CITATION:	*Chief Executive Officer (Housing) v Young & Anor* [2022] NTCA 1
PARTIES:	CHIEF EXECUTIVE OFFICER (HOUSING) v YOUNG, Enid and CAVANAGH, Petria in her capacity as Administrator of the Estate of Robert Conway (Deceased)
TITLE OF COURT:	NORTHERN TERRITORY COURT OF APPEAL
JURISDICTION:	APPEAL from SUPREME COURT exercising Northern Territory jurisdiction
FILE NO:	No. AP 9 of 2020 (22031505)
DELIVERED:	4 February 2022
HEARING DATE:	23 February 2021
JUDGMENT OF:	Grant CJ, Southwood and Barr JJ

CATCHWORDS:

LEASES AND TENANCIES – Residential tenancies — Jurisdiction of Northern Territory Civil and Administrative Tribunal

Whether Supreme Court erred in remitting claims for unconscionable dealings and repayment of rent to Tribunal for reconsideration – Tribunal has no jurisdiction or power to make such a determination – Tribunal's jurisdiction to award compensation predicated upon existence of a valid tenancy agreement – Appeal allowed.

Residential Tenancies Act 1999 (NT), s 122

Australian Securities & Investments Commission v Edensor Nominees Pty Ltd (2001) 204 CLR 559, *Cavanagh v Chief Executive Officer (Housing)* (2018) 345 FLR 55, *Herald & Weekly Times Ltd v Victorian Civil and Administrative Tribunal* (2006) 24 VAR 174, *Household Financial Services Ltd v Commercial Tribunal of New South Wales* (1995) 36 NSWLR 220, *Osland v Secretary to the Department of Justice* [2010] HCA 24; (2010) 241 CLR 320, *Smith v Baker* (1873) 8 CP 350, *State of New South Wales v Kable* (2013) 252 CLR 118, *Thompson v Palmer* (1933) 49 CLR 507, *Thorne v Kennedy* (2017) 263 CLR 85, *Walton v McBride* (1995) 36 NSWLR 440, referred to.

LEASES AND TENANCIES – Residential tenancies — Construction

Whether Supreme Court erred in construing the term 'habitable' in s 48(1)(a) of the *Residential Tenancies Act* – Determination of habitability not restricted to matters of health and safety – Reasonable comfort of premises may be a test of habitability – Appeal dismissed.

Residential Tenancies Act 1999 (NT), s 48

Belcher v McIntosh (1839) 174 ER 257, *Bond v Weeks* [1999] 1 Qd R 134, *De Soleil v Palhide Pty Ltd* [2010] NSWCTTT 464, *Fine v Geier* (2003) QSC 73, *Finn v Finato* [2004] NSWCTTT 179, *Gray v Queensland Housing Commission* [2004] QSC 276, *Hall v Manchester Corporation* (1915) 84 LJ Ch 732, *Hampel & Hampel v South Australian Housing Trust* [2007] SADC 64, *Lewin v Zhou* [2018] NSWCATCD 54, *Morgan v Liverpool Corporation* [1927] 2 KB 131, *Proudfoot v Hart* (1890) 25 QBD 42, *Summers v Salford Corporation* [1943] AC 283, referred to.

Anforth, Christensen & Taylor, *Residential Tenancies Law and Practice New South Wales*, 5th ed, The Federation Press 2011, [2.52.2].
Woodfall, *Landlord & Tenant*, 28th ed, [1-1477].

LEASES AND TENANCIES – Residential tenancies — Power to award damages for distress and disappointment

Whether Supreme Court erred in finding damages for distress and disappointment were recoverable under the second limb of the principle in *Baltic Shipping* – No finding that damages for distress and disappointment awarded for physical inconvenience – Principal object of tenancy agreement

not to provide enjoyment, relaxation or freedom from molestation – Appeal allowed.

Residential Tenancies Act 1999 (NT), s 122

Baltic Shipping Co v Dillon (1993) 176 CLR 344, *Barton v Lantsbery* [2004] VCAT 926, *Blackington Pty Ltd & Anor v Holder & Ors* [2007] NSWSC 266, *Branchett v Beaney* [1992] 3 All ER 910, *Celemajer Holdings Pty Ltd v Kopas* [2011] NSWSC 40, *Farley v Skinner* [2002] 2 AC 732, *Fawzi El-Saiedy v NSW Land and Housing Corporation* [2011] NSWSC 820, *Free v Thomas* [2009] NSWSC 642, *Hadley v Baxendale* (1854) 156 ER 145, *Heywood v Wellers* [1976] QB 446, *Jackson v Horizon Holidays Ltd* [1975] 3 All ER 92, *Jarvis v Swan Tours Ltd* [1973] QB 233, *Kemp v Sober* (1851) 61 ER 200, *McCall v Abelesz* [1976] 1 All ER 727, *Moore v Scenic Tours Pty Ltd* (2020) 268 CLR 326, *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723, *Reiss & Anor v Helson & Ors* [2001] NSWSC 486, *Residential Tenancies Tribunal v Offe* (unreported, NSWSC, 1 July 1997), *Silberman v Silberman* (1910) 10 SR(NSW) 554, *Spathis v Hanave Investement Co Pty Ltd* [2002] NSWSC 304, *Stone v Chappel* [2017] SASCFC 72, *Strahan v Residential Tenancies Tribunal* (unreported, NSWSC, 12 September 1998), *Watts v Morrow* [1991] 4 All ER 937, referred to.

REPRESENTATION:

Counsel:

Appellant:	N Christrup SC (Solicitor-General for the Northern Territory) with M Littlejohn
Respondents:	M Albert
Amicus curiae:	S Mirzabegian

Solicitors:

Appellant:	Minter Ellison
Respondents:	Daniel Kelly
Amicus curiae:	Australian Human Rights Commission

Judgment category classification: B
Number of pages: 58

IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Chief Executive Officer (Housing) v Young & Anor [2022] NTCA 1
No. AP 9 of 2020 (22031505)

BETWEEN:

CHIEF EXECUTIVE OFFICER (HOUSING)
Appellant

AND:

ENID YOUNG
First Respondent

AND:

PETRIA CAVANAGH IN HER CAPACITY AS ADMINISTRATOR OF THE ESTATE OF ROBERT CONWAY (DECEASED)
Second Respondent

CORAM: GRANT CJ, SOUTHWOOD and BARR JJ

REASONS FOR JUDGMENT
(Delivered 4 February 2022)

THE COURT:

[1] This is an appeal by the Chief Executive Officer (Housing) (**CEO**) from a decision of the Supreme Court delivered on 8 September 2020[1], allowing in part an appeal from a determination by the Northern Territory Civil and Administrative Tribunal (**Tribunal**) delivered on

1 *Young & Conway v Chief Executive Officer, Housing* [2020] NTSC 59.

27 February 2019 concerning the entitlement to compensation pursuant to s 122(1) of the *Residential Tenancies Act 1999* (NT) for breaches of various obligations alleged to have been committed in the course of two residential tenancies[2].

Proceedings before the Tribunal

[2] At the material times, Enid Young (**Young**) and Robert Conway (**Conway**) were the tenants of separate residential premises located in Santa Teresa, an Aboriginal community located 80 kilometres south-east of Alice Springs. The CEO is a corporation sole established by s 6 of the *Housing Act 1982* (NT), and was the putative 'landlord' within the meaning of the *Residential Tenancies Act* for both tenancies.

[3] On 5 February 2016, Young and Conway filed Initiating Applications in the Tribunal seeking orders under s 63 of the *Residential Tenancies Act* requiring the CEO to effect emergency repairs to the premises. Subsequently, the relief sought was amended to include a claim for compensation under s 122(1) of the *Residential Tenancies Act* for a breach of the landlord's obligation to repair the premises under s 57 of the *Residential Tenancies Act*, or, in the alternative, for a breach of the landlord's obligation to ensure that the premises were 'habitable' under s 48 of the *Residential Tenancies Act*.

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2 *Various Applicants from Santa Theresa v Chief Executive Officer (Housing)* [2019] NTCAT 7.

[4] The CEO counterclaimed against Conway for compensation under s 122(1) of the *Residential Tenancies Act* for unpaid rent under a written tenancy agreement made on 23 November 2011; and for compensation under that same provision for loss suffered as a result of Conway's failure to properly maintain the premises in breach of the terms of the written tenancy agreement and the term implied by s 51 of the *Residential Tenancies Act*. The CEO also counterclaimed against Young on the same grounds under a written tenancy agreement made on 14 December 2011, but withdrew the claim against Young for unpaid rent during the course of the hearing of the matter.

[5] In response to those Counterclaims, Young and Conway pleaded that: (a) the tenancy agreements made by them were void; (b) the tenancy agreements prescribed by s 19(4) of the *Residential Tenancies Act* were void for uncertainty as to the amount of rent payable; (c) further, or in the alternative, the CEO was estopped from claiming compensation for unpaid rent; and (d) consequently, the CEO's counterclaim for compensation for unpaid rent and a failure to properly maintain the premises must fail. During the course of the hearing before the Tribunal, Young and Conway ultimately submitted that, in addition to the defence to the Counterclaims, they were entitled to the return of any rent paid under the purported agreements because they were voidable and properly declared void on the basis of what was

essentially an assertion of unconscionable conduct on the part of the CEO's agents.

[6] So far as is relevant for the purposes of the present appeal, the Tribunal found:

(a) the tenancy agreement purportedly entered into by the CEO and Conway in 2017 was void because the subsisting periodic tenancy was not lawfully terminated in accordance with the notice provisions of the *Residential Tenancies Act*;[3]

(b) the tenancy agreement purportedly entered into by the CEO and Conway on 23 January 2011 was void because it was not signed by the CEO;[4]

(c) the tenancy agreement purportedly entered into by the CEO and Young on 14 December 2011 was invalid because it did not contain terms to the same effect as each term specified by the *Residential Tenancies Act* to be a term of a tenancy agreement, and because it contained terms not designated by the *Residential Tenancies Act* to be a term of a tenancy agreement;[5]

(d) as a consequence, the operative tenancy agreements between the CEO and Young and Conway were in the terms of the model

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3 *Various Applicants from Santa Theresa v Chief Executive Officer (Housing)* [2019] NTCAT 7, [54]-[62]; *Residential Tenancies Act*, ss 89 and 94.

4 *Various Applicants from Santa Theresa v Chief Executive Officer (Housing)* [2019] NTCAT 7, [63]-[64]; *Residential Tenancies Act*, s 19(4).

5 *Various Applicants from Santa Theresa v Chief Executive Officer (Housing)* [2019] NTCAT 7, [66]-[81]; *Residential Tenancies Act*, ss 19(1), 19(4) and 20(1).

residential tenancy agreement prescribed by reg 10 and Schedule 2 of the *Residential Tenancies Regulations 2000* (NT); those agreements were not void for a failure to specify the rent amounts; and the claims made by Young and Conway for compensation for the rent and security deposits paid, which were made on the basis that the prescribed agreements were void, were dismissed;[6]

(e) in order to establish a breach of the CEO's obligation to ensure that the premises were 'habitable' under s 48(1) of the *Residential Tenancies Act*, the state of the premises must have been such that there was 'a threat to the tenant's safety, going to both structural and health issues'; and the obligation was on the tenants to establish that the state of the premises were such that a threat to the tenant's safety would naturally occur from the ordinary use of the premises;[7]

(f) the CEO's failure to replace a missing backdoor on Young's premises for over six weeks was in breach of the duty to repair under s 57(1) of the *Residential Tenancies Act*, but the absence of a backdoor did not constitute a breach of the CEO's obligation to ensure that the premises were 'habitable' under s 48(1) of the *Residential Tenancies Act* or to take reasonable steps to ensure the

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6 *Various Applicants from Santa Theresa v Chief Executive Officer (Housing)* [2019] NTCAT 7, [82]-[90], [93]-[97], [106]-[107].

7 *Various Applicants from Santa Theresa v Chief Executive Officer (Housing)* [2019] NTCAT 7, [115]-[120], citing *De Soleil v Palhide Pty Ltd* [2010] NSWCTTT 464.

premises were reasonably secure under s 49(1) of the *Residential Tenancies Act*;[8]

(g) the bent perimeter fence surrounding Young's premises did not constitute a breach of the duties implied by ss 48(1), 49(1) or 57(1) of the *Residential Tenancies Act*;[9]

(h) the failure to equip Young's premises with an air conditioner was, in the months of January, November and December each year, in breach of the CEO's obligation to ensure that the premises were 'habitable' under s 48(1) of the *Residential Tenancies Act* during the period from 13 November 2011 up until 31 January 2016 when an air-conditioner was installed;[10]

(i) the manner in which the air-conditioner was installed at Young's premises was not in breach of the CEO's obligation to ensure that the premises were 'habitable' under s 48(1) of the *Residential Tenancies Act* or the obligation to repair under s 57(1) of the *Residential Tenancies Act*;[11]

(j) there was no evidence that the leak under the kitchen sink at Young's premises was in breach of the CEO's obligation to ensure

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8 *Various Applicants from Santa Theresa v Chief Executive Officer (Housing)* [2019] NTCAT 7, [160]-[166].

9 *Various Applicants from Santa Theresa v Chief Executive Officer (Housing)* [2019] NTCAT 7, [167]-[172].

10 *Various Applicants from Santa Theresa v Chief Executive Officer (Housing)* [2019] NTCAT 7, [173]-[182].

11 *Various Applicants from Santa Theresa v Chief Executive Officer (Housing)* [2019] NTCAT 7, [183]-[185].

that the premises were 'habitable' under s 48(1) of the *Residential Tenancies Act*, and the leak was repaired in compliance with the obligation under s 57(1) of the *Residential Tenancies Act*;[12]

(k) there was no evidence that the leaking shower head or drain at Young's premises was in breach of the CEO's obligation to ensure that the premises were 'habitable' under s 48(1) of the *Residential Tenancies Act*, or in breach of the obligation to repair under s 57(1) of the *Residential Tenancies Act*;[13]

(l) there was no evidence that any problem with the toilet at Young's premises was in breach of the CEO's obligation to ensure that the premises were 'habitable' under s 48(1) of the *Residential Tenancies Act*, but the CEO failed to act with reasonable diligence to have the toilet repaired during the period from 22 January to 8 April 2016 in breach of the obligation under s 57(1) of the *Residential Tenancies Act*;[14]

(m) the CEO failed to act with reasonable diligence to have the stove at Young's premises repaired during the period from November

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12 *Various Applicants from Santa Theresa v Chief Executive Officer (Housing)* [2019] NTCAT 7, [186]-[188].

13 *Various Applicants from Santa Theresa v Chief Executive Officer (Housing)* [2019] NTCAT 7, [189]-[191].

14 *Various Applicants from Santa Theresa v Chief Executive Officer (Housing)* [2019] NTCAT 7, [192]-[196].

2015 to mid-April 2016, in breach of the obligation under s 57(1) of the *Residential Tenancies Act*;[15]

(n) the defect in the shower at Conway's premises was not in breach of the CEO's obligation to ensure that the premises were 'habitable' under s 48(1) of the *Residential Tenancies Act*, but the CEO failed to act with reasonable diligence to have the shower repaired during the period from 5 November 2015 to 12 February 2016 in breach of the obligation under s 57(1) of the *Residential Tenancies Act*;[16]

(o) the leaking air-conditioner installed at Conway's premises was not in breach of the CEO's obligation to ensure that the premises were 'habitable' under s 48(1) of the *Residential Tenancies Act*, or the obligation to repair under s 57(1) of the *Residential Tenancies Act*;[17]

(p) the CEO acted with reasonable diligence to have the broken back window, the loose front window, the missing fly screens, the broken electrical outlet, the outside power point, the missing fan controller and the faulty oven and grill at Conway's premises

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15 *Various Applicants from Santa Theresa v Chief Executive Officer (Housing)* [2019] NTCAT 7, [240]-[243].

16 *Various Applicants from Santa Theresa v Chief Executive Officer (Housing)* [2019] NTCAT 7, [197]-[201].

17 *Various Applicants from Santa Theresa v Chief Executive Officer (Housing)* [2019] NTCAT 7, [202]-[208].

repaired in compliance with the obligation under s 57(1) of the *Residential Tenancies Act*;[18]

(q) there was insufficient evidence on which to find that the CEO failed to replace the missing front gate at Conway's premises in breach of the obligation under s 57(1) of the *Residential Tenancies Act*;[19]

(r) the CEO's counterclaim for unpaid rent was dismissed because no evidence was adduced to prove the amounts owing;[20]

(s) the CEO's counterclaim for repairs was dismissed because insufficient evidence was adduced to prove the claim;[21]

(t) as a result of the CEO's breach of s 48(1) of the *Residential Tenancies Act* in failing to install an air-conditioner, Young was entitled to compensation for loss and damage in the amount of $4735.80 (being a refund of the rent paid in the period from 13 November 2011 to 5 October 2016), and $4000 for the distress arising from the physical inconvenience caused by the breach;[22]

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18 *Various Applicants from Santa Theresa v Chief Executive Officer (Housing)* [2019] NTCAT 7, [244]-[256], [262]-[263].

19 *Various Applicants from Santa Theresa v Chief Executive Officer (Housing)* [2019] NTCAT 7, [257]-[261].

20 *Various Applicants from Santa Theresa v Chief Executive Officer (Housing)* [2019] NTCAT 7, [272]-[276].

21 *Various Applicants from Santa Theresa v Chief Executive Officer (Housing)* [2019] NTCAT 7, [277]-[279].

22 *Various Applicants from Santa Theresa v Chief Executive Officer (Housing)* [2019] NTCAT 7, [284.2].

(u) as a result of the CEO's breach of s 57(1) of the *Residential Tenancies Act* in failing to replace the missing backdoor and to repair the stove in a timely fashion, Young was entitled to 'nominal damages' in the amounts of $100 and $200 respectively in the absence of evidence as to specific loss and damage;[23] and

(v) as a result of the CEO's breach of s 57(1) of the *Residential Tenancies Act* in failing to repair the shower in a timely fashion, Conway was entitled to compensation for loss or damage in the amount of $1000 for the disappointment and distress arising from the physical inconvenience caused by the breach.[24]

[7] During the course of submissions in the proceedings before the Tribunal, counsel for Young and Conway had also contended that the default prescribed tenancy agreements which commenced operation in 2010 should be declared void in the application of the principle from *Commonwealth Bank of Australia Ltd v Amadio (**Amadio**)*.[25] That submission was made on the basis that at the time of entering into the tenancy arrangements Young and Conway were unable to make decisions in their own best interests due to special disadvantage arising from the lack of a common language with the landlord's agent, the lack

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23 *Various Applicants from Santa Theresa v Chief Executive Officer (Housing)* [2019] NTCAT 7, [287]-[289].

24 *Various Applicants from Santa Theresa v Chief Executive Officer (Housing)* [2019] NTCAT 7, [290]-[291].

25 *Commonwealth Bank of Australia Ltd v Amadio* [1983] HCA 14; (1983) 151 CLR 407, 461.

of advance notice, the haste involved, and the fact that no explanation of the nature and effect of the documents or the rent amount payable was given.[26]

[8] It was further asserted that the consequence of that declaration would be that Young and Conway were entitled to be repaid the rent collected under the void agreements. The necessary adjunct to that submission was that the Tribunal would retain jurisdiction in the matters notwithstanding the absence of valid tenancy agreements, and Young and Conway would be entitled in the exercise of that jurisdiction to awards of compensation for lack of habitability and safety, or delayed repairs. The written submissions filed in the Tribunal on behalf of Young and Conway suggested that consequence flowed necessarily from the decision of the Supreme Court in *Cavanagh v Chief Executive Officer (Housing)*[27]. That decision was concerned principally with whether the continuation of the tenancy agreement in question was inconsistent with the provisions of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). As is discussed further below, the Court in *Cavanagh* was not called upon to consider or decide whether the applicant was entitled to the repayment of rent, and the decision is not authority for the proposition that the Tribunal retains

26 Appeal Book (**AB**) 555-556.

27 *Cavanagh v Chief Executive Officer (Housing)* (2018) 345 FLR 55.

jurisdiction under the *Residential Tenancies Act* in circumstances where there is no valid and operative tenancy agreement.

[9] Although the matter before the Tribunal had proceeded by way of pleadings, Young and Conway had not asserted in the Amended Initiating Applications that the default prescribed tenancy agreements should be declared void in the application of the principle from *Amadio,* with the result that they were entitled to repayment of the rent collected under the void agreements. Rather, the only pleading in *Amadio* terms was contained in the Defences to the CEO's Counterclaims seeking compensation for the failure to pay rent and the failure to properly maintain the premises. The relevant pleading was that by reason of special disadvantage and other matters the CEO was estopped from claiming rental arrears or any compensation pursuant to s 122 of the *Residential Tenancies Act*.

[10] Counsel for the CEO made an application to reopen the CEO's case to lead further evidence when it became apparent in the latter stages of the hearing in the Tribunal that Young and Conway were asserting a claim for the repayment of rent on the ground of unconscionable conduct. The Tribunal refused that application on the basis that the CEO's contentions were matters that did not require further evidence, and the CEO could deal with them in submissions. Counsel for the CEO addressed the *Amadio* claim in written submissions. In the final reasons for determination, the Tribunal did not address the assertion

that the prescribed tenancy agreements should be declared void in the application of the *Amadio* principle, finding instead that the Amended Initiating Applications made no claim for compensation under s 122(1)(b) of the *Residential Tenancies Act* for the repayment of rent.[28]

Proceedings before the Supreme Court

[11] Subsequently, Young and Conway brought an appeal to the Supreme Court asserting that the Tribunal made various errors of law in its determination. So far as is relevant to the present appeal, the Supreme Court found:

(a) the Tribunal erred in failing to deal with the *Amadio* issue and the attendant claim for the repayment of rent, and the matter was remitted to the Tribunal for determination;[29]

(b) the Tribunal erred in construing the term 'habitable' in s 48(1) of the *Residential Tenancies Act* as limited to matters bearing on a tenant's health and safety, and the matter was remitted to the Tribunal for determination on the basis that the assessment of habitability includes 'an overall assessment of the humaneness,

28 *Various Applicants from Santa Theresa v Chief Executive Officer (Housing)* [2019] NTCAT 7, [108]-[109].

29 *Young & Conway v Chief Executive Officer, Housing* [2020] NTSC 59 at [39]-[43].

suitability and reasonable comfort of the premises … judged against contemporary standards';[30] and

(c) the Tribunal erred in finding that the CEO's failure to furnish Young's premises with a backdoor did not constitute a breach of the CEO's obligation to take reasonable steps to ensure the premises were reasonably secure under s 49(1) of the *Residential Tenancies Act*; and Young was therefore entitled to compensation under s 122 of the *Residential Tenancies Act* in the amount of $10,200 ($150 per month for 68 months), apparently for distress and disappointment caused by the failure to provide secure premises.[31]

Grounds of appeal

[12] The CEO has brought this appeal from the decision of the Supreme Court on the following grounds:

Repayment of rent

1. The Supreme Court erred in remitting and conditionally remitting the claim for unconscionable dealings and repayment of rent as the determination of that claim by the Tribunal in favour of Young and Conway would:

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30 *Young & Conway v Chief Executive Officer, Housing* [2020] NTSC 59 at [68]-[81].

31 *Young & Conway v Chief Executive Officer, Housing* [2020] NTSC 59 at [82]-[93]. The award of damages under the second head was said by the Judge at intermediate level to have been made in accordance with '[t]he principles and observations drawn from both *Baltic Shipping [Co v Dillon* [1993] HCA 4; (1993] 176 CLR 344] and *Moore v Scenic Tours Pty Ltd* [[2020] HCA 17; (2020) 268 CLR 326]… heavily calibrated appropriately to the circumstances of Young's reduced enjoyment of the premises'.

(a) mean that there would be no ‘tenancy agreement’ within the meaning of s 122(1) of the *Residential Tenancies Act* in place between the CEO and Young or Conway;

(b) mean that the Tribunal would not have had jurisdiction to make the awards of compensation to Young and Conway for loss and damage suffered by reason of the CEO’s failure to comply with the terms of the prescribed tenancy agreement and the obligations implied by ss 48(1) and 57(1) of the *Residential Tenancies Act*, which awards were not challenged in the appeal to the Supreme Court;

(c) be inconsistent with the findings and orders made by Tribunal for the payment of that compensation, which findings and orders bind the parties;

(d) mean that the Supreme Court would not have had jurisdiction to make the award of compensation to Young in the amount of $10,200 for loss and damage suffered by reason of the CEO’s failure to comply with the obligations implied by ss 49(1) of the *Residential Tenancies Act*; and

(e) be inconsistent with the findings and orders made by the Supreme Court for the payment of that compensation predicated on the existence of a tenancy agreement between the CEO and Young, which findings and orders bind the parties.

2. The Supreme Court erred in holding that the Tribunal possesses implied or incidental powers under the *Residential Tenancies Act* to order repayment of rent where it finds that a tenancy agreement is void.

Habitability

3. The Supreme Court erred in construing s 48(1)(a) of the *Residential Tenancies Act* by holding that 'habitable' requires an overall assessment of humaneness, suitability and reasonable comfort of the premises judged against contemporary standards.

Compensation for distress and disappointment

4. The Supreme Court erred in finding that the tenancy agreement between the CEO and Young was an agreement whose object was to provide enjoyment, relaxation or freedom from molestation and was therefore governed by the second limb of the principle in *Baltic Shipping* concerning damages for distress and disappointment for breach of contract.

[13] We deal with those grounds seriatim.

Repayment of rent

[14] The CEO does not assert that the Supreme Court erred in finding that the Tribunal's failure to deal with the *Amadio* issue gave rise to a reviewable error. Rather, by the first ground of appeal the CEO contends, in essence, that the Supreme Court erred in remitting the determination of that claim to the Tribunal because it was anomalous

and futile to do so where a finding that there was no valid tenancy agreement would deprive the Tribunal of jurisdiction under the *Residential Tenancies Act* generally, and power to award compensation pursuant to s 122 of the *Residential Tenancies Act* specifically. The related ground of appeal is that the Supreme Court erred in holding that the Tribunal possesses implied or incidental powers under the *Residential Tenancies Act* to order repayment rent where it finds that a tenancy agreement is void. Although the Supreme Court did not make an express finding to that effect, the finding is implicit in the Supreme Court's conclusion that the Tribunal had: (a) jurisdiction to determine whether a tenancy agreement was void; and (b) implied or incidental powers to order compensation if the tenancy agreement was found to be void.[32]

[15] Counsel for Young and Conway makes three responses to the CEO's contentions. First, the concern that the Tribunal might declare the tenancy agreements void and award compensation as a result is both premature and hypothetical. Second, the Tribunal's jurisdiction does not rely on a tenancy agreement being operative in law. It requires only that there is an agreement in place which the parties have treated as operative in fact, including as the basis for the Tribunal's jurisdiction.[33] Until such time as a tenancy agreement is declared void

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32 *Young & Conway v Chief Executive Officer, Housing* [2020] NTSC 59 at [43].

33 Relying, by analogy, on *State of New South Wales v Kable* (2013) 252 CLR 118, [22], [52].

it continues to have legal force.[34] Third, the fact that the Tribunal has express power to determine that a tenancy agreement is unconscionable and therefore void in certain circumstances[35] is irreconcilable with the assertion that the Tribunal loses jurisdiction in considering whether, or deciding that, a tenancy agreement is void.

[16] As a creation of statute, the Tribunal has no authority to adjudicate a dispute beyond the jurisdiction conferred on it by legislation.[36] Similarly, the powers of the Tribunal, in the sense of its procedures and the remedies it can grant, must also be conferred by legislation.[37] It is well-recognised that for these reasons tribunals of this type lack 'inherent jurisdiction'.[38] The Tribunal's jurisdiction and power must be found expressly, or by necessary implication, in the legislation which establishes it and confers jurisdiction and power. A jurisdiction or power will only be 'implied' where it is necessarily incidental to an express conferral of jurisdiction in order to enable the Tribunal to work effectively within that jurisdiction.

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34 *Thorne v Kennedy* (2017) 263 CLR 85, [87].

35 *Residential Tenancies Act*, s 8(b) provides: '[A] tenancy agreement may be enforced in accordance with this Act against a person who has attained the age of 16 years but has not attained the age of 18 years unless, in the opinion of the Tribunal, the agreement is harsh or unconscionable.'

36 *Australian Securities & Investments Commission v Edensor Nominees Pty Ltd* [2001] HCA 1; (2001) 204 CLR 559.

37 *Osland v Secretary to the Department of Justice* [2010] HCA 24; (2010) 241 CLR 320, [9].

38 See, for example, *Household Financial Services Ltd v Commercial Tribunal of New South Wales* (1995) 36 NSWLR 220; *Walton v McBride* (1995) 36 NSWLR 440; *Herald & Weekly Times Ltd v Victorian Civil and Administrative Tribunal* (2006) 24 VAR 174, [27].

[17] The *Residential Tenancies Act* does not make any general conferral of jurisdiction or power on the Tribunal. The general conferral of jurisdiction is made under s 8 and Part 3 of the *Northern Territory Civil and Administrative Tribunal Act 2014* (NT). Pursuant to those provisions: (a) the Tribunal has the jurisdiction conferred on it by any Act;[39] (b) that jurisdiction may be 'original' or 'review';[40] (c) the jurisdiction will be 'original' if the matter does not involve the review of a decision;[41] (d) if the matter that the relevant Act gives the Tribunal jurisdiction to deal with involves a review of a decision, the matter comes within the Tribunal's 'review' jurisdiction;[42] and (e) a person aggrieved by a decision of the Tribunal in the exercise of its original jurisdiction may apply for a review of the decision, which is conducted in the Tribunal's 'review' jurisdiction.[43]

[18] In accordance with that general conferral of jurisdiction, the *Residential Tenancies Act* confers specific jurisdiction, powers and functions on the Tribunal as follows:

(a) the power to enforce a tenancy agreement in accordance with the provisions of the *Residential Tenancies Act* against a person who has attained the age of 16 years but has not attained the age of 18

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39 *Residential Tenancies Act,* s 30.

40 *Residential Tenancies Act,* s 31.

41 *Residential Tenancies Act,* s 32.

42 *Residential Tenancies Act,* s 33.

43 *Residential Tenancies Act,* s 140.

years, unless the Tribunal is of the opinion that the agreement is harsh or unconscionable;[44]

(b) the power to rescind or vary a term of a tenancy agreement (other than a term specified by the *Residential Tenancies Act*), including making any consequential changes to the tenancy agreement, if satisfied that the term is harsh or unconscionable;[45]

(c) the power to request the Commissioner of Tenancies to prepare a condition report in respect of premises in circumstances where a landlord and tenant are unable to reach agreement as to the contents of a condition report, and to determine whether a condition report is to be taken to have been accepted;[46]

(d) the power to determine the proportions of a security deposit paid in relation to each tenant under a tenancy agreement;[47]

(e) the power to declare that the rent payable under a tenancy agreement is excessive, and specify the rent payable, including power to request the Commissioner of Tenancies to undertake a valuation for that purpose;[48]

(f) the power to order the refund of rent paid in advance;[49]

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44 *Residential Tenancies Act,* s 8(b).

45 *Residential Tenancies Act,* s 22.

46 *Residential Tenancies Act,* ss 25-28, 110(7), 111.

47 *Residential Tenancies Act,* s 33(3)(a).

48 *Residential Tenancies Act,* s 42, 42A.

49 *Residential Tenancies Act,* s 43.

(g) the power to determine whether a method of calculating rent, penalty or liquidated damages is punitive and therefore prohibited;[50]

(h) the power to determine whether premises are in reasonable or reasonably clean condition;[51]

(i) the power to order payment for the cost of permitted repairs;[52]

(j) the power to order emergency repairs;[53]

(k) the power to order that a tenant must not keep a pet on the premises;[54]

(l) the power to order a tenant to let the landlord enter premises;[55]

(m) the power to declare that consent to an assignment or subletting was reasonably or unreasonably refused, or that a charge levied for that purpose is unreasonable;[56]

(n) the power to order termination of a tenancy for serious breach, hardship, unacceptable conduct or a failure on the part of a public

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50 *Residential Tenancies Act,* s 44, 45.

51 *Residential Tenancies Act,* s 51(4).

52 *Residential Tenancies Act,* s 61(4).

53 *Residential Tenancies Act,* s 63.

54 *Residential Tenancies Act,* ss 65A, 65B.

55 *Residential Tenancies Act,* s 77A.

56 *Residential Tenancies Act,* ss 79(4), 81.

housing tenant to enter into an 'acceptable behaviour agreement', and to declare a purported termination of a tenancy of no effect;[57]

(o) the power to make an order for vacant possession following service of a notice of intention to terminate, and to suspend an order for vacant possession and extend the operation of the tenancy agreement on the ground of severe hardship;[58]

(p) the power to vest a landlord's interest under a tenancy agreement in a person entitled to possession of the premises as against the landlord;[59]

(q) the power to declare premises abandoned and to make an order for immediate possession;[60]

(r) the power to make orders resolving disputes in relation to abandoned goods;[61]

(s) the power to determine the proportion of a charge payable for electricity, gas or water under a tenancy agreement;[62]

(t) the power to order a tenant to pay the landlord compensation for any loss, expense or rent forgone as a result of a failure to hand over vacant possession of premises;[63]

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57 *Residential Tenancies Act,* ss 82(1)(b), 84, 97, 98, 99, 99A, 100, 100A, 149.

58 *Residential Tenancies Act,* ss 104, 105.

59 *Residential Tenancies Act,* s 107(3), (4).

60 *Residential Tenancies Act,* s 108.

61 *Residential Tenancies Act,* s 109(10).

62 *Residential Tenancies Act,* s 119.

(u) the power to order compensation for loss or damage suffered by a party to a tenancy agreement because the other party has failed to comply with the agreement or has paid more than required under the terms of the agreement (or an obligation under the *Residential Tenancies Act* relating to the agreement), including determining the distribution of the security deposit and interest paid on the deposit;[64] and

(v) the power to make orders concerning personal information listed or proposed to be listed in a tenancy database.[65]

[19] In common with most other Australian jurisdictions, the *Residential Tenancies Act* has created a special jurisdiction to deal with residential tenancy disputes, and that jurisdiction has been conferred on a general civil and administrative tribunal with authority to deal with range of minor civil and administrative law matters. In accordance with the principles already described, the Tribunal cannot act outside its statutory authorisation as catalogued in the immediately preceding paragraph. In broad terms, the nature and scope of the legislation means that the Tribunal may only deal with disputes relating to security bonds, excessive rent claims, applications for termination of tenancy and grant of possession to the landlord, orders relating to

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63 *Residential Tenancies Act,* s 121.

64 *Residential Tenancies Act,* s 112(7), 113, 116(3), 122.

65 *Residential Tenancies Act,* s 134.

abandonment of the premises or of goods left on the premises, creation of a tenancy with a sub-tenant, orders requiring performance or restraining actions in breach of obligations, compensation for breach of a tenancy agreement, and terms that are harsh or unconscionable or otherwise inconsistent with the provisions of the legislation.

[20] The orders which may be made by the Tribunal fall into four broad categories. *First*, the Tribunal may make monetary awards in the nature of compensation for the breach of a tenancy agreement or amounts payable (particularly rent). *Second*, the Tribunal may make performance orders requiring a party to a tenancy agreement to undertake designated work or refrain from specified conduct. *Third*, the Tribunal may make possession orders on termination of a tenancy, and orders ancillary to termination. *Fourth*, the Tribunal may make orders to vary the terms of the tenancy agreement that require payment of excessive rent, or if the terms are harsh or unconscionable. However, the Tribunal does not have a general jurisdiction, either express or implied, which would permit it to declare the entirety of a tenancy arrangement void on equitable grounds. Nor does it have power to order the payment of restitution or equitable compensation contingent upon such a declaration.

[21] Moreover, the jurisdiction is limited to the parties to a valid tenancy agreement. That is the jurisdictional fact which must exist before the Tribunal can exercise its statutory powers. So far as the power to

award compensation is concerned, s 122(1) of the *Residential Tenancies Act* provides (emphasis added):

> 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*.

[22] On the proper construction of the legislation, the Tribunal has no power to make an order for compensation in the absence of a tenancy agreement. For the reasons described, no question as to whether the tenancy agreement is operative in fact (but not law), or whether it is voidable, properly arises. This is because the Tribunal has no jurisdiction or power to declare a tenancy agreement void in the application of equitable principles for making an award of compensation. A number of matters should be understood in this respect.

[23] First, the Tribunal no doubt has power to determine as a threshold issue whether it has jurisdiction in an application, particularly in circumstances where a party seeking to defend an application for the payment of compensation asserts that there is no tenancy agreement on foot. However, in those circumstances, a finding by the Tribunal that

there is no operative 'tenancy agreement' under the *Residential Tenancies Act* has application for the sole purpose of determining if it has jurisdiction. There is no power to declare the tenancy agreement void and order compensation in the nature of restitution or equitable damages on that basis.

[24] Second, the extent to which the doctrine of unconscionability operates under the residential tenancies scheme is both specified and circumscribed by the legislation. The provision allowing the Tribunal to enforce a tenancy agreement against a person who has attained the age of 16 years but has not attained the age of 18 years unless, in the opinion of the Tribunal, the agreement is harsh or unconscionable, is not a vesting of equitable jurisdiction. It is the vesting of a power in the Tribunal to enforce legal consequences against a minor, coupled with a discretion not to do so if it would be unfair. The exercise of that statutory discretion is not the exercise of a general jurisdiction to declare tenancy agreements void on equitable grounds. While it might be open to a minor to defend a claim for compensation on that basis, it would not entitle the minor to press a claim for the repayment of rent on the basis that the tenancy agreement was void. Similarly, the Tribunal's power to rescind or vary a term of a tenancy agreement, if satisfied that the term is harsh or unconscionable, is not a conferral of equitable jurisdiction or a power to declare a tenancy agreement void. The default position in the event that the tenancy agreement does not

contain terms to the same effect as specified under the legislation, or the tenancy agreement is void to the extent of inconsistency with the legislative scheme[66], is that the tenancy agreement will be as prescribed for the purposes of s 19(4) of the *Residential Tenancies Act*.

[25] Third, the decision in *Cavanagh v Chief Executive Officer (Housing)*[67] is not authority for the proposition that the Tribunal exercises equitable or analogous jurisdiction. As in the present cases, the applicant before the Tribunal in that matter had pleaded an estoppel in defence of the landlord's claim for unpaid rent. The Supreme Court in that case observed that s 122(3) of the *Residential Tenancies Act* incorporated notions which were similar to equitable principles and which reflected the requirement in s 53 of the *Northern Territory Civil and Administrative Tribunal Act* that the Tribunal act fairly and according to the substantial merits of the matter.[68] The applicant's pleading in defence was in essence that it would be unfair to award compensation for unpaid rent in the circumstances. Accordingly, the Tribunal had an implied jurisdiction to determine that matter. The decision in *Cavanagh* goes no further than that, and is not to the effect that the Tribunal has either express or implied equitable jurisdiction. In particular, it was not claimed in that matter, or suggested to the Court,

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66 *Residential Tenancies Act,* s 20(1).

67 *Cavanagh v Chief Executive Officer (Housing)* (2018) 345 FLR 55, [63]-[69].

68 Section 53(1) of the *Northern Territory Civil and Administrative Tribunal Act* is a stipulation as to the manner in which the Tribunal must exercise its jurisdiction and powers. It is not an independent conferral of jurisdiction or power.

that the Tribunal had power to declare that the tenancy agreement was void and order the applicant was entitled to recover rent paid under that purported agreement.

[26] Fourth, it is important to appreciate how the claim for the repayment of rent evolved in these matters. As described above, the only pleading in *Amadio* terms was as a shield to the CEO's Counterclaims seeking compensation for the failure to pay rent and the failure to maintain the premises properly. It was not until the third day of the hearing before the Tribunal that the applicants sought to deploy the issue as a sword by claiming repayment of rent paid under the tenancy agreements. That affords some explanation as to why the matter proceeded before the Tribunal without a preliminary determination of the jurisdictional issue. In this case, the applicants seek to approbate and reprobate by asserting that the obligations under the agreement remain enforceable for the purpose of the awards of compensation made in their favour; but that the obligation to pay rent was void *ab initio* for the purpose of securing an award of compensation in the form of the repayment of that rent. It is contrary to principle to say that a transaction is valid, and thereby obtain some advantage on that basis, and to also say it is void for the purpose of securing some further advantage.[69]

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69 *Smith v Baker* (1873) 8 CP 350, 357. See also the examples of the principle cited in *Thompson v Palmer* (1933) 49 CLR 507, 547

[27] Even leaving aside the question of the Tribunal's limited statutory jurisdiction, the subsisting awards of compensation made by the Tribunal for breaches by the CEO of its obligations under the tenancy agreements are predicated on the validity of those agreements, and irreconcilable with a claim for the repayment of rent on the basis that the agreements are void and unenforceable. However, given the limitations on the Tribunal's jurisdiction it is unnecessary to determine whether those awards of compensation, which are binding on the parties, give rise to an issue estoppel in the technical sense.

[28] For the reasons we have given, the Tribunal has no power to make an order for compensation in the absence of a valid tenancy agreement; the Tribunal has no jurisdiction or power to declare the tenancy agreements void for the purpose of making an order for the repayment of rent paid under those agreements; and the Tribunal has no implied or incidental powers under the *Residential Tenancies Act* to order repayment of rent where it finds that a tenancy agreement is void. The Tribunal dismissed the CEO's Counterclaims, and the *Amadio* pleading in the Defences to the Counterclaims was not raised in the appeal to the Supreme Court.[70] For these reasons, the Supreme Court erred in law in remitting the claim for unconscionable dealings and repayment of rent to the Tribunal for determination in circumstances where the Tribunal

70 *Various Applicants from Santa Theresa v Chief Executive Officer (Housing)* [2019] NTCAT 7, [272]-[279].

has no jurisdiction or power to make such a determination, and the Tribunal's jurisdiction to award compensation is predicated upon the existence of a valid tenancy agreement.

[29] These grounds of appeal are allowed.

Habitability

[30] The CEO contends that the Supreme Court erred in law by holding that the application of the term 'habitable' as it appears in s 48(1)(a) of the *Residential Tenancies Act* requires an overall assessment of humaneness, suitability and reasonable comfort of the premises judged against contemporary standards.

[31] Section 48 of the *Residential Tenancies Act* provides:

> (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
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> (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.

[32] As described above, the Tribunal found that the term 'habitable' under s 48(1) in that provision was directed exclusively to structural and

health issues relevant to the tenant's safety. In order to establish a breach of the statutory obligation, it was therefore necessary to show that a threat to the tenant's safety would naturally occur from the ordinary use of the premises. The Tribunal characterised this as 'a very high test'.[71] That construction was informed principally by observations made in a decision of the Consumer, Trader and Tenancy Tribunal of New South Wales which was published in 2010.[72]

[33] The notion of habitability has a long jurisprudential history. The concept of habitability in general tenancy law has been transposed into statutes, and its base meaning remains largely unchanged. As early as 1839, it was observed that habitability was concerned not only with safety but also with 'reasonable comfort'.[73] In that case, the tenant argued that an obligation to put premises into 'habitable repair' required only that they are in such condition that they can be used without harm or danger. The Baron of the Exchequer rejected that proposition in his directions to the jury. The test was expressed with reference to both safety and reasonable comfort, and that formulation was expressly endorsed by the Master of the Rolls in the later case of *Proudfoot v Hart*.[74]

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71 *Various Applicants from Santa Theresa v Chief Executive Officer (Housing)* [2019] NTCAT 7, [118].

72 *De Soleil v Palhide Pty Ltd* [2010] NSWCTTT 464.

73 *Belcher v McIntosh* (1839) 174 ER 257, 258.

74 *Proudfoot v Hart* (1890) 25 QBD 42, 50-51.

[34] Although *Proudfoot v Hart* involved a contractual obligation on the part of the tenant to keep the premises 'in good tenantable repair', in neither case did the court consider there to be any material difference between that expression and 'habitable repair'. Lord Justice Lopes, who was the other member of the Bench in *Proudfoot*, opined that the expression meant 'such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it'. That definition was also expressly endorsed by the Master of the Rolls.

[35] Those decisions were followed by the House of Lords in *Hall v Manchester Corporation* (1915) 84 LJ Ch 732.[75] The question at issue there was whether a building could be found 'unfit for human habitation' by reason of something apart from a structural or other defect existing in the building itself; in that case, insufficient ventilation. The House of Lords found that it could. Although the decision was directed to whether the enquiry into habitability extended to matters extrinsic to the premises, in a more general sense the House of Lords held that the question of whether premises were unfit for human habitation was a question of fact to be determined by applying the standard of the 'ordinary reasonable man'.

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75 *Hall v Manchester Corporation* (1915) 84 LJ Ch 732.

[36] Against that background, the position pressed by the CEO in this matter has its genesis in observations made by Atkin LJ in *Morgan v Liverpool Corporation (**Morgan**)*.[76] That case involved physical injury sustained by the tenant when, as the upper portion of a window was being opened, one of the cords of the window sash broke and the window slipped down and severely crushed his hands. Ultimately, the question of liability turned on whether the landlord had been given notice of the defect. All members of the court were agreed that the landlord was absolved of liability in the absence of notice. Only Atkin LJ found that by reason of the defect the premises were not 'reasonably fit for human habitation'. In coming to that conclusion, Atkin LJ adopted the standard, suggested in argument, that:

> … if the state of repair of a house is such that by ordinary user damage may naturally be caused to the occupier, either in respect of personal injury to life or limb or injury to health, then the house is not in all respects reasonably fit for human habitation.[77]

[37] A number of observations must be recognised about that expression of the relevant 'standard'. First, Atkin LJ was the only member of the Court who came to that conclusion, and his Lordship recognised at the outset of his reasons that the *obiter dicta* on those parts of the case in which there was not agreement were not authoritative.[78] Second, the 'standard' as formulated and adopted was directed to the particular

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76 *Morgan v Liverpool Corporation* [1927] 2 KB 131.

77 *Morgan v Liverpool Corporation* [1927] 2 KB 131, 145.

78 *Morgan v Liverpool Corporation* [1927] 2 KB 131, 144.

circumstances of that case, which involved personal injury. The 'standard' was not expressed as an exhaustive test for determining whether premises are 'fit for human habitation'. Third, Atkin LJ himself went on to consider the example of the house in which one window will not open. His Lordship observed that in a house which has many rooms and many windows, that fact would not make the house unfit for human habitation. Conversely, when dealing with a working class house with only two bedrooms occupied by a family with children, the question whether the only window in one of the only two bedrooms is capable of being opened will bear on the question of whether the premises are fit for human habitation.[79] Those observations suggest an acceptance that the enquiry into habitability may extend beyond narrow considerations of health and safety to notions of amenity and reasonable comfort.

[38] The House of Lords was called upon 15 years later to consider a suit involving remarkably similar circumstances in *Summers v Salford Corporation*.[80] In that case the sash cord of a window broke causing the window to fall and crush the tenant's hand; however the landlord was on notice that the window was defective. Again, the question was whether the premises were 'reasonably fit for human habitation'. Lord Atkin repeated the test he enunciated in *Morgan*, but again subject to

79 *Morgan v Liverpool Corporation* [1927] 2 KB 131, 146.

80 *Summers v Salford Corporation* [1943] AC 283.

the qualifying observation that a window which must either remain permanently closed or permanently open in a house of only two bedrooms would render the house 'unfit for occupation by a working class family'.[81] Such a conclusion derived not from the fact that the window presented a risk of falling on the tenant and causing personal injury, but from the fact that an inoperative window in a small house made it unfit for human habitation.

[39] So much is apparent from the fact that his Lordship goes on to agree expressly with the tests formulated in *Belcher v McIntosh* and *Proudfoot v Hart*, including the reference to 'reasonable comfort', and expressed regret that neither authority had been cited in either *Morgan* or the matter then before the court. In that respect, his Lordship said that:

> Too much emphasis should not be laid on 'comfort', but, taking a reasonable view of the meaning of 'comfort' in the definition, it affords a useful test of liability.[82]

[40] The reference in that passage to the 'definition' is not to a statutory definition, but to the formulation expressed in *Belcher v McIntosh*. The scope of the enquiry is illustrated by the fact that his Lordship had earlier observed:

> A burst or leaking pipe, a displaced slate or tile, a stopped drain, a rotten stair tread, may each of them until repair make a house unfit

81 *Summers v Salford Corporation* [1943] AC 283, 289.

82 *Summers v Salford Corporation* [1943] AC 283, 290.

> to live in, though each of them may be quickly and cheaply repaired.[83]

[41] Those conclusions are also reflected in Lord Wright's speech, which includes the observation that '[t]he most elementary needs of comfort and sanitation require that windows should be opened and shut'. Further, '[t]hese elementary needs must, in my opinion, be capable of being satisfied if a house is to be regarded as fit in every respect for human habitation'.[84] While Lord Wright went on to say that the enquiry into fitness 'also imports some reference to what we call humanity or humaneness'[85], his Lordship was not there prescribing some criterion of habitability based on imprecise notions of kindness or compassion. Rather, his Lordship was drawing a distinction between fitness for habitation by pigs, horses or other animals, or the use of buildings as warehouses, and fitness for human habitation. Similarly, Lord Romer observed that the statutory obligation imposed on the landlord:

> … the duty of seeing that the house does not get too much ventilation or get in a damp condition by the impossibility of keeping the windows closed when necessary, and that the rooms of the house do not in course of time become too dark for comfort by reason that the windows cannot be cleaned. If the windows in a room cannot be opened or shut or cleaned, that room is not, in my opinion, reasonably fit for human habitation.[86]

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83 *Summers v Salford Corporation* [1943] AC 283, 288.

84 *Summers v Salford Corporation* [1943] AC 283, 292.

85 *Summers v Salford Corporation* [1943] AC 283, 293.

86 *Summers v Salford Corporation* [1943] AC 283, 297-298.

[42] While on proper analysis those authorities did not confine the assessment of habitability to structural and health issues relevant to the tenant's safety, it is unsurprising that the risk of injury has subsequently been adopted as a key test of habitability where the defect in question gives rise to such a risk. So, for example, in *Gray v Queensland Housing Commission*[87], Chesterman J opined that the term 'fit for human habitation' was exactly synonymous with 'fit for the tenant to live in'. His Honour then adopted Lord Atkin's statement from *Morgan's* case, which had subsequently been approved in *Summers v Salford Corporation*, making reference to 'damage … in respect of personal injury to life or limb or injury to health'. *Gray* was a case in which the question of habitability turned upon a safety issue; in that case, an injury said to have been caused by dangerously slippery tiles.[88] Having regard to that context, the case is not authority for the proposition that fitness for human habitation is limited to matters of health and safety. That is borne out by the passage extracted from Woodfall in the reasons for decision in *Gray*, which was in the following terms:

> … [N]ot every defect … will condemn a house as unfit. It is to be deemed to be unfit for human habitation if and only if it is so far defective … that it is not reasonably suitable for occupation in that condition … [T]he standard required by the Act is a lower standard

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87 *Gray v Queensland Housing Commission* [2004] QSC 276.

88 See also *Fine v Geier* (2003] QSC 73, where the Court considered that the house in question was 'fit to live in' because it did not contain any dangerous defects and was sufficiently safe or ordinary, everyday use. That case was also concerned with safety issues arising from fire hazards.

> than an obligation to keep premises in good and tenantable repair.[89]

[43] That passage does not suggest that habitability is exclusively a function of structural and health issues relevant to the tenant's safety. We note in that respect that the Consumer, Trader and Tenancy Tribunal of New South Wales, the decision of which[90] the Tribunal in this matter placed significant reliance upon in construing the term 'habitable', has recognised that the reasonable comfort of tenants may also operate as a test of habitability. By way of example, in *Finn v Finato* the New South Wales Tribunal held that the requirements of 'fit for habitation must both import such a state of repair that the premises might be used and dwelt in, not only for safety, but for reasonable comfort, by the class of persons by whom and for the sort of purpose for which, they were to be occupied'.[91] That approach has been affirmed by the successor tribunal, the Civil and Administrative Tribunal of New South Wales, most recently in the matter of *Lewin v Zhou*.[92]

[44] In the application of that criterion of reasonable comfort, the New South Wales Tribunal has found premises unfit for habitation in circumstances variously where there was no functional hot water

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89 Woodfall, *Landlord & Tenant*, 28th ed, [1-1477].

90 *De Soleil v Palhide Pty Ltd* [2010] NSWCTTT 464.

91 *Finn v Finato* [2004] NSWCTTT 179.

92 *Lewin v Zhou* [2018] NSWCATCD 54, [25]-[30].

system, where there was no usable bathroom and toilet, where there was an accumulation of defects (none of which by itself would lead to a conclusion that the premises were not habitable), and where the premises were subject to an infestation of fleas. On the other hand, circumstances found not to render premises uninhabitable have variously included the absence or disrepair of a fence, the absence of non-transparent drapes or blinds, stains on the internal areas of the premises and a small area of water leakage from a shower.[93] To the extent that some isolated decisions in other forums have found that a house is unfit for human habitation only if the occupier could be expected to suffer physical injury to health from the ordinary use of the premises, we are respectfully unable to agree.[94]

[45] That conclusion is consistent with the fact that there are provisions in the *Residential Tenancies Act* which indicate a legislative intention that the considerations which inform the determination of habitability are not coextensive with matters of health and safety. In particular, ss 86 and 92 of the *Residential Tenancies Act* draw a distinction between flooding, threats to health and safety and habitability. While it is no doubt the case that health and safety considerations may operate as a test of habitability, they are not the only criteria. By way of example, dampness and mould may be some circumstances constitute a threat to

93 Anforth, Christensen & Taylor, *Residential Tenancies Law and Practice New South Wales*, 5th ed, The Federation Press 2011, [2.52.2].

94 See, for example, *Hampel & Hampel v South Australian Housing Trust* [2007] SADC 64, [63].

health and sustain a finding that the premises are not habitable on that account. However, even where the incursion of dampness and mould is not such as to constitute a threat to health, it may yet ground a conclusion that the premises are not habitable on the basis that it substantially interferes with reasonable comfort. To take another example, an accumulation of defects in the property may so undermine its comfort and amenity as to render it unfit for habitation, even where those defects do not constitute a threat to health and safety.

[46] The adoption of a broader construction is also consistent with the approach taken by international instruments dealing with the right to adequate housing.[95] Having said that, we do not consider that the term 'habitable' as it appears in the *Residential Tenancies Act* is ambiguous. As we have attempted to describe above, it has a long jurisprudential history which on proper review accommodates reasonable comfort as one test. That jurisprudential history and the interpretive process is not assisted, and may in fact be confounded, by the application of broad and imprecise concepts such as 'security, peace and dignity'.[96]

[47] The Supreme Court made the following statement concerning the correctness of the Tribunal's findings in relation to habitability:

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95 See, for example, *International Covenant on Economic, Social and Cultural Rights*, article 11(1).

96 See, for example, Committee on Economic, Social and Cultural Rights, *General Comment No 4* (1991), [7].

> After considering the range of authorities, including those from other specialist tribunals, I have concluded the Tribunal adopted a threshold for "habitable" which was too narrow, solely confined to safety. The adoption of a threshold which is a "very high test" is apt to skew the assessment of the particular premises. Premises are not uninhabitable if any inadequacies only give rise to mere inconvenience or aesthetic deficiencies, are trivial, or are a minor irritation. The assessment of whether the premises were habitable should have included not only the health and safety of tenants but an overall assessment of the humaneness, suitability and reasonable comfort of the premises, even if only basic amenities are provided, judged against contemporary standards. The assessment of whether premises were habitable should take into account any proven inadequacies cumulatively.[97]

[48] While we agree that the Tribunal fell into error in its approach to the construction of the term 'habitable', and that the matter should be remitted to the Tribunal for reconsideration of the claims for compensation made on that ground, the statement by the Supreme Court of the test to be applied should not be adopted in its entirety in that reconsideration.

[49] First, the Supreme Court's rejection of the relevant standard as a 'very high test' is unrelated to whether fitness for human habitation is limited to matters of health and safety. The New South Wales Tribunal was correct to observe in *De Soleil v Palhide Pty Ltd*[98] that a finding that premises are not fit for habitation should not lightly be made.

[50] Second, the suggested criteria of 'humaneness' and 'suitability' involve the application of standards insufficiently precise to engage the

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97 *Young & Conway v Chief Executive Officer, Housing* [2020] NTSC 59, [80].

98 *De Soleil v Palhide Pty Ltd* [2010] NSWCTTT 464.

exercise of judicial power in this context. As already described, the first descriptor derives only from Lord Wright's distinction between fitness for human habitation and fitness for the housing of animals or goods. The second descriptor is used in some authorities and texts only as a synonym for 'fitness', rather than a criterion of habitability. The question of 'suitability' for habitation is a statement of the statutory formula, rather than a test by which that standard may be assessed. The relevant test of liability, apart from matters of health and safety, is 'comfort', subject to Lord Atkin's qualification that a reasonable view of that criterion must be taken. Questions of fitness for habitation are to be judged against a standard of reasonableness having regard to the age, character and locality of the residential premises and to the effect of the defect on the state or condition of the premises as a whole.[99]

[51] Subject to those observations, this ground of appeal is dismissed.

Compensation for distress and disappointment

[52] In the final ground of appeal the CEO asserts that the Supreme Court erred in law in finding that the tenancy agreement between the CEO and Young was an agreement whose object was to provide enjoyment, relaxation or freedom from molestation, and was therefore governed by 'the second limb of the principle in *Baltic Shipping*'[100] concerning

99 *Bond v Weeks* [1999] 1 Qd R 134, 138.

100 *Baltic Shipping Co v Dillon* (1993) 176 CLR 344.

damages for distress and disappointment for breach of contract. The Supreme Court's conclusions in that respect were as follows (citations omitted):

> Both parties recognise the principles from *Baltic Shipping Co v Dillon* apply to residential tenancies. The respondent recognised distress and disappointment arising from physical inconvenience is relevant, but the circumstances here should not be aligned with cases where the contract breached is one whose object is to providing enjoyment and relaxation. Any award made in favour of Ms Young under s 122 of the RTA may compensate for the physical inconvenience caused by the breach of contract or statutory provisions such as s 49(1) of the RTA. While I agree with the respondent that the circumstances here are far removed from those in *Baltic Shipping*, distress and disappointment arising from physical inconvenience may form part of an award of compensation. Since the hearing of the appeal, counsel have drawn attention to and made further submissions on the recent High Court decision of *Moore v Scenic Tours Pty Ltd* which confirmed various elements of *Baltic Shipping*. Counsel for the appellants pointed out that in *Moore v Scenic Tours*, the Court made reference to compensation arising in respect of "vexation and frustration", "humiliation, indignity…grief, anxiety and distress, not involving a recognised psychological condition" and 'depression of spirit'. The Court also endorsed the following passage by Brennan J in *Baltic Shipping*:
>
> > "[I]f peaceful and comfortable accommodation is promised … 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."
>
> The tenancy agreement here is very different to a contract offering holiday makers enjoyment and relaxation. The statutory guarantee underpinning the tenancy agreement is fundamental and promised secure premises. The principles and observations drawn from both *Baltic Shipping* and *Moore v Scenic Tours Pty Ltd* must be heavily calibrated appropriately to the circumstances of Ms Young's reduced enjoyment of the premises and subsequent distress and disappointment due to the failure to provide a premises which was secure. Although I am prepared to accept the application of those principles, heavily calibrated to include frustration and distress, compensation here cannot be based on a proportion of the damages

> in *Moore v Scenic Tours Pty Ltd* as was suggested by the appellants.[101]

[53] As a preliminary matter, the parties are in disagreement as to whether the Supreme Court did in fact make an award of compensation in the application of 'the second limb of the principle in *Baltic Shipping*'. Counsel for Young draws attention to the sentence in the first paragraph extracted above which states that, '[a]ny award made in favour of Ms Young under s 122 of the RTA may compensate for the physical inconvenience caused by the breach of contract or statutory provisions such as s 49(1) of the RTA'. That was said by counsel for Young to reflect a determination by the Supreme Court to limit the award of compensation to distress and disappointment contingent on physical inconvenience. However, that is clearly a paraphrase of the submission made by the CEO during the course of the proceedings at intermediate level. An assessment of these two paragraphs read as a whole make it plain that the Supreme Court awarded compensation for the 'reduced enjoyment of the premises and subsequent distress and disappointment due to the failure to provide a premises which was secure'; albeit on a 'heavily calibrated' basis. That is a clear reference to the second limb in *Baltic Shipping*, rather than an award of damages for distress and disappointment arising from physical inconvenience.

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101 *Young & Conway v Chief Executive Officer, Housing* [2020] NTSC 59, [90]-[91].

[54] The threshold question to be determined in this ground of appeal is whether the power to award compensation under s 122 of the *Residential Tenancies Act* is subject to the same strictures which govern the award of damages under the law of contract. That section, which has been extracted earlier in these reasons, provides that the Tribunal may 'order compensation for loss or damage suffered by the applicant' due to a breach of the tenancy agreement or because the applicant has paid more than required under the agreement. The section makes reference to a number of principles which also have operation under the general law of contract, including set-off and mitigation of loss. Although the scope of damages for breach of contract is not necessarily coextensive with the scope of compensation under s 122 of the *Residential Tenancies Act,* some principles which govern the award of damages in contract will properly be applied by analogy to the award of compensation.

[55] Damages for discomfort and loss of enjoyment are not generally recoverable for breach of contract because they are considered to be too remote. The rule is based on the assumption that in the application of the second limb in *Hadley v Baxendale*[102], disappointment or distress flowing from the breach of contract would not have been in the contemplation of the parties, at the time they made the contract, as a

102 *Hadley v Baxendale* (1854) 156 ER 145.

likely result of breach.[103] The same principle properly governs the award of compensation under the *Residential Tenancies Act*, both because the relationship giving rise to the claim for compensation is contractual in nature, and because the causal nexus which s 122 of the *Residential Tenancies Act* requires between the breach and the entitlement to compensation necessarily imports considerations of foreseeability and remoteness.

[56] The second question to be determined in this ground of appeal is whether the power to award compensation under s 122 of the *Residential Tenancies Act* extends to compensation for distress and disappointment for a failure to provide quiet enjoyment and/or secure premises.[104] The general rule that damages in contract are not recoverable for mental distress is subject to exceptions which, where relevant, are also properly applied to the power to order compensation under s 122 of the *Residential Tenancies Act*. Those categories of exception have included breach of promise of marriage, breach of contract causing physical injury and breach of contract directly causing physical inconvenience.[105] The decision in *Baltic Shipping* recognised

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103 *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 380-381 per Deane and Dawson JJ.

104 Section 122(5)(a) of the *Residential Tenancies Act* provides that the Tribunal is not to make an order for the payment of compensation 'in respect of death, physical injury [or] pain or suffering'. An award of compensation for disappointment or distress of this nature which is not contingent on physical injury is not properly characterised as an award for pain and suffering: see *Moore v Scenic Tours Pty Ltd* [2020] HCA 17; (2020) 268 CLR 326.

105 *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 362-363 per Mason CJ, 381 per Deane and Dawson JJ.

that those categories also included breach of a contract the object of which is to provide what was described by Mason CJ (at 363) as 'pleasure, relaxation or freedom from molestation'. Justices Deane and Dawson JJ (at 381-382) adopted a similar formulation in terms of a contract 'to provide pleasure, entertainment or relaxation or to prevent molestation or vexation'.

[57] The authorities referred to in *Baltic Shipping* which concerned contracts with the object of pleasure, entertainment or relaxation all involved the provision of a stipulated holiday, entertainment or enjoyment.[106] The object of preventing 'molestation or vexation' derives from *Heywood v Wellers*[107], in which the plaintiff recovered damages for mental distress resulting from a solicitor's breach of contract in failing to obtain an injunction to protect the client from molestation. It was to these particular types of circumstances which McHugh J was referring when describing the common law rule that 'damages are not recoverable for distress or disappointment arising from a breach of contract unless the distress or disappointment arises from a breach of an express or implied term that the promisor will provide the promisee with pleasure, enjoyment or personal protection'.[108]

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106 See, for example, *Jarvis v Swan Tours Ltd* [1973] QB 233, 237-238; *Jackson v Horizon Holidays Ltd* [1975] 3 All ER 92.

107 *Heywood v Wellers* [1976] QB 446.

108 *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 394.

[58] These have been described as an 'exceptional category of case'[109], with the exception predicated on the fact that in such cases disappointment is not merely a reaction to the breach and resultant damage, but is itself the resultant damage[110]. The fact that the central object of the contractual stipulation is to relieve a party from anxiety or annoyance, or to provide pleasure and relaxation, proves that it is within the contemplation of the parties that distress and disappointment will flow from the breach of that stipulation.[111] Although in *Baltic Shipping* Brennan J said, by way of example, that if peaceful and comfortable accommodation is promised to holidaymakers, and the accommodation tendered does not answer the description, damages are recoverable for the loss of the promised peacefulness and comfort,[112] it does not follow that residential tenancy agreements fall within the same category. That is because the central object of a residential tenancy agreement is to grant a right of occupation of premises for the purpose of use as a residence in return for rent. Although the exclusive possession of premises in pursuance of a tenancy agreement no doubt affords a degree of security and comfort, among other benefits, the central object of such a contract is not to relieve a party from anxiety or annoyance, or to provide pleasure and relaxation.

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109 *Watts v Morrow* [1991] 4 All ER 937, 959-960.

110 *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 369-370 per Brennan J.

111 *Kemp v Sober* (1851) 61 ER 200, 201; *Silberman v Silberman* (1910) 10 SR(NSW) 554, 557.

112 *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 371 per Brennan J.

[59] That characterisation is not altered by the fact that s 65 of the *Residential Tenancies Act* provides that 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.' That is a statutory statement of the common law right to quiet enjoyment under a lease agreement, which is directed to ensuring that the tenant is able to make full use of the property without interference by the landlord or the landlord's agent. It is a term of art which has no equivalence with the object of 'pleasure, entertainment or relaxation' contemplated by the decision in *Baltic Shipping*. Similarly, the fact that s 49 of the *Residential Tenancies Act* requires the landlord to take reasonable steps to maintain the locks and other security devices necessary to ensure the premises are reasonably secure does not sustain the conclusion that the central object of a residential tenancy agreement is to protect the tenant from molestation or to provide personal protection in the relevant sense.

[60] Of course, this is not to say that damages for distress and disappointment are not recoverable in consequence of a breach of contract directly causing physical inconvenience. Although sometimes referred to as the first limb in *Baltic Shipping*, this is a well-recognised

and freestanding exception to the general rule that damages in contract are not available for distress and loss of enjoyment. The distinction has been recognised and applied by the Supreme Court of New South Wales. In *Musumeci v Winadell Pty Ltd*, Santow J stated:

> I consider that the matter is settled by *Baltic Shipping Co v Dillon* (1993) 176 CLR 344. The covenant for quiet enjoyment in the lease is very different from the notion of providing "pleasure or enjoyment or personal protection". As was put by McHugh J (at 405), though with some reservation, 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. That is not the case here.[113]

[61] Counsel for Young submitted that the statement was made with reference to a retail tenancy, and had no force or application in relation to residential tenancies. However, the central question is the same. That is, whether an agreement affording the tenant a right to exclusive possession and quiet enjoyment has as its central object the provision of pleasure, entertainment or relaxation. The statement from *Musumeci* has subsequently been considered with apparent approval and applied, including in the residential tenancy context.[114] A similar position was adopted by the English Court of Appeal in *Branchett v Beaney*[115] with specific reference to a residential tenancy. After referring to the basic

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113 *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723, 752.

114 *Celemajer Holdings Pty Ltd v Kopas* [2011] NSWSC 40, [435]-[436]; *Spathis v Hanave Investement Co Pty Ltd* [2002] NSWSC 304, [180]; *Fawzi El-Saiedy v NSW Land and Housing Corporation* [2011] NSWSC 820, [86]-[89]; *Barton v Lantsbery* [2004] VCAT 926, [58].

115 *Branchett v Beaney* [1992] 3 All ER 910.

principle that damages in contract are not available for distress and disappointment, the Court stated:

> … where the breach of contract (eg breach of a covenant to repair) causes physical inconvenience and discomfort then the damages may include compensation for mental suffering directly related to that inconvenience and discomfort: see *Personal representatives of Chiodi v De Marney* (1988) 21 HLR 6; *Watts v Morrow* [1991] 4 All ER 937–956, 960, [1991] 1 WLR 1421–1441, 1445 per Ralph Gibson and Bingham LJJ. However, this exception (if such it be) has no relevance to the present case.
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> Accordingly compensation for injured feelings and mental distress caused by the breach of a covenant for quiet enjoyment contained in a lease or tenancy agreement is only recoverable if the object of the contract can be described as 'to provide pleasure, relaxation, peace of mind or freedom from molesatation'. An example of such a contract is one to provide a holiday: see *Jarvis v Swans Tours Ltd* [1973] 1 All ER 71, [1973] QB 233
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> So the question comes down to whether a covenant for quiet enjoyment in a lease or tenancy agreement is such a contract. In this connection the word 'enjoyment' has a technical meaning. As Pearson LJ said in *Kenny v Preen* [1962] 3 All ER 814, [1963] 1 QB 499:
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> > 'I think the word “enjoy” used in this connexion is a translation of the Latin word “fruor” and refers to the exercise and use of the right and having the full benefit of it, rather than to deriving pleasure from it.'
>
> After all, a covenant for quiet enjoyment is as much a term of a lease of a large office block to a big commercial company as it is a term of a tenancy of a tumbledown cottage to an elderly widow who has lived there all her life.
>
> …
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> *Perera v Vandiyar* [1953] 1 All ER 1109, [1953] 1 WLR 672 and *Kenny v Preen* [1962] 3 All ER 814, [1963] 1 QB 499 are both decisions of this court which held that damages for breach of the covenant for quiet enjoyment must be limited to the ordinary measure of damages for breach of contract.[116]

116 *Branchett v Beaney* [1992] 3 All ER 910, 916-917.

[62] The Court then made reference to a criticism of those last two authorities by Lord Denning MR in *McCall v Abelesz*.[117] Lord Denning expressed the view that damages for mental upset and distress should be available for 'any conduct of the landlord or his agents which interferes with the tenant's freedom of action in exercising his rights as tenant'. The Court dealt with that criticism in the following terms:

> Since the question of the measure of the damage recoverable for breach of a covenant for quiet enjoyment was not necessary for the particular decision in that case, viz whether s 30(2) of the *Rent Act* 1965 gave rise to a civil claim for damages, Lord Denning MR's criticism of *Perera v Vandiyar* and *Kenny v Preen* was *obiter*. In *Millington v Duffy* (1984) 17 HLR 232 Sheldon J recognised the divergence in views but declined to express an opinion, save to say that he found considerable appeal in the view expressed by Lord Denning MR in *McCall v Abelesz*. Finally, in *Sampson v Floyd* (1989) 2 EGLR 49 this court (Butler-Sloss LJ and Sir George Waller) upheld a judgment in the county court for damages for breach of a covenant for quiet enjoyment which included an element for mental distress. However, a consideration of the facts in that case makes it clear that the conduct of the landlord which was there in question was tortious in a number of respects — trespass and assault were two — and the damages could have been given in tort. It would not appear from the report that the court was referred to any of the relevant authorities and we have to say that the decision appears to have been made *per incuriam*.
>
> So we are unpersuaded by those authorities which are to the contrary effect that the view we expressed above is wrong, and we remain of the view that a covenant for quiet enjoyment is not within the exception to the rule in *Addis v Gramophone Co Ltd* relating to contracts to provide peace of mind or freedom from distress.[118]

117 *McCall v Abelesz* [1976] 1 All ER 727, [1976] QB 585.

118 *Branchett v Beaney* [1992] 3 All ER 910, 917-918.

[63] Since that decision was delivered, in *Farley v Skinner*[119] the House of Lords gave further consideration to the circumstances in which non-pecuniary damages may be awarded in contractual claims. However, that consideration took place in the context of a contract for professional services between a prospective purchaser of property and the surveyor engaged to inspect the property. Following the purchase it became apparent that the property was seriously affected by aircraft noise. The House of Lords found that non-pecuniary damages were available for that disturbance where a major or important object of the contract was to give pleasure, relaxation or peace of mind. It was unnecessary that the principal object of the contract as a whole be directed to that matter.

[64] A number of matters must be recognised about that decision. First, although the contract was for a general survey inspection, the surveyor was specifically instructed to investigate whether the property was seriously affected by aircraft noise. Second, the matter in respect of which the plaintiff sought damages was of particular importance to him. Third, that importance was made clear to the surveyor at the time the contract was formed. Finally, the requisite duty on the part of the surveyor concerning the investigation of aircraft noise was made a

119 *Farley v Skinner* [2001] UKHL 49; [2002] 2 AC 732.

specific term of the contract.[120] The result in that case is reconcilable with principles expressed in *Baltic Shipping*, in that the purchaser's disturbance by aircraft noise and consequent disappointment was not merely a reaction to the breach and resultant damage, but was itself the resultant damage. In any event, the law in Australia is as expressed in *Baltic Shipping,* and as recently affirmed in *Moore v Scenic Tours Pty Ltd*[121].

[65] The other Australian authorities referred to by counsel for Young do not lead to any different conclusion. The decision in *Residential Tenancies Tribunal v Offe* [122] included observations to the effect that the tribunal had power to award compensation for non-economic loss in an appropriate case, but did not go so far as to make an award of compensation under the second limb of the principle in *Baltic Shipping*. To the extent that the decision conflates the concept of 'quiet enjoyment' with the object of 'pleasure, relaxation or freedom from molestation' described in *Baltic Shipping*, for the reasons already given we are unable to accept that proposition as correct. In any event,

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120 It may be noted that in the present matter it would appear that the rear door was missing prior to the commencement of the tenancy agreement, and that Young was already in occupation prior to that time.

121 *Moore v Scenic Tours Pty Ltd* [2020] HCA 17; (2020) 268 CLR 326. *Farley v Skinner* was referred to by the Full Court of the Supreme Court of South Australia in *Stone v Chappel* [2017] SASCFC 72, but the Court made no assessment of the reasoning. That was a case involving a contract for the construction of a retirement village, and the relevant ground of appeal centred on the quantum of the award of damages rather than the conceptual basis on which damages could be awarded for disappointment and loss of amenity.

122 *Residential Tenancies Tribunal v Offe* (unreported, NSWSC, 1 July 1997).

the decision was subsequently and wholly set aside by the Court of Appeal on other grounds.

[66] In *Strahan v Residential Tenancies Tribunal*[123], the Court affirmed the power of the relevant tribunal to award compensation for non-economic loss. However, on proper analysis the compensation in that case was awarded for the physical inconvenience of having to constantly clean the premises by reason of the landlord's failure to seal the road access to the premises. In *Reiss & Anor v Helson & Ors*[124], the Master cited *Strahan* as authority for the proposition that the tribunal could award compensation for non-economic loss where 'the contract is one for enjoyment, relaxation or freedom'. For the reasons already given, we do not consider that to be a central object of a residential tenancy agreement. Even if it was accepted that compensation could be awarded for distress and disappointment for a breach of the covenant of quiet enjoyment, that was not the breach in issue in this case. Similar observations may be made in relation to the decisions in *Free v Thomas*[125] and *Blackington Pty Ltd & Anor v Holder & Ors*[126]. None of those cases have sought to undertake or engage with the analysis in *Musumeci v Winadell Pty Ltd*[127], and all were decided before *Fawzi El-*

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123 *Strahan v Residential Tenancies Tribunal* (unreported, NSWSC, 12 September 1998).

124 *Reiss & Anor v Helson & Ors* [2001] NSWSC 486, [53].

125 *Free v Thomas* [2009] NSWSC 642.

126 *Blackington Pty Ltd & Anor v Holder & Ors* [2007] NSWSC 266.

127 *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723, 752.

Saiedy v NSW Land and Housing Corporation[128] which effectively found that compensation for disappointment and distress was not recoverable unless it proceeded from physical inconvenience caused by the breach.

[67] In accordance with the CEO's concession made during the course of the appeal, the Supreme Court found that the Tribunal had erred in law in concluding that the failure to furnish Young's premises with a backdoor did not constitute a breach of the CEO's obligation to take reasonable steps to ensure the premises were reasonably secure under s 49(1) of the *Residential Tenancies Act*. Having made that finding of error, the Supreme Court went on to make an award of compensation for distress and disappointment caused by that failure. That determination necessarily involved findings of fact and mixed questions of fact and law. As such, it arguably went beyond the scope of the Supreme Court's function in an appeal restricted to a question of law.[129] However, neither party makes complaint in relation to that matter. This ground of appeal only concerns the conceptual basis on which damages may be awarded for disappointment and distress consequential on the breach of a tenancy agreement.

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128 *Fawzi El-Saiedy v NSW Land and Housing Corporation* [2011] NSWSC 820, [86]-[89].

129 In an appeal restricted to a question of law, the Supreme Court's function is to determine whether there has been an error of law and, if so, to describe the nature, content and effect of that error. Although the dispositive powers of the Supreme Court extend to setting aside the decision below and substituting its own decision, that does not necessarily authorise the Supreme Court to make findings of fact. The Supreme Court will generally only substitute its own decision in circumstances where the correct answer to the question of law is determinative of the matter.

[68] For the reasons we have already described, the award of compensation made by the Supreme Court was for distress and disappointment caused by the failure to provide secure premises under the second limb of the principle in *Baltic Shipping*, rather than as a consequence of physical inconvenience caused by the breach. That conclusion derives not only from a reading of the relevant part of the Supreme Court's reasons as a whole, but also from the fact that there was no finding by the Tribunal of physical inconvenience by reason of the breach, and no evidence on which to make such a finding. For the reasons we have also described, the Supreme Court fell into error in finding that the tenancy agreement was governed by the second limb of the principle in *Baltic Shipping* concerning damages for distress and disappointment for breach of contract.

[69] This ground of appeal is allowed.

Disposition

[70] The orders are:

1. The appeal is allowed on the grounds asserting that the Supreme Court erred in remitting the claims for unconscionable dealings and repayment of rent to the Tribunal for reconsideration.

2. Order 1 made by the Supreme Court on 8 September 2020 is set aside.

3. The ground of appeal asserting that the Supreme Court erred in construing the term ‘habitable’ in s 48(1)(a) of the *Residential Tenancies Act* is dismissed, but the last sentence in order 4 made by the Supreme Court on 8 September 2020 is set aside.

4. 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 governed by the second limb of the principle in *Baltic Shipping* concerning damages for distress and disappointment for breach of contract.

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

[71] We will hear the parties in relation to costs if need be.

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