HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 23 Dec 2022 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	D5/2022
File Title:	Young & Anor v. Chief Executive Officer (Housing)
Registry:	Darwin
Document filed:	Form 27E - Reply
Filing party:	Appellants
Date filed:	23 Dec 2022

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

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' REPLY

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

Part II: Reply to the argument of the respondent

1. In respect of **ground 1**, the respondent's submissions dated 2 December 2022 (**RS**) correctly identify manifold ways in which the Act uses the language or concepts of general contract law (RS [21]-[29]). From that analysis the respondent seeks to add to s 122(1) contract law principles applying to the determination of loss and damage.
2. The reasoning in this analysis is flawed because it seeks to fill the silence in s 122 on the critical contract law principles and terminology (ie remoteness and foreseeability) distracted by the noise around s 122. The appellants submit that the silence in s 122 should be respected: where Parliament intended to bring contract law principles into this Act it said so, and it defined with precision which principles applied and in what way. Where it did not intend to bring in contract law principles– most relevantly in s 122 – it did not do so. That is, by precisely and selectively picking, choosing and modifying some contract law principles Parliament sought to 'establish a detailed and special code of contract… law to be applied in relation to the contracts' between landlords and tenants in the NT.[1]
3. If, as the respondent submits, it was Parliament's intention that general contract law applied to tenancy agreements, then there was no purpose in it enacting express provisions which picked up only part of that law. Two of the aspects of contract law highlighted by the respondent from Part 13 Division 2 of the Act itself illustrate this: the contract law principles concerning mitigation (s 120; RS [25]) and concerning privity (s 122; RS [26]).

[1] *Williams v Wreck Bay Aboriginal Community Council* (2019) 266 CLR 499, [67] (Kiefel CJ, Keane, Nettle and Gordon JJ), especially noting the contrast between the Act in this case and the Act in that case (see [69]-[70]), being provisions concerning 'the rights or obligations of the parties in relation to the maintenance of lease premises', 'quiet enjoyment and exclusive possession' and a requirement 'to use the premises in a tenant-like manner'.

4. The second of these deserves exploration. The Act adopts a broad statutory definition of 'landlord' that includes the landlord's agent. By precise drafting, s 122(1)(a) only allows orders of compensation between the parties to the tenancy agreement itself. It does not, for example, allow a tenant to recover compensation directly from a real estate agent. Parliament thus expressly relied on the privity principle of contract law in s 122. D5/2022

5. Against that precise adoption of that contractual principle, Parliament's silence on contract law principles of remoteness in the same provision is in stark relief. Parliament's election to expressly adopt one contract law principle in s 122 leads to the negative inference that it did not intend to pick up other such principles. Parliament's silence on any additional application of contract law principles in s 122 is thereby revealed to be intentional: those principles are not mentioned because they do not apply there.

6. The example concerning real estate agents also addresses a misunderstanding of the respondent (RS [63]-[64]). Sections 65 and 66 do not protect only against interference by 'the landlord itself (i.e., the counterparty)'. They protect against all those covered by the broad definition of 'landlord' stretching to, for example, agents of a former landlord (s 4).

7. This is one of the ways that the Act moves away from the common law concerning leases and contracts. Further illustrations appear in the carve-out to s 122 affected by s 6(1)(c) and the expansion of s 122 affected by the definition of 'tenancy agreement'.

8. Section 6(1)(c) relevantly provides that parties to certain common law leases are excluded from remedy under s 122, namely those for which the tenant's consideration is by way of the provision of services (for example, stockmen residing rent-free at an outstation). In this way, Parliament limited access to compensation through the Tribunal to people who are parties to a lease or contract and who meet the statutory definitions of 'tenant' and 'landlord' under a 'tenancy agreement'.

9. Similarly, the definition of 'tenancy agreement' in s 4 makes plain that that term covers an agreement for a right to occupy premises that is not an exclusive right (see also s 64(2)). Such a contract would not be a lease at common law[2] and yet parties to such an agreement have equal access to relief under s 122 (contra RS [21]).

10. Likewise, ss 48, 51 and 57 deem something that would be a contractual breach to be otherwise (RS [28]). That, in turn, limits when compensation can be ordered under s 122.[3]

11. By these precise departures from the common law, Parliament defined and modified what would otherwise be the applicable body of law. The precision and detail of that departure

---

[2] *Williams v Wreck Bay Aboriginal Community Council* (2019) 266 CLR 499 at [70]
[3] It may not be that 'breach' and 'failure to comply' are 'interchangeable' (contra RS [28]); see *Victoria v The Commonwealth* (1975) 134 CLR 81, 192 (Jacobs J)

demonstrates an intention to leave at least s 122 as a standalone statutory regime defined by its terms and not otherwise confined, including by the introduction of contractual remoteness or foreseeability principles.

12. That construction does not 'throw open' s 122 nor lead to 'indeterminate contractual liability' (contra RS [39]-[40]). The liability is limited by the language of s 122. It expressly relies on a causative connection by use of the word 'because'. Unlike remoteness, causation has a foothold in the language chosen by Parliament (contra RS [30]). Common law principles would at least 'guide' the proper application of that language to any given fact scenario before the Tribunal.[4] In any event, the nuances of causation could not arise on this appeal: there could be no debate that Ms Young suffered both insecurity and associated feelings 'because' of the breach of the landlord's obligation to provide her with reasonable security.

13. The respondent's analysis also overstates the function of s 122 (eg RS [42]). That provision does not 'limit… the amount of compensation recoverable for a breach of the tenancy agreement' *per se*. Rather, s 122 empowers the Tribunal to order compensation in limited circumstances. The Act is silent as to 'the amount of compensation recoverable for a breach of the tenancy agreement' in a court and does nothing to 'limit' an amount ordered judicially. Equally, s 122 does not limit 'common law damages'. It is concerned only with statutory compensation by a statutory Tribunal.

14. Finally on ground 1, the respondent's suggestion that compensation for disappointment or distress only under s 122 first emerged as an issue in this Court is incorrect (RS [13], [16]). It is dealt with expressly in the NTCA's reasons, and it was the basis upon which Ms Young first sought relief.[5] It is true that neither party precisely defined their positions in the Tribunal. But it is also true that that is not a court of pleadings and it is supposed to (and did) act flexibly in the way it dealt with arguments and issues as they emerged.[6]

15. In respect of **ground 2**, the respondent's submissions give particular prominence (eg RS [58], [62], [68] to the positive objects (including comfort, pleasure, enjoyment, and relaxation) and make little mention of the protective objects (including peace of mind and freedom from molestation, distress or vexation) identified as indicators that a contract falls within the second limb of *Baltic Shipping*. Even assuming that an object of a tenancy agreement is only peace of mind, that is enough to engage that limb.

---

[4] See, for example, *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at [25], [26], [33] (Gleeson CJ); [57], [62] (Gaudron, Gummow and Hayne JJ); [84], [85], [90] (McHugh J).
[5] *Young & Conway v Chief Executive Officer, Housing* [2020] NTSC 59, [10] (Blokland J).
[6] *Northern Territory Civil and Administrative Tribunal Act* 2014 (NT) ss 10, 53

16. The bulk of the respondent's submissions on this ground adopt a literal approach not supported by authority or principle. The respondent submits that 'the very object' of the contract must be to provide second limb benefits, 'as opposed to providing a base setting from which the promisee may or may not experience them' (RS [57], [62]). By way of illustration, it says that s 49 'is merely an obligation concerning the provision and maintenance of… security devices' to ensure reasonable security (RS [71]-[72]). D5/2022

17. This misses the point in a way not dissimilar to the Tribunal. The ends are the true focus of s 49, being reasonable security. The means - being locks and other security devices - are demonstrative of how the ends might be achieved. To focus on the means isolated from the ends leads back to the illogical analysis of the Tribunal: a landlord does not comply with s 49 by delivering a door (ie providing a security device) in vacuum packed foam (ie to maintain it). That door only serves the ends of reasonable security if it is installed properly. Only then is the object of providing peace of mind and freedom from molestation met. The overlap with the freedom from molestation case of *Heywood v Wellers* (RS [59]) is this: a door provides a physical barrier to molestation and an injunction provides a legal barrier to molestation. They are both sought by contract to serve the same purpose: to offer a sense of protection.

18. It is true, but irrelevant, that the tenant may still not have peace of mind and may be molested even with a door. It is also true that Mr Moore or Mrs Dillon may have had no enjoyment from the part of their cruises that they missed because of, for example, obnoxious cruise-ship passengers. But neither possibility changes the objective fact that the contract was entered with the provision of reasonable security or enjoyment respectively as an important object of each agreement.

19. The same can be said of all contracts which courts have accepted to give rise to compensation for loss of amenity, disappointment or distress. A contract for burial by a funeral home is a contract for the purpose of putting a body in the ground, but doing nothing more than hiring and using a digger and then lowering the body would not be the performance of an important object of such a contract.[7] Similarly, a contract with a doctor to aid in giving birth is a contract for the purpose of removing one body from another, but doing that in a way that does not avoid a still birth would not be the performance of an important object of such a contract.[8] Likewise, a contract for the construction of a swimming pool is to create a watertight cavity in the ground, but doing it at a depth that did not suit the owner would not be the performance of an important object of such a

[7] *Wilson v Houston Funeral Home* (1996) 42 Cal.App.4th 1124.
[8] *Stewart v Rudner*, No. 39, 84 N.W.2d 816 (Mich Sup Ct, 1957).

contract.[9] What is required in every instance is an objective and holistic assessment of the substance of the ends which the contract parties agreed to achieve, not a purely functional or detached assessment of the means (or, as the respondent puts it, 'base setting') being provided to meet those ends. D5/2022

20. The respondent also seems to submit that the contract terms need to refer to a second limb benefit in order for disappointment or distress compensation to be available (RS [61]). This is inconsistent with authority. There was no 'solace provided' clause in the funeral contract, no 'the birth will provide happiness' clause in the obstetrician's engagement and no 'guaranteed relaxation' clause on Mr Moore or Mrs Dillon's cruise tickets. Yet, each contract was objectively bargained for with those natural expectations in mind.

21. In any event, the breach in this case is most like the breach in the swimming pool depth case: it relates to an express term. The difference between the clauses in the two cases is that the relevant clause in the present case expressly identifies its purpose (being reasonable security) and that purpose is linked to a second limb benefit (being peace of mind or freedom from molestation; contra RS [61]). By contrast, the swimming pool depth clause specified the depth, but it did not expressly identify the ends to which that depth was directed (being enjoyment for the particular owner).

22. Relatedly, the respondent draws an analogy between the provision of 'base settings' by the landlord with those provided by builders. The analogy is good, and, on existing authority, leads to the opposite result to the one which the respondent urges.[10]

23. Finally and by way of clarification, the respondent is correct that this appeal does not directly concern a claim for breach of the Act (RS [1], [38], [45]). Mention of that in the appellants' primary submissions (**AS**) was intended to frame the question of statutory construction, not expand the claim. The respondent is also correct that Ms Young's house was not, in fact, invaded by snakes or wild horses (RS [7]). The point is, as stated at AS [26], given her experiences at that house, those were things she would have been naturally concerned about by reason of being left without a door at that location.

Dated: 23 December 2022

Name: Matthew Albert
Telephone: 03 9225 8265
Email: matthew.albert@vicbar.com.au

[9] *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344, cited in *Farley v Skinner* [2002] 2 AC 732.
[10] See, eg, in Australia, *Stone v Chappel* (2017) 128 SASR 165 or in the USA, *Austin Homes Inc v Thibodeaux* 821 So.2d 10 (La.App 3 Cir 2002).