁴

[23] Taking into account these decisions, we consider the principle which is to be extracted from them relevant to this case is that her Honour had to be satisfied, after an examination of the Tribunal's reasons for decision and any other relevant material, that there was a real possibility (but not a mere or slight possibility) that the second error of law could (but not necessarily would) have affected the Tribunal's decision.

Leave to appeal

[8] In *Booth*, Grant CJ said:⁵

Leave to appeal should be granted only if it is in the interests of justice to do so in all the circumstances of the case. There are no rigid or exhaustive guidelines governing that enquiry. When the leave sought is in relation to an appeal on a question of law, it is ordinarily incumbent on the applicant to establish that there is sufficient doubt about the

3 [2010] NTCA 3; (2010) 27 NTLR 174 at [11] and [23]

4 Ibid at [23]

5 *Booth* at [52]; See also *King v Commissioner for Consumer Protection* [2018] WASCA 194 at [166]; *Richmond Football Club Ltd v Verraty Pty Ltd* [2019] VSC 597 at [12] cited by Grant CJ in *Booth*.

question of law to justify the grant of leave, and that a substantial injustice would result if the error of law is not corrected.

Procedural history (taken largely from the Second Tribunal Decision)

- [9] The original applications to the Tribunal by the applicants were filed on 5 February 2016. Seventy applications against the respondent were filed in the Tribunal at the same time on behalf of tenants in housing owned by the respondent in remote Aboriginal communities. It was agreed between the parties that, given the commonality of factual and legal issues, only four of the matters (including those of the current applicants) would proceed to the Tribunal for hearing. The other matters remain outstanding pending the resolution of the present matters.

First Tribunal Decision

- [10] The Tribunal handed down its decision in the four matters heard by it on 27 February 2019.⁶ In the First Tribunal Decision, the Tribunal held that to show a breach of the landlord's obligation to ensure that premises were habitable, the applicants would have to show that a threat to the tenant's safety, going to both structural and health issues will naturally occur from the ordinary use of the premises, and, further that the test to be met was a high one.

⁶ *Various Applicants from Santa Teresa v Chief Executive Officer (Housing)* [2019] NTCAT 7 ("the First Tribunal Decision")

First appeal to the Supreme Court

- [11] The applicants (being two of the original four) brought an appeal from the First Tribunal Decision to the Supreme Court pursuant to s 141(1) of the NTCAT Act.
- [12] The Supreme Court upheld two of the five grounds of appeal and remitted the matter to the Tribunal for reconsideration.
- [13] The Supreme Court held⁷ that “the assessment of whether the premises were habitable should have included not only the health and safety of tenants but an overall assessment of the humaneness, suitability and reasonable comfort of the premises, even if only basic amenities are provided, judged against contemporary standards”.
- [14] Relying on the principles enunciated in the High Court decisions in *Moore v Scenic Tours*⁸ and *Baltic Shipping v Dillon*,⁹ the Supreme Court assessed compensation owing to Ms Young under s 122 of the *Residential Tenancies Act 1999* (“RTA”) for the respondent’s breach of RTA s 49(1)¹⁰ to be the sum of \$10,200.¹¹

7 *Young and Conway v Chief Executive Officer, Housing* (SC) (2020) 355 FLR 290; [2020] NTSC 59 (“*Young and Conway v Chief Executive Officer, Housing* (SC)”)

8 (2020) 268 CLR 326

9 (1993) 176 CLR 344 (“*Baltic Shipping*”)

10 This is the landlord’s obligation to take reasonable steps to provide and maintain the locks and other security devices that are necessary to ensure the premises and ancillary property are reasonably secure.

11 *Young and Conway v Chief Executive Officer, Housing* (SC)

First Appeal to the Court of Appeal

[15] The respondent appealed to the Court of Appeal from the decision of the Supreme Court in *Young and Conway v Chief Executive Officer, Housing* (SC).

[16] The Court of Appeal¹² agreed with the Supreme Court that the Tribunal fell into error in its approach to the construction of the word “habitable” in RTA s 48(1)(a), and that the issue of habitability should be remitted back to the Tribunal. However, the Court of Appeal held that the test enunciated by the Supreme Court “should not be adopted in its entirety in that reconsideration”. The Court of Appeal, contrary to the finding of the Supreme Court, held that “a finding that premises are not fit for habitation should not be lightly made”. The Court of Appeal also found that the Supreme Court’s suggested criteria of “humaneness” and “suitability” were insufficiently precise to “engage the exercise of judicial power” when determining the issue of habitability as set out in s 48(1)(a).¹³ The NTCA set out the test of habitability applicable to s 48(1)(a) as follows:

The relevant test of liability, apart from matters of health and safety, is “comfort”, subject to Lord Atkin’s qualification that a reasonable view of that criterion must be taken. Questions of fitness for habitation are to be judged against a standard of reasonableness having regard to the age, character and locality of the residential premises and to the effect of the defect on the state of the premises as a whole.

12 *Chief Executive Officer (Housing) v Young and Anor* (2022) 43 NTLR 196; [2022] NTCA 1 (“*Chief Executive Officer (Housing) v Young and Anor* (CA1)”)

13 Section 48(1)(a) provides that the landlord must ensure that the premises are habitable.

[17] Finally, the Court of Appeal held that the Supreme Court fell into error in awarding damages to Ms Young for the respondent's breach of RTA s 49(1). The Court of Appeal agreed with the Supreme Court that the Tribunal had erred in law in finding that the respondent's failure to provide a back door to Ms Young's premises did not constitute a breach of s 49(1)¹⁴, but concluded that the Supreme Court had erred in finding that an award of compensation under s 122 was governed by the second limb of the principle in *Baltic Shipping*. The Court of Appeal construed RTA s 122(1) as importing principles of remoteness that limit the assessment of damages for breach of contract at common law and took the view that those principles operated to exclude compensation for distress or disappointment arising from non-compliance with a term of the tenancy agreement other than in consequence of physical inconvenience.

Appeal to the High Court

[18] The applicants appealed the decision of the Court of Appeal in *Chief Executive Officer (Housing) v Young and Anor* (CA1) to the High Court. The question to be determined by the appeal was articulated by Kiefel CJ, Gageler and Gleeson JJ (the 'majority') in the following terms.¹⁵

The dispositive question in this appeal is whether the Civil and Administrative Tribunal of the Northern Territory ... is empowered by

14 Section 49(1) provides that the landlord will take reasonable steps to provide and maintain the locks and other security devices that are necessary to ensure the premises are reasonably secure.

15 *Young v Chief Executive (Housing)* (2023) 278 CLR 208 ("*Young v Chief Executive (Housing)* (HC)") at [1]

s 122(1) of the *Residential Tenancies Act 1999* (NT) ... to order that a landlord compensate a tenant for distress or disappointment suffered by the tenant as a normal healthy reaction to a failure on the part of the landlord to comply with a statutorily imposed term of a residential tenancy agreement that the landlord take reasonable steps to provide and maintain security devices necessary to ensure that residential premises are reasonably secure.

- [19] The majority held that the Court of Appeal was correct to conclude that the assessment of damages under RTA s 122 would inter alia, be governed by the common law principles of remoteness. The majority found, however:¹⁶

Where the reasoning of the Court of Appeal and the argument of the CEO went too far was in postulating a further element of the design of the Act to be that the measure of compensation capable of being ordered by the Tribunal under s 122 of the Act for breach of a term of a tenancy agreement is confined by reference to the measure of damages that could be ordered by a court for breach of that term of that tenancy agreement in a common law action for breach of contract. Statutory compensation under s 122 is rather to be seen as an alternative, and likely more accessible, remedy to common law damages for breach of a tenancy agreement.

- [20] The majority articulated the approach to an award of compensation given the facts of these proceedings.¹⁷

The evident purpose of the obligation specified by s 49(1) of the Act to be a term of a tenancy agreement, with which the CEO as landlord failed to comply, is ensuring that premises occupied by a tenant for the purpose of residency are reasonably secure. For a tenant to be secure in the occupation of premises is for the tenant to reside there free from threat of harm or unwanted access. The feeling of insecurity which Ms Young experienced because of the landlord's failure to provide the residential premises with a back door was the obverse of the security which it was the purpose of the obligation to secure. The connection between the landlord's breach and the distress and disappointment

¹⁶ *Young v Chief Executive (Housing)* (HC) at [23]

¹⁷ *Young v Chief Executive (Housing)* (HC) at [29] – [30]

suffered by Ms Young readily satisfied the causal connection required by the word “because” in s 122(1).

Whether or not the distress and disappointment found to have been suffered by Ms Young due to the failure of the CEO to provide the requisite security would have been compensable in an action for damages at common law, Ms Young’s distress and disappointment was compensable on application to the Tribunal under s 122(1)(a) of the Act, subject to the Tribunal’s consideration of the factors prescribed by s 122(3).

- [21] The remaining members of the High Court, Gordon and Edelman JJ, also allowed the appeal, but based on reasoning different from that expressed by the majority. They held that the default position in RTA s 122 is to adopt general contract law rules in respect of a claim for compensation for loss or damage suffered because of a failure to comply with the tenancy agreement.¹⁸
- [22] Gordon and Edelman JJ held that the recovery of damages for disappointment and distress at common law was restricted to two categories. The first was where the disappointment and distress was consequent upon physical inconvenience caused by the breach of contract.¹⁹ The second was that recognised in *Baltic Shipping* in which the object of the contract — pleasure, enjoyment, entertainment, relaxation, freedom from molestation, peacefulness, comfort, protection from disappointment of mind, personal protection — is concerned with the same underlying criterion: the promisee’s state of mind.²⁰ The relevant contract term breached in this case,

18 *Young v Chief Executive (Housing)* (HC) at [58]

19 *Ibid* at [68]

20 *Ibid* at [69] – [71]

with its focus upon the safety and security of the premises, had an object which included providing the tenant with the peace of mind that comes with secure premises such that Ms Young was entitled to compensation for disappointment and distress.²¹

Second appeal to the Court of Appeal on the issue of compensation

[23] In August 2024, the Court of Appeal heard a further appeal from the first decision of the Supreme Court in *Young and Conway v Chief Executive Officer, Housing* (SC) brought by the administrator of Ms Young's estate. The appeal concerned the administrator's submissions that the Supreme Court erred in its approach to the calculation of compensation under RTA s 122(1) for the respondent's failure to provide a back door to Ms Young's property for an extended period of time or, alternatively, that the amount of compensation ordered for this breach of the RTA was manifestly inadequate.

[24] The Administrator submitted that the Supreme Court had erred in finding that:

[t]he principles and observations drawn from both *Baltic Shipping* and *Moore v Scenic Tours Pty Ltd* must be heavily calibrated appropriately to the circumstances of Ms Young's reduced enjoyment of the premises and subsequent distress and disappointment due to the failure to provide a premises which was secure. Although I am prepared to accept the application of those principles, heavily calibrated to include frustration and distress, compensation here cannot be based on a proportion of the damages in *Moore v Scenic Tours Pty Ltd* as was suggested by the appellants.

21 Supra at [77]

[25] In the Court of Appeal, the Administrator argued that decisions of the High Court support the proposition that the common law principles from *Baltic Shipping* apply to the award of compensation under RTA s 122. The administrator submitted that such common law principles should be taken to have application because the members of the High Court were unanimous as to the result; the three-member joint reasons did not expressly disavow the reasoning in the two-member joint reasons; and two justices may constitute a Full Court of the High Court.

[26] The Court of Appeal rejected this submission.²²

That argument must be rejected. The relevant claim was exclusively for statutory compensation under s 122 of the *Residential Tenancies Act*. It was not, and is not, an action for damages at common law for breach of contract, nor would the Tribunal have jurisdiction to entertain such a claim. For the reasons already described, the *ratio* of the High Court's decision is that the availability of compensation under s 122 of the *Residential Tenancies Act* is a matter of statutory interpretation having regard to the nature and purpose of the obligation with which there has been a failure to comply, and does not import the common law principles of remoteness addressed in *Baltic Shipping*.

[27] The Court of Appeal went on to hold that the Supreme Court had erred in determining damages based on the common law principles of recoverability expressed in *Baltic Shipping*.²³ The Supreme Court's order of compensation in the sum of \$10,200 for a breach of the respondent's obligation under RTA s 49 was set aside, and the matter remitted to the Tribunal for determination

22 *Young v Chief Executive Officer (Housing)* [2025] NTCA 5 at [32] (“*Young v Chief Executive Officer (Housing)* (CA2)”)

23 *Ibid* at [36]

in accordance with the principles enunciated in the High Court majority decision, as interpreted by the Court of Appeal. The Court of Appeal did not determine that the award of \$10,200 was manifestly inadequate because there had been a finding of specific error, namely the application of the principles in *Baltic Shipping*, which was contrary to the decision of the majority in the High Court.²⁴

The Second Tribunal Decision

[28] At the hearing before the Tribunal, the applicants submitted that the Court of Appeal did not properly interpret the decision of the High Court and reiterated the submissions made before the Court of Appeal. In the Second Tribunal Decision, the Tribunal correctly rejected this contention saying (inter alia):²⁵

In *Young v Chief Executive Officer (Housing)* [2025] NTCA 5, the NTCA interpreted the *ratio* of the earlier High Court decision in *Young v Chief Executive Officer (Housing)* (2023) 278 CLR 208. The NTCA decision is precisely on point with these proceedings. Further, no appeal was taken from the NTCA decision.

When faced with such a situation, the Tribunal is bound to follow the decision of the NTCA.

...

If the applicants sought to challenge the decision of the NTCA in *Young v Chief Executive Officer (Housing)* [2025] NTCA 5, it should have done so by way of appeal to the High Court. In the circumstances of these proceedings, the doctrine of precedent requires that the Tribunal follows the reasoning of the NTCA.

²⁴ Supra at [35]

²⁵ Second Tribunal Decision at [24] – [26]

[29] This is an application for leave to appeal against the Second Tribunal Decision.

Proposed Ground 1

[30] In proposed ground 1, the applicants contend that the Tribunal:

- (a) failed to perform its statutory task of compensating the Appellants in accordance with RTA s 122; and/or
- (b) erred by failing to deal with the claims or deal with an issue of significance raised by each Appellant of a claim for compensation.

[31] The nub of the applicants' complaint in this ground is that the applicants submitted that the Tribunal failed to award the applicants compensation for the physical inconvenience they suffered as a result of the respondent's breaches of RTA ss 48 and 49.

[32] The applicants referred to the Tribunal's findings that Ms Young had been without a back door to her house for 2090 days and Mr Conway was left without tiles around the tap in his shower for 610 days as a result of which water seeped through the wall into the adjacent toilet every time someone took a shower and Mr Conway and his elderly wife had to mop it up. The applicants contended that these defects were productive of physical inconvenience; that the applicants should have been compensated for that

physical inconvenience as a separate head of damage to the compensation given for distress and disappointment; and that the Tribunal failed to do this and did not, in the decision, deal with the applicants' submissions on this issue.

[33] The applicants relied on *Bailey v Bullock & Ors*²⁶ in which Scott LJ said:

To my mind, there is a very real difference between mere annoyance and injury to feelings, on the one hand, and physical inconvenience, on the other.

[34] The applicants also relied on *Thomas v Powercor Australia Limited*²⁷ in which Forrest J examined various authorities in which damages had been awarded in tort for physical inconvenience suffered as a result of breaches of tortious duties and distinguished physical inconvenience from mental distress, but held that there was insufficient evidence in that case to award damages for physical inconvenience to the plaintiff. Forrest J quoted Steytler P's remarks in the Western Australian Court of Appeal case of *Thorpe v Lochel*:²⁸

Steytler P set out the rule in breach of contract cases:

[As] the trial Judge correctly recognised ... damages for anxiety, disappointment and distress are not recoverable in actions for breach of contract ...

But then he noted:

²⁶ [1950] 2 All ER 1167 ("*Bailey v Bullock & Ors*") at 1170; This was a breach of contract case in which the plaintiff obtained damages for the inconvenience or discomfort he had suffered as a direct result of the breach but not for the annoyance and mental distress he had suffered.

²⁷ [2011] VSC 586 ("*Thomas v Powercor Australia Limited*") at [119]

²⁸ [2005] WASCA 85

However, over time, a number of exceptions to the rule have developed. These are conveniently enumerated in the judgment of Mason CJ in Baltic Shipping, at 363. Only two of the exceptions are relevant for present purposes, being those identified by the trial Judge. Courts have awarded compensation for physical inconvenience suffered by a plaintiff as a consequence of a breach. They have also awarded damages for mental suffering which is a direct consequence of physical inconvenience resulting from a breach.

[35] The judgment went on to consider a number of cases in which damages had been awarded for physical inconvenience and Forrest J concluded:²⁹

In my opinion, notwithstanding the difficulties associated with identification of what constitutes physical inconvenience and also ensuring that no allowance is made for any element of mental distress, this category of damage remains claimable in tort as held by Gobbo J in *Clarke*.

However, the inconvenience must be of some significance.

...

The end result is, I think, that if a claim is to be made for inconvenience there needs to be a strong evidentiary foundation that the tortious act led to a genuine inconvenience of some significance (be that in terms of impact or duration).

[citations omitted]

[36] Counsel for the applicants pointed to uncontested evidence of considerable inconvenience to both applicants: aged tenants having to continually mop the floor in the case of Mr Conway and the incursion of dirt, dust and a snake in the case of Ms Young. He contended that this warranted a substantial award of damages referable solely to physical inconvenience, in addition to the award for mental distress. Counsel pointed to submissions to this effect made to the Tribunal and then contended that those submissions

29 Supra at [129] - [132]

were ignored or overlooked by the Tribunal and that the decision contained no award of damages under this head.

[37] The reason for the analysis in *Bailey v Bullock* and *Thomas v Powercor Australia Limited* (and other like cases) carefully distinguishing between physical inconvenience and mental distress (or “mere annoyance and injury to feelings”) is that these are tort and contract cases and, as Gordon and Edelman JJ noted in *Young v Chief Executive Officer (Housing)* (HC):³⁰

[T]he common law rules concerning limitation of recovery of compensation or damages for breach of contract preclude recovery of damages for disappointment and distress where that disappointment and distress is not consequential upon physical injury or physical inconvenience. That is, damages for disappointment and distress are not available at common law unless an object of the contract, or the specific term that is breached, was concerned with the promisee’s state of mind.

[38] In common law cases, it is important to separate out and distinguish between the various heads of damages because of the limitations on common law damages including the limitation referred to by Gordon and Edelman JJ in *Young v Chief Executive Officer (Housing)* (HC), in the above cited paragraph.

[39] In *Chief Executive Officer (Housing) v Young* (CA1)³¹ the Court of Appeal construed RTA s 122(1) as importing principles of remoteness that limit the assessment of damages for breach of contract at common law and took the

30 *Young v Chief Executive Officer (Housing)* (HC) at [36]

31 *Chief Executive Officer (Housing) v Young* (CA1) at [54] - [55]

view that those principles operated to exclude compensation for distress or disappointment arising from non-compliance with a term of the tenancy agreement other than in consequence of physical inconvenience.³²

[40] In *Young v Chief Executive Officer (Housing)* (HC), the majority (Kiefel CJ, Gageler and Gleeson JJ) held that that approach was erroneous saying:³³

Where the reasoning of the Court of Appeal and the argument of the CEO went too far was in postulating a further element of the design of the Act to be that the measure of compensation capable of being ordered by the Tribunal under s 122 of the Act for breach of a term of a tenancy agreement is confined by reference to the measure of damages that could be ordered by a court for breach of that term of that tenancy agreement in a common law action for breach of contract. Statutory compensation under s 122 is rather to be seen as an alternative, and likely more accessible, remedy to common law damages for breach of a tenancy agreement.

[41] Their Honours concluded:³⁴

The language and structure of s 122(1)(a) provides no basis for differentiating in principle between the evaluative judgment to be made by the Tribunal in determining the existence and extent of compensable loss or damage suffered by an applicant because the other party has failed to comply with an obligation imposed as a term of a tenancy agreement, on the one hand, and the evaluative judgment to be made by the Tribunal in determining the existence and extent of compensable loss or damage suffered by an applicant because the other party has failed to comply with an obligation imposed directly by force of the Act in relation to a tenancy agreement, on the other hand. To adapt language drawn from judicial descriptions of the evaluative judgments required to be made in determining statutory compensation in other statutory contexts the task of the Tribunal in each case is to arrive at a measure of compensation which conforms to the purposes of the Act

32 See *Young v Chief Executive Officer (Housing)* (HC) at [8]; *Chief Executive Officer (Housing) v Young* (CA 1) at [56] - [68]

33 Ibid (HC) at [23]

34 Ibid (HC) at [25]

and to the justice and equity of the case, having regard to the nature and purpose of the particular obligation with which there has been failure to comply and taking into account each of the mandatory considerations specified in s 122(3).

[emphasis added]

[42] The applicants' contention on this ground of appeal depends upon acceptance of the proposition that in assessing compensation under RTA s 122, the Tribunal must assess that compensation under the various heads of damage available at common law and specify each head of damage separately. That proposition cannot be accepted. As enunciated by the majority in the High Court, the task of the Tribunal is to arrive at a measure of compensation which conforms to the purposes of the RTA (which includes ensuring that tenants are provided with safe and habitable premises³⁵ and ensuring that premises occupied by a tenant for the purpose of residency are reasonably secure³⁶) and to the justice and equity of the case, having regard to the nature and purpose of the particular obligation with which there has been failure to comply and taking into account each of the mandatory considerations specified in s 122(3).

[43] As it applies to the assessment of compensation in this case, their Honours said:³⁷

The evident purpose of the obligation specified by s 49(1) of the Act to be a term of a tenancy agreement, with which the CEO as landlord failed to comply, is ensuring that premises occupied by a tenant for the

35 RTA s 3(d)

36 *Young v Chief Executive Officer (Housing)* (HC) at [29]

37 Ibid at [29]-[30]

purpose of residency are reasonably secure. For a tenant to be secure in the occupation of premises is for the tenant to reside there free from threat of harm or unwanted access. The feeling of insecurity which Ms Young experienced because of the landlord's failure to provide the residential premises with a back door was the obverse of the security which it was the purpose of that obligation to secure. The connection between the landlord's breach and the distress and disappointment suffered by Ms Young readily satisfied the causal connection required by the word "because" in s 122(1).

Whether or not the distress and disappointment found to have been suffered by Ms Young due to the failure of the CEO to provide the requisite security would have been compensable in an action for damages at common law, Ms Young's distress and disappointment was compensable on application to the Tribunal under s 122(1)(a) of the Act, subject to the Tribunal's consideration of the factors prescribed by s 122(3).

[44] That, it seems to me, is inconsistent with the approach urged by the applicants, namely parsing out the various available common law heads of damage and making a specific award for each one. As counsel for the respondent urged, the approach to assessing compensation set out by the majority in the High Court in *Young v Chief Executive Officer (Housing)* (HC) is more akin to the sort of "instinctive synthesis" approach determined by the High Court to be appropriate in sentencing.

[45] There is no reason to suppose the Tribunal did not adopt the approach to assessing compensation directed by the High Court. The Tribunal set out the relevant paragraphs from *Young v Chief Executive officer (Housing)* (HC).³⁸ There follows a discussion of the relevant principles, reference to the submissions of the parties and conclusions in relation to the

38 Second Tribunal Decision at [157]

compensation the Tribunal assessed as payable to each of the applicants. In that discussion, the Tribunal used the language of the High Court in *Young v Chief Executive officer (Housing)* (HC). For example, in rejecting the applicants' submission that an appropriate award for distress and disappointment should be based on \$360 a day, the Tribunal said (inter alia) that "it is inconsistent with the purpose of the RTA and the justice and equity in this case".³⁹ Later, in assessing compensation for Mr Conway for failing to fix his shower for 610 days, the Tribunal said, "When the value of the contract is considered, and taking into account both the gravity of the breach and the time that elapsed before the leaking shower was fixed, compensation in the sum of \$6,000 for distress and disappointment is consistent with the purpose of the RTA and the justice and equity of the case."⁴⁰

[46] The applicants complain that, in this passage, and indeed in all others in which compensation was assessed or referred to, the Tribunal used the phrase, "for distress and disappointment" and did not once use the term "physical inconvenience". The applicants contended that this means the Tribunal did not award compensation for the physical inconvenience suffered by the applicants as a result of the breaches.

39 Second Tribunal Decision at [167]

40 Second Tribunal Decision at [170]

[47] In my view, on a fair reading of the Second Tribunal Decision, this contention is not made out.

- (a) As explained above, on the approach to the assessment of compensation mandated by the majority in the High Court, the Tribunal was obliged to arrive at a measure of compensation which conforms to the purposes of the RTA and to the justice and equity of the case. This is incompatible with the applicants' suggested approach of separately assessing damages under the various heads recognised by the common law.⁴¹ The High Court stated that, Ms Young's distress and disappointment due to the failure of the CEO to provide the requisite security was compensable on application to the Tribunal under RTA s 122(1)(a) whether or not the distress and disappointment found to have been suffered by Ms Young would have been compensable in an action for damages at common law.
- (b) The fact that the Tribunal used the phrase "for distress and disappointment" does not mean that the Tribunal left out of the assessment of compensation a consideration of the physical consequences of the breaches. The Presiding Member specifically mentioned them and there is no reason to suppose he did not take them into account.

⁴¹ The Tribunal reiterated (correctly) at [179] when dealing with a claim by the applicants for interest on the awards of compensation: "These proceedings are not an action for damages at common law for breach of contract. As the NTCA stated in *Young v Chief Executive officer (Housing)* [2025] NTCA 5 at [32], the Tribunal would not have jurisdiction to entertain such a common law action. The Tribunal may order statutory compensation pursuant to s 122(1)(a) of the RTA.

- (c) At [144] of the Tribunal Decision, the Tribunal set out the evidence of Mr Conway regarding (inter alia) the physical inconvenience caused by the breach:

The shower needed tiles. Housing took tiles off when they fixed the taps in 2013 and 2014 but did not replace them.

When someone had a shower, the water dripped down into the wall and through the other side to the toilet and the next room. It was really unsafe and it was really easy to slip. Every time we had a shower, we had to clean up all the water on the toilet floor.

I'm on dialysis and my wife was having cancer treatment, so it was really hard cleaning up water every day just to stay safe from slipping. It made me really angry that Housing did not fix things to make it safe.

Then, in the paragraph in which the Tribunal assessed compensation for Mr Conway for failure to repair the leaking shower,⁴² the Tribunal said:

The leak had a significant impact on Mr Conway and his spouse at a time when both were dealing with significant health issues. When the value of the contract is considered, and taking into account both the gravity of the breach and the time that elapsed before the leaking shower was fixed, compensation in the sum of \$6,000 for distress and disappointment is consistent with the purpose of the RTA and the justice and equity of the case.

- (d) Similarly, the Tribunal recited a list of the physical consequences to Ms Young of the respondent's breaches,⁴³ including the following in relation to the back door:

The Respondent's failure to provide a back door to Ms Young's property until March 2016 also meant that her home was subject to a snake incursion, and dirt and other material which needed to be continuously swept. This, coupled with the other matters

⁴² Second Tribunal Decision at [170]

⁴³ Second Tribunal Decision at [163], [165] and [166]

constituting a breach of section 48(1)(a) noted above, warrants a substantial award for compensation for distress and disappointment.

[48] In summary, although the Tribunal used the phrase “for distress and disappointment”, which was taken directly from High Court’s explanation of Ms Young’s entitlement to compensation, on a fair reading of the Second Tribunal Decision, it is clear that the Tribunal did take into account the physical inconvenience caused to the applicants by the respondent’s breaches of s 48(1)(a) – and in Ms Young’s case s 49. What the Tribunal actually did was, in line with the decision of the High Court in *Young v Chief Executive Officer (Housing)* (HC), “to arrive at a measure of compensation which conforms to the purposes of the Act and to the justice and equity of the case, having regard to the nature and purpose of the particular obligation with which there has been failure to comply and taking into account each of the mandatory considerations specified in s 122(3).”⁴⁴

[49] The applicants have not established that the Tribunal erred in law in its approach to the assessment of compensation in the way asserted in proposed ground 1. The applicants have not shown that the decision appealed against is attended by sufficient doubt to justify granting leave to appeal on this ground. Leave to appeal on ground 1 is refused.

⁴⁴ The Tribunal explicitly dealt with the matters set out in s 122(3) after making the assessment of compensation: at [171].

Proposed Ground 2

[50] Proposed ground two is in two parts. First, the applicants contend that the Tribunal erred by misconstruing RTA s 48 by adding a ‘reasonable steps’ qualification which is absent from the terms of the obligation on a landlord in s 48(1) (proposed ground 2 part 1).

[51] In the alternative to part 1, the applicants contend that the Tribunal erred in construing the ‘reasonable steps’ qualification to be satisfied in the absence of evidence or without identification of the evidence of any steps being taken by the landlord prior to notification of an issue by the tenant (proposed ground 2 part 2).

Proposed ground 2 part 1

[52] The applicants referred in written submissions to paragraphs [101], [138], [141], [143] and [154] of the Tribunal Decision in which the Tribunal found, in relation to a number of the applicants’ complaints that “the Respondent did not fail to take reasonable steps to ensure that the premises was habitable” and so had not, in relation to those matters, breached its obligation in s 48 to “ensure the premises ... are habitable”. The applicants contend that it was an error of law to apply this “reasonable steps test” saying, “The NTCAT’s source for doing so was not the *Residential Tenancies Act* (because the *Residential Tenancies Act* contains does not

apply such a qualification to s 48) but rather a judgment of the Court of Appeal” in *Chief Executive Officer (Housing) v Pepperill & Ors.*⁴⁵

[53] This proposed ground of appeal cannot possibly succeed. NTCAT is bound by the decision of the Court of Appeal in *Pepperill*, as is this Court.

[54] In *Pepperill*, the Court of Appeal set out the constructional choice in relation to s 48 in the following terms.

Is the landlord’s obligation one of strict/absolute liability or one requiring reasonable steps?

[59] There appear to be two potential constructions of the term implied by s 48(1)(a) of the RTA, namely that it imposes an obligation on the landlord of strict and absolute liability, or, that it imposes an obligation on the landlord which requires only the taking of reasonable steps.

[60] This consideration is of assistance because the CEOH effectively sought to import into (thereby confining) the concept of ‘habitable’, factors which are usually considered when determining whether a duty to take reasonable steps has been breached. Equally, the tenants effectively sought to translate (thereby enlarging) the scope of the landlord’s obligation in s 48(1)(a) to the concept of ‘habitable’.

[61] The first potential construction is that the implied term in s 48(1)(a) is breached when premises or ancillary property are or become uninhabitable, for whatever cause, and whether that cause is within or outside the power or capacity of the landlord to control or address. That construction, which appeared to be pressed by the tenants, is effectively one of strict or absolute liability, in relation to which the power or capacity of the landlord to control or address the issue is irrelevant.

[62] The second potential construction is that the implied term is only breached to the extent that the landlord has power or capacity to control or address the cause affecting the safety, health and/or reasonable comfort of the tenant. That construction is effectively

45 [2024] NTCA 10 (“*Pepperill*”) at [96]

one the scope of which is dependent upon factors which include the nature and degree of the impact on or risk to the tenant, the power or capacity of the landlord to control or address the issue (including whether the issue is the responsibility of a third party) and the nature and degree of any skill or expertise involved in doing so. If this construction is correct, it points against confinement of the concept of ‘habitable’ pressed by the CEHO as the factors argued to confine it are matters which go to whether there is a breach, not the concept of ‘habitable’ itself.

- [63] In favour of the first construction, it could be argued that the intention of the legislature was that, in the broader interests of public health, safety and/or reasonable comfort, housing which is not reasonably suitable for occupation for residential use, whether by reason of safety, health or reasonable comfort, simply should not be occupied.
- [64] In favour of the second construction, it could be argued that the intention of the legislature was that the regulation of residential tenancies, which are founded in the contractual relationship between landlord and tenant, is to adopt a scheme of balanced and reciprocal rights between the two, and is not directed to imposing on landlords strict or absolute liability rendering them the insurers of tenants by distributing all risks to safety, health and reasonable comfort from tenants to landlords.
- [65] This constructional choice is assisted and informed by the decision of the High Court in *Northern Sandblasting Pty Ltd v Harris* [1997] HCA 39; (1997) 188 CLR 313.

[55] The Court went on to analyse the various judgments in *Northern Sandblasting Pty Ltd v Harris*,⁴⁶ and other authorities construing statutory provisions using the language “must ensure”; and to review the provisions in the RTA applicable to habitability issues and concluded:⁴⁷

⁴⁶ [1997] HCA 39; (1997) 188 CLR 313

⁴⁷ *Pepperill* at [92] - [96]

Conclusions as to ‘habitable’ and the landlord’s duty under s 48(1)(a)

- [92] It follows from the above that the question whether premises or ancillary property are ‘habitable’ does not turn on the landlord’s power or capacity to control the matter affecting habitability or whether that matter emanates from within or external to the premises, as those are matters directed to whether or not the landlord has breached its duty under s 48(1)(a).
- [93] Rather, as set out in paragraph [34] above, for premises or ancillary property to be other than ‘habitable’ within the meaning of the RTA, they must be ‘not reasonably suitable for occupation for residential use in that condition, whether by reason of safety, health or reasonable comfort’. Where the issue is one of safety or health, premises will be other than habitable where there is an actual and appreciable risk to the health and/or safety of the tenants in their ordinary residential day to day use of the premises.
- [94] Further, if premises are not habitable, the question may then arise as to whether the landlord has breached the term implied into the tenancy agreement by s 48(1)(a) of the RTA. That question has arisen in this case because the tenants have sought compensation under s 122 of the RTA (which permits compensation for a breach by the landlord of the terms of the tenancy agreement) and what are said to be orders ancillary to a finding by the NTCAT in that respect.
- [95] While we are not called upon to decide whether the NTCAT would have power to make such ‘ancillary orders’ in this matter, we note that the orders sought would now appear to be futile given that the PWC (though IES) has now installed a water treatment plant which has lowered the concentration of uranium in the water supplied by it to the community of Laramba and the residences the subject of these proceedings.
- [96] Whether or not the landlord has breached the implied term in s 48(1)(a) turns on whether the uninhabitable condition of the premises (assuming that be established) was a consequence of the landlord’s failure to take reasonable steps to ensure that the premises or ancillary property were habitable. That consideration involves questions as to the nature and degree of the risk to or impacts upon the health, safety and/or reasonable comfort of the tenants, the measures available to the landlord to alleviate the risks or impacts, the capacity and power of the landlord to control or address those risks or impacts and the nature and extent of any expertise or special skill involved.

[emphasis added]

[56] When determining, in relation to each of the applicants' complaints, whether the respondent had breached the implied term in RTA s 48(1), the Tribunal was obliged to apply the test set out in *Pepperill*⁴⁸ and ask whether the respondent had taken reasonable steps to ensure that the premises or ancillary property were habitable. That is precisely what the Tribunal did and it was not an error of law for it to do so.

[57] The applicants have conceded this but contended that proposed ground 2 part 1 should be referred to the Full Court pursuant to s 20 of the *Supreme Court Act 1979*. In *Brown & Ors v Chief Executive Officer (Housing)*⁴⁹ the applicants' application for leave to appeal against a decision of the Tribunal advanced a similar argument in relation to the correctness of *Pepperill* and identified three decisions of the Tribunal said to have been infected by the error of importing a reasonableness requirement into RTA s 48 rather than construing the word "ensure" as importing strict liability into that section. The relevant ground of appeal also argued that the Tribunal had imported into the text of RTA s 48 a notice requirement of the kind found in s 57(2) and not found in the text of s 48. (This is similar to proposed ground 2 part 2.)

[58] The trial judge in *Brown*, Huntingford J, gave leave to appeal on that ground but dismissed that ground of appeal.

48 *Pepperill* at [96]

49 [2025] NTSC 72 ("*Brown*")

[59] I was advised by counsel for the applicants that the appeal in *Brown* is set down for hearing on 19 October 2026. Counsel for both the applicants and the respondent are the same in this case and in *Brown* and I was advised by counsel for the applicants that it would not add appreciably to the complexity or length of the *Brown* appeal if proposed ground 2 part 1 were to be referred to the Full Court and heard at the same time as the *Brown* appeal.⁵⁰ Counsel for the respondent, while opposing the referral, did not contend that the referral would add to the length or complexity of the *Brown* appeal.

[60] Were it not for the immanent *Brown* appeal, I would have refused leave to appeal on this ground. However, given what is occurring in *Brown*, in those circumstances it would seem to be unfair if the point were to be successfully argued in *Brown* but the present applicants were precluded from having a decision in their favour on the point because leave was refused. Accordingly, I refer the question of whether leave to appeal should be granted in relation to part 1 of the proposed ground 2 to the Full Court pursuant to s 21 of the *Supreme Court Act*. The Full Court may accept or decline to accept the referral.⁵¹ If the Full Court declines the referral, leave to appeal on proposed ground 2 part 1 will be refused.

50 Counsel relied on the precedent in *Badari & Ors v Minister for Territory Families and Urban Housing & Anor; Badari & Ors v Minister for Housing and Homelands & Anor; Nadjamerrek & Ors v Chief Executive Officer (Housing)* [2025] NTCA 1 in which two referrals to the Full Court were heard together with an appeal to the Court of Appeal.

51 *Supreme Court Act* s21(2)

Proposed ground 2 part 2

- [61] Proposed ground 2 part 2 must fail. Having applied the correct test, the findings of the Tribunal as to whether in each particular instance the respondent had taken reasonable steps to ensure the premises were habitable were factual findings. There is no appeal to this Court in relation to alleged factual errors: the only appeal allowed for under s 141 is an appeal on a question of law.
- [62] Counsel for the applicants contended that the Tribunal made an error of law in misapplying s 48(2). The applicants contended that the Tribunal impliedly imported into s 48 the same notice requirement as in s 57(2) which provides that a landlord is not in breach of the obligation to ensure that the premises are in a reasonable state of repair when a tenant enters into occupation⁵² unless he or she:
- (a) has notice of the defect requiring repair; and
 - (b) fails to act with reasonable diligence to have the defect repaired.
- [63] Counsel for the applicants submitted that s 57 and s 48(2) operate differently. The notice referred to in s 48(2)(b) is of a different character from the notice (meaning knowledge) referred to in s 57(2). Section 48(2) conditions the obligation of the landlord to ensure that premises are habitable. The question is not whether the landlord has the requisite

52 Section 57(1)

knowledge, as with s 57(2), but whether the tenants' failure to give notice has caused the lack of habitability. So much may be accepted.⁵³

[64] Counsel for the applicants contended that in the Tribunal's decision it is apparent that the Tribunal gave an unduly restrictive construction to s 48(2) because the Tribunal effectively held that it was reasonable for the landlord to do nothing at all prior to receipt of notice – in this case a lawyer's letter. As with proposed ground 2 part 1, counsel referred to paragraphs [101], [138], [141], [143] and [154] of the Second Tribunal Decision and contended that in those paragraphs the Tribunal:

- (a) effectively held that it was always reasonable for a landlord to do nothing until notified of a problem by the tenant; and
- (b) in doing so failed to enquire whether the breach of s 48(1) was caused by the failure of the tenant to notify the landlord of the relevant defect, as required by s 48(2).

[65] This is not what the Tribunal did.

- Paragraph [101] is in the following terms:

The Tribunal in *Various Applicants* found that, before 22 January 2016, the Respondent acted with reasonable diligence to repair the faulty flush mechanism when notified to do so by Ms Young. This finding was not challenged on appeal. During this period, when this matter arose, the Respondent dealt with the issue in accordance with its obligation to repair in s 57. In the language of *Pepperill*, the

⁵³ See *Brown* at [188]-[189]; However Huntingford J did not accept that the Tribunal had reasoned in the way suggested.

Respondent did not fail to take reasonable steps to ensure that the premises was habitable during this time, at least in relation to the faulty flush mechanism. It was only for the period from 22 January 2016 to 8 April 2016, when the Respondent was in breach of its obligation to repair, that liability for a breach of s 48(1)(a) arose. That is a period of 78 days.

In making this finding the Tribunal was (correctly) focusing on what the respondent did and whether that amounted to reasonable steps to ensure habitability. It is wholly unremarkable for the Tribunal to find that the respondent did not fail to take reasonable steps to ensure habitability during the period when the landlord acted with “due diligence” to comply with its repair obligations. Such a finding does not conflate s 57 with s 48 or engage s 48(2) at all.

- Paragraph [138] states:

Given the absence of evidence as to which flyscreens were broken or missing at the commencement of Mr Conway’s tenancy, coupled with the fact that the issue with the flyscreens was not identified by Mr Conway as an issue requiring repair on 13 June 2014, leads the Tribunal to accept the Respondent’s submission that such flyscreens were intact at the commencement of the tenancy. Once notified of the need to repair, the Respondent acted with reasonable diligence to fix the flyscreens. The test of habitability in *Pepperill* at [96] has not been made out

The reference to “the test of habitability” is perhaps unfortunate;

Pepperill at [96] was (relevantly) concerned with the test for whether there had been a breach of the obligation in s 48 to ensure habitability, not with a test for habitability. Nevertheless, in this paragraph, the Tribunal has not either expressly or by implication said that it is always reasonable for a landlord to do nothing until notified of defects by the

tenant. Rather, the Tribunal is engaged in fact finding and in answering the correct question of whether the steps taken by the landlord to ensure habitability were in fact reasonable.

- Paragraph 141 reads:

The Tribunal is satisfied that the missing front gate may have rendered Mr Conway's premises not reasonably suited for occupation for residential use by reason of reasonable comfort and safety within the meaning of *Chief Executive Officer (Housing) v Pepperill & Ors* [2024] NTCA 10 at [34]. Once notified of the need for the repair, however, the Respondent took "reasonable steps to ensure that the premises or ancillary property were habitable." Consequently, in relation to the missing front gate no breach of s 48(1)(a) has been established.

The Tribunal asked the right question as set out in *Pepperill* and found that in all of the circumstances the respondent did take "reasonable steps" to ensure the habitability of the property taking into account relevant circumstances including when the respondent was notified of the defect. This does not amount to an attempt to water down s 48(2): s 48(2) was not engaged.

- Paragraph 143 reads:

The Tribunal in *Various Applicants* found that the Respondent repaired the air-conditioners on 10 February 2016. While the faulty air-conditioners rendered Mr Conway's property premises not reasonably suited for occupation for residential use by reason of reasonable comfort within the meaning of *Chief Executive Officer (Housing) v Pepperill & Ors* [2024] NTCA 10 at [34], once notified of the need for repair the Respondent took "reasonable steps to ensure that the premises or ancillary property were habitable". No breach of s 48(1)(a) has been established.

Paragraphs [141] and [143] (and [154]) are somewhat formulaic but, again, the focus of this paragraph is on the right question, as in *Pepperill*: “Did the respondent take reasonable steps to ensure that the premises were habitable?” If the Tribunal answered that question wrongly, it is a factual, not a legal error.

- Paragraph 154 reads:⁵⁴

The same reasoning applies to the Applicants’ submission that the faulty electrical outlets in the kitchen and outside the premises, and the faulty oven and griller, taken in conjunction with other issues, failed to meet the standard of habitability in s 48(1)(a). In *Various Applicants*, the Tribunal noted that the Respondent acted with reasonable diligence in repairing such issues once the need for repair was brought to its attention. Consequently, once notified of the need for repair the Respondent took “reasonable steps to ensure that the premises or ancillary property were habitable”. No breach of s 48(1)(a) in relation to these issues has been established.

Similar comments can be made in relation to this paragraph as with the paragraphs above. The Tribunal applied the correct test and focused on whether what the respondent did do was reasonable in all of the circumstances including the time at which the respondent became aware of the problem. If there was an error in that process it was an error in the fact-finding process: a factual, not a legal error.

[66] In support of their contention that the Tribunal made an error of law of this nature in construing RTA s 48 and applying (or failing to apply) s 48(2), the applicants contended that the time at which the respondent became aware of

54 Paragraph [153] is in similar terms.

the issues the subject of a breach of s 48(1) could never be taken into account in determining whether a landlord had taken reasonable steps to ensure habitability except in engaging s 48(2): it was s 48(2) (a breach caused by the failure of the tenant to give notice) or nothing. That contention cannot be accepted. There may be many cases in which the time when a landlord found out what needed to be done was relevant to an assessment of whether what the landlord did do was reasonable in the circumstances but in which there is no suggestion that lack of notice by the tenant caused the breach or in which lack of notice may be just one factor among many.

[67] Leave to appeal on proposed ground 2 part 2 is refused.

Proposed Ground 3

[68] Proposed Ground 3 is also in two parts. The applicants contend that the Tribunal failed to perform its statutory function of compensating the applicants in accordance with RTA s 122 in two ways:

- (a) It limited each order for compensation by reference to the value of the contract, being the agreed rent (proposed ground 3 part 1).
- (b) Alternatively, each order for compensation was manifestly inadequate having regard to the findings of the Tribunal and decisions of Courts concerning quantifying compensation for disappointment or distress (proposed ground 3 part 2).

Proposed ground 3 part 1

[69] The simple answer to proposed ground 3 part 1 is that the Tribunal did not limit the awards of compensation by reference to the value of the contract. The Tribunal made a number of references to the value of the contract, but none of them suggested that the value of the contract (weekly, monthly or annually) placed some kind of limit on the amount of compensation that could be awarded as distinct from merely being one factor for the Tribunal to consider in making an assessment.

[70] At [167] the Tribunal said:

The Tribunal does not accept the Applicants' submission that an appropriate award for distress and disappointment should be based on the sum of \$360 per day. Such a figure is entirely divorced from the value of the tenancy contract which required Ms Young to pay \$184 per week in rent. It is inconsistent with the purpose of the RTA and the justice and equity of this case.

[71] At [169]-[170], the Tribunal said:

Subject to a consideration of section 122(3) of the RTA discussed below, given the gravity of the breaches, and the distress and disappointment experienced by Ms Young, the sum of \$50,000 should be paid to Ms Young's estate. It is consistent with the purpose of the Act and the justice and equity of this case. While the amount is substantial, particularly when considered in relation to the value of the contract, the breaches of sections 48(1)(a) and 49(1) were both significant and lasted for an extended period of time.

Mr Conway is entitled to compensation for the distress and disappointment arising from the Respondent's breach of section 48(1)(a) for failing to repair the leaking shower for 610 days. The leak had a significant impact on Mr Conway and his spouse at a time when both were dealing with serious health issues. When the value of the contract is considered, and taking into account both the gravity of the breach and the time that elapsed before the leaking shower was fixed,

compensation in the sum of \$6,000 for distress and disappointment is consistent with the purpose of the RTA and the justice and equity of the case. This figure is subject to the consideration of the matters set out in section 122(3) to which the Tribunal now turns.

[72] Counsel for the applicants contended that the value of the contract was not a relevant consideration at all. To hold otherwise would be to say that a rich person is entitled to more compensation than a poor person for the same breach.⁵⁵ That contention cannot be accepted. The value of the contract must be one relevant factor – along with the gravity of the breach and its duration, the egregiousness or otherwise of the landlord’s failure to take reasonable steps to ensure habitability and any other relevant circumstances. Taking the value of the contract into account as but one of many relevant circumstances (which may be given more or less weight depending on the other circumstances) does not necessarily mean that a rich person will be given more compensation than a poor person for the same breach. Given the range of relevant circumstances that might affect the assessment of appropriate compensation, the differential weight to be given to those factors and the richness and variety of human experience, query whether there could ever be two breaches that are “the same” in any event.

[73] In relation to proposed ground 3 part 1, the applicants have failed to establish that the Tribunal engaged in the conduct complained of and have

⁵⁵ To this, counsel for the respondent responded that he would feel more aggrieved if he had bought a million dollar car and the wheels fell off than he would if he had bought a \$2,000 car and the wheels fell off. In reply, counsel for the applicants took issue with this analogy, contending (inter alia) that a car cannot be equated with a person’s residence. Nothing turned on this disagreement.

failed to establish that the decision in question is attended by sufficient doubt to warrant the grant of leave to appeal.

[74] Leave to appeal on proposed ground 3 part 1 is refused.

Proposed ground 3 part 2

[75] In proposed ground 3 part 2, the applicants complain that the award of compensation to each of the applicants was manifestly inadequate.

[76] In support of this proposed ground the applicants produced a table setting out the awards of compensation in a number of cases, then calculating what that would equate to on a daily basis. (For example in *Baltic Shipping* the plaintiff was awarded compensation of \$5,000 for disappointment and distress after a cruise was disrupted by the sinking of the ship. The plaintiff missed six days of a 14 day cruise. The applicants calculated this to be \$833.33 per day.). The applicants then performed a calculation which purported to show those daily rates in today's dollars adjusted for inflation. (In the *Baltic Shipping* example the daily rate adjusted for inflation was \$1,838.66.) They then multiplied that figure by 2,090, being the number of days over which the breach occurred in the case of Ms Young. The figures so calculated range from \$53,232.30 (in the case of *Sandy v Sananikone and Do*)⁵⁶ to \$3,842,799.40 (in the case of *Baltic Shipping*).

56 [2015] NTRTCmr 1 ("*Sandy v Sananikone and Do*")

[77] Mr Conway received \$6,000 compensation for the breach of s 48(1)(a) by the respondent consisting of a failure to fix his leaking shower for 610 days. Ms Young received an award of \$50,000 compensation for the breach of ss 48(1)(a) and 49 consisting of a failure to provide a back door for 2,090 days, a faulty toilet flush for 78 days, no air-conditioning and an inability to open the front window for 869 days and a faulty stove and oven for 107 days. The applicants contend that these amounts are out of proportion to the amounts calculated in their table, and hence, manifestly inadequate.

[78] The figures in the applicants' table depend upon the application of a daily rate. The applicants have cited no authority for the contention that a daily rate is an appropriate way to calculate compensation. None of the cases in the table prepared by the applicants is authority for that proposition and none of them in fact calculated the compensation awarded using a daily rate. The actual awards of compensation in each of the cases cited by the applicants were relatively modest ranging from \$1,000 (in the case of *Sandy v Sananikone and Do*) to \$30,000 (in the case of *Stone v Chappel*).⁵⁷ Most of the awards were between \$1,000 and \$5,000. (The award in *Baltic Shipping* was \$5,000.)

57 (2017) 128 SASR 165

[79] Further the application of a daily rate would appear inconsistent with the approach mandated by the High Court in *Young v Chief Executive Officer (Housing)* (HC):⁵⁸

[T]he task of the Tribunal in each case is to arrive at a measure of compensation which conforms to the purposes of the Act and to the justice and equity of the case, having regard to the nature and purpose of the particular obligation with which there has been failure to comply and taking into account each of the mandatory considerations specified in s 122(3).

[80] The artificiality of the exercise is further demonstrated when one looks at the range of daily rates extracted in this way from the cases, ranging from \$20.40 to \$833.33. I gained no assistance from the table.

[81] The applicants contended that it is appropriate to apply a daily (or weekly or monthly) rate because a breach of the condition to ensure habitability is more serious the longer it lasts. It may be accepted that the length of time over which a breach lasts is a relevant factor to be taken into account in assessing compensation under RTA s 122 and the Tribunal did so. In discussing the various alleged breaches and determining whether there had in fact been a breach, the Tribunal took account of the number of days during which the defects were present; and at [156] of the Tribunal's decision, the Tribunal listed the breaches for which compensation was being assessed and the number of days during which each breach lasted. At [163]

⁵⁸ *Young v Chief Executive Officer (Housing)* (HC) at [25]

the Tribunal said this in relation to Ms Young as a preliminary to assessing the compensation payable to her:

[T]he Respondent's failure to provide a back door too Ms Young's premises meant that Ms Young was not provided with safe and habitable premises for a period of 2,090 days. Due to the respondent's failure to provide an air-conditioner, coupled with the inability to open the front window, Ms Young was unable to live in her home from November to January, and the Tribunal has found that s 48(1)(a) was breached for a period of 869 days. In addition, during the term of her tenancy Ms Young was without a properly functioning stove and oven for a period of 107 days and had to put up with a toilet that did not flush for a period of 78 days.

In assessing the compensation payable to Mr Conway, the Tribunal said:

Mr Conway is entitled to compensation for the distress and disappointment arising from the Respondent's breach of section 48(1)(a) for failing to repair the leaking shower for 610 days.

[82] However, the fact that the duration of the breach is one relevant factor to be taken into account in assessing compensation does not mean that it is necessary (or even desirable) to apply a daily rate.

[83] In assessing an appropriate award of compensation under RTA s 122 the Tribunal is exercising a discretion. The principles applicable to an appeal from a discretionary decision are in *House v The King*:⁵⁹

But the judgment complained of, namely, sentence to a term of imprisonment, depends upon the exercise of a judicial discretion by the court imposing it. The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been

59 (1936) 55 CLR 499 at 505 per Dixon, Evatt and McTiernan JJ

made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.

[84] The applicants have not established that the Tribunal acted on wrong principle; that it took into account any irrelevant consideration or failed to take into account a relevant consideration or that the Tribunal mistook the facts.

[85] The applicants' contention is that the awards of compensation are unreasonable or plainly unjust so that this Court must infer there has been a failure properly to exercise the discretion.

[86] In my view the awards of compensation are not unreasonable or plainly unjust. The applicants' submission that they are is largely based on the artificial exercise of extracting daily rates from decided cases which were not decided on the basis of daily rates, an approach which is inconsistent with the High Court's decision in *Young v Chief Executive Officer (Housing)* (HC). If a comparison is made of the actual amounts awarded in the cases referred to with the amounts awarded to the applicants, no great disparity appears.

[87] The respondent argued that, if there was any error on the part of the Tribunal, it was that the compensation awarded to the applicants was too high as most of the awards cited in the applicants' table were under \$5,000. One argument put by the applicants in reply was that the awards of compensation listed in the table were largely for distress and disappointment for the loss of optional luxuries such as a cruise or a lottery win whereas the applicants' distress and disappointment was for "fundamental flaws" in their homes and that, accordingly, the awards of compensation to the applicants should have been greater. The fact is that Ms Young received a larger award of compensation than any in the applicants' table and Mr Conway's award of compensation for failure to fix a leaking shower for 610 days was substantial.

[88] The applicants have not shown that the exercise of the Tribunal's discretion to award compensation to the applicants miscarried. Leave to appeal is refused for ground 3 part 2.

Proposed Ground 4: denial of natural justice

[89] The applicants are also seeking leave to appeal against a decision by the President of NTCAT dated 22 May 2026 to refuse leave to the applicants to bring an application for internal review of a costs decision in relation to the Second Tribunal Decision.⁶⁰ The President refused leave on the ground that s 140(2) of the NTCAT Act provides that an application for internal review

⁶⁰ *The Estate of Conway, Young v Chief Executive Officer (Housing) (No 2)* [2026] NTCAT 6 ("the NTCAT costs decision")

cannot be made in relation to a decision other than a final decision; under s 140(5) a final decision in a proceeding means a decision of the Tribunal that finally determines the matters that are the subject of the proceeding; and the NTCAT costs decision was not a “final decision” within the meaning of s 140(5), being an ancillary issue to the Second Tribunal Decision. The applicants complain that they were denied procedural fairness because they were not given an opportunity to be heard on the question of whether leave to bring an application for internal review should be given.

[90] This proposed ground involves a two step process:

- (a) What was the content of the obligation to accord the applicants’ natural justice? Was the President obliged to afford the applicants an opportunity to make submissions on the question of whether the NTCAT costs decision was a “final decision” within the meaning of s 140(5) of the NTCAT Act?
- (b) If the answer to (a) is “yes” what are the consequences of the failure by NTCAT to do so?

[91] Section 53 of the NTCAT Act sets out principles for conducting Tribunal proceedings. They include that the Tribunal must comply with the rules of natural justice; may inform itself in any way it considers appropriate and is not bound by the rules of evidence; and must act with as little formality and

technicality, and with as much speed as the requirements of this Act, a relevant Act and a proper consideration of the matter permit.⁶¹

[92] The statutory requirement to comply with the rules of natural justice does not necessarily confer on applicants an automatic right to make submissions to the President on the question of whether to grant leave to apply for an internal review of a decision. The content of the requirement to comply with the rules of natural justice depends on all of the circumstances including the nature of the jurisdiction being exercised and the statutory provisions governing its exercise.⁶²

[93] In *Kioa v West*, Brennan J said:

The content of the principles which the legislature intends to be applied in the circumstances of a particular case cannot be discovered by reference solely to the statute. Nevertheless, a legislative intention that the principles of natural justice apply is an intention that the principles appropriate to the circumstances of the particular case should apply.

The principles of natural justice have a flexible quality which, chameleon-like, evokes a different response from the repository of a statutory power according to the circumstances in which the repository is to exercise the power.

[94] His Honour went on to quote from numerous authorities referring to “the variable content of the principles of natural justice”⁶³ including:

61 Section 53(2)(a), (b) and (c)

62 *R v Commonwealth Conciliation and Arbitration Commission; Ex parte The Angliss Group* (1969) 122 CLR 546 at pp 552-553 per Tucker LJ and Kitto J cited in *Kioa v West* [1985] 159 CLR 550 (“*Kioa v West*”) by Brennan J at p 613

63 *Kioa v West* per Brennan J at pp 612-613

- (a) Lord Morris of Borth-y-Gest in *Furnell v Whangarei High Schools Board*:⁶⁴

Natural Justice is but fairness writ large. It has been described as ‘fair play in action’.

- (b) Kitto J in *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation*:⁶⁵

What the law requires in the discharge of a quasi-judicial function is judicial fairness. That is not a label for any fixed body of rules. What is fair in a given situation depends on the circumstances. And it is not a one-sided business.

- (c) Gibbs CJ in *National Companies and Securities Commission v News Corporation*:⁶⁶

The authorities show that natural justice does not require the inflexible application of a fixed body of rules; it requires fairness in all the circumstances, which include the nature of the jurisdiction or power exercised and the statutory provisions governing its exercise.

[95] The nature of the jurisdiction being exercised by the NTCAT President in determining whether to give leave to the applicants for internal review of the costs decision needs to be looked at in the context of the relevant statutory provisions. Section 140 of the NTCAT Act provides for applications for internal review in the following terms:

64 [1973] AC 660 at p 679

65 (1963) 113 CLR 475 at p 504

66 (1984) 156 CLR 296 at p 113

- (1) A party to a proceeding in the Tribunal's original jurisdiction may apply to the Tribunal for an internal review of a decision made by the Tribunal in the proceeding.
- (2) Despite subsection (1), an application for an internal review cannot be made in relation to:
 - (a) a decision of a kind excluded by the relevant Act; or
 - (b) a decision of a kind prescribed by regulation; or
 - (c) a decision other than a final decision in the proceeding.
- (3) An application under subsection (1) must be:
 - (a) accompanied by a written statement setting out the grounds on which the application is made; and
 - (b) made in accordance with the rules.
- (4) An internal review on an application under subsection (1) may be brought only with the leave of the President.
- (5) In this section:
 "final decision", in a proceeding, means a decision of the Tribunal that finally determines the matters that are the subject of the proceeding.

[96] In summary, an application for an internal review of a decision can only be brought with the leave of the President; such an application can only be made in relation to a decision of the Tribunal that finally determines the matters that are the subject of the proceeding; and the application must be accompanied by a written statement setting out the grounds on which the application is made. It is hard to discern from that a legislative intention that the President should, in effect, notify the applicant of his proposed decision whether to grant leave and invite submissions from the applicant as to why the decision should/ should not be made on that basis. It seems, rather, that in the ordinary course, the President would be entitled to act upon the written statement of the applicant setting out the grounds for the application for internal review. The written statement can (and should) set

out everything relied upon by the applicant to show that leave should be given for internal review and, where appropriate, address the preconditions for an internal review in s 140(2). This is particularly so given that:

- (a) by s 53 NTCAT must act with as little formality and technicality, and with as much speed as the requirements of this Act, a relevant Act and a proper consideration of the matter permit; and
- (b) there would appear to be nothing in the NTCAT Act or Rules to stop an unsuccessful applicant for leave to apply for internal review of a decision to put in a further, more fulsome application, setting out, in this case, the reasons why the applicants contend the costs decision is a final decision within the meaning of s 140 as well as why the applicants say the costs decision is wrong.

[97] I find support for this view in s 141 which sets out the procedure on an internal review. That section provides (relevantly):

Determination of internal review

- (1) An internal review of a decision (the original decision) conducted by the Tribunal on an application under section 140(1) is limited to:
 - (a) a determination of whether the original decision was or was not affected by any error of fact or law; and
 - (b) the correction of any identified error of fact or law in respect of the decision.
- (2) Subject to subsection (3), the Tribunal must hear and determine the internal review by way of a reconsideration of the evidence or material that was before the Tribunal when the original decision was made.

- (3) The Tribunal may allow a party to the internal review to give further evidence or material on the internal review if the Tribunal considers that it would be in the interests of justice to do so.

[98] That is to say, even if leave is given for internal review of a decision, there is no automatic right to an oral hearing or even to put in further material (including further submissions): the Tribunal may allow a party to put in further evidence or material if the Tribunal considers it in the interest of justice to do so. The mechanism provided in the statute for an applicant for internal review to make submissions about why leave should be given and what determination should be made on the internal review if leave is granted, is the written statement setting out the grounds for the application for internal review which must accompany the application.

[99] Ground 4 must fail because the principles of natural justice did not require the President to invite the applicants to make further submissions on why leave should be given for internal review. It was a matter for the applicants to set out fully in the written statement accompanying the application the grounds on which they contended there should be an internal review of the NTCAT costs decision including addressing the preconditions for such a review in s 140(2).

[100] The answer to the first step in the two step process, therefore, is “no”. The President was not obliged to afford the applicants an opportunity to make submissions on the question of whether the NTCAT costs decision was a “final decision” within the meaning of s 140(5) of the NTCAT Act. The

mechanism provided by the NTCAT Act by which natural justice is afforded to an applicant for internal review is the written statement which must accompany the application and which is to set out the grounds for an internal review, addressing, where necessary, the preconditions for an internal review under s 140(2).

[101] The respondent contended that, if the applicants neglected to address the question of whether the decision was a final decision in the initial application, their remedy was to put in a further application addressing that question which the President would then consider afresh. There would appear to be nothing in the NTCAT Act or Rules to preclude such a further application. However, I am unaware of the Tribunal's practice in relation to repeat applications for internal review.

[102] In relation to the second step: what would be the consequences of a failure to provide procedural fairness, the respondent contended that a further reason for refusing leave is that the decision of the President was an interlocutory decision on a question of practice and procedure. As the Court of Appeal said in *Kellie v Northern Territory of Australia*,⁶⁷ even if the applicant for leave to appeal can show the correctness of the decision is attended by sufficient doubt to justify the granting of leave, where the appeal is from an interlocutory judgment on a matter of practice and procedure, leave may nevertheless be refused unless it can be shown that

⁶⁷ [2026] NTCA 4 ("*Kellie v Northern Territory of Australia*") at [20] and the cases cited therein

substantial injustice will be done by leaving the erroneous decision unreversed. This reticence applies with even more force to a decision on costs. An appellate court will not, except for strong reasons, interfere with the discretion which belongs to the court below with respect to costs. In *McCauley v McCauley*⁶⁸ Isaacs J said:

As to costs, they were in the discretion of the judge, and, in the absence of any error of principle, or manifest misapprehension of fact on his part, this Court will not interfere.

[103] The respondent contended that the applicants have not shown that substantial injustice will be done by not granting leave to appeal against the decision of the President to refuse leave to apply for internal review of the costs decision.⁶⁹ Their remedy was to apply again for an internal review, setting out in the accompanying written statement any submissions they wanted to make on the issue of whether the costs decision was a final decision.

[104] The applicants contended that *Kellie v Northern Territory of Australia* is not an applicable authority. Rather, the proper approach to an appeal (or leave to appeal) on a question of denial of natural justice is that set out by the

68 (1910) 10 CLR 434 at 455

69 If this approach is correct, the applicants would have to show that the denial of an opportunity to make further submissions on the question of whether leave should be given for an internal review vitiated the decision in the sense set out in *Development Consent Authority v Phelps*, namely that there was a real possibility (but not a mere or slight possibility) that the error could (but not necessarily would) have affected the Tribunal's decision. Counsel for the applicants declined to advise this court what submissions they would have made to NTCAT on the question of whether the costs decision was a final decision within the meaning of s 140 on the basis that the correct approach was that set out in *DWN042 v Republic of Nauru* (discussed below). I note that in *Kowal v Zuccoli* (2002) 4VR 399; [2002] VSCA 100 the Victorian Court of Appeal held that an order on taxation of costs following judgment for costs was an interlocutory, not a final decision.

High Court in *DWN042 v Republic of Nauru*.⁷⁰ The earlier case of *Stead v State Government Insurance Commission*⁷¹ involved a denial of procedural fairness at trial where a party was deprived of the chance to make submissions on an issue of fact and the High Court held that:

All that the appellant needed to show was that the denial of natural justice deprived him of the possibility of a successful outcome. In order to negate that possibility, it was, as we have said, necessary for the Full Court to find that a properly conducted trial could not possibly have produced a different result.

This is similar to the test applied to appeals on questions of law in general articulated in *Development Consent Authority v Phelps*.⁷²

[105] In *DWN042 v Republic of Nauru*,⁷³ the High Court held that this test did not apply where a party receives no hearing at all. The Court held:

The appellant was, and is, entitled to a hearing in the Supreme Court. It is not for this Court to attempt to provide the hearing that the appellant has not had, or to attempt to give any judgment such as might be thought to have been appropriate in the Supreme Court.

[106] It is not necessary for me to determine which would be the appropriate approach to the denial of natural justice which the applicants contend occurred here as I have found that there was no such denial.⁷⁴

70 [2017] HCA 56 at [20] – [21]

71 (1986) 161 CLR 141; [1986] HCA 54

72 [2010] NTCA 3; (2010) 27 NTLR 174

73 [2017] HCA 56 at [21]

74 Even if it were found that the applicants had wrongly been denied an opportunity to make submissions on the question of whether the NTCAT costs decision was a final decision, query whether this could be said to be a case where the applicants received **no hearing at all** given that the applicants were required to (and did) provide a written statement setting out the grounds on which an internal review was sought accompanying the application.

[107] Leave to appeal on Ground 4 is refused.

[108] The applicants advanced further reasons why leave to appeal should be granted including that this was effectively (though not formally) a test case. I am told that there are at least 94 other applications for compensation under RTA s 122 awaiting the final determination in this case of the principles to be applied in such cases. However, there would be little utility in granting leave given that none of the proposed grounds are sufficiently arguable to warrant a grant of leave to appeal. Further, this case was instituted 10 years ago; both applicants are now deceased and the compensation awarded has been paid and distributed to the beneficiaries of the two estates. The interests of finality in litigation militate against the granting of leave to appeal.

The Cross-Appeal/ Notice of Contention

[109] The respondent has filed a Notice of Cross-Appeal contending that the Tribunal erred in law:

- (a) in refusing to allow the respondent to rely on its pleaded *Limitation* defence; and
- (b) in misunderstanding the respondent's evidence about the reliability of its Tenancy Management System ("TMS"), wrongly considering that there was a conflict between the evidence of two of the respondent's witnesses (Ms Jacobson and Ms Biro), and purporting to prefer the

evidence of Ms Jacobson as a result of which the Tribunal did not consider the respondent's claimed set off for rent waived or written off.

[110] At the hearing of the application for leave to appeal counsel for the respondent indicated that it would not press the cross-appeal unless leave to appeal was given to the applicants.

[111] The applicants contended that the cross-appeal was incompetent as the respondent indicated that it did not seek to have the awards of compensation reduced; rather it sought to justify the awards on other grounds. Following that, the respondent filed a Notice of Contention in similar terms.

[112] As leave to appeal has not been given to the applicants, there is no need to consider the cross-appeal at this stage. This can be revisited if the Full Court gives leave to appeal on proposed ground 2 part 1.
