HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	D5/2022
File Title:	Young & Anor v. Chief Executive Officer (Housing)
Registry:	Darwin
Document filed:	Form 27D - Respondent's submissions
Filing party:	Respondent
Date filed:	02 Dec 2022

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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

RESPONDENT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

2. The issue raised by ground 1 is whether, in determining the first appellant's (**Young**) application for compensation for breach of a tenancy agreement under s 122(1)(a) of the *Residential Tenancies Act 1999* (NT) (**Act**), the common law principles concerning the recovery of damages for distress and disappointment for breach of contract can be properly applied. The respondent (**CEO**) disagrees that the appeal concerns a claim for compensation for breach of the Act[1]. Young has at all times confined the compensation claim to one based on the CEO's failure to comply with the tenancy agreement.

3. Ground 2 concerns whether the residential tenancy agreement between Young and the CEO is a contract with the object of providing enjoyment, relaxation or freedom from molestation for the purpose of the rule in ***Baltic Shipping*** *Co v Dillon* (1993) 176 CLR 344.

4. Ground 3 is not in issue as the parties are largely in agreement as to its resolution.

Part III: Notice

[1] Cf AS[1(a)].

5. Notice is not required under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Facts

Background facts

6. A periodic tenancy agreement between Young and the CEO commenced on 13 November 2011[2] and included terms requiring the payment of $184 rent per week[3] and those prescribed in reg 10 and schedule 2 of the *Residential Tenancies Regulations 2000* (NT) (**Regulations**) by s 19(4) of the Act (**Tenancy Agreement**). The subject premises had no back door at commencement so the tenant installed a mesh-steel door to secure the property[4]. The CEO was notified of the need to install a back door on 22 January 2016 and it was installed in late March 2016[5].

7. The premises were not, as the Appellants' Submissions (**AS**) suggest, "invaded by snakes"[6] as a result of the missing back door, or "destroyed by the return of 'roaming wild horses' who bent [Young's] metal perimeter fence"[7]. Rather, the Tribunal found that: "While [Young] noted that a snake came through a gap, it would appear that this occurred after the back door was repaired"[8]. Young's evidence about the perimeter fence and wild horses was simply that the "fence around the property was bent to the ground in many places. This was not caused by me – I do not have the strength. I think it may have been caused by roaming wild horses."[9] As noted by the Court of Appeal (**NTCA**), "there was no finding by the Tribunal of physical inconvenience by reason of the breach [in failing to provide a back door], and no evidence on which to make such a finding."[10] There is no need to comment in this Court on AS[25]-[26] to the extent they concern the damages to which Young claims to be entitled.

Tribunal proceedings

8. Young applied to the Tribunal for compensation under s 122(1)(a) for various alleged breaches of the Tenancy Agreement, including a breach of the term in s 49(1) (that the

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2 *Various Applicants from Santa Teresa v Chief Executive Officer (Housing)* [2019] NTCAT 7 (**Tribunal decision)**, [27], [95] (Core Appeal Book (**CB**) 11, 27).
3 Tribunal decision, [93]-[94], [107] (CB 27, 29).
4 Tribunal decision, [161] (CB 42).
5 Tribunal decision, [161], [163], [164], [280] (CB 42, 62).
6 AS[25]-[26].
7 AS[26], see also AS[12] and [25].
8 Tribunal decision, [287] (CB 64).
9 Tribunal decision, [167] (CB 43).
10 *Chief Executive Officer (Housing) v Young & Anor* [2022] NTCA 1 (**NTCA decision**), [68] (CB 202).

landlord take reasonable steps to provide security devices that are necessary to ensure the premises is reasonably secure) by the CEO's failure to install a back door.

9. Young sought 'non-economic compensation' for such breaches based on the application of the *Baltic Shipping* principles to s 122(1)(a). That is, Young implicitly assumed the application of the common law '**general rule**' that damages for distress and disappointment are not recoverable for breach of contract by arguing that the Tenancy Agreement fell within the '**second limb**' exception to the general rule – being where the contract is one the object of which is to provide enjoyment, relaxation or freedom from molestation[11].

10. In relation to this issue, the Tribunal, at [282], held that "in appropriate cases, the Tribunal can award compensation for distress and disappointment arising from a breach of a tenancy agreement" and said that the relevant principles to be applied were those articulated by Mason CJ in *Baltic Shipping* that:

> [A]s a matter of ordinary experience, it is evident that, while the innocent party to a contract will generally be disappointed if the defendant does not perform the contract, the innocent party's disappointment and distress are seldom so significant as to attract an award of damages on that score. For that reason, if for no other, it is preferable to adopt the rule that damages for disappointment and distress are not recoverable unless they proceed from physical inconvenience caused by the breach or unless the contract is one the object of which is to provide enjoyment, relaxation or freedom from molestation.

11. The Tribunal, at [284]-[291], then proceeded to award compensation, beyond nominal damages, for disappointment and distress (for the various breaches it found) only where there was evidence that the disappointment and distress was "arising from"[12] or "due to"[13] physical inconvenience caused by the breach. While not expressly stated, it seems clear

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11 See the Applicants' closing submissions to the Tribunal dated 20 December 2018, [98] (Respondent's Book of Further Material (**RBFM**) 4) which submitted for 'non-economic compensation' by quoting *Reiss & Anor v Helson & 2 Ors* [2001] NSW 486, [53] that: "The method by which the amount of compensation [for non-economic loss] should be determined is outlined by Abadee J …". This is a reference to Abadee J's decision in *Residential Tenancy Tribunal v Offe* (NSWSC, unreported 1 July 2017) – that being a case in which the *Baltic Shipping* principles (including the general rule) were applied to the statutory compensation provisions. The Respondent's closing submissions dated 28 December 2018 did not respond to this issue, such that the Applicant's closing submissions in reply dated 22 January 2019 then submitted at [2] (RBFM 5) that because the Respondent's submissions had eschewed the opportunity to respond to the issue, the appropriateness of compensation based on [98] (RBFM 4) of the Applicant's closing submissions dated 20 December 2018 should be accepted.

12 Tribunal decision, [284.1], [284.2] (CB 63).

13 Tribunal decision, [291] (CB 65).

that the Tribunal did not consider that the Tenancy Agreement (or the other tenancy agreements the subject of the Tribunal proceedings) fell within the 'second limb' exception[14].

12. The Tribunal did not find that the CEO had breached the s 49 term of the Tenancy Agreement by failing to provide a back door to the premises[15]. However, it did find that the CEO breached the s 57(1) term of the Tenancy Agreement by failing to repair or install the back door.

Appellants' submissions about the Tribunal proceedings

13. At AS[14], the Appellants purport to set out, incorrectly, the parties' positions on compensation under s 122(1)(a) in the Tribunal proceedings. In fact, Young did not seek compensation for non-economic loss under s 122(1)(a) 'in its own terms' separately from the *Baltic Shipping* principles. Rather, Young sought non-economic loss based on the application of *Baltic Shipping* principles to s 122(1)(a)[16]. It is correct that the CEO did not contest the application of those principles (which continues to be its position). As noted by Blokland J in the Supreme Court (**NTSC**) proceedings: "Both parties recognise the principles from *Baltic Shipping Co v Dillon* apply to residential tenancies"[17].

Supreme Court proceedings

14. The NTSC relevantly held (and the CEO had conceded[18]) that the CEO's failure to furnish the premises with a back door was a breach of the s 49(1) term of the Tenancy Agreement[19]. Further, the NTSC held that Young was entitled to compensation under s 122(1) in the amount of $10,200, for distress and disappointment caused by the breach. The basis of this award was not that distress and disappointment proceeded from physical inconvenience (so as to be within the 'first limb' exception to the general rule) but because the Tenancy Agreement was an agreement whose object was to provide 'enjoyment, relaxation and freedom from molestation' and so within the 'second limb' exception[20].

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14 The submission at AS[15]-[16] that the law in the Northern Territory until the NTCA decision permitted recovery absent physical inconvenience is misconceived.
15 Tribunal decision, [166] (CB 43).
16 See fn 11 above.
17 *Young & Conway v Chief Executive Officer, Housing* [2020] NTSC 59 (**NTSC decision**), [90] (CB 128).
18 AS[20] fn19 incorrectly asserts that the CEO conceded that substantial damages should be awarded. The primary submission at [69] was that only nominal damages were appropriate.
19 NTSC decision, [85]-[87] (CB 126, 127).
20 As found by in the NTCA decision, [53], which finding has not been appealed (CB 109, 110).

Court of Appeal proceedings

15. The CEO appealed the NTSC's decision on the basis, *inter alia*, that the NTSC had erred in finding that the Tenancy Agreement fell within the 'second limb' exception[21].

16. In the NTCA proceedings, both parties again accepted that the 'general rule' in common law applied to compensation determinations under s 122(1). Accordingly, the contest between the parties was as to whether the 'second limb' exception to the general rule applied.

Part V: Argument

A. SUMMARY

17. The CEO advances the following propositions:

    (a) as matter of statutory construction, save as modified by the Act (most obviously by ss 112(8), 122(2), (3) and (5)), the common law principles concerning the recovery of damages for breach of contract apply to the determination of an application under s 122(1)(a) for compensation for loss and damage suffered because the other party has failed to comply with the tenancy agreement, including the rules concerning the recovery of damages for distress and disappointment (ground 1); and

    (b) the Tenancy Agreement does not have as its object the provision of enjoyment, relaxation or freedom from molestation (ground 2).

18. Save for ground 3, the appeal should therefore be dismissed.

B. GROUND 1

19. The Act evinces the intention that where a landlord or a tenant seeks compensation under s 122(1)(a) for a failure by the other to comply with the tenancy agreement, the common law principles governing the recovery of loss and damage for breach of contract apply save to the extent those principles are modified by the Act, most obviously by ss 112(8), 122(2), (3) and (5). This is made plain when one considers the statutory text and operation of the Act. It is also consistent with the objects of the Act and the case law at the time the Act commenced.

The statutory text and operation

[21] Amended Notice of Appeal dated 23 February 2021, Ground E (CB 138, 139).

20. Section 122(1)(a) relevantly provides that the Tribunal "may", on the application of a landlord or tenant "under a tenancy agreement", order compensation for "loss or damage" suffered by the applicant be paid to the applicant by the other party to the agreement "because" the other party has "failed to comply with the agreement"[22]. The intended application of common law principles to the recovery of compensation for a failure to comply with the agreement is indicated by the following textual and operative matters.

21. *First*, s 122(1) requires the Tribunal to apply common law principles to determine whether the parties entered into a tenancy agreement. By s 4, a "tenancy agreement" means "an agreement under which a person grants to another person for valuable consideration a right (which may be, but need not be, an exclusive right) to occupy premises for the purpose of residency". This clearly incorporates the general contract law principles of "agreement" and "consideration" and contract law principles specific to leases, such as "grant" and "right to occupy".

22. *Secondly*, subject only to the Act[23] and the Tribunal's power to rescind or vary a harsh or unconscionable term[24], the Act envisages that the landlord and tenant are at liberty to agree on any terms they like[25].

23. *Thirdly*, the Act recognises that the terms of the contract can be breached[26] and enforced[27]. The enforcement is not confined to a compensation order by the Tribunal under s 122, but would extend to e.g., a personal injury claim in the Supreme Court for breach of the contractual term in s 48(1)(b) to ensure the premises meet all safety requirements specified under an Act that apply to residential premises[28].

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22 It may be convenient to determine the appeal by reference to the Act in its present form. The breach of the term in s 49(1) of the Act occurred at the beginning of the periodic tenancy on 13 November 2011 and the CEO provided the back door in late March 2016. The CEO does not consider that the amendments to the Act since late March 2016 affect the resolution of either ground of appeal.

23 An agreement or arrangement that is inconsistent with the Act or Regulations or purports to exclude, modify or restrict the operation of the Act or Regulations is void to the extent of the inconsistency unless permitted by or under the Act (s 20(1) and (2)).

24 Act, s 22.

25 The Act does not contain a prohibition on the parties negotiating and agreeing the terms, nor does it purport to exhaustively specify the terms of a tenancy agreement. See also s 13(3)(c) concerning model tenancy agreements and ss 96B(1)(b) and 96C(1)(b) concerning the tenancy agreement specifying that breach of a term permits the other party to terminate the agreement.

26 Act, ss 96A(1), 96B(1), 96C(1), 97(1)(a) and 98.

27 Act, ss 3(c) and 8(a) and (b).

28 The Tribunal does not have jurisdiction to hear such a claim, see s 122(5)(a). However, the Act does not purport to extinguish such a claim or to prevent it being brought in a court.

24. *Fourthly*, the Act goes to great length to provide that certain terms are incorporated into the tenancy agreement[29]. This is in contradistinction to the other instances in the Act where Parliament has provided for a free-standing norm of conduct without making it a term of the tenancy agreement[30]. The adoption of these two different means of imposing obligations is a strong indication that Parliament intended the contractual ones to be enforceable in accordance with the law of contract. The statutory imposition of a term into a contract usually carries with it the full contractual liability for breach[31].

25. *Fifthly*, s 120 provides that the rules of contract law about mitigation of loss or damage on breach of contract apply to a breach of a tenancy agreement. The rules of mitigation provide that the loss or damage to which a plaintiff may otherwise be entitled shall nonetheless be reduced or not recovered where the plaintiff has failed to take reasonable steps to reduce or avoid that damage. Critically, those rules presuppose the application of the more general rules concerning the recovery of loss and damage in contract, described in s 120 as "loss or damage on breach of contract".

26. *Sixthly*, the cause of action for compensation under s 122(1)(a) for failing to comply with a tenancy agreement reflects the principle of privity of contract by confining the claim to one between landlord and tenant.

27. *Seventhly*, the Act relies extensively on concepts from the law of contract as it applies to tenancies, including "termination", "fixed term tenancy", "periodic tenancy", "rent", "occupation", "right of occupancy", "bond", "rescinding", "varying a term", rent increases, liabilities of the tenant, "reasonable wear and tear", abandoned premises, "vacant possession", "exclusive possession", "remedy the breach" and "make good".

28. *Eighthly*, a claim for compensation can be made where a party has "failed to comply with the agreement". This requires the Tribunal to apply common law principles regarding whether the tenancy agreement has been breached. It may here be noted that the Act interchangeably uses the terms 'breach' and 'failure to comply' (e.g., ss 48(2) and

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29 Sections 12(1), 21, 35, 48(1), 49(1), 49(2), 49(3), 51(1), 51(2), 52(1), 52(2), 54, 55(1), 55(3), 56, 57(1), 58(1), 64(1), 64(3), 65, 65A(1), 68(1), 78(1) and 78(2). Section 19(1)(d) requires that the statutory terms must be reproduced in the written tenancy agreement.

30 For example see ss 19(1), 19(2), 19(3), 20(4), 23, 24(1), 24(3), 25(2), 28B, 29(1), 29(3), 29(4), 29(5), 31(1), 31(2), 31(3), 32, 36(1), 36(4), 36(5), 37(1), 37(2), 37(3), 39(1), 39(2), 39(3), 43(1), 44(1), 47, 50(1), 50(2), 53(1), 53(2), 66(1), 66(2), 67(1), 67(2), 77, 77A(4), 80, 81(1), 106, 109(1), 109(3), 109(4), 109(6), 109(8), 110(2), 112(2), 115(2), 117, 118(2), 118(3), 130(2), 132(1), 132(3), 139(4), 139(5), 156(1) and 156(2).

31 See *Wallis v Downard-Pickford (North Queensland) Pty Ltd* (1994) 179 CLR 388, 396 (Toohey and Gaudron JJ, Deane and Dawson JJ agreeing, 393).

122(2)(b)). Clearly, it would be an error for the Tribunal to find a breach of the tenancy agreement where no such breach would be found as a matter of contract law. The fact that ss 48(2), 51(3), 57(2) and (3) expressly stipulate various situations that are deemed not to be a "breach" does not indicate otherwise.

29. *Finally*, the overall operation of the Act is to superimpose the statutory provisions onto the common law tenancy agreement between the landlord and the tenant. For example, the parties may agree on a term providing for rent reviews every 6 months[32], however, the procedure for the exercise of the right by the landlord must be in accordance with s 41(2). The Act contains no express provision to the effect that the common law principles concerning the law of contract, or the recovery of damages for breach of contract, do not apply. By giving the Tribunal jurisdiction to award compensation for breach of a tenancy agreement it is assumed that contract law principles regarding the recovery of damages apply unless indicated otherwise.

30. It follows from [21] to [29] above that, where s 122(1)(a) provides that a claim can be made for compensation where the claimant has "suffered" "loss or damage" "because" the other party has failed to comply with the tenancy agreement, that must necessarily be by reference to those concepts as they are known in the law of contract. This includes the principles concerning causation and remoteness and the rules governing the recovery of damages for distress and disappointment[33]. There was therefore no need to carve out damages for distress and disappointment[34] - noting that such a carve out would actually displace, not reflect, the common law principles[35].

<u>The case law at the commencement of the Act</u>

31. Contrary to AS[41]-[42], the Act was made in the context of an assumption that common law principles applied to statutory compensation under residential tenancies legislation. That is, the Act was drafted in the context of an assumption by the courts and tribunals that

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32 Section 48(1).

33 By using such language, s 122(1) necessarily involves consideration of these principles in contract law. As Gummow J said in *Elna Australia Pty Ltd v International Computers (Aust) Pty Ltd [No 2]* (1987) 16 FCR 410 at 418-419, concepts the common law would describe by the terms 'causation' and 'remoteness' and 'measure of damages' are necessarily wrapped up within s 82 of the *Trade Practices Act 1974* (Cth) (noting that Gummow J's statement was approved by McHugh J in *Henville v Walker* (2001) 206 CLR 459, [135] and [136] (similarly, see [18]-[31] per Gleeson CJ)). This is the case *a fortiori* for these concepts in contract law *viz.* s 122(1) of the Act.

34 Cf AS[34]; Cf s 122(5)(a) viz. compensation in respect of death, physical injury, pain or suffering.

35 Cf AS[34]:The common law *Baltic Shipping* principles do not 'carve out' such damages but rather provide that they can only be awarded in certain circumstances (i.e. if one of the exceptions applies to the general rule that damages for distress and disappointment are not recoverable for breach of contract).

the common law *Baltic Shipping* principles applied in determining statutory compensation for breach of a tenancy agreement[36]. Similarly, the authority extracted at AS[41] (*Reardon v Ministry of Housing* (Supreme Court of Victoria, Smith J, 13 November 1992)) assumes that it is only loss and damage that is 'compensable at common law' which is to be compensated under the legislation, stating (our emphasis):

> The expression "loss and damage" is a wide one and I would expect an express limitation to be included (as in s.106(4)) if it was intended by the Parliament to exclude compensation for a typical consequence of disruption to quiet enjoyment and one that is compensable at common law.[37]

The construction of s 122(1)(a) advanced by Young should be rejected

32. The effect of the construction of s 122(1)(a) advanced by Young is that the principles of contract law governing the recovery of damages for breach of the agreement do not apply save to the extent that the Act otherwise expressly provides[38]. It is put that the relevant loss and damage must be determined by reference solely to the "but for" test[39]. The Court should not, for the reasons set out in [19] to [31] above, accept this construction.

33. Further, this construction suffers from the following additional shortcomings.

34. *First*, it rests on the erroneous proposition that s 122(1)(a) of the Act requires that the principles applicable to determining compensation for loss and damage for failing to comply with a tenancy agreement must be the same as the principles applicable to failing to comply with an obligation under the Act relating to the tenancy agreement. There is no reason why this should be so and Young cites no authority for this proposition.

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36 The courts and tribunals that considered compensation under equivalent pre-existing residential tenancies legislation for breach of a tenancy agreement applied the common law *Baltic Shipping* principles to determine whether compensation for disappointment and distress could be awarded. This includes the authorities relied upon by Young in relation to Ground 2 – i.e., *Residential Tenancies Tribunal v Offe* (Supreme Court of New South Wales, Abadee J, 1 July 1997); *Strahan v Residential Tenancies Tribunal of NSW* (Supreme Court of New South Wales, Dowd J, 12 September 1998); *Reiss v Helson* [2001] NSW 486; *Robinson v Fretin* [2006] NSWSC 598; *Blackington v Leonard Hogg* [2007] NSWSC 266 at [47]. It should also be noted that the textbook commentary referenced by the Appellants in support of their submissions at AS[28] fn 35 actually contradicts them. Bradbrook, MacCallum & Moore, *Residential tenancy law and practice: Victoria and South Australia* (Law Book Co., 1983) at [2423], which discusses a provision in similar terms to s 122, in fact provides that Tribunals "have power to limit compensation by some test of remoteness".

37 At 16.

38 AS[28]-[30], [32]. It can be noted that this is essentially the opposite to what Young submits about the term incorporated into the Tenancy Agreement by s 65(a) of the Act at AS[55]-[59], i.e., that s 65 is a statutory statement of the common law right to quiet enjoyment but with statutory modifications (additions) to it.

39 AS[37].

35. The fact that Parliament went to the trouble of specifying that certain obligations imposed by the Act are terms of the tenancy agreement, and that other obligations are statutorily mandated norms of conduct and not terms of the tenancy agreement, suggests that Parliament intended for the determination of compensation for the two different types of breach to be determined through different legal lenses.

36. Unlike s 236 of the *Australian Consumer Law* (**ACL**)[40], or its predecessor in the form of s 82 of the *Trade Practices Act 1974* (Cth) (**TPA**), s 122(1)(a) expressly refers to loss and damage suffered because of a breach of an agreement. There is no reason in principle why the rules governing the recovery of loss or damage for failing to comply with purely statutorily imposed norms of conduct, such as the content of a condition report under s 25(2), should apply where a statute expressly refers to a cause of action well recognised by the common law.

37. Moreover, it has been observed that even within a provision like s 236 of the ACL, it may be necessary to apply different principles for the recovery of loss or damage depending on the nature of the underlying contravening conduct. For example, compensation under s 82 of the TPA "can apply in many different kinds of case"[41], such that the applicable principles will vary depending on the type of case being considered (for example, in misleading and deceptive conduct cases, principles from the tort of deceit may be appropriately applied[42], whereas for cases considering compensation for a misuse of market power or engaging in exclusive dealing, different principles would apply[43]). Likewise, in determining the compensation for loss or damage suffered under s 122(1)(b), the Tribunal is in all likelihood required to apply the general principles concerning restitution for unjust enrichment[44]. The suggestion at AS[40] that the Tribunal or a court cannot adopt bifocal legal lenses depending on the nature of the claim is untenable.

38. In any event, the question of whether or not "different legal lenses" apply to compensation for breach of a tenancy agreement compared with compensation for breach of an obligation of the Act is not an issue that arises in this case[45]. The answer to this question (and the

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40 *Competition and Consumer Act 2010* (Cth), Sch 2.

41 *Marks v GIO Holdings Australia Ltd* (1998) 196 CLR 494 (***Marks v GIO***), 509 [33] (McHugh, Hayne and Callinan JJ).

42 *Henville v Walker* (2001) 206 CLR 459, [135] (McHugh J with whom Gummow J agreed); see also [31] (Gleeson CJ);

43 *Marks v GIO*, 509 [33] (McHugh, Hayne and Callinan JJ).

44 Subject to the express modifications such as those in s 122(3) and (5).

45 Young's claims against the CEO have always been confined to alleged breached of the Tenancy Agreement.

identification of the limits on compensation for breach of an obligation of the Act) does not affect how compensation for breach of a tenancy agreement is properly determined.

39. *Secondly*, given that the Act preserves freedom of contract (see [22] above) and contemplates that the terms of the contract can be enforced (see [23] above), one would expect Parliament to have been express in its intention that the recoverable loss and damage for a breach should be thrown open to include any loss which satisfies the "but for" test[46]. There is no indication in the Act or in the second reading speech that Parliament intended such a radical departure from the well-established principles governing damages for breach of contract. Such a construction does not even allow for the application of the common law principles as a guide[47].

40. *Thirdly*, a construction which exposes tenants and landlords to indeterminate contractual liability by reference to the "but for" test is at odds with the objects of the Act. The objects of the Act are set out in s 3 as being, relevantly, to "fairly balance the rights and duties of tenants and landlords"[48], to improve their "understanding" of their rights and obligations in relation to residential tenancy leases[49] and to ensure they are provided with a suitable mechanism to enforce their rights[50].

41. There is nothing in these objects to suggest that compensation for breach of the tenancy agreement is intended to go beyond what would be available at common law. If anything, the purpose of the Act, in seeking to fairly balance rights and improve the understanding of those rights, points against the expansion of liability for breach of a tenancy agreement beyond that recoverable at common law.

42. The text of the Act repeatedly shows a legislative intention to limit, not expand, the amount of compensation recoverable for a breach of the tenancy agreement to that recoverable at common law. This can be seen most clearly in s 122(3) which is directed at limiting the recovery of common law damages rather than expanding them. A construction of s 122(1)(a) allowing for compensation for breach of a tenancy agreement depending only on a 'but for' test of causation would significantly expand potential compensation beyond the

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46 *Coco v R* (1994) CLR 427, 437 (Mason CJ, Brennan, Gaudron, McHugh JJ).
47 See *Henville v Walker* (2001) 206 CLR 459, [18] (Gleeson CJ)
48 Section 3(a).
49 Section 3(b).
50 Section 3(c).

parties' contemplation and would be contrary to the legislative intention to limit, not expand, liability.

43. *Fourthly*, confining the inquiry for the recovery of loss and damage for breach of a tenancy agreement to ss 120 and 122(3), without the application of common law principles, would not work in practice. The former is addressed in [25] above. As to s 122(3), it can be readily seen that it is directed at specific factual scenarios, most of which are unlikely to be present in many compensation claims.

Conclusions on ground 1

44. The NTCA was correct in applying the common law principles governing the recovery of damages for distress and disappointment to a claim under s 122(1)(a) for compensation for loss and damage for failing to comply with a tenancy agreement.

45. The observation at NTCA decision [55][51] concerning s 122 necessarily importing considerations of foreseeability and remoteness was clearly confined to a claim based on a failure to comply with the tenancy agreement and should not be taken to extend to a claim based on a failure to comply with the Act. The NTCA was dealing with a claim for breach of a tenancy agreement only, had referred to "a breach of the tenancy agreement" at NTCA decision [54] and had referred to "a breach of contract" in the first sentence at NTCA decision [55].

46. Further, the reference to "foreseeability" was a reference to the two limbs in *Hadley v Baxendale*[52] rather than a reference to the limit on the recovery of loss and damage in the law of torts. The same label was applied by this Court in *Reg Glass Ltd v Rivers Locking Systems Pty Ltd*[53] concerning a claim for breach of contract[54] and the NTCA did not apply foreseeability as a separate criterion in analysing whether damages for distress or disappointment were available on the basis that the Tenancy Agreement had as its object the provision of enjoyment, relaxation or freedom from molestation.

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51 (CB 191).
52 (1854) 156 ER 145.
53 (1968) 120 CLR 516.
54 Ibid at 523 (Barwick CJ, McTiernan, Menzies JJ): "This involves two steps. First that the loss suffered resulted from the breach, and secondly that the loss suffered was, when the contract was made, reasonably foreseeable as likely to result from such a breach".

47. Contrary to AS[31]-[32], the NTCA was not adding words or superimposing common law concepts that are not apparent in the text of the Act. These concepts are apparent in and 'wrapped up'[55] in the text of s 122(1).

C. GROUND 2

48. The NTCA found that the Tenancy Agreement was not a contract for the provision of enjoyment, relaxation or freedom from molestation such that damages for distress and disappointment were not recoverable in the absence of physical inconvenience. This conclusion involved no error because the Tenancy Agreement did not have as its object the provision by the CEO of enjoyment, relaxation or freedom from molestation.

10 The legal principles

49. Damages for distress and disappointment are as a matter of policy[56] not available at common law for breach of contract unless it is breach of a promise of marriage, where the breach caused physical injury, where the breach caused physical inconvenience and the distress and disappointment was directly related to that inconvenience or where the object of the contract was to provide enjoyment, relaxation or freedom from molestation[57].

50. As to the last of those categories, there must be a promise, express or implied, to provide enjoyment, relaxation or freedom from molestation[58]. Where there has been a breach of that promise, the damages flow directly from the breach of contract because the breach results in a failure to provide the promised benefits[59].

20 51. There is a question whether the breached term must itself have the object of providing enjoyment, relaxation or freedom from molestation or whether it is sufficient that the contract as a whole has those objects. The observations in *Baltic Shipping*[60] and ***Moore** v*

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55 See fn 33 above.

56 *Baltic Shipping* at 361-2 (Mason CJ, Toohey and Gaudron JJ agreeing at 383, 387, respectively), 369 (Brennan J), 380-1 (Deane, Dawson JJ). The general rule prohibiting damages for distress and disappointment is probably best viewed as a qualification to the rule in *Hadley v Baxendale* that damages for breach of contract must either arise according to the usual course of things from such a breach of contract itself or such as may reasonably be supposed to have been in the contemplation of the parties.

57 *Baltic Shipping* at 363, 365 (Mason CJ, Toohey and Gaudron JJ agreeing at 383, 387, respectively), 381 (Deane, Dawson JJ) and 405 (McHugh J). See also Brennan J at 370.

58 *Baltic Shipping* at 365 (Mason CJ, Toohey and Gaudron JJ agreeing at 383, 387, respectively), 370, 371 (Brennan J), 381-2 (Deane, Dawson JJ), 405 (McHugh J).

59 *Baltic Shipping* at 365 (Mason CJ, Toohey and Gaudron JJ agreeing at 383, 387, respectively), 369-70 (Brennan J), 382 (Deane, Dawson JJ).

60 *Baltic Shipping* at 365 (Mason CJ, Toohey and Gaudron JJ agreeing at 383, 387, respectively), 370 (Brennan J), 382 (Deane, Dawson JJ), 394 (McHugh J).

Scenic Tours (2020) 377 CLR 209[61] support the view that it is the term that was breached that must have the requisite object.

The 'central object' or merely 'an object'

52. In *Baltic Shipping*, Mason CJ (with whom Toohey and Gaudron JJ relevantly agreed), described the 'second limb' exception as where "the very object"[62] of the contract was to provide pleasure, relaxation or freedom from molestation. Dawson and Deane JJ expressed the same sentiment[63]. In *Moore*, this Court quoted with apparent approval Mason CJ's formulation[64]. The submission at AS[46], [68] that it being "an object" of the contract is sufficient (expressed by Brennan J in *Baltic Shipping*) has not been accepted by this Court and the NTCA committed no error in adopting the "central object" test[65].

53. AS[69] refers to various formulations of the requisite object in other countries, but they are not consistent and cannot simply be transplanted into Australian law. In any event, regardless of which of these tests applies, it is plainly the case that the Tenancy Agreement did not have a 'principal', 'central', 'major or important' or 'significant' object of providing Young with pleasure, relaxation or freedom from molestation in the *Baltic Shipping* sense.

The Tenancy Agreement and the breach

54. The terms of the Tenancy Agreement are those in schedule 2 to the Regulations as supplemented by the terms incorporated by the Act[66].

55. The only breach forming the basis for ground 2 of the appeal is of the term of the Tenancy Agreement required by s 49(1)[67] of the Act,, which provides that the CEO will 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.

56. These submissions demonstrate below that the Tenancy Agreement cannot be characterised as having the object of providing enjoyment, relaxation and freedom from molestation in the requisite sense.

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61 *Moore* at [45] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon JJ, Edelman J agreeing at [62]).
62 363.
63 382.
64 *Baltic Shipping*, [44].
65 NTCA decision, [58], [59], [61], [66] (CB 193, 194, 195, 200).
66 Tribunal decision, [78], [81] (CB 19, 20).
67 NTCA decision, [53].

The object of the Tenancy Agreement

57. The 'second limb' principles in *Baltic Shipping* and confirmed in *Moore* are that damages for disappointment and distress, not proceeding from any physical inconvenience, can be awarded where "the very object of the contract has been to provide pleasure, relaxation or freedom from molestation"[68]. Critically, it can be seen that the object of the contract must be to "provide" (or "promise") these things – as opposed to providing a base setting from which the promisee may or may not experience them.

58. The inclusion within the second limb exception of contracts with the object of providing pleasure, enjoyment and relaxation derives from cases where the contract is "to provide a stipulated holiday, entertainment or enjoyment" [69].

59. The inclusion within the second limb exception of contracts with the object of providing "freedom from molestation" derives from *Heywood v Wellers* [1976] QB 466 where the plaintiff instructed the solicitor to obtain an injunction to protect the client from molestation which the solicitor negligently failed to do. That is, where the contract is *specifically* entered by the promisee for the purpose of contracting for protection or freedom from molestation by the promisor from and as against *other* persons or things.

60. The Tenancy Agreement does not fall within any of these 'exceptional categories'[70] of contract. The object of the Tenancy Agreement is to provide Young with accommodation, in accordance with the basic minimum standards required by the Act, in return for the payment of rent. Neither the object of the Tenancy Agreement, nor of the specific terms relied upon by Young, is to "provide" Young with pleasure, enjoyment or freedom from molestation.

61. At AS[48], the Appellants submit that because "peaceful and comfortable accommodation … promised to holidaymakers"[71] may fit within the 'second limb', this must therefore apply to accommodation and tenancy agreements generally[72]. This proposition misunderstands the meaning of that passage in *Baltic Shipping*. A tenancy agreement in the statutorily prescribed terms, such as the relevant Tenancy Agreement in this case, does not have the same objects as those promised to holiday makers for which "peace of mind"[73]

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68 *Baltic Shipping*, Mason CJ at 363 (with whom Toohey and Gaudron JJ agreed).
69 *Baltic Shipping*, 363 (Mason CJ).
70 *Watts v Morrow* [1991] 4 All ER 397, 959-960.
71 *Baltic Shipping* at 371 (Brennan J).
72 AS[48].
73 *Baltic Shipping* at 371 (Brennan J).

and enjoyment and relaxation are "promised" as an important object of the contract. Nowhere in the prescribed terms of the Tenancy Agreement are such things promised or provided for as the object of the contract.

62. At AS[49]-[51], the Appellants make submissions about how "few things are more central to the enjoyment of human life than having somewhere to live" and that a "home … is that where a person "lives and to which he returns and which forms the centre of his existence"." Such submissions are not to the point. Like food and clothing (and shelter), having a home may be a necessary foundation from which to enjoy life (or not). Having somewhere to live provides the base setting from which pleasure and enjoyment or otherwise, may be experienced. It does not come with a promise of pleasure, enjoyment and relaxation (such as is offered by a holiday cruise for example). Rather, relaxation and enjoyment are for the tenant to arrange (not the landlord) and will likely depend upon a range of circumstances well outside the landlord's control. The fact that a home may be the centre of a person's existence does not mean that the person who provides the home (whether it be a builder or a landlord) promises that the person will have a pleasurable and relaxing time in that home.

<u>The terms of the Tenancy Agreement relied upon by the Appellants</u>

Section 65 (AS[52]-[61], [65], [67], [70])

63. Section 65 provides a term of the Tenancy Agreement that: (a) the tenant is entitled to quiet enjoyment of the premises without interruption by the landlord or a person claiming under the landlord or with superior title to the landlord's title; and (b) the landlord will not cause an interference with the reasonable peace or privacy of a tenant in the tenant's use of the premises. This term does not "promise" peace and relaxation (which is up to the tenant). Further, it does not promise freedom from molestation - it simply provides for non-interference by the *landlord*.

64. A requirement of non-interference by the landlord does not bring the Tenancy Agreement within the *Heywood v Wellers* category of case whereby the contract is entered by the promisee for the specific purpose of seeking protection from the promisor against molestation by and as against *other* people or things. All that s 65 does is to ensure non-interference by the landlord itself (i.e., the counterparty) in a general way. Clearly, Young did not enter the Tenancy Agreement for the purpose of obtaining freedom from molestation as against the landlord. There was no specific concern or risk of interference from the CEO that the parties sought to address through s 65. Young entered the Tenancy

Agreement so as to rent the premises from the landlord (i.e., to enter into a contractual relationship from the landlord).

65. AS[55]-[59] criticise the NTCA for recognising that the s 65 term relating to "quiet enjoyment" is a "term of art" and "a statutory statement of the common law right to quiet enjoyment under a lease agreement". However, the Appellants then accept that this is so but say that the Act adds to it (AS[59]: "it contains such a statutory statement but then adds to it"). Any such additions do not transform the Tenancy Agreement into a contract with the object of providing pleasure, relaxation or freedom from molestation in the sense contemplated in *Baltic Shipping*.

10 66. As to relaxation and enjoyment, s 65(b) provides that the *landlord* will not cause an interference with the reasonable peace or privacy of a tenant in the tenant's use of the premises. In no way do these terms "provide" or "promise" pleasure and relaxation in the *Baltic Shipping* sense for the reasons already given.

Section 48 (AS[62]-[64], [65], [70])

67. Section 48(1) is a term requiring that the landlord ensure the premises is habitable, meets specified health and safety requirements and is 'reasonably' clean. The NTCA held that the term "habitable" extends to the provision of reasonable comfort but does not answer to concepts such as security, peace, dignity, humaneness and suitability[74]. In other words, s 48(1) is a term seeking to ensure that the accommodation meets certain basic minimum
20 standards (noting that AS[65] refers to these as the "most elementary needs" and "basic amenities").

68. A statutory assurance of these basic minimum standards does not mean that the object of the Tenancy Agreement is for the CEO to "provide" or "promise" relaxation, pleasure and enjoyment in the sense contemplated in *Baltic Shipping* (as in those exceptional categories of case involving contracts for holidays, entertainment or enjoyment[75]) and even less so that they somehow provide peace of mind and freedom from vexation. There is no promise by the CEO in s 48(1) that the tenant will derive enjoyment and pleasure from the premises or will not be vexated when in occupation.

Section 49(1) (AS[52]-[54], [70])

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74 NTCA decision, [46], [50] (CB 185, 186, 187).

75 Many contractual promises could be said to confer an element of "enjoyment" on the promisee in a general sense.

69. Section 49(1) provides a term of the Tenancy Agreement that the landlord will take reasonable steps to provide and maintain the locks and other security devices that are necessary to ensure the premises and its ancillary property are reasonably secure.

70. The provision is referred to in AS[52]-[54] and [70], but those passages do not rise above a submission to the effect that the landlord must provide premises that are reasonably secure and that the section has the aim of excluding others from access. There is no proper analysis of how this clause operates to confer on the Tenancy Agreement the object of providing enjoyment, relaxation or freedom from molestation to which the CEO can respond.

10 71. In truth, the term is merely an obligation concerning the provision and maintenance of locks and other security devices to ensure the "premises and its ancillary property" are reasonably secure. Notably, ss 52 and 53 place obligations of a reciprocal nature upon the *tenant*.

72. Such a requirement does not promise pleasure, relaxation or freedom from molestation. There is no promise that the tenant will not be harassed by unwelcome visitors etc. It rather provides for a basic minimum standard of security devices for the premises and it is not expressed to be aimed at any identified risk. Plainly, the s 49(1) term does not bring the Tenancy Agreement into the *Heywood v Wellers* category of case as being a contract specifically entered for the purpose of obtaining protection from molestation.

Appellants' submissions regarding 'quiet enjoyment'

20 73. At AS[73]-[77], the Appellants criticise the NTCA for focussing on the right to exclusive possession and quiet enjoyment when "'quiet enjoyment' from the landlord was not raised in this case." That is incorrect. The Appellants submitted to the NTCA (as they do in this appeal) that the Tenancy Agreement falls within the second limb exception *inter alia* by reason of the terms in s 65[76]. Further, the observations in *Offe* upon which the Appellants relied in the NTCA were in respect of a covenant of quiet enjoyment[77].

74. In this respect, the NTCA noted that in *Musumeci v Winadell Pty Ltd*[78], Santow J in considering the *Baltic Shipping* principles stated that: "The covenant for quiet enjoyment

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76 See [3]-[5] (RBFM 7, 8) of Young's submissions dated 1 February 2021 (in NTCA appeal proceeding no. AP8 of 2020) which were adopted in [9] of Young's written submissions to the NTCA in this matter dated 8 February 2021. (RBFM 9)

77 It may also be noted that the decision in *Celemajer Holdings Pty Ltd v Kopas* [2011] NSWSC 40 referenced by NTCA was in fact a residential tenancy case (cf AS[73]).

78 (1994) 34 NSWLR 723, 752.

in the lease is very different from the notion of providing "pleasure or enjoyment and personal protection"." The NTCA expressly recognised that this statement was made in a retail tenancy context rather than regarding a residential tenancy lease[79], but noted that the central question is the same, being whether an agreement affording the tenant the right to exclusive possession and quiet enjoyment has as its central object the provision of pleasure, entertainment or relaxation. There is no error in such reasoning.

75. The submissions at AS[76] about the differences between a retail lease and a residential lease are not to the point and are overstated (the object of a residential tenancy lease is not to "protect the tenant from, among other things, strangers entering the premises for the purpose of taking things").

76. The submissions at AS[77] that *Musumeci* has not been considered with apparent approval and applied is incorrect, as appears to be conceded by the Appellants by the reference to *El-Saiedy v New South Wales Land and Housing Corp*[80] (***El-Saiedy***)). The English Court of Appeal adopted a similar position in *Branchett v Beaney*[81].

Appellants' submissions on the existing case law

77. The Appellants submit that nine Supreme Court decisions confirm that tenancy agreements fall within the second limb exception[82]. However, none of the *eight*[83] Supreme Court decisions referenced by the Appellants stand as authority for this proposition. One is a decision of the South Australian Supreme Court that does not stand for or consider the point at all[84]. What is left are seven decisions of the NSW Supreme Court. However, of these seven, *Residential Tenancies Tribunal v Offe* (unreported, NSWSC 1 July 1997) (***Offe***) is the only decision where the reasoning identifies whether a residential tenancy agreement is within the 'second limb'. However, *Offe* is not a reliable authority on this point[85].

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79 NTCA decision, [61] (CB 195, 196).
80 *El-Saiedy v NSW Land and Housing Corporation* [2011] NSWSC 820, [86]-[89].
81 *Branchett v Beaney* [1992] 3 All ER 910, 916-917.
82 AS[78].
83 AS[78], fn 133.
84 *Varricchio v Wentzel* (2016) 125 SASR 191 (Doyle J).
85 The Court did not have the benefit of considered argument on the issue (p4), the matter was heard ex parte and was incompetent (*Offe v Residential Tenancies Tribunal of NSW & Ors* [1997] NSWCA 239), the Court was concerned with the interpretation of the word "compensation" rather than the characterisation of the tenancy agreement, the Court did not in fact make an award under the 'second limb' and the decision was wholly set aside by the Court of Appeal (*Offe v Residential Tenancies Tribunal of NSW & Ors* [1997] NSWCA 239).

78. Further, *Offe* was decided (and overturned) before *El-Saiedy* in which the NSW Supreme Court considered the *Baltic Shipping* principles at length and effectively found that the tenancy agreement did not fall within the 'second limb' exception[86].

79. The British authority referenced by Young does not stand for the proposition for which the Appellants contend; it does not even consider the issue[87]. The English Court of Appeal's *obiter* comments in *Branchett v Beaney* remain on point in England at least in respect of the object of a covenant for quiet enjoyment.

80. Finally, given that the Appellants' argument is based on the application of the established *Baltic Shipping* principles in Australia (without contending for their modification or expansion), their reference to American principles and the French and Spanish civil codes is unhelpful and beside the point.

Part VII: Estimate

81. The Respondent will require one and a half hours for oral submissions.

Dated: 2 December 2022

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Nikolai Christrup
Solicitor-General of the Northern Territory
Tel: (08) 8999 6682
Fax: (08) 8999 5513
Email: nikolai.christrup@nt.gov.au

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Hamish Baddeley
William Forster Chambers
Tel: (08) 8982 4700
Fax: (08) 8941 1541
Email: hbaddeley@williamforster.com

86 *El-Saiedy* at [77]-[89].

87 *Personal Representative of Chiodi v de Marni* (1989) 21 HLR 6 and *Calabar Properties v Sticher* [1984] 1 WLR 287 considered the quantification of damages for physical inconvenience and distress from the physical discomfort of living in a defective property. These cases do not consider the characterisation of the tenancy agreements or the proposition contended for by Young.

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

10 **CHIEF EXECUTIVE OFFICER (HOUSING)**

Respondent

ANNEXURE TO RESPONDENT'S SUBMISSIONS

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, the Respondent sets out below a list of the constitutional, statutory and statutory instrument provisions referred to in these submissions.

No.	Description	Version	Provisions
1.	*Competition and Consumer Act 2010* (Cth)	Current	Schedule 2, s 236
2.	*Judiciary Act 1903* (Cth)	Current	s 78B
3.	*Residential Tenancies Act 1999* (NT)	Current	ss 3, 3(a), 3(b), 3(c), 4, 8(a), 8(b), 12(1), 13(3)(c), 19(1), 19(1)(d), 19(2), 19(3), 19(4), 20(1), 20(2), 20(4), 21, 22, 23, 24(1), 24(3), 25(2), 28B, 29(1), 29(3), 29(5), 31(1), 31(2), 31(3), 32, 35, 36(1), 36(4), 36(5), 37(1), 37(2), 37(3), 39(1), 39(2), 39(3), 41(2), 43(1), 44(1), 47, 48, 48(1), 48(1)(b), 48(2), 49, 49(1), 49(2), 49(3),

			50(1), 50(2), 51(1), 51(2), 51(3), 52, 52(1), 52(2), 53, 53(1), 53(2), 54, 55(1), 55(3), 56, 57(1), 57(2), 57(3), 58(1), 64(1), 64(3), 65, 65(b), 65A(1), 66(1), 66(2), 67(1), 67(2), 68(1), 77, 77A(4), 78(1), 78(2), 80, 81(1), 96A(1), 96B(1), 96B(1)(b), 96C(1), 96C(1)(b), 97(1)(a), 98, 106, 109(1), 109(3), 109(4), 109(6), 109(8), 110(2), 112(2), 112(8), 115(2), 117, 118(2), 118(3), 120, 122, 122(1), 122(1)(a), 122(1)(b), 122(2), 122(2)(b), 122(3), 122(5), 122(5)(a), 130(2), 132(1), 132(3), 138(4), 139(5), 156(1), 156(2)
4.	*Residential Tenancies Regulations 2000* (NT)	Current	reg 10, Schedule 2
5.	*Trade Practices Act 1974* (Cth)	Repealed End date 17 December 2010	s 82