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
DARWIN REGISTRY

No. D5 of 2022

BETWEEN:

Enid Young
First Appellant

Petria Cavanagh in her capacity as Administrator of the Estate of Robert Conway
Second Appellant

and

Chief Executive Officer (Housing)
Respondent

APPELLANTS' OUTLINE OF ORAL SUBMISSIONS

Part I: These submissions are in a form suitable for publication on the internet.

Part II: The propositions the Appellants intend to advance in oral argument

1. A home was let to Enid Young with an external door missing for 68 months.
2. **Ground 1:** The function of s 122 of the *Residential Tenancies Act 1999* (NT) (the **Act**) is to empower the Tribunal (the **Tribunal**) to 'order compensation for loss or damage' suffered by a tenant or landlord. As a creature of statute, the Tribunal's power is defined by statute.
3. By operation of s 122(1)(a) of the Act, the Tribunal can order compensation for loss or damage 'because' of a failure to comply with a tenancy agreement or the Act. That is, the statutory test for whether compensation can be ordered relies on causation.
4. Section 122(3) sets out the list of mandatory considerations that the Tribunal 'must take into account' to determine 'whether' to order compensation. Remoteness is not included in that list.
5. Section 122(5) limits the power of the Tribunal to order specified compensation, relevantly, by prohibiting compensation 'in respect of death, physical injury, pain or suffering'. This does not preclude orders to compensate disappointment or distress. Those forms of loss or damage concern neither '*physical* injury, pain or suffering', nor any other form of 'pain and suffering'. They are rather the 'normal, rational reaction of an unimpaired mind'.[1]
6. The following four matters confirm that the proper construction of s 122 permits compensation to be ordered by the Tribunal for disappointment or distress:
    a. In the two years before the Act was passed, two authorities were handed down[2] that confirmed such compensation was available for breach of a residential tenancy agreement. In that context it is telling that Parliament did not exclude those from s 122.

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[1] *Moore v Scenic Tours Pty Ltd* (2020) 377 CLR 209, 340-1 [41], 346 [56]-[57] ('***Moore***').
[2] *Laurence Edmond Strahan v Residential Tenancies Tribunal* [1998] NSWSC 30008; *Residential Tenancies Tribunal of New South Wales v Lyle Offe* [1997] NSWSC 10752.

b. Section 122 was introduced after this Court's decision in *Baltic Shipping* which itself came months after the Victorian Supreme Court's decision of *Reardon*. The Court in *Reardon* held that a provision in materially the same terms as s 122 permitted orders for non-pecuniary 'loss and damage', which it noted to be a wide expression.[3] D5/2022

c. Parliament was deliberate to define and legislate which parts of the general law of contract applied to residential tenancies,[4] and, by omission, those which did not.

d. Section 122(1)(a) empowers the Tribunal to order compensation for both failing to comply with terms of a tenancy agreement, and obligations under the Act. It is unlikely that Parliament intended that the Tribunal apply remoteness considerations to only one part of s 122(1)(a), but not the other: that is, for failure to comply with a tenancy agreement, as compared with failing to comply with the Act. This is especially so when an equivalent distinction is made in s 120: it expressly applies to one, but not the other.

7. **Ground 2:** Damages for disappointment or distress can be ordered for breach of contract where, among other things, those feelings 'aris[e] from a breach of a… term' promising 'personal protection',[5] 'freedom from molestation'[6], 'comfort'[7] or 'peace of mind'.[8]

8. Section 49(1) imposes such a term. It prescribes the means ('locks and other security devices') and the ends ('reasonable security') which the landlord must provide. What 'arises naturally'[9] from a failure to provide reasonable security is a feeling of insecurity. 'The feeling of [insecurity] is the damage'[10] from a breach of this term.

9. Section 48(1)(a) also imposes such a term. It prescribes related ends – namely, 'ensur[ing] that the premises… are habitable' – which the landlord must promise a tenant. That term requires a landlord to provide for 'safety',[11] 'decent and comfortable habitation',[12] 'fair use and enjoyment'[13] by the tenant. Feeling unsafe, uncomfortable or disappointed are thus a 'normal, rational reaction of an unimpaired mind' to breach of that term.[14]

10. Having a doorless external doorway was a breach of s 49(1) and s 48(1)(a).

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[3] *Reardon and Reardon v Ministry of Housing* (Supreme Court Victoria, Smith J, 13 November 1992) 15-16.
[4] See, eg, Act ss 6, 120.
[5] *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 394, 405 ('***Baltic Shipping***').
[6] *Moore* (n 2) 341 [44], 342 [46], 350 [68]; *Baltic Shipping* (n 6) 363-65, 371, 382, 402.
[7] *Moore* (n 2) 342 [45]; *Baltic Shipping* (n 6) 371.
[8] *Moore* (n 2) 340-1 [41]; *Baltic Shipping* (n 6) 364, 370-1, 381-2, 401-2.
[9] *Hadley v Baxendale* (1854) Ex 341, 354 ('***Hadley v Baxendale***').
[10] *Kemp v Sober* (1851) 61 ER 200, 201.
[11] *Belcher v McIntosh* (1839) 174 ER 257; *Proudfoot v Hart* (1890) 25 QBD 42; *Collins v Hopkins* [1923] 2 KB 617, 620-621.
[12] *Smith v Marrable* (1843) 11 M&W 5, 694.
[13] *Cooke v Cholmondeley* (1858) 4 Drew 326, 327–8; *Summers v Salford Corporation* [1943] AC 283.
[14] *Moore* (n 2) 340-1 [41].

11. An assessment of '*an* object'[15] or 'a major or important object'[16] of the contract also supports the conclusion that residential tenancy agreements protect the benefits identified at [7] above. D5/2022

12. First, s 3 makes the provision of 'safe and habitable accommodation' a prominent object.

13. Secondly, by operation of s 65, the landlord promises 'to secure the tenant, not merely in the possession, but in the enjoyment of the premises'.[17] Putting aside *obiter* observations,[18] authorities on the common law covenant of 'quiet enjoyment' support the conclusion that a breach of such an obligation can give rise to compensation for disappointment or distress.[19] In any event, the contractual term required by statute in s 65(b) is broader in scope than its common law ancestor because it protects both the peace and privacy of the tenant.

14. Thirdly, the object of a residential tenancy is to provide a home. The direct loss that flows in the 'usual course of things'[20] from breach of a contract for a home is an emotional or experiential form of 'loss or damage': 'the house of every one is to [them] as [their] castle and fortress, as well for [their] defence against injury and violence as for [their] repose'.[21]

15. The conclusion that residential tenancy agreements are contracts of a kind from which compensation for disappointment or distress can arise is confirmed by many Supreme Court judgments,[22] specialist residential tenancy tribunals,[23] appellate courts in other common law jurisdictions (including the UK[24] and USA[25]) and leading textbooks.[26]

Dated: 15 March 2023

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[15] *Baltic Shipping* (n 6) 362; see also 366.
[16] *Farley v Skinner* [2002] 2 AC 732, 749–750, 755–6, 761 [20], [23]–[24], [41]–[42], [54]; *Taylor v Burton,* 708 So 2d 531, 535 (3rd Cir, 1998); *Fidler v Sun Life Assurance Co of Canada* [2006] 2 SCR 3, [45]–[48].
[17] *Martins Camera Corner Pty Ltd v Hotel Mayfair Ltd* [1976] 2 NSWLR 15, 23; *Andrews v Paradise* (1724) 8 Mod 318; *Kenny v Preen* [1963] 1 QB 499, 511. This distinction is spelled out in the heading of the Act s 65.
[18] *Branchett v Beaney* [1992] 3 All ER 910, 916.
[19] *Sampson v Floyd* [1989] 2 EGLR 49, 50 cited in *Baltic Shipping* (n 6) 382 fn 63; *McCall v Abelesz* [1976] 1 All ER 727
[20] *Hadley v Baxendale* (n 10).
[21] *R v Semaynes* [1604] 77 ER 194, 195; *London Borough of Harrow v Qazi* [2004] 1 AC 983, 1016 [89].
[22] See, eg, *Reiss & Anor v Helson & Ors* [2001] NSWSC 486, 498 [53]; *Free v Thomas* [2009] NSWSC 642, 648 [19]; *Blackington Pty Ltd v Hogg* [2007] NSWSC 266, 274–5 [47]; *Robinson v Fretin* [2006] NSWSC 598, 599–602 [6]–[9], [15], [22]; *Makowska v St George Community Housing Ltd* [2021] NSWSC 287, 302 [25], [46].
[23] See, eg, *Torpey v Stewart* [2021] NSWCATAP 248, 251–4 [21]-[31], the list at Allan Anforth et al, *Residential Tenancies Law and Practice, New South Wales* (The Federation Press, 8th ed, 2022) 394, 398–435; *Walmsley & Walmsley v Charles (Hall) (Residential Tenancies)* [2019] VCAT 1691, 1715 [125]; *Fores v Kay & Kay* [2006] SARTT 3, 6–7; *Lee v Guo* [2017] ACAT 60, 76–7 [59]; *Sandy v Sananikone and Do* [2015] NTRTCmr 1, 11 [67].
[24] See, eg, *Chiodi's Personal Representative v De Marney* (1989) 21 HLR 6; *Calabar Properties v Sticher* [1984] 1 WLR 287.
[25] See, eg, *Hilder v St Peter,* 478 A 2d 202 (1984); *McNairy v CK Realty*, 59 Cal Rptr 3d 429 (Ct App, 2007).
[26] See, eg, Allan Anforth et al, *Residential Tenancies Law and Practice, New South Wales* (The Federation Press, 8th ed, 2022) 394; Adrian J Bradbrook, Susan V MacCallum and Anthony P Moore, *Residential Tenancy Law and Practice: Victoria and South Australia* (Lawbook, 1983) 695 [2421].