HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

No. D5 of 2022 D5/2022

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

APPELLANTS' SUBMISSIONS

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

Part II: Statement of the issues that the appeal presents.

1. The appellants submit that this appeal presents two issues.
    a. Ground 1: Does the Northern Territory Civil and Administrative Tribunal (the **Tribunal**) have power to order compensation for disappointment or distress absent physical inconvenience suffered by a person when that loss and damage was caused by a breach of a tenancy agreement or a breach of the *Residential Tenancies Act* 1999 (NT) (the **Act**)?
    b. Ground 2: Is a residential tenancy agreement generally, or a tenancy agreement under the Act specifically, a contract which has as an object, or as its principal object, the provision to the tenant of peace of mind, comfort, relaxation, enjoyment, freedom from molestation or vexation?
2. Both issues should be resolved in the affirmative. That resolution is reached primarily by applying *Moore v Scenic Tours Pty Ltd*[1] to the present contractual and statutory context.
3. The third ground of the appeal is not in issue, having been resolved by the parties in favour of the appellants. That resolution will provide a basis for Enid Young's appeal concerning the compensation amount to be determined by the Court of Appeal of the Supreme Court of the Northern Territory (**Court of Appeal**) following the present appeal.

Part III: Notice in compliance with s 78B of the *Judiciary Act* 1903 (Cth)

4. The appellants have considered whether any notice should be given and have concluded that none is required.

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[1] (2020) 377 CLR 209 ('*Moore*').

Part IV: Citations for the reasons for judgment below

5. The Tribunal's decision is cited at *Various Applicants from Santa Teresa v Chief Executive Officer (Housing)* [2019] NTCAT 7.
6. The Supreme Court of the Northern Territory's (**Supreme Court**) judgment is cited at *Young and Conway v Chief Executive Officer, Housing* (2020) 355 FLR 290.
7. The Court of Appeal's judgment is cited at *Chief Executive Officer (Housing) v Young & Anor* [2022] NTCA 1.

Part V: A narrative statement of the relevant facts

8. From 2010, Enid Young leased her home from the Respondent, the Chief Executive Officer (Housing) (**Landlord**).[2] Ms Young's home is in the remote, desert community of Ltyentye Apurte, also known as Santa Teresa. Ms Young was about 71 years old when she commenced the tenancy and lived there with her brother, Gerard.
9. For 68 months, Ms Young's home had no back door in the doorframe.[3]
10. Her Landlord is a statutory body corporate sole which, among other things, is supposed to maintain and manage premises[4] of those Northern Territorians who are 'of limited means' and are 'not adequately housed'.[5]
11. On 5 February 2016, Ms Young brought a claim in the Tribunal for compensation from her Landlord under s 122 of the Act. She alleged, among other things, that by not installing a door, her Landlord had breached its obligation to provide a home that was reasonably secure (s 49(1)) or alternatively a home that was habitable (s 48(1)(a)).
12. On 19 November 2018, Ms Young gave evidence through an interpreter at the opening day of the trial in Ltyentye Apurte.[6] She told the Tribunal that the open doorway meant that 'we battled the environment [and] people were [also] the problem',[7] having earlier attested that snakes came in through that doorway and wild horses had trampled her metal fence just beyond it.[8]
13. On 27 February 2019, the Tribunal rejected Ms Young's claim that having an empty external doorway made her home not reasonably secure (s 49(1)) or habitable (s 48(1)(a)).

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[2] The terms of the agreement were prescribed by operation of the Act s 19(4) read with s 19(1)(d) and *Residential Tenancies Regulations 2000* (NT) r 10 and Sched 2; see *Various Applicants from Santa Teresa v Chief Executive Officer (Housing)* [2019] NTCAT 7, 18-21 [66]-[81] ('*Tribunal decision*').
[3] *Young & Conway v Chief Executive Officer, Housing* [2020] NTSC 59, 47 [89], 53 [93] (Blokland J) ('*Supreme Court judgment*').
[4] *Housing Act 1982* (NT) ss 6, 15-16.
[5] *Housing Regulations 1983* (NT) rr 3-4; see also the unattested declaration of Enid Young dated 6 October 2018, [15]: 'I have no savings or assets.'
[6] *Tribunal decision* 2 [3], 7 [29].
[7] Affidavit of Daniel Kelly dated 9 May 2019, 18
[8] *Tribunal decision* 39 [167], 39 [171], 53 [257].

Instead, the Tribunal found that her Landlord had failed to comply with its obligation of repair (s 57) for the 6 weeks after Ms Young gave notice concerning the door. It reasoned: D5/2022

> While the absence of a backdoor is odd in an Australian context, it does not render a house uninhabitable within the test articulated… above [which articulation was found to be in error by the Court of Appeal]. Further, It is difficult to see how the *absence* of a backdoor, and hence a lock, could constitute a breach of the Respondent's obligation under s 49(1). The Respondent cannot be required to "provide and maintain" a lock on a door that does not exist.[9] (Errors and emphasis are from the original text.)

The Tribunal then went on to find for a different tenant in Ltyentye Apurte that the absence of a key was a breach of s 49 .[10]

14. Ms Young sought compensation for non-economic loss under s 122(1)(a),[11] in its own terms or by application of *Baltic Shipping Co v Dillon.*[12] Before the Tribunal, the Landlord did not contest the availability of compensation for non-economic loss on either basis.[13] The Landlord also did not rely on notions of remoteness or foreseeability to resist Ms Young's (or any other of the representative tenants') applications for compensation.

15. The Tribunal concluded on the topic of non-economic loss compensation that:

> …while s 122(5)(a) of the RTA prohibits the Tribunal from making an order for compensation for, *inter alia*, pain and suffering, it has been held that, in appropriate cases, the Tribunal can award compensation for distress and disappointment arising from a breach of a tenancy agreement…[14]

16. As this passage makes clear, the established position in NT law up to the Court of Appeal judgment was that compensation for disappointment or distress (including absent physical inconvenience) was available (and was awarded) under s 122. That that was the correct position was not doubted or challenged by the Respondent in the Tribunal in this case.[15]

17. The Tribunal awarded $100 compensation to Ms Young by reason of her having not been provided with a back door.[16]

18. On appeal to the Supreme Court, the Landlord conceded that the Tribunal was wrong, and that it had breached s 49. The Court agreed[17] and the Tribunal's decision was relevantly set aside. Justice Blokland held that the failure to install the door was a 'fundamental breach' of the Landlord's obligation to provide premises that were reasonably secure. The

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[9] Ibid 39 [166].
[10] Ibid 46 [214].
[11] Initiating application of Enid Young dated 5 February 2015 (*sic* 2016).
[12] (1993) 176 CLR 344 ('*Baltic Shipping*').
[13] Affidavit of Daniel Kelly dated 9 May 2019, 8 and 51. See also the Applicants' closing written submissions in reply dated 22 January 2019 at [2(f)].
[14] *Tribunal decision* 58 [282], citing *Sandy v Sananikone & Ors* [2015] NTRTCmr, [67]; *Wooley & McKenna v Ginnis & Ginnis* [2016] NTCAT 490, [23], citing *Peisker v O'Donoghues First National* [2012] NTRTCmr 86.
[15] Ibid 60 [289]. See, eg, Ms Young had no functioning stove for 170 days. The Tribunal 'assumed that this breach caused [her] significant distress and disappointment' when awarding compensation.
[16] *Tribunal decision* 38-9 [160]-[166], 60 [287]-[288].
[17] *Supreme Court judgment* 46-7 [87].

Court then ordered $10,200 compensation for disappointment and distress for the period of almost 6 years, rather than just the final 6 weeks.[18]

19. On 8 September 2020, her Honour made the resulting order 5 as follows:

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

20. All three parties filed appeals on the same day only in respect of the third sentence of that order. Ms Young contended that, among other things, the Supreme Court's award was manifestly inadequate, including because that Court awarded less (by almost half) compensation than the Landlord had conceded Ms Young should receive.[19] Her appeal has not yet been heard.[20]

21. In its appeal, the Landlord alleged that the Supreme Court should have found that Ms Young could only recover compensation for disappointment or distress if that resulted from physical inconvenience. The Court of Appeal agreed and allowed the appeal.[21]

22. Notwithstanding that history, the Court of Appeal also ordered that:

> Order 5 made by the Supreme Court on 8 September 2020 is set aside.

23. The overly broad terms of the Court of Appeal order is the basis of the third ground of the present appeal, which the parties have resolved.

The significance of this appeal

24. This proceeding is and has always been a 'representative' case[22] concerning a contract with mandatory statutory terms to which a majority of Northern Territorians are a party. There are currently at least 94 cases in the Tribunal awaiting the outcome of this appeal.[23]

25. As noted, the Court of Appeal concluded that compensation for Ms Young's doorless doorway could be recovered for 'distress and disappointment… in consequence of a breach of contract directly causing physical inconvenience'.[24] On that analysis, Ms Young could recover for 'the physical inconvenience of having to constantly clean the premises by reason of the landlord's failure' for an hour or so every day or two,[25] of having to

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[18] Ibid 50 [93].
[19] Submissions on behalf of the landlord dated 28 June 2019 at [71]-[73], noting that the time period was in error, being 68 months not '272 days'.
[20] Authenticated orders of the Court of Appeal dated 16 February 2022, order 7.
[21] *Chief Executive Officer (Housing) v Young & Anor* [2022] NTCA 1, 57 [68]-[69] ('*Court of Appeal judgment*').
[22] *Supreme Court judgment* 2-3 [3]-[4]; *Cavanagh v CEO Housing [No.4]* [2017] NTCAT 240, [6]-[7]; affidavit of Daniel Kelly dated 3 March 2022 at [4](a)
[23] Affidavit of Daniel Kelly dated 3 March 2022 at [2]-[8].
[24] *Court of Appeal judgment* 49-50 [60].
[25] Ibid 55-6 [66]; read with *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2020) 395 ALR 403, 409 [20] (Keane, Gordon, Edelman, Steward and Gleeson JJ).

remove snakes from her home that entered by that doorway for an hour or so once in a while[26] and of taking half a day or so every year moving any daily necessities to and from the home of her daughter[27] to which she retreated when Ms Young's home became unlivable for months because it had no air conditioning.[28]

26. However, on the Court of Appeal's analysis Ms Young could not recover for the 'natural human emotional response'[29] to being left with an insecure home. Such a natural response would include the concern for having the inside of her home invaded by snakes,[30] or destroyed by the return of 'roaming wild horses' who bent her metal perimeter fence 'to the ground in many places'.[31] It would also include the annual worry for the security of all the possessions she left when she sought refuge from the desert heat for three months a year,[32] or on any other occasion when she left the home unattended. This was a natural response because people were known 'to steal our possessions and do damage' to insecure homes in Ms Young's small community.[33] If this appeal is allowed, these are the kinds of disappointments or vexations or sources of 'depression of spirit'[34] for which Ms Young will be able to be compensated.

Part VI: Argument

27. The Court of Appeal's error can be demonstrated in either of two main ways: by focusing on the language chosen by Parliament in s 122 of the Act (ground 1) or by connecting a tenancy agreement with authorities dealing with compensation for disappointment and distress in general contract law (ground 2).

Ground 1: s 122 allows compensation for loss and damage, subject to express limits only

28. Section 122 of the Act empowers the Tribunal to award compensation for loss and damage suffered 'because' (sub-s (1)) or 'by reason of' (sub-s (2)(b)) a breach of a tenancy agreement or an obligation under the Act. In dealing with such a claim the Tribunal is required to (a) determine whether the breach of the tenancy agreement or

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[26] *Tribunal decision* 38 [106].
[27] Unattested declaration of Enid Young dated 6 October 2018 at [2] on p 2 and [10] on p 3
[28] *Tribunal decision* 41 [180]-[181].
[29] *New South Wales Lotteries Corporation Pty Ltd v Kuzmanovski* (2011) 195 FCR 234, 253-4 [123]; see also *Chiodi's Personal Representatives v De Marney* (1989) 21 HLR 6, 10, 12 ('*Chiodi v De Marney*').
[30] *Tribunal decision* 38 [160].
[31] *Tribunal decision* 39 [167]-[168].
[32] *Tribunal decision* 41 [180]-[181].
[33] *Tribunal decision* 37-8 [157], 46 [212], 60 [285]-[286].
[34] *Moore* 340 [39] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

statute has caused a person to suffer loss or damage; and (b) then determine the extent of that loss or damage.[35]

29. In carrying out those tasks, the Tribunal is required to apply certain rules (eg the duty to mitigate (s 120)), take into account certain matters (eg whether compensation has been obtained from another source (s 122(3)) and exclude from its consideration certain claims (eg 'death, physical injury, pain or suffering' (s 122(5)(a))).

30. Parliament elected to pick and choose elements of the general law, and to set unique limits on the Tribunal's power to order compensation. All of that is express in the text of the Act. On first principles,[36] that election should be respected in the task of construing the power in s 122.

The Court of Appeal added limits not apparent in the words chosen by Parliament

31. However, the Court of Appeal added to the words chosen by Parliament concepts and limits not apparent in the text, namely that the Tribunal also apply the rules of general contract relating to remoteness or foreseeability, or that the text also be taken to exclude loss or damage in the form of disappointment or distress.[37]

32. The Court of Appeal's reasoning was erroneous when it superimposed on the Act the principles by which common law courts limit damages for breach of contract. Where Parliament limited the Tribunal's power to award compensation under s 122, but did not exclude the power to award compensation for distress or disappointment, the Court of Appeal lacked power to add such an exclusion.[38] The purpose and structure of s 122, in the context in which it is found, and assessed against its history, shows that the Court of Appeal's textual addition and further limitation on the Tribunal's power was in error.

33. The Tribunal has a non-exclusive, but limited, jurisdiction to award compensation in two circumstances: for a breach of a tenancy agreement and for a breach of the Act. For the purposes of the exercise of this jurisdiction, Parliament has prescribed a self-contained scheme for the Tribunal to apply in determining compensation claims. That scheme adopts some, but not all, of the rules that limit damages in contract claims (most explicitly, contract law principles concerning mitigation)[39] and provides a broader compensating

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[35] Bradbrook MacCallum & Moore, *Residential tenancy law and practice: Victoria and South Australia* (Law Book Co., 1983) 696 [2423] ('*Bradbrook*'), discussing a provision in materially the same terms as the Act s 122. See also *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 525 (Mason CJ, Dawson, Gaudron and McHugh JJ).

[36] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 162 (Higgins J).

[37] *Court of Appeal judgment* 45-6 [55] contra 18 [16] and *Kemp v Sober* (1851) 61 ER 200, 201 (Lord Cranworth V-C)

[38] *HFM043 v The Republic of Nauru* (2018) 359 ALR 176, 180 [24] (Kiefel CJ, Gageler and Nettle JJ); in a residential tenancy context see *Reardon and Reardon v Ministry of Housing* (Supreme Court of Victoria, Smith J, 13 November 1992) 16 ('*Reardon*').

[39] *Act* s 120. This duplicated *Residential Tenancies Act 1995* (SA) s 78.

power than is exercisable by a court (including the power to compensate for a breach of an obligation under the Act relating to a tenancy agreement).[40] D5/2022

34. Parliament could have, but did not, carve out from the scope of s 122 compensation for distress or disappointment.[41] The existing carve out in s 122(5)(a) does not exclude recovery for loss or damage in such form. This is so for either of two reasons:

    a. Section 122(5)(a) is concerned only with *physical* repercussions of a breach. The word 'physical' qualifies each of injury, pain and suffering.[42] The Tribunal is thus unconstrained in ordering compensation for *mental* injury, pain and suffering.

    b. Alternatively, and even if the qualifier 'physical' is limited to 'injury', compensation for 'pain and suffering' is distinct from compensation for distress or disappointment. The category of loss or damage for distress or disappointment compensates for the 'normal, rational reaction of an unimpaired mind'[43] and 'stands independent of physical or psychiatric injury', which is instead addressed by the category of loss or damage for pain and suffering.[44]

35. Reading s 122(1) expansively (and thus reading s 122(5) restrictively) in either of the above ways would be consistent with one of the mischiefs that that Act was introduced to remedy:[45] that was, to have as many tenancy disputes as possible dealt with completely by an informal Tribunal, instead of by a court.[46]

The compensation scheme is based on causation and is not subject to limits of remoteness and foreseeability

36. Compensation is recoverable under s 122 of the Act if loss or damage arises 'because' the defaulting party has breached a tenancy agreement or the Act. In using the word 'because', Parliament intended that any person who suffers loss or damage caused by a breach of a tenancy agreement or the Act be entitled to compensation for that loss or damage, including if it takes the form of disappointment or distress.

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[40] See also Act ss 33(3)(a), 119

[41] For an example of such a provision applied in a residential tenancy context, see *Head et al v Community Estates* [1944] 3 DLR 189, [25] (Hope J)

[42] *Teubner v Humble* (1963) 108 CLR 491, 507 (Windeyer J). For an analysis of the then-current Victorian provision which adopted the same phrase as the Act s 122: see *Bradbrook* (n 35) 695 [2422].

[43] *Moore* 340-1 [41], 346 [56]-[57] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

[44] Ibid 341-2 [44] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ); applied in a residential tenancies' context at *Makowska v St George Community Housing Ltd* [2021] NSWSC 287, [24]-[25], [46] ('*Makowska v St George Community*').

[45] *R v A2* (2019) 269 CLR 507, 521 [33] (Kiefel CJ and Keane J); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 46-7 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

[46] In the parliamentary debates leading to the introduction of the Act, reliance was placed on the 1992 working group report which formed the basis for reform of NT residential tenancy legislation: see Northern Territory, *Parliamentary Debates*, Legislative Assembly, 19 August 1999, 4272 (Tim Baldwin, Minister for Industries and Business) ('*Parliamentary Debate*') and The Working Group Appointed to Review Tenancy Law in the Northern Territory, *Discussion Paper: Tenancy Review* (October 1992) 40 [10.11] ('*Working Group Paper*').

37. In this connection s 122 relevantly uses the same language ('because') as is found in s 236 of the *Australian Consumer Law*.[47] That section also permits a court to award compensation for contravention of that Act. The cases that deal with the assessment of damages under that section show that what is recoverable is compensation for any loss or damage caused by the wrongful conduct.[48] Such an approach comes with familiar, well-established limits: a 'but for' assessment should be applied[49] so as to avoid any 'chain of consequences that can reach back to the Norman Conquest'.[50] D5/2022

38. The purpose of the causation element in this statutory context[51] is to provide a means to remedy breaches that have a natural, predictable (including intangible and non-pecuniary) effect. Protecting against those effects is central to the scheme of this and any Act primarily concerned with giving legal protections around peoples' homes. This includes the present context, namely seeking remedy for the natural feeling of insecurity that comes from having an empty external doorway. That and the way that such matters are central to this particular statutory scheme are explored below, especially at [49]-[51].

39. Parliament also could have, but did not, require the Tribunal to apply any other common law method of limiting damages. In particular, Parliament did not require the Tribunal to apply the principles relating to remoteness and foreseeability.

40. Those principles cannot sensibly be applied when the claim for compensation is for a breach of the Act as s 122 also permits. If concepts of remoteness and foreseeability formed part of s 122, the Tribunal would have to approach the same issue through two different legal lenses where an act or omission constituted both a breach of an agreement and a breach of the Act: for example, if a landlord made a tenant temporarily homeless in order to complete a condition report, that would involve a breach of s 28B of the Act and a breach of a mandatory term of the tenancy agreement (s 65). If contractual principles of remoteness and foreseeability applied only to the breach of the agreement, the Tribunal would have to form a view through bifocal legal lenses of the same act.

The drafting history reinforces the conclusion above

41. The conclusion that Parliament did not intend for s 122 to exclude orders for compensation for distress or disappointment is reinforced when the drafting history is

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[47] *Competition and Consumer Act 2010* (Cth) Sch 2.
[48] Eg, *Marks v GIO Holdings Australia Ltd* (1998) 196 CLR 494, 509 [34] (McHugh, Hayne and Callinan JJ).
[49] *Tapp v Australian Bushmen's Campdraft & Rodeo Association Limited* (2022) 96 ALJR 337, 356 [101] (Gordon, Edelman and Gleeson JJ); *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420, 440 [45] (French CJ, Gummow, Hayne, Heydon and Crennan JJ). Alternatively, the approach in *Fitzgerald v Penn* (1954) 91 CLR 268, 277 (Dixon CJ, Fulgar and Kitto JJ); *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506, 534-6 [18] (McHugh J).
[50] *Young & Anor v Chief Executive Officer (Housing)* [2022] HCATrans 159, 2 [35] (Edelman J).
[51] *Comcare v Martin* (2016) 258 CLR 467, 479 [42] (French CJ, Bell, Gageler, Keane and Nettle JJ).

considered. Section 122 was adopted into NT law in 1999. In presently relevant respects, it replicated the earlier, equivalent Victorian Act.[52] Before the NT Parliament adopted those terms, the Victorian Supreme Court had construed the identical terms of the Victorian Act relevantly as follows: D5/2022

> the express exclusion of compensation for some non-pecuniary loss by [the provision which was the source of the text in s 122(5) of the Act] supports the view that loss and damage in [the provision which was the source of the text in s 122(1) of the Act] otherwise includes non-pecuniary loss and damage… The expression loss and damage is a wide one and I would expect an express limitation by the Parliament to exclude compensation for a typical consequence of disruption to quiet enjoyment and one that is compensable at common law…[53]

By 1999, it was established too that it was 'highly desirable that there be conformity of decision between States where legislative provisions are identical'.[54] That is, when adopting the language of the Victorian Act, the NT Parliament is properly taken to have intended for it to have the same meaning, scope and effect as the Victorian Act.

42. Further, as at the time the NT Parliament adopted s 122, there was also then-recent Supreme Court authority that compensation for disappointment and distress could be ordered for breach of a residential tenancy agreement absent physical inconvenience.[55] Against that backdrop, the NT Parliament took no steps to displace by statute the then-established position that such compensation could be awarded for a breach. Section 122(5) was a natural place for such an exclusion, but terms directing it are absent.

43. It follows that the Court of Appeal was wrong to add words or concepts to those chosen by Parliament in and around s 122. It allows for compensation for loss or damage in the form of disappointment or distress caused by a breach of the Act or a tenancy agreement. That conclusion is consistent with first principles of statutory construction, by analogy with like compensation schemes and with the drafting history of this one in particular.

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[52] *Residential Tenancy Act 1980* (Vic) ss 105-106.
[53] *Reardon* (n 38) 15-16; noting that compensation was only sought for inconvenience, and not for disappointment or distress. For a decision dealing with a similar provision allowing for compensation for 'actual damage' in a residential tenancies context, see *McNairy v C.K Realty* (2007) 150 Cal.App.4th 1500
[54] *Camden Park Estate Pty Ltd v O'Toole And Another* (1969) 72 SR (NSW) 188, 190 (Herron CJ, Sugerman and Jacobs JJ).
[55] *Laurence Edmond Strahan v Residential Tenancies Tribunal* [1998] NSWSC 30008; *Residential Tenancies Tribunal of New South Wales v Lyle Offe* [1997] NSWSC 10752.

Ground 2: a residential tenancy agreement's objects include peace of mind, comfort, , relaxation, enjoyment, freedom from molestation or vexation D5/2022

44. The conclusion that a tenancy agreement under the Act can result in compensation for disappointment or distress can similarly be reached by traversing contract law authorities.

45. The Court of Appeal misapplied *Baltic Shipping* by impermissibly narrowing its operation. The conclusion that a tenancy agreement falls within the second limb of *Baltic Shipping* flows from a review of the inherent nature of what is provided by way of a tenancy agreement, and a review of the specific, mandatory protections given by the Act .

46. In *Baltic Shipping*, this Court recognised that compensation can be recoverable for disappointment and distress absent physical inconvenience if and only if the contract was one which had as an object the provision of peace of mind,[56] comfort,[57] pleasure,[58] enjoyment,[59] relaxation,[60] or freedom from molestation,[61] distress[62] or vexation[63] (together, **second limb benefits**). As Mason CJ held:

> the rule that damages for disappointment and distress are not recoverable unless they proceed from physical inconvenience caused by the breach [first limb] or unless the contract is one the object of which is to provide enjoyment, relaxation or freedom from molestation [second limb].[64]

47. The core aspects of, and terminology from, *Baltic Shipping* were recently and unanimously endorsed afresh by this Court.[65] In particular, the Court highlighted that compensation can arise in respect of 'vexation and frustration',[66] 'humiliation, indignity… grief, anxiety and distress, not involving a recognised psychological condition',[67] and 'depression of spirit'.[68] Any of these, the Court held, are 'not an "impairment" of the mind

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[56] *Moore* 340-1 [41] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ); *Baltic Shipping* 364 (Mason CJ), 370-1 (Brennan J), 381-2 (Deane and Dawson JJ), 401-2 (McHugh J).
[57] *Moore* 342 [45] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ); *Baltic Shipping* 371 (Brenan J).
[58] *Moore*, 341-2 [43]-[45] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ), 349-50 [68]-[69] (Edelman J); *Baltic Shipping,* 363-4 (Mason CJ), 371 (Brennan J), 381-382 (Deane and Dawson JJ), 394, 401-402, 405-406 (McHugh J).
[59] *Moore* 342 [46] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ), 349 [65], 351 [71] (Edelman J); *Baltic Shipping* 363, 365-6 (Mason CJ), 382 (Deane and Dawson JJ), 394, 399, 405-6 (McHugh J).
[60] *Moore* 341 [43]-[44], 342-3 [46] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ), 349-50 [68]-[69] (Edelman J); *Baltic Shipping* 363-66, 371 (Mason CJ), 381-2 (Deane and Dawson JJ), 402 (McHugh J).
[61] *Moore* 341 [44], 342 [46] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ), 350 [68] (Edelman J); *Baltic Shipping* 363-65 (Mason CJ), 371 (Brennan J), 382 (Deane and Dawson JJ), 402 (McHugh J).
[62] *Moore* 341-43 [43]-[46], 346 [56]-[60], (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ), 348 [62], 350-1 [68]-[71] (Edelman J); *Baltic Shipping* 363-366 (Mason CJ), 370-72 (Brennan J), 383 (Toohey J), 387 (Gaudron J), 399-405 (McHugh J).
[63] *Moore* 341 [44] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ), 350 [68]-[69] (Edelman J); *Baltic Shipping* 363 (Mason CJ), 400 (McHugh J).
[64] *Baltic Shipping* 365 (Mason CJ); *Moore* 342 [46] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
[65] *Moore* 341 [43] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ), 349-50 [68] (Edelman J). Justice Edelman wrote separately but endorsed the reasons of the plurality: *Moore* 347-8 [62].
[66] *Moore* 341 [44] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
[67] *Moore* 346 [56]-[57] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
[68] *Moore* 340 [39] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ), *Baltic Shipping* 368-71 (Brennan J).

or a "deterioration" or "injurious lessening or weakening" of the mind' such as to be 'injury, pain or suffering' but are rather 'a normal, rational reaction of an unimpaired mind'[69] which could be compensated.

48. This Court also unanimously endorsed the following passage from *Baltic Shipping*:

> [I]f peaceful and comfortable accommodation is promised to holidaymakers and the accommodation tendered does not answer the description, there is a breach which directly causes the loss of the promised peacefulness and comfort and damages are recoverable accordingly.[70]

If this is right for cruise ship accommodation agreements, it must be right for other accommodation agreements.

The inherent nature of a tenancy agreement aligns with the second limb benefits

49. Since 1604, the common law has recognised that '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'.[71] Nothing has changed in this regard in the intervening four centuries: 'A person's "home" is… the place where [they] and [their] family are entitled to be left in peace free from interference…. It is an important aspect of [their] dignity as a human being, and it is protected as such and not as an item of property.'[72]

50. In 1999, the NT Parliament introduced legislation which offered such protection and placed obligations on landlords to reflect the very same centuries-old protections in the homes of tenants. Added to that is the particular statutory role of this Landlord. It is governed by further legislation of the NT Parliament which relevantly includes a requirement that it only let premises if 'satisfied that the [will-be tenant] intends to use the dwelling *as a home* for the person or the person's dependants and for no other purpose.'[73]

51. A home, like a cruise ship, is not a door, walls and a roof all there solely to avoid physical inconvenience.[74] '[F]ew things are more central to the enjoyment of human life than

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[69] *Moore* 340-1 [41] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
[70] *Moore* 342 [45] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ); see also by analogy *Arsalan v Rixon* [2021] ALJR 1, 9 [26] (Kiefel CJ, Gageler, Keane, Edelman and Steward JJ).
[71] *Roy v O'Neill* (2020) 95 ALJR 64, [31] (Bell and Gageler JJ), quoting *R v Semaynes* [1604] 5 Co Rep 91, [91 a]; 77 ER 194, 195.
[72] *London Borough of Harrow v Qazi* [2004] 1 AC 983, 1016 [89] (Lord Millett) ('*Qazi*'). The qualification in the original text as to state interference arose because of the public law right being considered.
[73] See *Housing Regulations 1983* (NT) r 4(4), made pursuant to *Housing Act 1982* (NT) s 37. This phrase dates back to at least the *Housing Ordinance 1959* (NT) s 26(4). It being for use 'as a home' would preclude its use for profit: see, eg, *Equity Trustees, Executors & Agency Co Ltd v Buckhurst* [1907] VLR 252, 257.
[74] *Calabar Properties v Sticher* [1984] 1 WLR 287 (Stephenson LJ); UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), 13 December 1991, E/1992/23, [7], [8(d)]; Sahra Nield, 'Article 8 Respect for the Home: A Human Property Right?' (2013) 24 K.L.J 147, 149-50: a "home encompasses more than the physicality of a shelter." By analogy, see *Wilson v Houston Funeral Home* (1996) 42 Cal.App.4th 1124, 1133 (Johnson J).

having somewhere to live…. [A] "home"… is that where a person "lives and to which he returns and which forms the centre of his existence"'.[75] A contract for a home: D5/2022

> [i]nvolve[s] rights we cherish, dignities we respect, emotions recognized by all as both sacred and personal. In such cases the award of damages for mental distress and suffering is commonplace, even in actions *ex contractu*… When we have a contract concerned not with trade and commerce but with life and death, not with profit but with elements of personality, not with pecuniary aggrandizement but with matters of mental concern and solicitude, then a breach of duty with respect to such contracts will inevitably and necessarily result in mental anguish, pain and suffering. In such cases the parties may reasonably be said to have contracted with reference to the payment of damages therefor in event of breach. Far from being outside the contemplation of the parties they are an integral and inseparable part of it.[76]

Sections 49(1) and 65 of the Act give peace of mind, freedom from molestation and vexation; 'a fortress and a defence'

52. To ensure tenanted homes were a 'fortress' and provided a 'defence against… violence' to the occupant, Parliament required landlords to provide premises that were 'reasonably secure' and left them with 'quiet enjoyment', 'peace' and 'privacy' (ss 49(1) and 65).[77]
53. Sections 49 and 65 of the Act have a common aim: to protect possession by the tenant. 'At the heart of the… right to possession is the… right to control access by others and thereby to exclude others from access'.[78] Both sections are concerned with regulating such access and exclusion.
54. The difference between ss 49(1) and 65 is principally as to the people excluded from access. Section 49(1) is intended to practically exclude, or avoid interference by, everyone and everything. By contrast, s 65(a) is intended to legally exclude, or avoid interference by, the landlord[79] as well as 'a person claiming under the landlord or with superior title to the landlord's title'.[80]
55. The Court of Appeal gave the common law concept of 'quiet enjoyment' prominence in its analysis and elided it with s 65 of the Act. It stated that 'quiet enjoyment' was 'a term of art which has no equivalence with the object of 'pleasure, entertainment or relaxation' contemplated by the decision in *Baltic Shipping*.' This misses the point in two ways.

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[75] *Qazi* (n 75) 990 [8] (Lord Bingham).
[76] *Stewart v Rudner, No. 39*, 84 NW 2d 816, 469, 471 (Mich Sup Ct, 1957): a case about this class of contract but not about a tenancy agreement.
[77] See, eg, *Ferguson v Crawford* [2003] NSWCTTT 148
[78] *Smethurst & Anor Commissioner of Police & Anor* (2020) 94 ALJR 502, 533 [120] (Gageler J); see also *Queensland v Congoo & Ors* (2015) 256 CLR 239, 282 [91] (Kiefel J).
[79] Understood broadly because of the definition of that term in the Act s 4.
[80] That latter class of person is not covered by common law 'quiet enjoyment'; *Western Australia v Ward* (2002) 213 CLR 1, 221 [499] (McHugh J) ('*Ward*'); *Hawkesbury Nominees Pty Ltd v Battik Pty Ltd* [2000] FCA 185, [37] (Hill J) ('*Hawkesbury*'); Wiseman, the Law of Landlord and Tenant in Victoria, (The Law Book Company of Australiasia Ltd) 1927, 15.

56. First, 'quiet enjoyment' at common law is directed at a different contractual feature which *was* contemplated in *Baltic Shipping*, namely freedom from molestation.[81] Controlling access to premises is only necessary and desirable if it is to be a means to avoid molestation. D5/2022

57. 'Quiet enjoyment' has been an obligation on landlords 'for centuries'.[82] It is a truncation of the original covenant of 'quiet possession and enjoyment'[83] and it 'operates… to secure the tenant, not merely in the possession, but in the enjoyment of the premises'.[84] At common law, it requires that the landlord not 'substantially interfere' with the tenancy,[85] including by ensuring or not blocking access[86] and not harassing the tenant.[87]

58. That last-cited British case of *Kenny v Preen* was the one on which the Court of Appeal relied,[88] That case and the British case from which *Baltic Shipping* derived the touchstone of 'freedom of molestation'[89] are similar: both concerned contracts being breached by harassment.[90] That factual overlap suggests that the case on which the Court of Appeal principally relied met this Court's 'freedom from molestation' touchstone. The NT Parliament made the same connection in s 66(2)(b) of the Act when it prohibited 'harassment' by the landlord. That is, ss 65 and 66 are directed at a second limb benefit, being protection from molestation.

59. Second, s 65 is not, as the Court of Appeal stated at [59], 'a statutory statement of the common law right to quiet enjoyment'. Rather, it contains such a statutory statement but it then adds to it.[91]

60. Section 65 was borne of a review of residential tenancies regimes across Australia of that time[92] and it was modelled on the provision from NSW.[93] Like its NSW predecessor,

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[81] Allan Anforth et al, *Residential Tenancies Law and Practice, New South Wales* (The Federation Press, 8th ed, 2022) 394 ('*Anforth*'). The language of molestation in a 'quiet enjoyment' context has a long history: see *Andrews v Paradise* (1724) 8 Mod 318; 88 ER 228 ('*Andrews*').
[82] *Pourzand v Telstra Corporation Ltd* [2012] WASC 210, [129] (Edelman J) ('*Pourzand trial judgment*').
[83] *Andrews* (n 81); *Kenny v Preen* [1963] 1 QB 499, 511 (Pearson LJ) ('*Kenny*'). This distinction is spelled out in the heading of the Act s 65: 'Tenant to be able to *use and enjoy* property'.
[84] *Martins Camera Corner Pty Ltd v Hotel Mayfair Ltd* [1976] 2 NSWLR 15, 23.
[85] *Hawkesbury* (n 80) [37] (Hill J), noting that the common law obligation extends to 'acts of commission or omission by the landlord'; see also *Booth v Thomas* (1926) 42 LT 296; *Pourzand trial judgment* (n 82) [129]-[130]; *Pourzand v Telstra Corporation Ltd* [2014] WASCA 14, [122] (Murphy JA).
[86] *Andrews* (n 81); *Sanderson v Mayor of Berwick-upon-Tweed* (1884) 13 QBD 547.
[87] *Kenny* (n 83) 515 (Donovan LJ).
[88] *Court of Appeal decision*, 52-3, [61]-[62].
[89] *Moore* 341 [44], 342 [46] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ), 349-50 [68] (Edelman J); *Baltic Shipping* 363-5 (Mason CJ), 371 (Brennan J), 381 (Deane and Dawson JJ), 402 (McHugh J); *Heywood v Wellers* [1976] QB 446, cited in *Watts v Morrow* [1991] 1 WLR 1421; *Court of Appeal decision* 49 [57].
[90] In *Kenny* (n 83), the landlord harassed the tenant. In *Heywood v Wellers*, the solicitors' client was harassed by her former associate, in respect of whom an injunction was supposed to have been sought by a solicitor.
[91] The statutory terms displace the otherwise implied ones: cf *Ward* (n 80) [499] (McHugh J).
[92] *Parliamentary Debate* (n 46), identifying an earlier working group's analysis as having been adopted in principle in the Residential Tenancies Bill 1999 (NT); see *Working Group Paper* (n 46) 7, 92 [18.1], 97.

s 65(b) adds a prohibition on the landlord, namely prohibiting 'caus[ing] interference with the reasonable peace and privacy of a tenant'. This substantially liberalised the pre-existing 'bleak *laissez-faire* of the common law'[94] and did so in favour of the tenant in at least three ways material to the object s 65(b) serves. Whereas the common law emphasises the need for 'substantial' interference, s 65(b) requires only 'an interference'. And whereas the common law reference to 'quiet' is not a reference to noise[95] nor does it protect privacy,[96] s 65(b) would be breached if peace was disturbed by, among other things, noise or vibration[97] and it protects privacy in terms. D5/2022

61. These elements demonstrate that s 65 gives greater focus to *Baltic Shipping* considerations of peacefulness (see the quote above at [48]), freedom from vexation and molestation than did its common law predecessor. It further demonstrates error in the Court of Appeal's reasons and also elucidates an additional reason that contracts of the kind covered by the Act are ones that align with the objects identified as indicia for the second limb in *Baltic Shipping*.

Section 48(1) of the Act gives peace of mind and freedom from vexation; 'a defence against injury'

62. To ensure landlords did not let homes with no 'defence against injury', Parliament obliged landlords to ensure the premises both were habitable and met all health and safety requirements[98] (s 48(1)).

63. 'Habitable' has a long-established meaning in residential tenancies law.[99] That meaning has been elucidated using language in common with the kinds of contract that this Court held in *Baltic Shipping* gave rise to compensation for disappointment or distress from

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[93] See *Residential Tenancies Act 1987* (NSW) s 22, which has become *Residential Tenancies Act 2010* (NSW) s 50. See also *Residential Tenancies Act 1987* (WA) s 44; *Residential Tenancies Act 1995* (SA) s 65.
[94] *Makowska v St George Community Housing* (n [x]) [20], quoting *Southwark London Borough Council v Mills* [2001] 1 AC 1, 8 (Lord Hoffman).
[95] *Pourzand trial judgment* (n 82) [131].
[96] *Browne v Flower* [1911] 1 Ch 219, 228; *Phelps v City of London Corp* [1916] 2 Ch 255, 267.
[97] *Reiss & Anor v Helson & 2 Ors* [2001] NSWSC 486, [35], [53] ('*Reiss*').
[98] See, eg, *Fire and Emergency Regulations 2011* (NT) r 13A, 13D**;** *Electricity Reform (Safety and Technical) Regulations 2000* (NT) r 3; *Swimming Pool Safety Act 2004* (NT) s 29.
[99] *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313, 373 (Gummow J), citing *Summers v Salford Corporation* [1943] AC 283, 289, 291 (Lord Russell of Killowen), 294-5 (Lord Wright), 299 (Lord Romer) ('*Summers v Salford*'), quoting *Morgan v Liverpool Corporation* [1927] 2 KB 131, 145 (Atkin LJ); *Court of Appeal judgment* 33 [33]; P. Nedovic and R. J. Stewart, 'The Fitness and Control of Leased Premises in Victoria' (1969) 7(2) *Melbourne University Law Review* 258, 258-9. (There is not 'any material difference' between the terms 'habitable repair', 'tenantable repair' (*Belcher v McIntosh* (1839) 174 ER 257 ('*Belcher v McIntosh*'); *Proudfoot v Hart* (1890) 25 QBD 42 ('*Proudfoot v Hart*') 'good repair', 'good tenantable repair', 'reasonably fit for human habitation', 'reasonably fit and suitable for occupation', 'good and tenantable order and condition' or 'habitable'. (*Belcher v McIntosh*, quoted in *Proudfoot v Hart* 50-1 (Lord Esher) and *Summers v Salford Corporation* 289-290 (Lord Atkin), all three of which were relied upon in the *Court of Appeal decision* [38]-[40]; see also *Abrahams v Shaw* [1969] 1 NSWR 25, 28 (Herron CJ, Sugerman JA and Walsh JA agreeing) and *Shields v Deliopoulos* [2016] VSC 500 [38] (Daly AsJ))

breach. In 1839, an obligation to ensure habitability was held to require that the premises 'may be occupied, not only with safety, but with reasonable comfort'.[100] In 1843, it was said to mandate 'decent and comfortable habitation'.[101] In 1858, it was said to require the landlord to put the premises 'in such a state that it may be fit for fair use and enjoyment'.[102] In 1923, it was similarly said to require premises to be 'fit and safe' and it was said to tend 'in the most striking fashion to the public good and the preservation of public health.'[103] In 1943, the House of Lords rehearsed and endorsed most of those earlier authorities, and concluded that to be habitable a home must provide for the 'most elementary needs of comfort and sanitation': 'the real question is how it affects the tenant's reasonable enjoyment of the premises'.[104] In summary and consistent with the history of the language the NT Parliament elected to adopt,[105] s 48 provides, as Blokland J held[106] and the Court of Appeal accepted,[107] that:

> The assessment of whether the premises [a]re habitable should… include… not only the health and safety of tenants but an overall assessment of the… reasonable comfort of the premises, even if only basic amenities are provided, judged against contemporary standards.

64. The overlap between the language concerning the landlord's obligation under s 48(1)(a) to make premises habitable as a means of protection for peace of mind and freedom from vexation in the home, and the *Baltic Shipping* second limb benefits is palpable.

Sections 48(1)(a) and 65(b) of the Act give comfort, pleasure and relaxation; 'a castle for repose'

65. To guarantee tenants had their own 'castle…for…repose', the NT Parliament mandated that landlords ensure the premises provided to tenants gave them reasonable comfort, enjoyment as well as protecting the tenant's peace and privacy (ss 48(1)(a) and 65(b)).
66. As noted at [63] above, an aspect of the obligation under s 48(1)(a) was the provision of 'reasonable comfort' and enjoyment. These are two of the second limb benefits.[108]

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[100] *Belcher v McIntosh*; *Proudfoot v Hart*; *United Cigar Stores Ltd v Buller* [1931] 2 DLR 144.
[101] *Smith v Marrable* (1843) 11 M&W 5, 694 (Parke B), cited in *Pampris v Thanos* [1968] 1 NSWR 56, 58 (Herron CJ, Sugerman and Walsh JJA).
[102] *Cooke v Cholmondeley* (1858) 4 Drew 326, 327–8 (Kindersley V-C).
[103] *Collins v Hopkins* [1923] 2 KB 617, 620-621 (McCardie J); see also *Hall v Manchester Corporation* (1915) 84 LJ Ch 732, 740 (Atkinson LJ); *Estate and Trust Agencies (1927) Ltd v Singapore Improvement Trust* [1937] AC 898, 916 (Lord Maughan, Sanderson and Rowlatt JJ).
[104] *Summers v Salford Corporation* (n 102) (Wright LJ).
[105] *Michell Sillar McPhee (A Firm) v First Industries Corp* (2006) 32 WAR 1, 7 [17] (Steytler P).
[106] *Supreme Court judgement* [80].
[107] *Court of Appeal judgment* [47]-[50].
[108] *Moore* 342 [45] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ); *Baltic Shipping* 371 (Brennan J).

67. As discussed at [60] above, s 65(b) also provides second limb benefits when it requires the landlord to 'not cause interference with the reasonable peace or privacy of a tenant'. A 'castle for repose' would provide both peace and privacy as first order concerns. D5/2022

Court of Appeal incorrectly applied a 'principal' or 'central' object test

68. The Court of Appeal was also in error to apply a narrow test of whether a contract falls within the second limb of *Baltic Shipping*. The question of whether a contract fits within the second limb of *Baltic Shipping* is not determined by reference to the contract's 'principal' or 'the central' object, as the Court of Appeal considered was determinative.[109] Rather, it is determined by assessing whether it is 'more accurately, an object of a contract'.[110]

69. That analysis is consistent with that of the House of Lords. It concludes that 'a major or important object' is enough (noting the reference in that case to a landlord-tenant agreement being of the kind contemplated as part of this class of contract).[111] Similarly, in America, the 'interest need only be a "significant" object or cause of the contract'.[112] Likewise in Canada, 'an object… which is to secure a particular psychological benefit' is sufficient, it need not be 'the dominant aspect or the "very essence" of the bargain'.[113] On this lower threshold, for the reasons given above, a residential tenancy agreement fits in the category covered by the second limb benefits.

70. In any event, it is plain that a – and probably the – central or principal object of a residential tenancy agreement under this Act or under the common law is peace of mind, comfort, relaxation, enjoyment, freedom from molestation or vexation. This conclusion can be reached by focusing on ss 48, 49 and 55 of the Act which adopt and expand on the covenants implied by the common law into residential tenancy agreements, namely in respect of quiet possession and enjoyment, and fitness for habitation.[114] These are 'implied in contracts between landlord and tenant, because [they are] a necessary incident of the relationship between landlord and tenant.'[115] They are 'the core rights for which a

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[109] *Court of Appeal judgment* [58]-[59], [61], [66], headnote.
[110] *Baltic Shipping* 362 (Brennan J).
[111] *Farley v Skinner* [2002] 2 AC 732, 749–750, 752, 755–6, 761 [20], [23]–[24], [32], [41]–[42], [54] (Lords Steyn, Browne-Wilkinson, Clyde, Hutton and Scott).
[112] *Taylor v Burton,* 708 So 2d 531, 535 (Doucet J) (3rd Cir, 1998).
[113] *Fidler v Sun Life Assurance Co of Canada* [2006] 2 SCR 3, [45]–[48] (McLachlin CJ, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ). (*Fidler*)
[114] Those covenants formed part of the predecessor legislation to the Act; see *Tenancy Act 1979* (NT) s 55 and Schedule 4. That, in turn, emerged as a consequence of the report authored by Professor Sackville (as his Honour then was): Australian Government Commission of Inquiry into Poverty, *Law and Poverty in Australia: Second Main Report: Law and Poverty in Australia* (Report, October 1975) 76, 78–9, 83, 85–6, 121–2, 139, 142.
[115] *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169, 199–200 [56]–[58] (Kiefel J) ('*Barker*').

tenant contracts'.[116] Given that such terms are 'essential'[117] to such an agreement, they must properly be characterised as a central, principal, major and important object of such an agreement. In this way, even applying the Court of Appeal's incorrect test, the contract in issue here carries second limb benefits such that a breach giving rise to disappointment and distress is compensable. D5/2022

71. This conclusion is reinforced by acknowledging that each of the highlighted provisions is an object mandated by Parliament for every NT residential tenancy agreement. Each has heightened protection under the present scheme by two mechanisms.

    a. If a tenancy agreement does not expressly 'contain each term, or a term to the same effect as each' of these terms, the entire agreement is deemed to be replaced by 'a tenancy agreement… prescribed'.[118] That is, there is no way for a landlord to contract out of, nor deny tenants the benefit of, these protections.

    b. Each of these mandatory contractual obligations is twinned with a related civil penalty provision: s 48 with s 47, s 49 with s 50 and s 65 with s 66. That is, Parliament recognised that each is an obligation to protect tenants, but each protects a public as well as a private interest.

72. Those central[119] and mandatory terms of every residential tenancy agreement make it plain that such an agreement is to provide peace of mind, comfort, relaxation, enjoyment or freedom from molestation or vexation. These were the touchstones adopted by this Court to distinguish contracts for which compensation for disappointment and distress was possible, from those where it was not. (It could even be said that disappointment and distress 'naturally, i.e., according to the usual course of things' arise from a breach of such a contract.) The Court of Appeal was thus wrong to consider only some of the purposes of a tenancy agreement, without regard to their context and all of *Baltic Shipping*.

Court of Appeal analysis too narrowly focused on 'quiet enjoyment'

73. The Court of Appeal analysis[120] relied primarily on a judgment concerned with a retail, not residential, lease and on the limits of the tenant's statutory entitlement to 'quiet enjoyment'. In addition to the Court of Appeal not appreciating the scope of s 65 as more than a codification of the common law, there are four reasons why this focus was misplaced.

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[116] *Anforth* (n 81) 392. Their universality is reflected in the same rights being protected in civil law systems also. See, for example, the French Civil Code, articles 1719 (peaceful enjoyment), 1720 (good repair); *Law of 6 July 1989 for the Improvement of the Relationship between Landlord and Tenants*, article 6 (health, safety and habitability).
[117] *Barker* (n 115) 199–200 [56]–[58] (Kiefel J).
[118] *The Act* s 19(4) read with s 19(1)(d) and *Residential Tenancies Regulations 2000* (NT) r 10, Sched 2 cl 4, 6 .
[119] *The Act* s 3(d).
[120] *Court of Appeal judgment* [60]-[61], [66]

74. First, the Court of Appeal was wrong to state that the scope of 'a right to exclusive possession and quiet enjoyment' was 'the central question' in the appeal before it.[121] 'Quiet enjoyment' from the landlord was not raised in this case. By contrast, 'quiet enjoyment' was the only relevant issue in *Musumeci*[122] and *Branchett*,[123] on which the Court of Appeal relied. D5/2022

75. Second, 'quiet enjoyment' is not the only, nor the main, reason why a tenancy agreement is properly classified as having second limb benefits, for the reasons given above.

76. Third, a case the Court of Appeal focused on, *Musumeci,* was a case about a clause in a retail lease, and not about one of a number of interconnected terms required by statute in respect of a residential lease. The difference between a retail lease and a residential lease[124] relevantly includes that the purpose of a retail lease is commonly to promote strangers entering the tenant's premises for the purpose of taking things. By contrast, the purpose of a residential lease is to protect the tenant from, among other things, strangers entering the premises for the purpose of taking things. The applicable legislative scheme in *Musumeci* imposed no obligation on the landlord to provide, among other things, protection from interference by the landlord with their peace or privacy, nor reasonable comfort. In that context, it is unsurprising that the NSW Supreme Court has repeatedly[125] ignored *Musumeci* when concluding that compensation for disappointment and distress is available in a residential tenancy context,[126] as have Tribunals including when dealing with residential tenancies and compensation for loss of quiet enjoyment,[127] including recently at the NSW Appeal Panel level.[128]

77. Fourth, the Court of Appeal's assertion that *Musumeci* has been 'considered with apparent approval and applied' in identified cases was misplaced. The first passage cited is a recitation of submissions of counsel immediately after the Court concluded that there was

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[121] Ibid [61].
[122] *Musemeci v Winadell Pty Ltd* (1994) 34 NSWLR 723.
[123] *Branchett v Beaney* [1992] 3 All ER 910, from which the Court of Appeal quoted at [61]-[62]. The fact it was so limited is revealed by subsequent British case law where damages for disappointment and distress have been awarded in a residential tenancy context where the breach was of the obligation to provide 'quiet enjoyment' from the landlord; see, for example, *Wallace v Manchester City Council* [1998] 30 HLR 1111.
[124] Cf *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333, [53]-[55]; *Pourzand trial judgment*, [136].
[125] *Robinson v Fretin and Anor* [2006] NSWSC 598, [6]-[9], [15], [22]; *Makowska v St George Community Housing Ltd* (n 43), [25], [46]; *Strahan v Residential Tenancies Tribunal of NSW* (Supreme Court of New South Wales, Dowd J, 12 September 1998) 16 ('*Strahan'*) 16; *Reiss* (n 97) 498 [53]; *Free v Thomas* [2009] NSWSC 642, [19]; *Blackington Pty Ltd & Ors v Leonard Hogg & Ors* [2007] NSWSC 266, [47].
[126] *Court of Appeal judgment* [66].
[127] See, eg, *Clarke v Director of Housing (Residential Tenancies)* [2017] VCAT 1413, 1418–9 [18]-[20] (Member Scott); *Randall v De Fraga (Residential Tenancies)* [2015] VCAT 458 (Member Warren). Foreign courts have done so also in a retail context, see, eg., *Reste Realty Corporation v Cooper* (1969) 251 A.2d 268.
[128] *Torpey v Stewart* [2021] NSWCATAP 248, 251–4 [21]-[31] (Senior Members Blake and Durack) ('*Torpey*).

no breach of 'quiet enjoyment' on the facts of that case.[129] *Spathis* is another retail, not residential, lease case.[130] *El-Saiedy* was a residential tenancy case but it was a decision of an Associate Justice who was bound by contrary judgments, but it did not cite nor engage with them.[131] (It is *per incuriam*.) And *Barton* was a decision of a Tribunal concerning a commercial, not a residential, lease.[132] D5/2022

Existing case law supports the conclusion urged by the Appellants

78. Existing case law confirms the conclusion that a residential tenancy agreement is covered by the second limb of *Baltic Shipping*. In addition to the above first principles analysis, nine Supreme Court judgments[133] and countless Tribunal decisions concerning residential tenancies across the country[134] conform with the conclusion reached that compensation for disappointment and distress can be awarded for a breach of a residential tenancy agreement. Indeed, in the most detailed of those Supreme Court judgments concerning compensation for breach of a residential tenancy agreement, the Court held:

> …loss of amenity, inconvenience, disappointment, distress, embarrassment and mud and dust throughout a house,… having to clean repeatedly and a general inability to enjoy a house are matters which are clearly compensable in terms of the principle in *Baltic Shipping*.[135]

79. That conclusion is consistent with British[136] and American[137] appellate authority, judicial application of civil codes including in France[138] and Spain,[139] as well as Australian

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[129] *Celermajer Holdings Pty Ltd v Kopas* [2011] NSWSC 40, [434]–[436] (Ward J).
[130] *Spathis v Hanave Investment Co Pty Ltd* [2002] NSWSC 304, 305, 343 [1], [180] (Campbell J).
[131] *El-Saiedy v New South Wales Land and Housing Corporation* [2011] NSWSC 820, (Harrison AsJ).
[132] *Barton v Lantsbery* [2004] VCAT 926 (Deputy President McNamara).
[133] *Strahan* (n 125) citing *Residential Tenancies Tribunal v Offe* (Supreme Court of New South Wales, Abadee J, 1 July 1997) 8–9, 12, cited in *Reiss* (n 97), 498 [53] (Master Harrison); *Free v Thomas* [2009] NSWSC 642, 648 [19] (Davies J); *Blackington Pty Ltd v Hogg* [2007] NSWSC 266, 274–5 [47] (Malpass AsJ); *Robinson v Fretin* [2006] NSWSC 598, 599–602 [6]–[9], [15], [22] (Malpass AsJ); *Makowska v St George Community Housing Ltd* (n 43), 302 [25], [46] (Basten J); *Varricchio v Wentzel* (2016) 125 SASR 191, 197, 205 [32], [77] (Doyle J); *Supreme Court judgment.*
[134] See, eg, *Torpey* (n 128) 251–4 [21]-[31] (Senior Members Blake and Durack), and the list at Anforth et al., *Residential Tenancies Law and Practice* (n 81) 398–435; from Victoria, see *Walmsley & Walmsley v Charles (Hall) (Residential Tenancies)* [2019] VCAT 1691, 1715 [125] (Member Ussher); from South Australia, see *Fores v Kay & Kay* [2006] SARTT 3, 6–7 (Member Patrick); from the ACT, see *Lee v Guo* [2017] ACAT 60, 76–7 [59] (Senior Member Robinson); from the NT, see *Sandy v Sananikone and Do* [2015] NTRTCmr 1, 11 [67] (Commissioner Bruxner). No decision for or against such awards of compensation have been located by Ms Young's lawyers from Queensland, WA or Tasmania, although it was left open in WA; see *Re Magistrate Martin Crawford; Ex Parte McCormack* [2020] WASC 236, 243 [40] (Hill J).
[135] *Strahan* (n 125) 16 [35].
[136] See, eg, *Chiodi's Personal Representative v De Marney* (1989) 21 HLR 6; *Calabar Properties v Sticher* [1984] 1 WLR 287
[137] See, eg, *Hilder v St Peter,* 478 A 2d 202 (1984); *McNairy v CK Realty*, 59 Cal Rptr 3d 429 (Ct App, 2007).
[138] French Civil Code, articles 1719 (peaceful enjoyment), 1720 (good repair), 1147 (damages); *Law of 6 July 1989 for the Improvement of the Relationship between Landlord and Tenants*, article 6 (health, safety and habitability) relevantly applied in CA Lyon, 21 December 2006, Numero JurisData: 2006-324556
[139] Spanish Civil Code, articles 1149, 1554 relevantly applied in STS 12/16/1986 RJ 7447.

textbooks on point.[140] The most recent of those deals with the Court of Appeal judgment in this matter and concludes that it was wrong on this point.[141] D5/2022

80. It follows that endorsing the Court of Appeal's approach would involve a departure from the Court's previous analysis in *Baltic Shipping* and *Moore*, would put Australian law at odds with other national law, and would require key objects of a tenancy agreement to be ignored or sidelined. The appeal on this ground should be allowed for these reasons and Ms Young's 'normal human reaction' to being left insecure by a doorless external doorway for almost 6 years should be appropriately compensated when her own appeal from the Supreme Court is heard in full by the Court of Appeal.

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Part VII: The form of orders sought by the appellants

81. The orders sought by the appellants are:

a. Appeal allowed.

b. Set aside orders 4 and 5 of the Court of Appeal of the Supreme Court of the Northern Territory made on 4 February 2022 and, in their place, order that:

i. the appeal from order 5 of the Supreme Court of the Northern Territory given on 8 September 2020 be allowed,

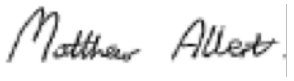
ii. the decision of the Northern Territory Civil and Administrative Tribunal given on 27 February 2019 be quashed; and

20 iii. the matter be remitted to that Tribunal for determination according to law following the determination of appeal number AP8 of 2020 in the Court of Appeal of the Supreme Court of the Northern Territory and any special leave application or appeal to this Court arising from that judgment.

c. The respondent pay the costs of the appellants in this Court.

Part VIII: The appellants' oral argument is estimated to take ninety minutes.

Dated: 4 November 2022



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[140] See, eg, Adrian J Bradbrook, Susan V MacCallum and Anthony P Moore, *Residential Tenancy Law and Practice: Victoria and South Australia* (Lawbook, 1983) 695 [2421], discussing a Victorian provision which is replicated in s 122 of the Act.

[141] Anforth et al., *Residential Tenancies Law and Practice* (n 81) 394.

Annexure of applicable statutory provisions D5/2022

***Residential Tenancies Act* 1999 (NT)**

3 Objectives

The objectives of this Act are:

(a) to fairly balance the rights and duties of tenants and landlords; and

(b) to improve the understanding of landlords, tenants and agents of their rights and obligations in relation to residential tenancies; and

(c) to ensure that landlords and tenants are provided with suitable mechanisms for enforcing their rights under tenancy agreements and this Act; and

(d) to ensure that tenants are provided with safe and habitable premises under tenancy agreements and enjoy appropriate security of tenure; and

(e) to facilitate landlords receiving a fair rent in return for providing safe and habitable accommodation to tenants.

28B Landlord must not require tenant to vacate for condition report

A landlord must not require a tenant to vacate residential premises in order to make a condition report under this Division.

47 Premises not to be let unless habitable and safe

A landlord must not enter into, or offer to enter into, a tenancy agreement unless the premises and ancillary property to which the agreement relates or would relate:

(a) are habitable; and

(b) meet all health and safety requirements specified under an Act that apply to residential premises or ancillary property.

Maximum penalty: 100 penalty units.

48 Premises to be clean and suitable for habitation

(1) It is a term of a tenancy agreement that the landlord must ensure that the premises and ancillary property to which the agreement relates:

(a) are habitable;

(b) meet all health and safety requirements specified under an Act that apply to residential premises or the ancillary property; and

(c) are reasonably clean when the tenant enters into occupation of the premises.

(2) It is not a breach of the term specified in subsection (1) if the failure to comply with the term is caused by:

(a) an act or omission of the tenant; or

(b) the tenant's failure to notify the landlord of repairs required to the premises.

49 Premises

(1) 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 necessary to ensure the premises and ancillary property are reasonably secure.

(2) It is a term of a tenancy agreement that the landlord will not:

(a) alter or remove a lock or security device on the premises or ancillary property; or

(b) add a lock or security device to the premises or ancillary property,

without the consent of the tenant.

(3) It is a term of a tenancy agreement that, if the landlord:

(a) alters a lock or security device on the premises or ancillary property; or

(b) adds a lock or security device to the premises or ancillary property,

without the consent of the tenant, the landlord will provide to the tenant a key to the lock or security device as soon as practicable after the alteration or the addition, unless the tenant consents to the landlord doing otherwise. D5/2022

57 Landlord's obligation to repair

(1) Subject to this Part, it is a term of a tenancy agreement that the landlord:

(a) must ensure that the premises and ancillary property are in a reasonable state of repair when a tenant enters into occupation of the premises; and

(b) must maintain the premises and ancillary property in a reasonable state of repair, having regard to their age, character and prospective life.

(2) A landlord is not in breach of the term specified under subsection (1) unless he or she:

(a) has notice of the defect requiring repair; and

(b) fails to act with reasonable diligence to have the defect repaired.

(3) A landlord is not in breach of the term specified under subsection (1) if:

(a) the repairs were known to the tenant to be required at the time of entering into the residential premises agreement;

(b) the repairs are not emergency repairs within the meaning of section 63;

(c) the tenant has, in writing, waived the right to have the particular repairs made; and

(d) the premises are habitable and meet all health and safety requirements specified under any Act.

(4) For the purposes of this section, ancillary property includes gardening or watering equipment or other chattels provided in relation to a garden but does not include vegetation, other than a tree that poses a risk to a person's safety.

58 Tenant to notify landlord if repairs required

(1) It is a term of a tenancy agreement that if premises or ancillary property require repair or maintenance, other than repair or maintenance of a negligible kind, a tenant is, as soon as reasonably practicable after becoming aware of the need for the repairs or maintenance, to notify the landlord orally or in writing of the requirement.

(2) Subsection (1) does not apply in relation to repairs if the tenant has waived the right to have the repairs made under section 57(3).

(3) If the landlord requests the tenant to put the notice in writing, the tenant is not to be taken to have given notice under subsection (1) unless it is given to the landlord in writing.

(4) For the purposes of this section, ancillary property includes gardening or watering equipment or other chattels provided in relation to a garden but, unless the tenancy agreement specifies otherwise, does not include vegetation, other than a tree that poses a risk to a person's safety.

65 Tenant to be able to use and enjoy property

It is a term of a tenancy agreement that:

(a) a 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.

66 Landlord not to interfere with tenant's enjoyment of premises

(1) A landlord must not cause interference with the reasonable peace or privacy of a tenant in the tenant's use of the premises, except in accordance with this Act.

Maximum penalty: 100 penalty units. D5/2022

(2) A landlord must not force, or attempt to force, a tenant to vacate the premises:
(a) except in accordance with this Act; or
(b) in circumstances that amount to harassment of a tenant.
Maximum penalty: 100 penalty units.

120 Duty of mitigation

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.

122 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. D5/2022