

CITATION: *Pepperill & Ors v Chief Executive Officer (Housing)* [2026] NTSC 19

PARTIES: PEPPERILL, Joanne

And:

STAFFORD, Jamesie

And:

BROWN, Kennedy

And:

McNAMARA, Anita

And:

JACK, Johnny

v

CHIEF EXECUTIVE OFFICER
(HOUSING)

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising Territory
jurisdiction

FILE NO: 2025-01118-SC

DELIVERED ON: 16 March 2026

HEARING DATES: 4 February 2026 and 4 March 2026

JUDGMENT OF: Grant CJ

CATCHWORDS:

CIVIL PROCEDURE – Stay of proceedings – Inherent power – Pleadings – Striking out – Abuse of process

Whether proceedings abuse of process given plaintiffs pursuing same relief in representative proceeding – Threshold for permanent stay not met – Vice of duplication capable of management by pleading amendments – Statement of claim fundamentally alters character proceeding transferred by Northern Territory Civil and Administrative Tribunal to Supreme Court – Question of pleadings a matter for Federal Court – Statement of claim struck out

Supreme Court Rules 1987 (NT) r 23.01, r 23.02

Agar v Hyde (2000) 201 CLR 552, *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175, *Dupas v The Queen* (2010) 241 CLR 237, *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87, *Jago v District Court of New South Wales* (1989) 168 CLR 23, *Oliver v Commonwealth Bank of Australia (No 2)* [2012] FCA 755, *R v Edwards* (2009) 255 ALR 399, *R v Glennon* (1992) 173 CLR 592, *R v Woods & Williams* (2010) 246 FLR 4, *Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325, *Timbercorp Finance Pty Ltd v Collins and Tomes* [2016] VSCA 128, *Trade Practices Commission v Pioneer Concrete (Qld) Pty Ltd* (1994) 52 FCR 164, *Walton v Gardiner* (1993) 177 CLR 378, *Webster v Lampard* (1993) 177 CLR 598, *Wigmans v AMP Ltd* (2019) 103 NSWLR 543, *Williams v Spautz* (1992) 174 CLR 509, referred to.

CIVIL PROCEDURE – Cross-vesting – Transfer to Federal Court – Relevant factors

Application for order pursuant to cross-vesting legislation transferring proceedings to Federal Court – Federal Court appropriate jurisdiction to determine matter given related representative proceeding – Transfer in interests of justice given most effective use of judicial resources and possibility for conflicting determinations – Order for transfer made

Jurisdiction of Courts (Cross-Vesting) Act (NT) s 5, s 12

Australian Consolidated Investments Ltd v Westpac Banking Corporation (1991) 5 ACSR 233, *BHP Billiton v Schultz* (2004) 221 CLR 400, *James Hardie & Coy Pty Ltd v Barry* (2000) 50 NSWLR 357, *Lambert v Dean* (1989) 13 Fam LR 285; 97 FLR 352, *Minister for Home Affairs v DMA18* (2020) 270 CLR 372, referred to.

REPRESENTATION:

Counsel:

Plaintiffs:	M Albert
Defendant:	T Moses

Solicitors:

Plaintiffs:	Daniel Kelly
Defendant:	Mills Oakley

Judgment category classification:	B
Judgment ID Number:	GRA2602
Number of pages:	36

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

Pepperill & Ors v Chief Executive Officer (Housing) [2026] NTSC 19
No 2025-01118-SC

BETWEEN:

JOANNE PEPPERILL
First Plaintiff

JAMESIE STAFFORD
Second Plaintiff

KENNEDY BROWN
Third Plaintiff

ANITA McNAMARA
Fourth Plaintiff

JOHNNY JACK
Fifth Plaintiff

AND:

**CHIEF EXECUTIVE OFFICER
(HOUSING)**
Defendant

CORAM: GRANT CJ

REASONS FOR DECISION
(Delivered 16 March 2026)

- [1] By summons filed on 27 October 2025, the plaintiffs have sought an order transferring this proceeding to the Federal Court of Australia (**the Federal Court**) pursuant to s 5 of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NT).

- [2] In response, and by summons filed on 28 January 2026, the defendant has sought an order staying the proceeding or, in the alternative, striking out the plaintiffs' statement of claim.

Procedural history

- [3] The proceeding has a long and somewhat tortuous history.
- [4] On 14 November 2019, the solicitor for the plaintiffs filed 24 initiating applications in the Northern Territory Civil and Administrative Tribunal (**the NTCAT**) on behalf of remote public housing tenants in the Laramba community seeking remedies under the *Residential Tenancies Act 1999* (NT). Laramba is a small town approximately 200 kilometres by road north-west of Alice Springs in the Central Desert Region. It has a population of approximately 300 people, nearly all of whom are of Aboriginal descent. The plaintiffs occupied premises pursuant to residential tenancy agreements with the defendant as landlord (**the premises**).
- [5] On 17 December 2019, the NTCAT ordered that three of the applications be treated as test cases on the basis that they were representative of the legal and factual issues affecting all 24 applicants. The applicants in those test cases are the plaintiffs in this proceeding (following the substitution of an applicant in March 2020). The three test cases were set down for hearing before the NTCAT in April 2020. Following the imposition of travel and other restrictions

because of the COVID-19 pandemic, that hearing was vacated and, on the plaintiffs' application, and over the objections of the defendant, the NTCAT determined to receive written submissions on preliminary issues which could be decided on the papers.

- [6] On 26 March 2020, the NTCAT ordered the separate determination of the relief sought requiring the defendant to install filters in kitchen taps in the premises to ensure the water supplied had a uranium level below the maximum safe drinking level identified in the relevant Australian guidelines.
- [7] On 1 July 2020, the NTCAT found that the defendant was not in breach of the term implied by s 48(1)(a) of the *Residential Tenancies Act* requiring the premises to be 'habitable'. The principal basis for that finding was that water was supplied to the premises by the Power and Water Corporation pursuant to its statutory functions under the *Power and Water Corporation Act 1987* (NT), rather than by the defendant, and the quality of the water was attributable to 'environmental factors emanating from outside the boundary of the premises'. Accordingly, the defendant could not be in breach of its statutory obligation as landlord to ensure that the premises were habitable by reason of the quality of the water supplied to the premises. The NTCAT ordered the dismissal of the claims relating to the concentration of uranium in the water.

- [8] On 27 July 2020, the plaintiffs sought an internal review of the NTCAT's decision on the preliminary issue in accordance with the mechanism in Part 5 of the *Northern Territory Civil and Administrative Tribunal Act 2014* (NT). The plaintiffs pressed for a determination in their favour of the basis that the analysis conducted by the NTCAT at first instance was flawed. The parties filed written submissions on 4 and 11 September 2020 respectively.
- [9] On 13 October 2020, the NTCAT determined to refer two questions of law to the Supreme Court. The questions were directed to whether the *Residential Tenancies Act* requires the landlord to ensure that water supplied by others to the premises does not contain levels of uranium that are unsafe for drinking, or, alternatively, to ensure that water supplied by others to the premises is safe for drinking.
- [10] On 19 November 2020, that referral from the NTCAT was referred in turn to the Full Court pursuant to s 21 of the *Supreme Court Act 1979* (NT). That was to allow the reference to be heard immediately following the hearing of an appeal by the Court of Appeal in a matter which also involved a question concerning the proper construction of the *Residential Tenancies Act*. The same sets of legal representatives were acting for the respective parties in both that appeal and the reference to the Supreme Court.

- [11] On 30 November 2020, one of the plaintiffs¹ commenced a separate proceeding against the defendant by writ filed in the original jurisdiction of the Supreme Court. That proceeding effectively sought the same relief claimed in the proceedings before the NTCAT.
- [12] On 18 December 2020, the defendant made application for summary judgment, a permanent stay or the striking out of the statement of claim in the proceedings commenced by writ. The principal bases for that application were that the plaintiff was estopped from bringing a proceeding in relation to an issue already determined by the NTCAT which was subject to internal review and a related reference to this Court and/or that it was an abuse of process to do so.
- [13] On 14 January 2021, the plaintiff served a Notice to Admit on the defendant in the reference proceedings seeking admissions consistent with the depositions which had been made for the purpose of the proceedings which were subject to the appeal before the Court of Appeal. The defendant took objection to the attempt to introduce new facts to the reference of the two questions of law. The plaintiff submitted that the questions of law were not ripe for reference to the Supreme Court and sought to have the reference refused.

¹ Although both the reference and the proceedings commenced by writ named only one of the tenants in the three test cases, it was common ground that the determinations made in the Supreme Court would have application to all five plaintiffs, and in turn to all 24 applicants.

- [14] On 19 March 2021, the plaintiff made application for the joinder of the Northern Territory of Australia as a party to the proceedings. That application was opposed by the defendant.
- [15] On 22 April 2021, a hearing was conducted in relation to the plaintiff's joinder application and the defendant's application for summary judgment or a stay of proceedings.
- [16] On 29 October 2021, the Supreme Court determined to send the reference back to the NTCAT because the funding arrangements for the delivery of water to public housing premises at Laramba required determinations of fact which might bear on the internal review proceedings and on the legal questions which had been referred concerning the content of the landlord's obligations.² By separate decision delivered on the same day, the Supreme Court refused the application for the joinder of the Territory to the proceeding commenced by writ and permanently stayed that proceeding on the basis that it was an abuse of process.³
- [17] On 4 April 2022, the NTCAT commenced a hearing by way of internal review. That hearing ran for two days during which the NTCAT received further evidence.

² *Jack v Chief Executive Officer (Housing) (No 1)* [2021] NTSC 79.

³ *Jack v Chief Executive Officer (Housing) (No 2)* [2021] NTSC 81.

[18] On 13 May 2022, the NTCAT found that the initial determination was correct and confirmed the order dismissing the three applications insofar as they related to the concentration of uranium in the water.⁴

Those dismissals were ordered on the basis that under the statutory scheme the concept of ‘habitability’ did not extend to issues arising from the supply of water to the premises by an external provider.

[19] On 20 May 2022, the plaintiffs sought leave to appeal the decision to the Supreme Court. That appeal was heard on 6 September 2022.

[20] On 2 October 2023, the Supreme Court granted leave to appeal and allowed the appeal.⁵ The basis for that finding was that in circumstances where a landlord is required to ensure that a tenant’s residence is habitable, and that obligation includes ensuring that water is supplied to their residence, there is necessarily an attendant obligation to ensure that the water supplied is safe to drink. That is a matter of ‘health and safety’ which bears on habitability.

[21] On 5 February 2024, the defendant lodged an appeal against that decision to the Court of Appeal. That appeal was heard on 29 November 2024.

[22] On 24 December 2024, the Court of Appeal dismissed the defendant’s appeal and remitted the matter back to the NTCAT for determination in

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

⁵ *Pepperill v Chief Executive Officer (Housing) (No 1)* [2023] NTSC 90.

accordance with law.⁶ That result followed from the findings that: (a) if running water is not supplied to a tenant's residential premises, they will not be habitable within the meaning of the *Residential Tenancies Act*; (b) a landlord has an obligation to take reasonable steps to ensure the habitable condition of the premises by the supply of running water; (c) the quality of the water which a landlord permits to be supplied to residential premises is a habitability issue and a landlord is obliged to ensure that the water supplied is safe to drink; and (d) if the uranium levels in water supplied to residential premises poses an actual and appreciable risk to the health and/or safety of the tenant then those premises would not be habitable, regardless whether or not the water is supplied by a third party with statutory responsibility for the supply of essential services. What the decision on appeal did not determine was whether the defendant had in the circumstances breached the relevant obligation under the *Residential Tenancies Act*. That question depended both on whether the premises were not habitable as a matter of fact and whether the landlord took reasonable steps to ensure habitability, which matters had not been determined by the NTCAT.

[23] On 15 April 2025, the NTCAT made orders transferring the proceeding as remitted to the Supreme Court.⁷ The transfer was made under s 99A

6 *Chief Executive Officer (Housing) v Pepperill & Ors* [2024] NTCA 10.

7 The initiating applications sought relief for alleged breaches of the term implied by s 48(1) of the *Residential Tenancies Act* other than those related to the concentration of uranium in the water supplied to the premises. The balance of those claims was determined on 17 January 2023 following trial in the NTCAT. They were then the subject

of the *Northern Territory Civil and Administrative Tribunal Act 2014* (NT). That provision allows the President of the NTCAT to order that a matter be transferred to the Supreme Court if satisfied, *inter alia*, that the proceeding would be more appropriately heard in the Supreme Court having regard to such matters as its complexity, the difficulty or novelty of the issues raised, and the unsuitability of NTCAT's powers and procedures for dealing with the matter. While the Supreme Court may refuse to accept the transfer if satisfied that the proceeding would be more appropriately heard by the NTCAT, that has not been done in the present case. That provision for transfer is complemented by s 16A of the *Supreme Court Act*, which provides that if the NTCAT makes a transfer under s 99A, the Act under which the jurisdiction is conferred on the NTCAT applies as if references in it to the NTCAT were references to the Supreme Court. Accordingly, for the purposes of determining these applications as transferred, the Supreme Court has all the jurisdiction and powers of the NTCAT.

- [24] On 27 October 2025, the plaintiffs sought an order transferring this proceeding to the Federal Court on the basis of a commonality with another proceeding running in that Court, and in anticipation of what the plaintiffs perceived would be delays in securing hearing dates and a decision in this Court. It is convenient to deal first with the defendant's

of an appeal to the Supreme Court for which reasons for decision have been published: *Brown v Chief Executive Officer (Housing)* [2025] NTSC 72. They do not form part of the proceeding which was remitted to the NTCAT and then transferred to the Supreme Court.

subsequent application for an order staying the proceeding or, in the alternative, striking out the plaintiffs' statement of claim. That is because the defendant asserts that if it is successful in the primary relief it seeks in that application there will be no proceeding to transfer. Before doing so, however, it is necessary to describe the related proceeding which has been commenced in the Federal Court.

The class-action

[25] On 16 December 2022, a class action was filed in the Federal Court by two applicants naming the 'Chief Executive Officer (Housing)', which is the defendant in the within proceeding, as the respondent (**the representative proceeding**). The applicants in the representative proceeding are tenants of remote public housing in the community of Gunbalanya. The representative proceeding is commenced on behalf of all Aboriginal persons who between specified dates in 2007 and 2024 have entered into tenancy agreements with the respondent and who believe they have suffered loss and damage by reason of the matters pleaded. The claims include loss and damage suffered because of the respondent's failure to meet health, safety and habitability requirements under the *Residential Tenancies Act*.

[26] One specific allegation of breach in contract and breach under the *Australian Consumer Law*⁸ involves the failure to provide water for

⁸ The *Australian Consumer Law* is defined for the purpose of the representative proceeding to be as set out in Schedule 2 of the *Competition and Consumer Act 2010* (Cth), as

drinking that did not exceed, or did not exceed by more than 50%, any level of impurity or toxicity identified in the Australian Drinking Water Guidelines. It is further alleged that the applicants' residences received drinking water which had an average pH level significantly lower than the safe range and concentrations of aluminium significantly higher than the maximum safe level.

[27] The representative proceeding claims, on behalf of the applicants and on behalf of the group members (which would *prima facie* include the plaintiffs in this proceeding), damages for breach of contract, breaches of the Australian Consumer Law Guarantees and unconscionable conduct, restitution and compensation for contraventions of the *Racial Discrimination Act 1975* (Cth). The proceeding also claims related declaratory and injunctive relief, interest and costs.

[28] The representative proceeding and the within proceeding involve several common and substantial issues of law and fact. Accordingly, the plaintiffs in this proceeding are included as group members by default. The plaintiffs had the right to opt out of the representative proceeding by 19 December 2025, but they have not chosen to do so. As matters presently stand, the applicants' claim in the representative proceeding has been listed for trial in the Federal Court commencing at 10 AM on 12 October 2026 for a period of four weeks, and thereafter

applicable pursuant to the *Competition and Consumer Act* and the *Consumer Affairs and Fair Trading Act 1990* (NT).

commencing at 10 AM on 30 November 2026 for a period of two weeks. The first week of the trial is to be conducted in Gunbalanya. The second week of the trial is to be conducted in Darwin. Thereafter, the trial is to be conducted at such places as the Federal Court may determine.

[29] That trial is confined to the determination of the claims by the named applicants and common issues relating to such matters as the characterisation of the Chief Executive Officer (Housing) and its activities for the purpose of the *Australian Consumer Law*; the terms of any tenancy agreement between the applicants and the respondent and the particular operation of those terms; whether the premises were reasonably fit for use as a place of residence and the consequence of that for the assessment of damages under the *Australian Consumer Law*; whether the mechanisms adopted for fixing rent involved unconscionable conduct on the part of the respondent; the manner in which any overpayment of rent is to be calculated; and the incidents of any right to housing under the *Racial Discrimination Act*.

[30] The applicants' statement of claim in the representative proceeding also pleads that material facts were not ascertained by the applicants and the group members until less than 12 months before the commencement of the proceeding. Those facts are said to include the terms of the tenancy agreements, the avenues for enforcement and remedy, the legal entity against whom claims could be made, the

operation and application of the *Australian Consumer Law*, the mistake involving the overpayment of rent and the method by which the respondent calculated rent. The applicants seek the extension of any period of limitation operating under the *Limitation Act 1981* (NT), and findings that time did not commence to run until various material facts were discovered or might with reasonable diligence have been discovered. That pleading implicitly recognises that the claims date back to 2007 and the *Limitation Act* fixes a general limitation period of three years from the date on which the cause of action first accrues (subject to the fixing of specific periods for certain types of action).

The application for a stay or strike out

[31] The proceeding which was remitted to the NTCAT and then transferred to the Supreme Court was commenced in November 2019. As already described, that proceeding is limited to the claims for relief for alleged breaches of the term implied by s 48(1) of the *Residential Tenancies Act* related to the concentration of uranium in the water supplied to the premises. That is, or was, principally a claim for compensation under s 122 of the *Residential Tenancies Act*.

[32] There were no pleadings as such in the NTCAT proceeding. On 11 November 2025, following the transfer to the Supreme Court, the Associate Judge ordered the plaintiffs to file and serve a statement of claim. On 14 January 2026, the plaintiffs filed a statement of claim pleading that the water available in the residences was contaminated

with unsafe levels of uranium and claiming damages for consequential breaches of the tenancy agreements, consequential breaches of the *Australian Consumer Law*, interest and costs. The relief sought in the statement of claim broadly reflects the relief sought in the representative proceeding so far as it claims a failure to provide water for drinking that did not exceed any level of impurity or toxicity identified in the Australian Drinking Water Guidelines. The statement of claim does not seek compensation under s 122 of the *Residential Tenancies Act*.

[33] The defendant says that the change in the basis on which the claim is brought is properly characterised as a pleading amendment, and the proceeding should be stayed or the statement of claim struck out on the following grounds.

- (a) The proceeding as now pleaded in this Court is both an abuse of process and futile because the same relief is claimed in the representative proceeding of which the plaintiffs are group members.
- (b) By filing the statement of claim the plaintiffs have purported to abandon for compensation under s 122 of the *Residential Tenancies Act* to pursue claims in common law and under the *Australian Consumer Law*. That amendment comes six years after the proceedings were commenced and is brought too late.

- (c) The amendment should not be allowed in circumstances where it will fundamentally alter the character of the proceedings. That is because the claim was initially brought in the NTCAT's specialist jurisdiction for statutory compensation, and the NTCAT is not invested with the federal jurisdiction necessary for the determination of the *Australian Consumer Law*. The claim as presently pleaded for damages at common law for breach of contract potentially involves different compensation principles and also falls outside the NTCAT's jurisdiction. That change in character is illustrated by the fact that the greater part of the plaintiffs' compensation claims have already been determined as claims for compensation under s 122 of the *Residential Tenancies Act*.
- (d) The plaintiffs have not proffered any explanation for the change in the basis on which the claim is made. In the absence of any explanation, the compelling inference is that the amendments have been improperly introduced in aid of the cross-vesting application.
- (e) The amendment would prejudice the defendant because the time and expense of defending the proceedings to date would be thrown away. In particular, the defendant's defence of the proceedings to date has been directed to the particular operation of the *Residential Tenancies Act* and its forensic decision-making would

have been very different in the defence of claims at common law and under the *Australian Consumer Law*.

[34] The principal basis on which the defendant seeks to have the proceeding stayed is that it constitutes an abuse of process. The principles which govern an application for a stay of proceedings for abuse of process are not in dispute. The authorities clearly establish that proceedings will only be permanently stayed in an ‘extreme or exceptional case’.⁹ The onus on an applicant is a heavy one.¹⁰ It has been described by the Full Court of this Court as ‘a remedy of last resort’.¹¹ Although the categories of case in which a permanent stay might be ordered are not closed, it is a step which has been described as ‘rarely justified’.¹² The relevant test is whether the continuation of the proceedings would necessarily and inevitably involve unacceptable injustice or unfairness.¹³ The court must be satisfied that there is a fundamental defect in the proceedings of such a nature that there is nothing the court could do to relieve against its unfair consequence.¹⁴

⁹ See *Walton v Gardiner* (1993) 177 CLR 378 at 392; *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 34; *R v Glennon* (1992) 173 CLR 592 at 605-606; *Agar v Hyde* (2000) 201 CLR 552 at [57]; and *Dupas v The Queen* (2010) 241 CLR 237 at [18], [35].

¹⁰ *Williams v Spautz* (1992) 174 CLR 509 at 529.

¹¹ *R v Woods & Williams* (2010) 246 FLR 4 at [104].

¹² *Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325 at [106].

¹³ See *Walton v Gardiner* (1993) 177 CLR 378 at 392; *R v Edwards* (2009) 255 ALR 399 at [23]-[24].

¹⁴ See *Dupas v The Queen* (2010) 241 CLR 237 at [18]; and *R v Glennon* (1992) 173 CLR 592 at 605-606.

[35] The principles which govern an application that a pleading be struck out are similarly stringent, although the test is not the same. There is a heavy onus to warrant exercise of the power.¹⁵ Rule 23.02 of the *Supreme Court Rules 1987* (NT) stipulates the grounds on which an order may be made. The defendant does not assert that the statement of claim fails to disclose a cause of action, or that the pleading is defective, deficient, unintelligible, embarrassing or repetitive. As stated, the defendant's assertion is that to allow the pleading may prejudice or delay the fair trial of the proceeding or that it would constitute an abuse of process. The circumstances are said to attract the principle expressed in *Oliver v Commonwealth Bank of Australia* (No 2) in the following terms:

‘It is prima facie vexatious and oppressive, in the strict sense of those terms, to commence a second or subsequent action in the courts of this country if an action is already pending with respect to the matter in issue’: *Henry v Henry* [1996] HCA 51; (1996) 185 CLR 571 at 591 per Dawson, Gaudron, McHugh and Gummow JJ. Consequently, it lies upon the party bringing the second action to show that is not so: *Moore v Inglis* (1976) 9 ALR 509 at 514 per Mason J, citing the dissenting judgment of Lord Esher MR in *The Christiansborg* (1885) 10 PD 141 at 148; *Henry v Henry* at 591 (footnote 66).

Representative proceedings give rise to complexities in this area because of the possibility that proceedings by the representatives, on the one hand, and separate proceedings brought by those represented, on the other, may infringe the above principle. In this Court representative proceedings operate on an ‘opt-out’ basis; that is, persons remain in the class of those represented unless they take the affirmative step of indicating they do not wish to be in that class: *Federal Court of Australia Act 1976* (Cth), s 33J(2).

¹⁵ See *Trade Practices Commission v Pioneer Concrete (Qld) Pty Ltd* (1994) 52 FCR 164 at 175; *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87 at 99; and *Webster v Lampard* (1993) 177 CLR 598 at 602-603.

Even though that is the case, however, class members are not parties to the proceeding unless they choose to be one of the nominated representative parties: s 33C(1); *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2002] FCA 1560 at [9] per Moore J; *Courtney v Medtel Pty Ltd* [2002] FCA 957; (2002) 122 FCR 168 at 179 [35]- [36] per Sackville J.

Consequently, the view in this Court is that the existence of proceedings by a class member (not being a representative party) at the same time as a representative proceeding in which that class member is represented is not necessarily an immediate abuse of process. In *Johnson Tiles Pty Ltd v Esso Australia Ltd* [1999] FCA 56 per Merkel J, albeit in the context of competing representative proceedings, thought that at least at an early stage the Court should determine which of the proceedings should be permitted and it was not necessarily the case that the proceeding which was filed first should be the proceeding which would go forward: see [14]-[15]. On the other hand, Lehane J thought that, after a party had failed to opt out of a representative proceeding, it was likely that the Court would prevent further pursuit of presently subsisting and overlapping ordinary proceedings: *Bright v Femcare Ltd* [2000] FCA 742; (2000) 175 ALR 50 at 83 [101]; [2000] FCA 742 at [101]. Considerations of commonsense and these two decisions suggest, therefore, that it is prima facie vexatious and oppressive for a person who has not opted out of a representative proceeding (when the opt-out time has passed) to maintain ordinary proceedings against the same respondent dealing with substantially the same subject matter. I so conclude.¹⁶

[36] That decision was given passing acknowledgement in *Timbercorp Finance Pty Ltd v Collins and Tomes*¹⁷, but without any express endorsement. The decision is also cited in *Wigmans v AMP Ltd*¹⁸, but as authority for the proposition that there is no abuse of process arising from the parallel conduct of representative proceedings prior to the time fixed for opt out. It did not endorse the proposition that there will necessarily be an abuse of process after that time. In fact, what Bell P

¹⁶ *Oliver v Commonwealth Bank of Australia (No 2)* [2012] FCA 755 at [1]-[3].

¹⁷ *Timbercorp Finance Pty Ltd v Collins and Tomes* [2016] VSCA 128 at fn 213.

¹⁸ *Wigmans v AMP Ltd* (2019) 103 NSWLR 543 at [49].

did say is that ‘the vice of duplication may be managed by means other than a stay of proceedings’.¹⁹ Those other means include such things as the consolidation of proceedings, the joint trial of proceedings and the coordination of matters to avoid duplication and overlap.²⁰

[37] The principal basis on which the defendant seeks to have the proceeding stayed or the statement of claim struck out is that it directly overlaps with the representative proceeding because it pleads the same allegations and seeks damages on the same basis. There is no doubt that the factual and legal basis for the claim in the within proceeding mirrors the factual and legal basis for the relevant part of the claim in the representative proceeding. In particular:

- (a) paragraph 16(i) of the fourth amended statement of claim in the representative proceeding pleads that the tenancy agreement required the Chief Executive Officer (Housing) to ensure that the premises were ‘habitable’ by operation of s 48(1)(a) of the *Residential Tenancies Act*;
- (b) paragraph 20(c) of the fourth amended statement of claim pleads that the habitability term required the Chief Executive Officer (Housing) to ensure that the premises had water for drinking that did not exceed, or did not exceed by more than 50%, any level of

19 *Wigmans v AMP Ltd* (2019) 103 NSWLR 543 at [8] (with the other members of the Court concurring).

20 Citing *McKay Super Solutions Pty Ltd (Trustee) v Bellamy’s Australia Ltd* [2017] FCA 947 at [43], [113]-[118].

impurity or toxicity identified in the Australian Drinking Water Guidelines; and

- (c) paragraph 21(c) pleads that the premises had water for drinking that exceeded the impurity or toxicity standards in the relevant guidelines, and that particulars relating to individual group members may be provided following the trial of the common questions.

[38] The first submission the plaintiffs make in that respect is that the position adopted by the defendant is one of approbation and reprobation. That is because for the purpose of pressing the assertion of abuse of process the defendant says that the plaintiffs fall within the class of group members with an entitlement to damages in the representative proceeding. Conversely, in the defence of the representative proceeding the defendant asserts that the class of group members does not and cannot include persons who have independently made claims for compensation under a tenancy agreement through proceedings in the NTCAT. Paragraph 3(b) of the defendant's defence to the fourth amended statement of claim pleads:

The class of Group Members cannot include any person who, independently of these proceedings, has made a claim, or is a party to a tenancy agreement in respect of which a claim has been made by tenant, for compensation for breach by the Respondent of the tenancy agreement.²¹

21 The defendant has foreshadowed an amendment to plead that the plaintiffs are not precluded from joining any judgment in the representative proceeding in relation to the

[39] The plaintiffs say that if the defendant is genuine in its reliance on that pleading no abuse of process can arise. On proper analysis, there is no necessary inconsistency in the position adopted by the defendant in that respect. It is open in the circumstances to assert both that the plaintiffs cannot benefit from the representative proceeding in circumstances where they have either obtained judgment or maintain an entitlement to compensation in relation to the same subject matter in a separate proceeding, and that the maintenance of the separate proceeding constitutes an abuse of process. To do so is to put, or seek to put, the plaintiffs to an election. However, it does not necessarily follow that the possibility of duplication in that respect must or should be addressed by the permanent stay of the separate proceeding.

[40] The second submission the plaintiffs make in relation to the defendant's assertion of an abuse of process is that the potential for duplication is no more than a case management issue which is properly addressed by the adoption of one or other of the measures proposed in the letter dated 27 November 2025 from the solicitors acting for the applicants in the representative proceeding to the solicitors acting for the defendant in both the within proceeding and the representative proceeding. That correspondence proposes 'two pragmatic alternatives'

overpayment of rent, unconscionability and discrimination claims. The defendant intends to maintain its position in relation to any claim concerning contaminated water and any breach in respect of which compensation has already been paid under the *Residential Tenancies Act*.

for dealing with the potential for duplication by an appropriate amendment to the applicants' pleading.

[41] Those alternatives, so far as the plaintiffs are concerned, both involve an amendment to the statement of claim in the representative proceeding to provide that the plaintiffs do not claim for loss or damage arising from the breaches of contract alleged in Section D of the statement of claim concerning the habitable premises term, the health and safety term, the secure housing term and the repair systems term for the period of time for which compensation is sought under section 122 of the *Residential Tenancies Act*.

[42] Those proposals are made consistently with the plaintiffs' instructions. By affidavit promised on 14 January 2026, the solicitor with conduct of the within proceeding on behalf of the plaintiffs deposes that he is also retained by the solicitors responsible for the care and conduct of the representative proceeding to act in the capacity of a second law practice in the class action. That capacity no doubt extends to the representation of the plaintiffs' interests. The solicitors for the defendant have responded by letter dated 10 February 2026 asserting, so far as the plaintiffs are concerned, that the maintenance of this proceeding constitutes an abuse of process and/or that the plaintiffs cannot be bound by or beneficiaries of any judgment in the representative proceeding concerning the same subject matter.

[43] While it is no doubt correct to say, as the defendant does, that the proceedings have been on foot since 2019, much of that time has been taken up with preliminary disputations concerning the meaning of habitability in this statutory context. That issue has been resolved and it is only now that the parties have turned their attention to whether the defendant was in breach of the relevant obligation under the *Residential Tenancies Act*, whether the premises were not habitable and whether the defendant took reasonable steps to ensure habitability. Those are issues which have not been heard or determined by either the NTCAT or the Supreme Court. It cannot in those circumstances be said that the amendment to the nature of the claim is irredeemably late. Moreover, the proceedings and determinations in the Supreme Court and the Court of Appeal concerning the meaning of ‘habitable’ and its application to the supply of water to premises will presumably obviate the need to agitate those issues in the representative proceeding.

[44] So far as questions of election, efficiency and finality are concerned, a quite different situation presented in *Aon Risk Services Australia Limited v Australian National University*²² and cases involving a similar result. In that case the plaintiff sought to make substantial amendments to its statement of claim at the commencement of a four-week trial in a manner which disrupted the court’s lists and caused substantial prejudice to the interests of the remaining defendant. This

²² *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175.

proceeding has yet to be listed for trial and the pleading in the statement of claim does substantially not alter the evidence necessarily adduced in the determination of the factual issues. The difference in the relief claimed concerns the source of the legal obligation rather than the factual matrix giving rise to the obligation, although it may be accepted that the plaintiffs' claim as now pleaded might require some further evidence concerning whether the defendant is engaged in trade and commerce or carries on a business.

[45] In my opinion, the prospect of overlap or duplication between the within proceeding and the representative proceeding does not cross the high threshold necessary to warrant the permanent stay of this proceeding. This is not a situation in which there are two parallel representative proceedings. The proceeding in this Court involving the plaintiffs is in relation to a subject matter which forms only a small part of the subject matter of the representative proceeding. This is a case in which the vice of duplication may be managed by means other than a stay of proceedings. In particular, the adoption of one or other of the pleading amendments proposed by the solicitors for the applicants in the representative proceeding would adequately address the issue, subject to the defendant's assertion that the plaintiffs cannot benefit from the representative proceeding in circumstances where they have already obtained the payment of compensation under s 122 of the *Residential Tenancies Act* in respect of other breaches.

[46] For reasons which are set out further below, I have determined that it is appropriate for this proceeding to be transferred to the Federal Court for determination. That being so, it is more appropriate for the Federal Court to deal compendiously with questions such as whether the plaintiffs are estopped from group membership in the representative proceeding; whether and in what form the transferred proceeding may be litigated by the plaintiffs having regard to amendments which might be made to the statement of claim in the representative proceeding; whether the plaintiffs are limited to the remedies available under the *Residential Tenancies Act* or may amend the relief sought to replicate the common law and statutory claims in the representative proceeding; and whether any amendment to the relief sought in this proceeding gives rise to limitation issues. Those matters are not ripe for determination at this point and in this forum.

[47] In response to the defendant's submission that no explanation has been proffered for the change in the basis on which the claim is now made in this proceeding, the plaintiffs say that it was done in anticipation of a submission or finding that the Supreme Court does not have jurisdiction to award compensation under s 122 of the *Residential Tenancies Act*. That apprehension is said to arise from certain observations made in the decision in *Jack v Chief Executive Officer (Housing) (No 2)*²³, in which this Court suggested that 'it does not

23 *Jack v Chief Executive Officer (Housing) (No 2)* [2021] NTSC 81 at [70]-[74].

obviously have an original jurisdiction to award compensation pursuant to s 122 of the *Residential Tenancies Act*'. That observation was made in the context of the referral of a question of law and subject to the express qualification that there is a provision for the NTCAT to transfer applications to the Supreme Court. The plaintiffs' concern in that respect is misconceived having regard to s 16A of the *Supreme Court Act*, which, as already described, provides that on transfer the jurisdiction and power of the NTCAT is effectively vested in the Supreme Court. Accordingly, the Supreme Court has all the jurisdiction and powers of the NTCAT in relation to the within proceeding, including the power to award compensation pursuant to s 122 of the *Residential Tenancies Act*.

- [48] The plaintiffs now accept that to be so and say in response that they are neutral as to whether their claim is pressed for compensation under s 122 of the *Residential Tenancies Act* or damages in common law and under the *Australian Consumer Law*. There is no doubt a substantive difference between compensation and damages. A majority of the High Court has held that s 122 of the *Residential Tenancies Act* provides for the award of compensation as an alternative to common law damages. The task of the NTCAT, and of the Supreme Court on transfer, in determining statutory compensation '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'.²⁴ On that formulation, the question whether a particular form or type of statutory compensation is available in relation to a breach is essentially one of statutory construction, and is not necessarily answered by whether damages would be available in an action for breach of contract at common law (or, by extrapolation, under the *Australian Consumer Law*).

[49] There can be no doubt that the cause of action now pleaded in the statement of claim filed by the plaintiffs fundamentally alters the character of the proceeding which was transferred by the NTCAT to the Supreme Court. That is so even accepting the plaintiffs' submission that the alternative basis for the claim is unlikely to impact greatly on its quantification notwithstanding the technical distinction which may be drawn between compensation and damages. That change in character extends beyond the nature of the remedy to include the evidence which would be necessary to establish or rebut a claim for damages under the *Australian Consumer Law*.

[50] As already stated, the configuration in which the within proceeding may properly be litigated by the plaintiffs, including the remedies which they are entitled to pursue, are properly determined by the Federal Court following transfer to it. If the proceeding which has been

²⁴ *Young v Chief Executive Officer (Housing)* (2023) 278 CLR 208, [20]-[25].

transferred from the NTCAT to the Supreme Court is now to be transferred to the Federal Court, that transfer is appropriately ordered on the basis of the claim as initially configured before the NTCAT and prior to the very recent filing of the statement of claim. The question of pleadings and their content will be a matter for the Federal Court having regard to the interaction between the transferred proceeding and the representative proceeding. To allow the matter to be transferred as presently configured may prejudice the proper determination of those matters and that the fair trial of the proceeding.

[51] For that reason, there will be an order striking out the statement of claim.

The application for transfer

[52] Section 4 of the *Jurisdiction of the Courts (Cross-Vesting) Act* provides that the Federal Court has and may exercise original and appellant jurisdiction in respect of matters in which the Supreme Court has jurisdiction otherwise than by reason of a law of the Commonwealth or of another State. The Supreme Court has jurisdiction and power in the matter as transferred from the NTCAT by operation of s 16A of the *Supreme Court Act*. The transfer to the Federal Court is made in those circumstances.

[53] Section 5(1) of the *Jurisdiction of the Courts (Cross-Vesting) Act* relevantly provides:

Where:

- (a) a proceeding (in this subsection referred to as the *relevant proceeding*) is pending in the Supreme Court; and
 - (b) it appears to the Supreme Court that:
 - (i) the relevant proceeding arises out of, or is related to, another proceeding pending in the Federal Court ... and it is more appropriate that the relevant proceeding be determined by the Federal Court ...
 - (ii) ...; or
 - (iii) it is otherwise in the interests of justice that the relevant proceeding be determined by the Federal Court ...
- the Supreme Court shall transfer the relevant proceeding to the Federal Court ...

[54] The applicant presses for transfer under both those limbs. So far as s 5(1)(b)(i) is concerned, it is common ground between the parties that this proceeding is ‘related to’ the representative proceeding pending in the Federal Court in the relevant sense.²⁵ The common features of the two proceedings which give rise to that relationship have already been traversed. In their relevant aspect, the proceedings involve the same defendant, the same tenancy agreements and the same statutory provisions.

[55] The plaintiffs say that it is more ‘appropriate’ that this proceeding be determined by the Federal Court because of the greater judicial availability and resourcing in the Federal Court, and that Court’s specialisation in claims under the *Australian Consumer Law*. As to the first two matters, the plaintiffs say that as a matter of anecdotal fact the

25 *Minister for Home Affairs v DMA18* (2020) 270 CLR 372 at [43].

Federal Court is better resourced than courts in the smaller states and territories, and that may in some cases allow proceedings to be listed and decisions to be delivered more quickly. That consequence of vertical fiscal imbalance does not of itself lead to the conclusion that the Federal Court is the more appropriate jurisdiction in which to have this proceeding determined.

[56] It is not possible at the present time to predict what course the matter would take if transferred to the Federal Court in terms of a listing for hearing. It would seem likely that the matter will not be heard until after the trial of the common issues in the representative proceeding. On the defendant's estimate, it is unlikely that the trial of the issues particular to Laramba in the representative proceeding will be conducted prior to 2027, and therefore also unlikely that the trial of the transferred proceeding concerning water quality in Laramba would be heard prior to that time.

[57] The Federal Court's suggested specialisation in claims under the *Australian Consumer Law* is of little or no account in the determination of appropriateness given that the statement of claim presently on foot will be struck out and the plaintiff's indication given in submissions that they are 'content to amend their statement of claim to seek relief also under s 122 of the [*Residential Tenancies Act*] and to make that the primary claim'. Even assuming that the plaintiff's press a claim under the *Australian Consumer Law*, consumer law has in its statutory

forms been part of the Australian legal landscape for more than 50 years now and its operation is relatively well-settled by authority.

[58] On the other hand, the defendant says that it is more appropriate to have the proceeding determined in this Court because it concerns public housing in the Northern Territory, it is between residents of the Northern Territory and a Northern Territory statutory corporation, and the subject matter concerning the provision of public housing in the Northern Territory is uniquely of this jurisdiction. None of those considerations render the Supreme Court a more appropriate forum for the determination of the matter than the Federal Court. The Federal Court is a national court which routinely sits in the Northern Territory, including in matters concerning Aboriginal land and related issues. The Supreme Court enjoys no forensic advantage in making factual determinations concerning issues of that type, and nor does the Supreme Court have any exclusive supervisory function in relation to statutory corporations in the Northern Territory.

[59] The second basis on which the defendant says the Supreme Court is the more appropriate jurisdiction is that the plaintiffs initially selected a Northern Territory tribunal as the forum in which to commence and conduct the proceedings. As the plaintiffs have submitted, a party's original preference of forum, and the subjective reasons for that choice, is not necessarily a factor to which significant importance will be attached in assessing either the forum most appropriate for the

determination of the proceedings or the interests of justice under s 5(1)(b)(iii) of the cross-vesting legislation.²⁶ The reasons why the plaintiffs commenced proceedings in a particular jurisdiction do not govern the determination at a later point in time of which jurisdiction is the more appropriate in a cross-vesting application. That proceedings were originally commenced in the first jurisdiction is properly treated as a neutral factor in the determination of any subsequent application under the cross-vesting legislation.

[60] I have come to the conclusion that it is more appropriate that this proceeding be determined by the Federal Court because the representative proceeding will necessarily require a determination of whether the Chief Executive Officer (Housing) is responsible for ensuring that water provided to remote public housing residences does not exceed any level of impurity or toxicity identified in the Australian Drinking Water Guidelines; whether a failure to do so renders premises not habitable in breach of the relevant obligation under the *Residential Tenancies Act*; and what steps the Chief Executive Officer (Housing) as landlord is reasonably obliged to take in order to ensure habitability. Regardless of the precise form or source of remedy sought, the proceeding presently before this Court will require the same determinations to be made. It would be an unnecessary and inappropriate drain on judicial resources to have two different courts

26 *BHP Billiton v Schultz* (2004) 221 CLR 400 at [14]-[26], [167]-[168].

deciding essentially the same issues, and invidious to have conflicting determinations on those issues.

[61] For similar reasons, I am of the view that the transfer of the proceedings to the Federal Court would also be in the interests of justice. The relevant considerations in that determination include:²⁷

- (a) the place or places where the parties and/or witnesses reside or carry on business;
- (b) the location of the subject matter of the dispute;
- (c) the importance of local knowledge to the resolution of the issues;
- (d) the law governing the relevant transaction;²⁸
- (e) the procedures available in the different courts;
- (f) the likely hearing dates in the different courts; and
- (g) whether it is sought to transfer the proceedings to a specialised court.²⁹

[62] Those matters have already been addressed in the consideration of the first limb. They are largely neutral in the choice between the Supreme Court and the Federal Court. In particular, the case management orders made in the representative proceeding provide for the Federal Court to take evidence in the Gunbalanya community where the applicants

27 See generally *James Hardie & Coy Pty Ltd v Barry* (2000) 50 NSWLR 357; *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400.

28 *Australian Consolidated Investments Ltd v Westpac Banking Corporation* (1991) 5 ACSR 233.

29 *Lambert v Dean* (1989) 13 Fam LR 285; 97 FLR 352.

reside and where the Chief Executive Officer (Housing) provides a social housing service. The determinative factor in assessing the interests of justice is the identity between the issues arising in the representative proceeding and the proceeding presently before this Court.

Costs

[63] Both the application for transfer and the application for a stay of proceedings or the striking out of pleadings are interlocutory in nature.

Rule 63.18 of the *Supreme Court Rules* provides:

Each party shall bear his own costs of an interlocutory or other application in a proceeding, whether made on or without notice, unless the Court otherwise orders.

[64] That rule represents a departure from the usual principle that costs will follow the event. The general approach to the provision is that something in the nature of special circumstances are required before the court will make an order in favour of the party which has succeeded in an interlocutory application.³⁰ The categories of special circumstance are not closed, but they include such matters as where the unsuccessful party has acted unreasonably³¹; the interlocutory

30 *TTE Pty Ltd v Ken Day Pty Ltd* (1992) 2 NTLR 143; *Hodge v Kimber* [1995] NTSC 111 at [29]; *Complete Crane Hire (NT) Pty Ltd v Marchetti Autogru Spa (Italy) (No 2)* [2015] NTSC 51 at [9]. Cf *Yao v NT Gymnastics Association* (1991) 1 NTLR 180 at 181 in which Kearney J stated that any purported test of special circumstances cannot limit the general discretion of the Court.

31 *TTE Pty Ltd v Ken Day Pty Ltd* (1992) 2 NTLR 143.

proceedings have been unnecessarily burdensome³²; the application is for an extension of time or some other relief in which the appellant is seeking the indulgence of the court³³; the application is effectively determinative of the proceeding³⁴; general interests were served by having a superior court decide a novel issue³⁵; the application is more akin to a substantive trial than a typical interlocutory application³⁶; or the application is not a ‘run-of-the-mill’ application because, by way of example, it constitutes an exceptional first review of the substantive relief sought such as an application for an interlocutory injunction or preservation of status³⁷. None of those circumstances presented in the current applications. Nor can it be said that the respective applications were without any merit or that either side acted unreasonably in either bringing or resisting the application. It is also material that s 12 of the uniform cross-vesting legislation provides:

Orders as to costs

Where a proceeding is transferred or removed to a court, that court may make an order as to costs that relate to the conduct of the proceeding before the transfer or removal if those costs have not already been dealt with by another court.

³² *TTE Pty Ltd v Ken Day Pty Ltd* (1992) 2 NTLR 143.

³³ *Halikos Hospitality Pty Ltd v Inpex Operations Australia Pty Ltd* [2017] NTSC 17 at [7]; *Golski v Kirk* [1987] 14 FCR 143 at 157.

³⁴ *Complete Crane Hire (NT) Pty Ltd v Marchetti Autogru Spa (Italy) (No 2)* [2015] NTSC 51 at [13].

³⁵ *Complete Crane Hire (NT) Pty Ltd v Marchetti Autogru Spa (Italy) (No 2)* [2015] NTSC 51 at [13].

³⁶ *Lexcray Pty Ltd v Northern Territory of Australia (No 3)* [2015] NTSC 83 at [4]-[6].

³⁷ *Stewart v Netball Northern Territory* [2012] NTSC 79 at [21]; *CH2M Hill Australia Pty Ltd v ABB Australia Pty Ltd (No 2)* [2016] NTSC 43 at [12].

[65] There is no call for the costs of either application to be decided immediately. That question should be left to the Federal Court because it will be in the best position to weigh up all relevant costs considerations once it has determined how the proceeding is appropriately configured.

Orders

[66] I make the following orders:

- (a) Pursuant to r 23.02 of the *Supreme Court Rules 1987* (NT), the statement of claim filed by the plaintiffs on 14 January 2026 is struck out.
- (b) Pursuant to s 5(1)(b) of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NT), proceeding No 2025-01118-SC pending in the Supreme Court of the Northern Territory is transferred to the Federal Court of Australia.
- (c) The costs of the application for transfer and the application for a stay of proceedings or the striking out of the statement of claim are reserved for determination by the Federal Court of Australia in accordance with s 12 of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NT).
