HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA No. D5 of 2022

DARWIN REGISTRY

BETWEEN: **ENID YOUNG**

First Appellant

PETRIA CAVANAGH IN HER CAPACITY AS ADMINISTRATOR OF THE ESTATE OF ROBERT CONWAY (DECEASED)

Second Appellant

And

CHIEF EXECUTIVE OFFICER (HOUSING)

Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE RESPONDENT

Ground 1 – Section 122(1)(a) and damages for distress and disappointment

1. The proper construction of s 122(1)(a) of the *Residential Tenancies Act 1999* (NT) (**Act**) in its application to a claim for a failure to comply with an obligation in a tenancy agreement, requires the Tribunal to apply the common law principles concerning loss and damage for breach of contract, including those for distress and disappointment, save to the extent that those principles are modified by the Act.

2. There are at least three textual indicators that the Act evinces an intention to operate against the backdrop of the common law contractual principles concerning loss and damage arising from breach of contract:

   (a) First, the legislative choice to make some obligations a term of the tenancy agreement (e.g. s 49(1)) and other obligations the subject of a statutory norm of conduct (e.g. s 28B) is the manifestation of a parliamentary intention that the compensation for the breach of the former shall be determined by reference to the common law principles for the recovery of damages for breach of contract. The power to award compensation under s 122(1)(a), being the principal means by which the Tribunal can "enforce" a term of a tenancy agreement, is the equivalent of the common law secondary obligation to pay damages where a contractual promise has not been honoured.

(i) *Reardon v Ministry of Housing* (Supreme Court of Victoria, Smith J, 13 November 1992) [JBA Vol 5, Pt D p1006].

(b) Secondly, the reference to "failed to comply" in s 122(1)(a) picks up the common law principles concerning breach and "loss and damage" picks up the damage recoverable at common law for breach. Those principles, as modified by provisions like s 122(3), then inform the Tribunal's discretion whether to order compensation, and the amount of compensation.

(c) Thirdly, s 120 concerning mitigation of damages impliedly (as the principles of mitigation only operate in the context of the common law damages) and expressly (by the words "loss or damage on breach of contract") adopts the common law principles concerning recovery of damages.

3. The Appellants' construction of s 122(1)(a) should be rejected because the Act is not a "self-contained scheme" or a "detailed and special Code of Contract" because of the many instances in which it relies on the continued existence of the law of contract. It is to be expected that Parliament would have used clear words had its intention been to displace the common law rules for breach of not only the terms imposed by the Act, but also of any other terms agreed between a landlord and tenant, and replace them with the but-for test.

(a) *Williams v Wreck Bay Aboriginal Community Council* (2019) 266 CLR 499 [JBA Vol 3, Pt C p493];

(b) *Coco v R* (1994) 179 CLR 427 [JBA Vol 3, Pt C p230].

Ground 2 – The object of the tenancy agreement

4. The characterisation of the tenancy agreement between the First Appellant and the Respondent reveals that does not have as its object the provision of enjoyment, relaxation or freedom from molestation when regard is had to the type of contract and the contract as a whole. There is no assumption of responsibility by the Respondent to provide the First Appellant with an experience of enjoyment or relaxation or to keep the First Appellant free from harm or harassment. Those are matters for the First Appellant to arrange.

(a) *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 [JBA Vol 3, Pt C p166];

(b) *Moore v Scenic Tours Pty Ltd* (2020) 268 CLR 326 [JBA Vol 3, Pt C p375].

5. The question of whether an important or principal object is sufficient does not arise in this case, but the principle should in any event not be accepted. *Farley v Skinner* [2002] 2 AC 732 [JBA Vol 4, Pt D p635] was essentially two contracts in one, the parties agreed a special term and the importance of the promise, and the consequences to the promisee in the event of breach, was apparent to the promisor at the time of the contract. The case is not authority for the proposition that a contract will have more than one object for the purpose of determining whether damages for distress and disappointment can be recovered. *Taylor v Burton* 708 So 2d 531 (1998) [JBA Vol 5, Pt D p1266] and *Fidler v Sun Life Assurance Co of Canada* [2006] 2 SCR 3 [JBA Vol 4, Pt D p676] cannot be transposed into the Australian common law. It cannot be said that s 48(1), s 49(1) and s 65 reflect a principal or major object of the tenancy agreement: *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 [JBA Vol 3, Pt C p266].

6. The Court should reject the submission that it is sufficient that it is an object of the contract to provide enjoyment, relaxation or freedom from molestation as such a principle reduces to an assessment of the object of a particular clause rather than the object of the contract. A principle so formulated is inconsistent with the principle in *Baltic Shipping*. The three clauses relied upon by the Appellants do not, in any event, have the requisite object.

(a) *Branchett v Beaney* [1992] 3 All ER 910 [JBA Vol 4, Pt D p578];

(b) *Residential Tenancies Tribunal of New South Wales v Offe* (Supreme Court of New South Wales, Abadee J, 1 July 1997) [JBA Vol 5, Pt D p1039];

(c) *Strahan v Residential Tenancies Tribunal* (Supreme Court of New South Wales, Dowd J, 9 December 1998) [JBA Vol 5, Pt D p1197].

Dated: 16 March 2023

Nikolai Christrup **Hamish Baddeley**