HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, GORDON, EDELMAN AND GLEESON JJ

WAYNE MATTHEW YOUNG AS ADMINISTRATOR
OF THE ESTATE OF KWEMENTYAYE
YOUNG & ANOR APPELLANTS

AND

CHIEF EXECUTIVE OFFICER (HOUSING) RESPONDENT

Young v Chief Executive Officer (Housing)
[2023] HCA 31
Date of Hearing: 16 March 2023
Date of Judgment: 1 November 2023
D5/2022

ORDER

1. *Appeal allowed.*

2. *Set aside order 4 of the orders made by the Court of Appeal of the Supreme Court of the Northern Territory on 4 February 2022.*

3. *The respondent pay the appellants' costs of the first and second grounds of the appeal to this Court.*

On appeal from the Supreme Court of the Northern Territory

Representation

M L L Albert for the appellants (instructed by Australian Lawyers for Remote Aboriginal Rights)

N Christrup SC, Solicitor-General for the Northern Territory, with H H Baddeley for the respondent (instructed by MinterEllison)

CATCHWORDS

Young v Chief Executive Officer (Housing)

Residential tenancies – Where s 122(1) of *Residential Tenancies Act 1999* (NT) ("Act") relevantly provided Civil and Administrative Tribunal of the Northern Territory ("Tribunal") may order compensation for loss or damage suffered by landlord or tenant under tenancy agreement be paid by other party because other party failed to comply with agreement – Where tenancy agreement between parties prescribed by Act – Where term of tenancy agreement imposed by s 49(1) of Act required landlord to take reasonable steps to provide and maintain locks and other security devices necessary to ensure premises and ancillary property were reasonably secure – Where premises had no back door for 68 months – Whether Tribunal empowered by s 122(1) to order landlord compensate tenant for loss or damage by way of distress and disappointment due to insecurity tenant felt because of landlord's breach of tenancy agreement – Whether s 122 incorporated common law principles of remoteness – Whether common law principles of remoteness precluded tenant from recovering compensation for distress and disappointment unless consequent upon physical inconvenience.

Words and phrases – "breach of contract", "causation", "compensation for loss or damage", "damages", "disappointment", "distress", "insecurity", "landlord", "peace of mind", "reasonable steps", "reasonably secure", "remoteness", "residential premises", "residential tenancy", "scope of duty", "security device", "statutory compensation", "tenancy agreement".

Residential Tenancies Act 1999 (NT), ss 49, 122.

1 KIEFEL CJ, GAGELER AND GLEESON JJ. The dispositive question in this appeal is whether the Civil and Administrative Tribunal of the Northern Territory ("the Tribunal") is empowered by s 122(1) of the *Residential Tenancies Act 1999* (NT) ("the Act") to order that a landlord compensate a tenant for distress or disappointment suffered by the tenant as a normal healthy reaction to a failure on the part of the landlord to comply with a statutorily imposed term of a residential tenancy agreement that the landlord take reasonable steps to provide and maintain security devices necessary to ensure that residential premises are reasonably secure. The answer is that the Tribunal is so empowered.

Facts and procedural history

2 Ms Young was the tenant of residential premises at Ltyentye Apurte, also known as Santa Teresa, an Aboriginal community approximately 85 kilometres from Alice Springs. The Chief Executive Officer (Housing) ("the CEO"), a corporation sole established under the *Housing Act 1982* (NT), was the landlord. For 68 months, the premises had no back door in the doorframe.

3 The written form of tenancy agreement between the CEO and Ms Young was not in accordance with s 19(1) of the Act in that it did not contain terms to the effect of each term specified by the Act to be a term of a tenancy agreement. The consequence was that, for the purposes of the Act, the tenancy agreement between the CEO and Ms Young was taken by s 19(4) of the Act to be the prescribed tenancy agreement set out in Sch 2 to the *Residential Tenancies Regulations 2000* (NT). As required by s 49(1) of the Act, cl 12(1) of the prescribed tenancy agreement provided that "[t]he landlord 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".

4 Ms Young applied to the Tribunal for an order under s 122(1) of the Act that the CEO compensate her for loss or damage she claimed to have suffered because of non-compliance by the CEO with the tenancy agreement. Her application included a claim to be compensated for loss or damage by way of distress and disappointment due to the insecurity she felt because of the CEO's failure to provide a back door in compliance with the term of the tenancy agreement imposed by s 49(1) of the Act.

5 Taking the view that an external door is not "a security device" within the meaning of s 49(1) of the Act, the Tribunal found no breach of the term of the

tenancy agreement specified in that sub-section and on that basis dismissed the application for compensation for non-compliance with it[1].

6 On appeal on a question of law to the Supreme Court of the Northern Territory under s 141 of the *Northern Territory Civil and Administrative Tribunal Act 2014* (NT), the CEO conceded that an external door is a security device within the meaning of s 49(1) of the Act, that having a back door was necessary to ensure that the premises were reasonably secure, and that the CEO had failed to comply with the term of the tenancy agreement specified in s 49(1) of the Act[2].

7 Accepting that concession, Blokland J set aside so much of the decision of the Tribunal as had dismissed the application for compensation for non-compliance with the term specified in s 49(1) of the Act. Going on to assess compensation for non-compliance with that term herself, Blokland J substituted an order that the CEO pay compensation to Ms Young in the sum of $10,200 in respect of loss or damage identified as "distress and disappointment due to the failure to provide a premises which was secure"[3].

8 On further appeal to the Court of Appeal of the Supreme Court of the Northern Territory under s 51 of the *Supreme Court Act 1979* (NT), the Court of Appeal, constituted by Grant CJ, Southwood and Barr JJ, set aside the order made by Blokland J that the CEO pay compensation to Ms Young. The Court of Appeal construed s 122(1) of the Act as importing principles of remoteness that limit the assessment of damages for breach of contract at common law[4] and took the view that those principles operated to exclude compensation for distress or disappointment arising from non-compliance with a term of the tenancy agreement other than in consequence of physical inconvenience[5].

9 The Court of Appeal recorded that no issue was raised before it as to whether the order made by Blokland J was within the jurisdiction of the Supreme Court on an appeal on a question of law under s 141 of the *Northern Territory Civil*

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1 *Various Applicants from Santa Teresa v Chief Executive Officer (Housing)* [2019] NTCAT 7 at [165]-[166].

2 *Young v Chief Executive Officer, Housing* (2020) 355 FLR 290 at 314 [87].

3 *Young v Chief Executive Officer, Housing* (2020) 355 FLR 290 at 315 [91], [93].

4 *Chief Executive Officer (Housing) v Young* [2022] NTCA 1 at [54]-[55].

5 *Chief Executive Officer (Housing) v Young* [2022] NTCA 1 at [56]-[68].

and Administrative Tribunal Act[6]. Nor has any such issue been raised in this Court[7].

10 Pursuant to a grant of special leave[8], the appeal to this Court from the decision of the Court of Appeal has been argued on two logically alternative grounds. The first ground is to the effect that the Court of Appeal erred in construing s 122 of the Act to import common law principles of remoteness. The second ground is to the effect that the Court of Appeal erred as to the content and application of those common law principles.

11 The appeal is to be allowed on the first ground, with the consequence that the second ground does not arise for consideration.

Compensation under the Act

12 The objectives of the Act are expressed to include "to fairly balance the rights and duties of tenants and landlords"[9], "to improve the understanding of landlords, tenants and agents of their rights and obligations in relation to residential tenancies"[10], and "to ensure that landlords and tenants are provided with suitable mechanisms for enforcing their rights under tenancy agreements and this Act"[11].

13 The Act significantly restricts the freedom of landlord and tenant to agree upon terms of occupation of residential premises. Most notably, as occurred in this case, if a tenancy agreement does not meet the requirements of s 19(1) of the Act, then s 19(4) imposes upon the parties the agreement prescribed by the Regulations. Further, the parties are unable to contract out of the operation of the Act[12].

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6 *Chief Executive Officer (Housing) v Young* [2022] NTCA 1 at [67].

7 Compare *Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd* (2021) 96 ALJR 56 at 64 [36]; 395 ALR 209 at 218, and the cases there cited.

8 *Young v Chief Executive Officer (Housing)* [2022] HCATrans 159.

9 Section 3(a) of the Act.

10 Section 3(b) of the Act.

11 Section 3(c) of the Act.

12 Section 20 of the Act.

14 Part 13 of the Act is headed "Financial liabilities". Division 2 of that Part is headed "Compensation". Within Div 2 are ss 120, 121 and 122. Sections 121 and 122(2) and (4) are of no present relevance.

15 Section 120 provides:

"The rules of the law of contract about mitigation of loss or damage on breach of a contract apply to a breach of a tenancy agreement."

16 Section 122 relevantly provides:

"(1) Subject to subsection (2), the Tribunal may, on the application of a landlord or the 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:

(a) the other party has failed to comply with the agreement or an obligation under this Act relating to the tenancy agreement; or

(b) the applicant has paid to the other party more than the applicant is required to pay to that other party in accordance with this Act and the agreement.

...

(3) In determining whether to order the payment of compensation to a party, the Tribunal must take into account each of the following:

(a) whether the person from whom the compensation is claimed has taken all reasonable steps to comply with his or her obligations under this Act and the tenancy agreement, being obligations in respect of which the claim is made;

(b) in the case of a breach of a tenancy agreement or this Act – whether the applicant has consented to the failure to comply with obligations in respect of which the claim is made;

(c) whether money has been paid to or recovered by the applicant by way of compensation, including any money recovered or entitled to be recovered from the security deposit paid under the tenancy agreement;

(d) whether a reduction or refund of rent or other allowance has been made to or by the applicant in respect of the tenancy agreement;

(e) whether an action was taken by the applicant to mitigate the loss or damage;

(f) any tender of compensation;

(g) if the claim is made in respect of damages to the premises to which the tenancy agreement relates – any action taken by the person from whom the compensation is claimed to repair the damage at his or her own expense.

...

(5) The Tribunal is not to make an order under this section:

(a) for the payment of compensation in respect of death, physical injury, pain or suffering; ..."

17 There is no dispute that the "loss or damage" to which reference is made in s 122(1) can extend to non-economic loss and can include non-economic loss in the form of disappointment or distress suffered by a landlord or a tenant as "a normal, rational reaction of an unimpaired mind"[13]. There is also no dispute that disappointment or distress of that nature is not "physical injury, pain or suffering" so that an order for compensation in respect of disappointment or distress of that nature is not precluded by s 122(5)(a)[14].

18 The Court of Appeal took the view that the principles of remoteness applicable to the assessment of damages for breach of contract at common law are imported into s 122(1) by the reference in s 122(1) to "loss or damage suffered by the applicant ... because" in its application to a circumstance referred to in s 122(1)(a) where "the other party has failed to comply with the agreement"[15].

19 On the appeal to this Court, the CEO sought to support the Court of Appeal's construction of s 122(1) by reference to the overall design of the Act by which certain obligations, including that specified in s 49(1), are made terms of a tenancy

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13 *Moore v Scenic Tours Pty Ltd* (2020) 268 CLR 326 at 340-341 [41].

14 *Moore v Scenic Tours Pty Ltd* (2020) 268 CLR 326 at 340-341 [40]-[41].

15 *Chief Executive Officer (Housing) v Young* [2022] NTCA 1 at [55].

agreement and thereby become enforceable in contract at common law. The CEO argued that s 122(1) follows through with that legislative design by incorporating the common law concerning both breach of contract and recoverability of damages for breach of contract subject only to "modification" of the common law concerning recoverability of damages by s 122(3) and (5). According to the CEO, s 120 confirms incorporation of the common law concerning recoverability of damages into s 122(1). Section 120's singling out of common law rules about mitigation for application to a breach of a tenancy agreement, according to the CEO, is to be understood as being for the avoidance of doubt.

20 The reasoning of the Court of Appeal and the argument of the CEO correctly accepted that: (1) the language of s 122(1) must be construed and applied purposively within the context of the Act[16]; and (2) the statutory language requires an applicant to establish a causal connection between a breach of the tenancy agreement and compensable loss or damage, which may require consideration of issues of the kind that would be addressed in the assessment of damages at common law under the rubric of remoteness[17].

21 The reasoning of the Court of Appeal and the argument of the CEO were also correct to the extent that they identified the design of the Act as being to provide for the application of the general law of contract, by making certain obligations terms of a tenancy agreement so as thereby to become enforceable contractual obligations carrying "full contractual liability for breach"[18]. Whether the main purpose of that element of the legislative design was to improve the understanding of landlords and tenants of their rights and obligations in relation to residential tenancies by requiring those obligations to be recorded in the terms of tenancy agreements or to ensure that landlords and tenants are provided with contractual mechanisms for enforcing their rights under tenancy agreements need not be explored.

22 Breach of an obligation made a term of a tenancy agreement, such as the obligation specified in s 49(1), would be remediable in the original jurisdiction of the Supreme Court either in an application for equitable relief or in an action for damages at common law. The assessment of damages in any such action at common law would be governed by common law principles of remoteness. The assessment of damages in any such action would also be governed by s 120, which

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16 *Comcare v Martin* (2016) 258 CLR 467 at 479 [42].

17 *Henville v Walker* (2001) 206 CLR 459 at 503-504 [135]-[136], 510 [166].

18 *Wallis v Downard-Pickford (North Queensland) Pty Ltd* (1994) 179 CLR 388 at 396.

operates to remove any doubt that common law principles about mitigation of loss or damage on breach of a contract are applicable to a breach of a tenancy agreement[19].

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

24 It is consonant with the legislative objective of ensuring that landlords and tenants are provided with suitable mechanisms for enforcing their rights under tenancy agreements to recognise that s 122 leaves such remedies as may be available to landlords and tenants at common law or in equity untouched and provides an additional mechanism by which landlords and tenants can obtain from the Tribunal statutory compensation the measure of which is provided by the Act itself. Double recovery is avoided by the requirement of s 122(3)(c) that any money that may have been recovered by way of compensation must be taken into account by the Tribunal in determining whether to order compensation under s 122(1).

25 The language and structure of s 122(1)(a) provides no basis for differentiating in principle between the evaluative judgment to be made by the Tribunal in determining the existence and extent of compensable loss or damage suffered by an applicant because the other party has failed to comply with an obligation imposed as a term of a tenancy agreement, on the one hand, and the evaluative judgment to be made by the Tribunal in determining the existence and extent of compensable loss or damage suffered by an applicant because the other party has failed to comply with an obligation imposed directly by force of the Act in relation to a tenancy agreement, on the other hand. To adapt language drawn from judicial descriptions of the evaluative judgments required to be made in determining statutory compensation in other statutory contexts[20], the task of the Tribunal in each case is to arrive at a measure of compensation which conforms to the purposes of the Act and to the justice and equity of the case, having regard to

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19 Compare *Maridakis v Kouvaris* (1975) 5 ALR 197 and *Vickers & Vickers v Stichtenoth Investments Pty Ltd* (1989) 52 SASR 90.

20 See *Henville v Walker* (2001) 206 CLR 459 at 470 [18]; *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at 119 [26]; *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568 at 597-598 [100].

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

26 In the case of an obligation specified by the Act to be a term of a tenancy agreement, just as in the case of an obligation imposed directly by force of the Act in relation to a tenancy agreement, the nature and purpose of the particular obligation falls to be determined by reference to principles of statutory interpretation.

27 In the case of an obligation imposed by a bespoke term of a tenancy agreement, the nature and purpose of the particular obligation falls to be determined by reference to common law principles of contractual interpretation applicable within a context[21] which, critically, includes the Act itself. Although the Act contemplates that landlords and tenants might enter into written tenancy agreements containing terms additional to those specified by or under the Act to be a term of a tenancy agreement, s 20 makes clear that any such term can have legal effect only to the extent to which that term is not inconsistent with the Act.

28 The only difference in the application of s 122(1)(a) as between a case where the other party has failed to comply with an obligation imposed as a term of a tenancy agreement and a case where the other party has failed to comply with an obligation imposed directly by force of the Act is that the mandatory consideration specified in s 122(3)(e), in terms of whether an action was taken by an applicant for compensation to mitigate the loss or damage, is hardened by s 120 in a case of a failure to comply with an obligation imposed as a term of a tenancy agreement into a rule that the applicant for compensation must mitigate his or her loss or damage in the same way as if the applicant were a plaintiff in a common law action for damages for breach of contract.

Compensation in this case

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

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21 See *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 657 [35].

landlord's breach and the distress and disappointment suffered by Ms Young readily satisfied the causal connection required by the word "because" in s 122(1).

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

Orders

31 The orders appropriate to be made are:

(1) Appeal allowed.

(2) Set aside order 4 of the orders made by the Court of Appeal on 4 February 2022.

(3) The respondent pay the appellants' costs of the first and second grounds of the appeal to this Court.

GORDON AND EDELMAN JJ.

Introduction

32 This appeal concerns the manner in which compensation for loss or damage should be quantified under s 122 of the *Residential Tenancies Act 1999* (NT) for a breach of a term of a residential tenancy agreement requiring the landlord to take various security precautions to ensure that the premises are reasonably secure. The Supreme Court of the Northern Territory overturned the conclusion of the Northern Territory Civil and Administrative Tribunal ("the Tribunal"), finding that the respondent landlord breached that term by failing, for years, to ensure that there was a back door installed in the external doorway of the premises leased to the first appellant, Ms Young. The Supreme Court made orders including for payment of compensation to Ms Young of $10,200 for disappointment and distress caused by that breach. The Court of Appeal of the Supreme Court of the Northern Territory allowed the respondent landlord's appeal, concluding that the central object of a residential tenancy agreement was not to provide pleasure, entertainment, or relaxation, and therefore compensation for disappointment and distress was not available unless it was consequential upon physical inconvenience suffered by Ms Young.

33 The first issue that arises is whether compensation for loss or damage under s 122 incorporates the common law limits on recovering compensation or damages for breach of contract. If it does, the second issue is whether, absent personal injury, those common law limits preclude Ms Young from recovering compensation for disappointment and distress unless it is consequent upon physical inconvenience.

34 The first issue arises from Ms Young's submission that an award of compensation under s 122(1) of the *Residential Tenancies Act* contains no limitations on recovery, other than causation, for loss or damage suffered because of a failure to comply with the tenancy agreement. In other words, so long as loss or damage was caused by the breach, the availability of compensation under s 122(1) was not limited by reference to notions of scope of duty or remoteness. That submission should not be accepted. There are limits on recoverable compensation under s 122(1) which are incorporated in the concept of "compensation", its award "for loss or damage", and the requirement that the loss or damage arise "because ... the other party has failed to comply with the agreement".

35 At every stage in this litigation, the parties accepted that if any principles limiting the recovery of damages did apply to the assessment of compensation

under s 122, then those principles would be common law principles[22]. No party to this appeal sought to depart from that approach. The parties were right not to contemplate that the rules that limit recoverable damages in s 122(1) of the *Residential Tenancies Act* were some unique, unspecified, and uncertain statutory rules. The model adopted by the *Residential Tenancies Act* included the creation of terms that were to become part of tenancy agreements, presupposing the operation of general contract law rules. But even if the *Residential Tenancies Act* were to be taken to have silently permitted the creation by the Tribunal of a new regime for "compensation" and "loss or damage", it is hard to see why any newly created regime by the Tribunal should be informed by anything other than the common law rules that have been developed incrementally over centuries. The Tribunal need not engage in an exercise of developing new rules to limit the recoverability of compensation under the *Residential Tenancies Act* for breach of a contractual obligation in a tenancy agreement.

36 As to the second issue, the common law rules concerning limitation of recovery of compensation or damages for breach of contract preclude recovery of damages for disappointment and distress where that disappointment and distress is not consequential upon physical injury or physical inconvenience. That is, damages for disappointment and distress are not available at common law unless an object of the contract, or the specific term that is breached, was concerned with the promisee's state of mind. The relevant contract term breached in this case, with its focus upon the safety and security of the premises, had an object which included providing the tenant with security and peace of mind. The appeal should therefore be allowed.

Background

37 The first appellant, Ms Young, is an Aboriginal woman, resident of a remote Aboriginal community in the town of Ltyentye Apurte/Santa Teresa, approximately 85 kilometres from Alice Springs, in the Northern Territory of Australia. She is one of 70 applicants who brought applications in the Tribunal concerning alleged breaches of the *Residential Tenancies Act* by their landlord, the Chief Executive Officer (Housing)[23].

38 The second appellant, the estate of Mr Conway, was treated by the parties before this Court as having the same material interest as Ms Young in this appeal.

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22 *Young v Chief Executive Officer, Housing* (2020) 355 FLR 290 at 315 [90]. See also *Chief Executive Officer (Housing) v Young* [2022] NTCA 1 at [52]-[54]; *Young v Chief Executive Officer (Housing)* [2022] HCATrans 159 at ll 13-23, 100-105.

23 *Various Applicants from Santa Teresa v Chief Executive Officer (Housing)* [2019] NTCAT 7 at [1]-[4].

Mr Conway was also a resident of Ltyentye Apurte/Santa Teresa and was also one of the applicants before the Tribunal. The circumstances of his application before the Tribunal were not the subject of submissions in this Court.

39 At the time of Ms Young's tenancy agreement with the Chief Executive Officer (Housing), she was 71 years old. She spoke little English and did not read English. Her first language was Eastern Arrernte. The Chief Executive Officer (Housing) is a statutory body corporate sole with functions and powers to assist in the provision of residential housing including by lease[24].

40 Ms Young's tenancy was found to have commenced on 13 November 2011[25]. Her written tenancy agreement was found to be invalid, so the tenancy was a prescribed tenancy under s 19(4) of the *Residential Tenancies Act*[26]. The terms of the tenancy included rent of $184 to be paid per week and the terms set out in Sch 2 to the *Residential Tenancies Regulations 2000* (NT)[27].

41 The premises leased to Ms Young were alleged to be defective in numerous respects[28]. One respect was that for several years from the time that her tenancy commenced, the Chief Executive Officer (Housing) had failed to provide Ms Young with a back door. The absence of a back door was a significant impairment of security in circumstances where, as Ms Young described, roaming wild horses may have bent a fence around the property, and where a snake may have entered the house through a gap that was left between the door and the doorframe following the eventual installation of a back door by the Chief

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24 *Housing Act 1982* (NT), ss 6, 15, 16.

25 *Various Applicants from Santa Teresa v Chief Executive Officer (Housing)* [2019] NTCAT 7 at [27], [95].

26 *Various Applicants from Santa Teresa v Chief Executive Officer (Housing)* [2019] NTCAT 7 at [78], [84], [93]-[94].

27 *Residential Tenancies Act 1999* (NT), s 19(4); *Residential Tenancies Regulations 2000* (NT), reg 10.

28 See *Various Applicants from Santa Teresa v Chief Executive Officer (Housing)* [2019] NTCAT 7 at [31].

Executive Officer (Housing)[29]. Ms Young was "an elderly woman who was left vulnerable to proven animal intruders and potentially human intruders"[30].

42 On 22 January 2016, a solicitor acting for Ms Young wrote to the Chief Executive Officer (Housing) saying that there had been no back door on the premises and that, although a mesh-steel door had been installed by Ms Young, a new door was required. More than six weeks later, in late March 2016, the Chief Executive Officer (Housing) installed a new back door[31].

43 In the Tribunal, Ms Young sought orders for repairs to be made to the premises, as well as a payment of compensation under s 122(1) of the *Residential Tenancies Act*. The Chief Executive Officer (Housing) was ordered to: refund rent of $4,735.80 for 540 days during which the premises were uninhabitable due to the lack of an air-conditioner; pay $4,000 in damages for distress arising from the associated physical inconvenience from the lack of an air-conditioner; and pay $200 in damages for the breach of its duty to repair Ms Young's stove for a period of 170 days[32]. None of these matters was an issue on appeal to this Court. The relevant issue concerned the Tribunal's decision in relation to the failure by the Chief Executive Officer (Housing) to install a back door.

44 The Tribunal held that by leasing a premises without a back door, the Chief Executive Officer (Housing) did not breach its obligation under s 48(1) of the *Residential Tenancies Act* to ensure that the premises were "habitable"[33]. The Tribunal also considered whether the failure to provide a back door amounted to a breach of a term of the tenancy agreement created by s 49(1) of the *Residential Tenancies Act*, which provides:

> "It is a term of a tenancy agreement that the landlord will take reasonable steps to provide and maintain the locks and other security devices that are

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29 *Various Applicants from Santa Teresa v Chief Executive Officer (Housing)* [2019] NTCAT 7 at [160], [167], [287].

30 *Young v Chief Executive Officer, Housing* (2020) 355 FLR 290 at 314 [89].

31 *Various Applicants from Santa Teresa v Chief Executive Officer (Housing)* [2019] NTCAT 7 at [161].

32 *Various Applicants from Santa Teresa v Chief Executive Officer (Housing)* [2019] NTCAT 7 at [284], [289].

33 *Various Applicants from Santa Teresa v Chief Executive Officer (Housing)* [2019] NTCAT 7 at [165]-[166].

> necessary to ensure the premises and ancillary property are reasonably secure."

45 Although the Tribunal accepted (in respect of a different applicant) that the failure by the Chief Executive Officer (Housing) to provide a key to a front door lock would be a breach of the term created by s 49(1)[34], the Tribunal held that there was no breach of that term by failing to provide an entire door[35]. The Tribunal did, however, conclude that the Chief Executive Officer (Housing) breached its obligation of the term in s 57 of the *Residential Tenancies Act* to carry out repairs with reasonable diligence by taking more than six weeks to install a back door from the time of being given notice by Ms Young. Damages of $100 were awarded[36].

46 The Supreme Court of the Northern Territory of Australia granted Ms Young leave to appeal[37] and allowed her appeal with respect to s 49(1)[38]. Blokland J found, and the Chief Executive Officer (Housing) properly conceded, that the failure to provide a back door was a breach "at a fundamental level" of the term created by s 49(1) of the *Residential Tenancies Act*[39]. Blokland J awarded $10,200 in compensation under s 122 of the *Residential Tenancies Act* for disappointment and distress, being $150 per month for 68 months[40]. Blokland J made the following orders in relation to Ms Young's appeal in the form of a compound order, Order 5[41]:

> "Ground E is upheld. The decision of the Tribunal to dismiss Ms Young's claim under s 49 of the *Residential Tenancies Act* is set aside. The respondent is to pay compensation under s 122 of the *Residential Tenancies*

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34 *Various Applicants from Santa Teresa v Chief Executive Officer (Housing)* [2019] NTCAT 7 at [214].

35 *Various Applicants from Santa Teresa v Chief Executive Officer (Housing)* [2019] NTCAT 7 at [166].

36 *Various Applicants from Santa Teresa v Chief Executive Officer (Housing)* [2019] NTCAT 7 at [287]-[288].

37 *Northern Territory Civil and Administrative Tribunal Act 2014* (NT), s 141(2).

38 *Young v Chief Executive Officer, Housing* (2020) 355 FLR 290 at 292 fn 1, 316.

39 *Young v Chief Executive Officer, Housing* (2020) 355 FLR 290 at 314 [87].

40 *Young v Chief Executive Officer, Housing* (2020) 355 FLR 290 at 315 [93].

41 *Young v Chief Executive Officer, Housing* (2020) 355 FLR 290 at 316.

Act to Ms Young in the sum of $10,200. Payment is to be made within 28 days from today."

47 Ms Young appealed to the Court of Appeal from the third sentence of the compound order, asserting the inadequacy of the award of $10,200 in compensation. Her appeal in relation to quantum has not yet been heard.

48 The Chief Executive Officer (Housing) also appealed to the Court of Appeal, including from the order to pay compensation of $10,200. The Court of Appeal allowed the appeal. The Court of Appeal held that s 122 of the *Residential Tenancies Act* should follow the approach to remoteness of damage for breach of contract. The Court of Appeal held that compensation under that section was therefore not available for disappointment and distress which is not consequential upon physical inconvenience, because a residential tenancy agreement is not a contract whose object is to provide enjoyment, relaxation or freedom from molestation[42].

49 The orders made by the Court of Appeal erroneously included an order (Order 5) setting aside the whole of Order 5 of Blokland J. At the commencement of the oral hearing in this Court, orders were made to correct that error, which had resulted in the accidental dismissal of Ms Young's claim for breach of the obligation created by s 49(1) of the *Residential Tenancies Act*, and to leave extant Ms Young's pending appeal in the Court of Appeal concerning the quantification of damages for that breach.

50 Order 5 of the Court of Appeal purported to follow from Order 4, which was expressed as follows: "The appeal is allowed on the ground asserting that the Supreme Court erred in finding that the tenancy agreement was an agreement whose object was to provide enjoyment, relaxation or freedom from molestation" (and was therefore one for which damages could be recovered for disappointment and distress caused by the breach independently of any physical inconvenience). As Order 4 was expressed only to concern a ground of appeal, not the appeal itself, it was, strictly, no order at all. Rather, Order 4 was in the nature of a declaration that the $10,200 award of compensation for disappointment and distress by Blokland J should be considered in Ms Young's forthcoming appeal to the Court of Appeal as damages which are consequential only upon physical inconvenience. In other words, Ms Young would be entitled to compensation for disappointment and distress arising from physical inconvenience — for example, from extra cleaning occasioned by not having a back door — but not the disappointment and distress from feelings of insecurity.

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42 *Chief Executive Officer (Housing) v Young* [2022] NTCA 1 at [55], [58]-[61], [66]-[69].

51 A related question on this appeal is, therefore, whether Order 4 should also be set aside so that it can be recognised that compensation for disappointment and distress following a breach of s 49(1) of the *Residential Tenancies Act* can be awarded independently of physical inconvenience.

The first issue: s 122 of the *Residential Tenancies Act*

An issue of interpretation

52 Ms Young's first ground of appeal asserted that s 122 of the *Residential Tenancies Act* did not incorporate any "restrictions imposed by the principles of remoteness and foreseeability". Ms Young submitted that the only restriction upon the recovery of compensation for loss or damage is that such loss or damage must be caused by a breach of the tenancy agreement or an obligation under the *Residential Tenancies Act* related to the tenancy agreement. The assumption underlying this submission is that other common law restrictions do not apply to limit recovery of compensation for loss or damage under s 122, including where the loss or damage is beyond the scope of the relevant duty. If this interpretation is correct, then the *Residential Tenancies Act* has, in respect of compensation under s 122, preserved and sometimes amended the operation of some general contract law rules, but silently altered the operation of other rules (including those related to remoteness and scope of duty) without any provision for the alteration.

Section 122 of the Residential Tenancies Act

53 Section 122 provides:

"**Compensation and civil penalties**

(1) Subject to subsection (2), the Tribunal may, on the application of a landlord or the 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:

(a) the other party has failed to comply with the agreement or an obligation under this Act relating to the tenancy agreement; or

(b) the applicant has paid to the other party more than the applicant is required to pay to that other party in accordance with this Act and the agreement.

(2) A party may not apply under subsection (1) for:

(a) compensation payable under section 121; or

(b) loss or damage suffered by reason of a breach of the landlord's duty to repair, unless notice under 58(1) has been given.

(3) In determining whether to order the payment of compensation to a party, the Tribunal must take into account each of the following:

(a) whether the person from whom the compensation is claimed has taken all reasonable steps to comply with his or her obligations under this Act and the tenancy agreement, being obligations in respect of which the claim is made;

(b) in the case of a breach of a tenancy agreement or this Act — whether the applicant has consented to the failure to comply with obligations in respect of which the claim is made;

(c) whether money has been paid to or recovered by the applicant by way of compensation, including any money recovered or entitled to be recovered from the security deposit paid under the tenancy agreement;

(d) whether a reduction or refund of rent or other allowance has been made to or by the applicant in respect of the tenancy agreement;

(e) whether an action was taken by the applicant to mitigate the loss or damage;

(f) any tender of compensation;

(g) if the claim is made in respect of damages to the premises to which the tenancy agreement relates — any action taken by the person from whom the compensation is claimed to repair the damage at his or her own expense.

(4) If a party to a tenancy agreement is found guilty of an offence against this Act by a court, that court, another court or the Tribunal may, on the application of the other party to the agreement, order the person convicted to pay to the applicant compensation for any loss or damage suffered by the applicant because of the commission of the offence.

(5) The Tribunal is not to make an order under this section:

(a) for the payment of compensation in respect of death, physical injury, pain or suffering; or

(b) in respect of a failure to pay rent unless:

(i) the rent has been unpaid for at least 14 days after it is due and payable; or

(ii) the tenant has failed on at least 2 previous occasions to pay rent under the same agreement within 14 days after it was due and payable."

The different types of claim recognised within s 122

54 Section 122(1) contemplates a variety of different types of "compensation for loss or damage suffered by the applicant". Plainly, the same rules of "compensation" will not apply to all types of "loss or damage". For instance, there is a vast difference between "compensation for loss or damage" arising from s 122(1)(a) and s 122(1)(b). A claim under s 122(1)(a) for failure to comply with the tenancy agreement is a claim for compensation for loss or damage for a breach of contract. A claim under s 122(1)(a) for failure to comply with an obligation under the *Residential Tenancies Act* relating to the tenancy agreement is a claim for compensation for loss or damage for breach of a statutory obligation. And a claim under s 122(1)(b) for recovery of an overpayment is a claim for restitution.

55 Although the three types of claim are all contained within s 122, the *Residential Tenancies Act* plainly manifests an intention that they be treated differently. For instance, throughout the *Residential Tenancies Act*, some obligations are created as "a term of a tenancy agreement"[43], others are created as statutory civil duties or statutory offences[44], and some are created both as terms of the tenancy agreement and as statutory offences[45].

56 The three different types of claim are also governed by different rules in s 122. For instance, it is well established that the remedy of restitution of an

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43 See *Residential Tenancies Act 1999* (NT), ss 12(1), 21, 35, 48, 49, 51(1), 51(2), 52(1), 52(2), 54, 55(1), 55(3), 56, 57(1), 58(1), 64(1), 64(3), 65, 68(1), 78(1), 78(2).

44 See *Residential Tenancies Act 1999* (NT), ss 19, 20(4), 23, 24(1), 25(1), 29(1), 29(4), 29(5), 31(1), 31(2), 32, 36(1), 36(4), 36(5), 37(1), 37(2), 37(3), 38, 39(1), 39(2), 39(3), 41, 43(1), 44(1), 47, 50(1), 50(2), 53(1), 53(2), 66(1), 66(2), 67(1), 67(2), 81(1), 106, 109(1), 109(3), 109(4), 109(6), 109(8), 112(2), 117, 118(2), 118(3).

45 See *Residential Tenancies Act 1999* (NT), ss 47 and 48(1)(a).

overpayment is of a different nature from the remedy of damages[46]. In particular, a "claim for restitution is a liquidated demand which, by contrast to an unliquidated claim for damages, may provide easier and quicker recovery including by way of summary judgment"[47]. It is also well established that, although "analogies may be helpful", it is "wrong to approach the operation of ... provisions" that deal with remedies for breach of a statutory obligation (such as s 82 of the *Trade Practices Act 1974* (Cth), now s 236 of the *Australian Consumer Law*[48]) "by beginning the inquiry with an attempt to draw some analogy with any particular form of claim under the general law"[49]. By contrast, where a statutory remedy of "compensation for loss or damage" arises because of a failure to comply with a tenancy agreement, there is no analogy that needs to be drawn with a breach of contract. The breach *is* a breach of contract.

57 This appeal is concerned only with the rules that govern a claim for compensation under s 122(1)(a) for loss or damage suffered because of a failure to comply with the tenancy agreement. The relevant "term of a tenancy agreement" alleged to have been breached is that created and required by s 49(1) of the *Residential Tenancies Act*, concerning the obligation of a landlord to ensure the premises and ancillary property are reasonably secure.

The general contract law rules preserved by s 122

58 The default position in s 122 of the *Residential Tenancies Act* is to adopt general contract law rules in respect of a claim for compensation for loss or damage suffered because of a failure to comply with the tenancy agreement. In some instances this is done expressly. For instance, s 120 of the *Residential Tenancies Act* provides that "[t]he rules of the law of contract about mitigation of loss or damage on breach of a contract apply to a breach of a tenancy agreement". In other instances it is done by implication. For instance, the *Residential Tenancies Act*

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46 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 528 [21]; *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at 624 [162], 632 [181], 637 [191], 643 [200].

47 *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560 at 641 [198].

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

49 *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388 at 407 [44], referring to *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 503-504 [17], 510 [38], 529 [103], 549 [152], *Henville v Walker* (2001) 206 CLR 459 at 501-502 [130]-[131], and *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at 124-125 [42]-[48].

stipulates procedures for termination following a breach of the agreement[50], but makes little provision for the rules for determining whether there has been a "fail[ure] to comply with the agreement"[51] or which parties are privy to the agreement. Those rules must be the general contract law rules concerning breach and privity. And just as the general contract law rules concerning breach are implicit in the requirement of a "fail[ure] to comply with the agreement", so too the general contract law rules concerning compensation are implicit in the meaning of "loss or damage" suffered because of a breach of the tenancy agreement.

59 It is notable that s 122 uses the same expression, "loss or damage", as s 120. The same concept must mean the same thing in each provision when dealing with a breach of a tenancy agreement[52]. It would be nonsense for s 122 to employ the general contract law meaning of "loss or damage" for the purpose of applying rules of mitigation for a breach of the tenancy agreement but to employ another, unstated, meaning of "loss or damage" for other rules concerning compensation for breach of the tenancy agreement.

60 A further indication that a consistent application of all general contract law rules to "loss or damage" was intended is the fact that the general contract law rules relating to mitigation are not independent of other general contract law rules concerning the calculation of loss or damage, particularly the rules associated with causation. Although causation was once described in this Court as a concept of "common sense"[53], it has since, and repeatedly, been emphasised that the concept of common sense should be eschewed when applying the principles of causation[54]. In the law of contract, the principles related to causation begin with a

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50 *Residential Tenancies Act 1999* (NT), Pt 11.

51 *Residential Tenancies Act 1999* (NT), s 122. Compare *Residential Tenancies Act 1999* (NT), s 48(2).

52 *Taikato v The Queen* (1996) 186 CLR 454 at 475; *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* (2021) 273 CLR 21 at 39 [25], quoting *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618.

53 *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506 at 515.

54 *Travel Compensation Fund v Tambree* (2005) 224 CLR 627 at 642 [45]; *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568 at 596-597 [96]-[98]; *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 at 440 [43]; *Comcare v Martin* (2016) 258 CLR 467 at 479 [42]; *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* (2022) 273 CLR 454 at 470-471 [45]-[46], 487-488 [101].

counterfactual, or "but for", test. Other general contract law rules that are related to causation include the rules concerning mitigation, remoteness of damage, and scope of duty.

61 For instance, this Court has held that the rule of mitigation that a plaintiff cannot usually recover for avoided loss can be equally described as a rule that is concerned with the principles of calculating compensation[55]. In that sense, rules of mitigation have been said to be rules of causation[56]. Hence, in the present case, when Blokland J correctly held that Ms Young had mitigated her damage by installing a temporary door[57], the consequent reduction in compensation could have been described as either the application of the general contract law rules concerning mitigation of loss or the application of principles concerned with the calculation of compensation.

62 Similarly, concepts of remoteness of damage and scope of duty are related to causation. In broad terms, loss or damage becomes too remote when the causal or contributing connection between the breach and the loss becomes too weak[58]. The strength of connection is generally assessed by reference to the two limbs of the "single principle" in *Hadley v Baxendale*[59]. Similarly, the scope of duty limit concerns "the kind of damage to B which A is under a duty to prevent" which has "a sufficient causal connection with the subject matter of the duty"[60].

63 The need to establish causation and the associated concepts (of remoteness, mitigation, and scope of duty) are all encapsulated within the requirements in s 122 that: (i) the award be one of "compensation"; (ii) the compensation be for "loss or damage"; and (iii) the loss or damage be suffered "because" of the failure to comply with the tenancy agreement. The subordinating conjunction, "because", indicates that causation or contribution must be established in the same way as the

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55 *Talacko v Talacko* (2021) 272 CLR 478 at 500-501 [57].

56 *Koch Marine Inc v D'Amica Societa di Navigazione ARL (The "Elena D'Amico")* [1980] 1 Lloyd's Rep 75 at 88; *Bunge SA v Nidera BV* [2015] 3 All ER 1082 at 1106-1107 [81].

57 *Young v Chief Executive Officer, Housing* (2020) 355 FLR 290 at 314-315 [89].

58 *Henville v Walker* (2001) 206 CLR 459 at 491-492 [101].

59 (1854) 9 Ex 341 [156 ER 145]. See *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 91-92; *European Bank Ltd v Evans* (2010) 240 CLR 432 at 438 [13].

60 *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413 at 429 [33]. See also at 431 [35].

word "by" in the former s 82 of the *Trade Practices Act*[61] required proof of a "counterfactual ... to establish the requisite causal link between identified loss or damage and identified misleading or deceptive conduct"[62]. This use of "because" thus provides a link between references to the concepts of "compensation" and "loss or damage". None of these concepts can be divorced from their general contract law meaning, which — as explained above — includes the general contract law limits on recovering damages for the consequences of a breach of contract.

64 Yet another indication that s 122 is based upon general contract law rules concerning causation and loss or damage is that where there is an intention to depart from those general rules, then such express provision is made. Hence, s 122(2) requires notice of a claim to be given. Section 122(3) makes the award of compensation subject to a discretion, which is to be exercised having regard to a list of considerations. And s 122(5)(a) prohibits the Tribunal from making an order for the payment of compensation in respect of "death, physical injury, pain or suffering".

65 No provision abolishes the general contract law rules of remoteness of damage or scope of duty. This is unsurprising. Ms Young's submission that s 122(1) contemplates the imposition upon a landlord or a tenant of a liability that is unlimited by any requirement of reasonable knowledge or foresight of the consequences suffered and without regard to the scope of the duty undertaken by the landlord or the tenant must be rejected.

66 Nor does any provision suggest that the general contract law rules of remoteness or scope of duty, refined and developed over nearly two centuries, are somehow intended to be amended and replaced with a fresh start. Even if s 122 somehow contemplated that the Tribunal could, if it wished, start afresh with the rules of remoteness and scope of duty and reinvent the wheel, the existing general contract law rules would surely be, at least, "of great assistance"[63]. The most obvious rules for the Tribunal to adopt when considering the principles governing compensation for loss or damage would be the general contract law rules developed by the common law.

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61 *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 527 [95].

62 See *Berry v CCL Secure Pty Ltd* (2020) 271 CLR 151 at 190 [72].

63 *Henville v Walker* (2001) 206 CLR 459 at 501-502 [130], citing *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 503-504 [17], 510 [38], 529 [103], 549 [152].

The second issue: availability of compensation for disappointment and distress

The scope of duty limitation on recovery

67 It was common ground on this appeal that the general contract law restriction upon the availability of damages for disappointment and distress which is not consequent upon physical inconvenience was stated by this Court in *Baltic Shipping Co v Dillon*[64]. In *Baltic Shipping*, Mrs Dillon purchased a 14-day cruise on a vessel which sank after ten days. One issue in that appeal in this Court was whether Mrs Dillon could recover for disappointment and distress that she suffered from the breach of contract by Baltic Shipping Co.

68 In *Baltic Shipping*, all members of the Court held that Mrs Dillon could recover $5,000 for her disappointment and distress, irrespective of the extent to which it was consequent upon physical inconvenience and personal injury that she suffered. As Mason CJ explained, the general contract law rule that had excluded such recovery was a rule that rested upon "flimsy policy foundations and conceptually [was] at odds with the fundamental [compensation] principle governing the recovery of damages"[65]. Nevertheless, apart from breaches of contract causing personal injury, the Court restricted the recovery of damages for disappointment and distress to two categories[66]. The first was where the disappointment and distress was consequent upon physical inconvenience caused by the breach of contract. These are modest damages that reflect the inevitable mental element consequential upon the physical inconvenience suffered[67]. For instance, in *Hobbs v London and South Western Railway Co*[68], the plaintiff could recover for the "suffering" associated with the personal inconvenience of having to walk four to five miles on a cold wet night when, in breach of contract, the train did not stop at the promised station. The usual considerations of remoteness of damage still applied, so that the plaintiff could not recover for the consequences of medical expenses and loss of assistance in his business when his wife caught a cold.

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64 (1993) 176 CLR 344.

65 (1993) 176 CLR 344 at 362.

66 (1993) 176 CLR 344 at 365, 370, 381-382, 383, 387, 394.

67 See *Arsalan v Rixon* (2021) 96 ALJR 1 at 7 [23]; 395 ALR 390 at 396. See also Barnett, *Damages for Breach of Contract*, 2nd ed (2022) at 113 [5-010].

68 (1875) LR 10 QB 111 at 116.

69 The second category where the Court in *Baltic Shipping* recognised damages for disappointment and distress for breach of contract was where the disappointment and distress was not too remote and was within the scope of the duty assumed by the promisor. Although Mason CJ accepted the "obvious" merits of an approach which treated damages for disappointment and distress by reference only to the usual considerations of remoteness of damage, his Honour held that unless physical inconvenience was suffered, a further restriction should be recognised[69]:

> "[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."

70 In other words, as it was later expressed by McLachlin CJ and Abella J giving the judgment of the Supreme Court of Canada in *Fidler v Sun Life Assurance Co of Canada*, although it is "not unusual that a breach of contract will leave the wronged party feeling frustrated or angry", disappointment and distress in an ordinary commercial contract is not recoverable because of its minimal nature and because it was not contemplated by the parties as "part of the business risk of the transaction"[70]. The limitations upon recovery for disappointment and distress that is not consequent upon physical inconvenience are, therefore, concerned not merely with requirements of remoteness but also with the scope or objects of the duty (and therefore the risk) assumed by the promisor[71].

71 The precise formulation of the object of the contract varied slightly between the members of the Court in *Baltic Shipping*. Toohey J and Gaudron J agreed with Mason CJ on this point[72]. Brennan J, Deane and Dawson JJ, and McHugh J focused upon whether the contract contained an express or implied promise that the promisor will, as variously expressed: "protect the promisee from ...

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69 (1993) 176 CLR 344 at 365.

70 [2006] 2 SCR 3 at 20 [45]-[46], quoting McGregor, *McGregor on Damages*, 17th ed (2003) at 63 [3-020].

71 See also *Arsalan v Rixon* (2021) 96 ALJR 1 at 7-8 [24]; 395 ALR 390 at 396.

72 (1993) 176 CLR 344 at 383, 387.

disappointment of mind"[73] and ensure "the promised peacefulness and comfort"[74]; or "provide pleasure, entertainment or relaxation or to prevent molestation or vexation"[75]; or "provide pleasure or enjoyment or personal protection for the promisee"[76]. Each of these formulations of the object of the contract — pleasure, enjoyment, entertainment, relaxation, freedom from molestation, peacefulness, comfort, protection from disappointment of mind, personal protection — is concerned with the same underlying criterion: the promisee's state of mind.

The object or scope of the specific obligation or of the contract as a whole?

72 The decision in *Baltic Shipping* concerned a claim for damages for disappointment and distress where the breach of contract was essentially concerned with all of Mrs Dillon's promised rights. The contract in that case was for "what in essence was a 'pleasure cruise'"[77]. From the time that the ship sank, on the tenth day of the cruise, Mrs Dillon lost the benefit of the "fruit of the contract"[78]. In those circumstances, the damages that she sought for disappointment and distress were concerned with the disappointment and distress that arose from the loss of the benefit of all her contractual rights. The scope of the duty of Baltic Shipping Co required a focus upon the contract as a whole.

73 By contrast, where a claim is brought for the breach of a particular contractual provision, damages for disappointment and distress can be recovered only if an object of that particular obligation was the provision of enjoyment, relaxation or freedom from molestation. As Brennan J said in *Baltic Shipping*[79], "[t]o ascertain whether the obtaining of peace of mind is the object of a contract or, more accurately, *an* object of a contract, reference is made to its terms, express or implied". Where the disappointment and distress arises from a repudiation of all the essential terms of the contract, then the focus will be upon whether those terms, express or implied, have the requisite object. But where the disappointment and

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73 (1993) 176 CLR 344 at 370 per Brennan J.

74 (1993) 176 CLR 344 at 371 per Brennan J, quoted in *Moore v Scenic Tours Pty Ltd* (2020) 268 CLR 326 at 342 [45].

75 (1993) 176 CLR 344 at 381-382 per Deane and Dawson JJ.

76 (1993) 176 CLR 344 at 405 per McHugh J.

77 (1993) 176 CLR 344 at 366.

78 *Watts v Morrow* [1991] 1 WLR 1421 at 1445; [1991] 4 All ER 937 at 960, cited in *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 364, 371.

79 (1993) 176 CLR 344 at 371 (emphasis in original).

distress arises from the breach of a particular term, then it is the object of that term that is relevant. That is not to say, however, that the purpose of other provisions, as well as the contract as a whole, will not be relevant in construing the particular term in context and identifying its object.

74 This distinction can be illustrated by reference to the well-known case of *Ruxley Electronics and Construction Ltd v Forsyth*[80]. In that case, if the contract had been not only to construct a residential pool to a particular depth, but also to build a separate commercial apartment block, there would have been no difference in the result. The object of the particular obligation relating to the depth of the pool (amenity, convenience, and the satisfaction of personal preference), and the builder's consequent assumption of risk, would have been unaffected by whatever might have been provided in the other terms of the contract. As Lord Steyn said in *Farley v Skinner* in response to a submission that it was not sufficient that only "a major or important *part* of the contract was to give pleasure, relaxation and peace of mind": "[i]t is difficult to see what the principled justification for such a limitation might be"[81].

Was the term created by s 49(1) of the Residential Tenancies Act *concerned with the tenant's state of mind?*

75 Not all provisions of a tenancy agreement will have an object concerned with the state of mind of the tenant. But some will. The parties to this appeal focused considerable attention on the contrasting approaches in the authorities concerning whether the obligation of quiet enjoyment in a lease had an object concerned with the tenant's state of mind, such as providing peace of mind or freedom from distress[82]. The obligation of quiet enjoyment is more than an obligation merely to afford possession; it extends also to securing enjoyment of the lease for all usual purposes[83]. In many cases, an object of the obligation will be to provide peace of mind. But every case will ultimately depend upon the contract or the statutory provision creating the term. For instance, an obligation of quiet enjoyment in a retail lease has been held not to involve an object of providing

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80 [1996] AC 344.

81 [2002] 2 AC 732 at 749 [22]-[23] (emphasis added).

82 Compare, eg, *Branchett v Beaney* [1992] 3 All ER 910 at 918 with *McCall v Abelesz* [1976] QB 585 at 594.

83 *Martins Camera Corner Pty Ltd v Hotel Mayfair Ltd* [1976] 2 NSWLR 15 at 23, quoting *Halsbury's Laws of England*, 3rd ed, vol 23, para 1298. See also *Hawkesbury Nominees Pty Ltd v Battik Pty Ltd* [2000] FCA 185 at [37]-[38].

peace of mind because it was not an object of the retail lease to provide enjoyment, relaxation or freedom from molestation[84].

76 The remaining issue on this appeal is whether s 49(1) of the *Residential Tenancies Act* had such an object. Section 49(1) created a term of the tenancy agreement concerned with the security of the leased premises. The leased premises were to be used as a home. The object of that requirement of security was protection of the physical and psychological well-being of the tenant. One of the objects of the *Residential Tenancies Act* is "to ensure that tenants are provided with safe and habitable premises under tenancy agreements"[85]. The concerns of that object of safety, being both physical and psychological well-being, are reflected in the obligation created by s 49(1), which provides for both the physical safety and the psychological security that come with a reasonably secure premises.

Conclusion

77 The appeal should be allowed. The proper interpretation of s 122 does not require the Tribunal to engage in a search for new rules limiting compensation under the *Residential Tenancies Act*. In the application of general contract law rules, an object of the term of the tenancy agreement created by s 49(1) of the *Residential Tenancies Act* was to provide a tenant with the peace of mind that comes with secure premises. The Chief Executive Officer (Housing) breached that obligation. The right in s 122 for Ms Young to obtain compensation for loss or damage suffered because of that breach includes the disappointment and distress suffered by Ms Young.

78 In the notice of appeal and joint submissions filed on behalf of the appellants, the costs of both appellants were sought in this Court if the appeal were allowed. There was no demur from that aspect of the relief sought. Further, orders were made by consent at the commencement of this appeal concerning Order 5 of the orders of the Court of Appeal of the Supreme Court of the Northern Territory and the further orders sought by Ms Young, including an order quashing the decision of the Tribunal and remitting this matter back to the Tribunal for determination according to law, are not appropriate orders to make in this appeal. There is also no necessity to substitute for Order 4 of the orders of the Court of Appeal an order quashing the orders for compensation to Ms Young and Mr Conway (Orders 2 and 3 of the orders of the Northern Territory Civil and Administrative Tribunal given on 27 February 2019). Any such orders concerning compensation, and any substitute amount, should be made in the pending appeal to the Court of Appeal concerning the proper quantum of the Tribunal's award of

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84 *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723 at 752.

85 *Residential Tenancies Act 1999* (NT), s 3(d).

compensation. For these reasons, orders should be made as proposed by Kiefel CJ, Gageler and Gleeson JJ.

Postscript

79 On 7 July 2023, after these reasons had been finalised, this Court was informed by the solicitors for the appellants, with the consent of the solicitors for the respondent, that Ms Young had passed away. The solicitors for the appellants advised the Court that they would seek instructions from Ms Young's estate to apply for an order substituting her estate as the first appellant. On 26 October 2023, consent orders were certified by the Court, substituting the administrator of the estate of Ms Young as the first appellant.