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| CITATION: | *Young & Conway v Chief Executive Officer, Housing* [2020] NTSC 59 |
| PARTIES: | YOUNG, Enid<br><br>AND:<br><br>CONWAY, Robert<br><br>v<br><br>CHIEF EXECUTIVE OFFICER, HOUSING |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT exercising Territory jurisdiction |
| FILE NO: | No 1 of 2019 (21911211) |
| DELIVERED: | 8 September 2020 |
| HEARING DATES: | 11 December 2019 |
| FURTHER WRITTEN SUBMISSIONS | 18 May 2020<br>3 June 2020 |
| JUDGMENT OF: | Blokland J |

**CATCHWORDS:**

NORTHERN TERRITORY CIVIL AND ADMINISTRATIVE TRIBUNAL – Application for leave to appeal – question of law – both parties consent to leave being granted to appeal – nature of the appeal reflects the principles underlying judicial review – nature of questions appeared to disclose questions of law – leave granted to appeal.

NORTHERN TERRITORY CIVIL AND ADMINISTRATIVE TRIAL – Residential Tenancies – whether Tribunal failed to exercise jurisdiction or failed to evaluate a submission of substance – issue concerning whether

tenancy agreements void on the grounds of being unconscionable held to fall outside of pleadings – issue raised in response to counterclaim relevant evidence given – Tribunal refused leave for respondent to reopen case to call further evidence – both parties submitted on issue – Tribunal refused to consider issue – held there was a failure to evaluate a submission of substance and failure to exercise jurisdiction – decision of Tribunal set-aside – matter sent back to the Tribunal for reconsideration in accordance with recommendations.

NORTHERN TERRITORY CIVIL AND ADMINISTRATIVE TRIBUNAL - Residential Tenancies - whether Tribunal erred by holding prescribed residential tenancy agreement applied given landlord's breaches of the *Residential Tenancies Act* 2018 – whether prescribed residential tenancy agreement under Schedule 2, clause 2(2) *Residential Tenancy Regulations* 2000 void for uncertainty due to amount of rent not agreed before commencement of tenancy and landlord failing to sign rental agreement – no requirement to agree amount of rent before commencement of the prescribed residential tenancy agreement - if residential tenancy agreement non-compliant with the *Residential Tenancies Act* prescribed agreement will apply – no error – ground not made out.

NORTHERN TERRITORY CIVIL AND ADMINISTRATIVE TRIBUNAL - Residential Tenancies – Remote Rent Framework was mechanism for determining rent payable for remote public housing tenants – category of "improvised dwelling" – no rent charged for agreement to live in "improvised dwelling" – whether Tribunal applied the definition of "improvised dwelling" from Department of Housing Glossary – whether Tribunal imposed its own definition – held context to be considered when construing terms in Department of Housing Glossary – no error on the part of the Tribunal finding subject premises not "improvised dwelling" – ground not made out.

NORTHERN TERRITORY CIVIL AND ADMINISTRATIVE TRIBUNAL - Residential Tenancies – statutory obligation on landlord to ensure premises are "habitable" – whether "habitable" under s 48(1)(a) of the *Residential Tenancies Act* is limited to safety of the tenant or whether it extends to health and reasonable comfort and humaneness assessed by contemporary standards – held "habitable" is not limited to the safety of the tenant – decision of Tribunal set-aside – matter sent back to the Tribunal for reconsideration in accordance with recommendations.

NORTHERN TERRITORY Civil AND ADMINISTRATIVE TRIBUNAL - Residential Tenancies – statutory obligation of landlord to ensure security devices that are necessary to ensure the premises are reasonably secure are in place – whether a back door is a "security device" – backdoor missing for approximately 68 months – tenant affixed her own door for some period –

evidence of intrusion of animal – decision of Tribunal set-aside – calculation of compensation under *Residential Tenancies Act*- compensation awarded.

*Northern Territory Civil and Administrative Tribunal Act 2017* (NT) s 53, s 141.

*Northern Territory National Emergency Response Act* 2007 (Cth).

*Residential Tenancies Act 2018* (NT) s 3, s 4, s 19, s 36, s 48, s 49, s 51, s 57, s 63, s 88, s 92, s 122.

*Baltic Shipping Co v Dillon* [1993] HCA 4; 176 CLR 344, *Beale v The Government Insurance Office of New South Wales* (1997) 48 NSWLR 430, *Booth v An Assessor & Anor* [2019] NTSC 89, *Cavanagh v The Chief Executive Office (Housing)* [2018] NTSC 52, *Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14; (1983) 151 CLR 447, *Dranichnikov v The Minister for Immigration and Multicultural Affairs* [2003] HCA 26; 77 ALJR 1088, *DWN042 v The Republic of Nauru* [2017] HCA 56, *Forrest and Forrest Pty Ltd v Minister for Mines and Petroleum* [2017] WASCA 153; 51 WAR 425, *HN v NTCAT & Ors* [2020] NTSC 48, *Jex v Struk* [2000] NSWRT 111, *Mattila v Gardner & Anor* [2012] NTSC 76, *Minister for Immigration and Border Protection v SZSSJ*, *Minister for Immigration and Border Protection v SZTZI* [2016] HCA 29; 259 CLR 180 at 915, *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11; 209 CLR 597, *Minister for Immigration and Multicultural Affairs* v *SBAA* [2002] FCAFC 195, *Moore v Scenic Tours Pty Ltd* [2020] HCA 17, *Morgan v Liverpool Corporation* [1927] 2KB 131, *Proudfoot v Hart* (1890) 25 QBD 42, *Reynolds v Chief Health Officer* [2020] NTSC 44, *Shields v Deliopoulos* [2016] VSC 500, *Summers v Salford Corporation* [1943] AC 283, *SZSS v The Minister for Immigration and Border Protection* [2014] FCA 863; 317 ALR 365, *SZSSC v Minister for Immigration and Border Protection* [2014] FCA 863; 317 ALR 365, *Thorne v Kennedy* [2017] HCA 49, *Various applicants from Santa Teresa v Chief Executive (Housing)* [2019] NTCAT 7, *Various Applicants from Santa Teresa v Chief Executive Officer (Housing) (No 2)* [2019] NTCAT 12, referred to.

**REPRESENTATION:**

*Counsel:*

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| Appellants: | M Albert |
| Respondent: | N Christrup SC/ M Littlejohn |

*Solicitors:*

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| Appellants: | Australian Lawyers for Remote Aboriginal Rights |
| Respondent: | Povey Stirk Lawyers |

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

*Young & Conway v Chief Executive Officer, Housing* [2020] NTSC 59
No. 21911211

BETWEEN:

**ENID YOUNG**
First Appellant

AND:

**ROBERT CONWAY**
Second Appellant

AND:

**CHIEF EXECUTIVE OFFICER, HOUSING**
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 8 September 2020)

## Introduction

[1] This is an appeal from a decision of the Northern Territory Civil and Administrative Tribunal (**NTCAT**).[1]

**1** The respondent Chief Executive Officer (Housing) did not oppose the granting of leave to appeal which is required under s 141(2) of the *Northern Territory Civil and Administrative Tribunal Act 2017* (NT) (**NTCAT Act**), nor an order dispensing with compliance of Supreme Court Rule (SCR) 83.23 which requires an application for leave to be filed within 7 days after the decision. Leave was granted to appeal under s 14(2) of the NTCAT Act as the questions appeared to disclose questions of law. Compliance with SCR 83.23 was dispensed with at the beginning of the hearing.

[2] Four of the five questions raised on the appeal are relevant to the cases of both appellants, Ms Enid Young and Mr Robert Conway. The fifth question is relevant to Ms Young only. Sadly and regrettably, Mr Conway is now deceased. The Court was notified of his death by his lawyers on 24 February 2020.[2]

[3] Counsel for the appellants impressed on the Court that the parties and their representatives treat these proceedings as sample cases which represent another 70 applicants, all of whom are residents of Ltyentye Apurte, also known as Santa Teresa. All other applicants have similar legal and factual issues to be resolved under or associated with the *Residential Tenancies Act 2018* (NT) (**RTA**).[3] The respondent is the Chief Executive Officer (Housing) who is the landlord.

[4] The appellants and the other applicants who have pending cases before the Tribunal are remote housing tenants. It is understood that once a number of the legal issues are clarified, the parties will attempt to resolve the outstanding cases on the basis of a settled legal framework. While it is appreciated this appeal may have consequences for the conduct of the other cases, and it is laudable that counsel are attempting to resolve the balance of the cases, the focus of the considerations here are confined to the legal

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**2** Email to Associate, Blokland J, from Australian Lawyers for Remote Aboriginal Rights, 24 February 2020.

**3** Although the representative nature of the proceedings is referred to throughout the preliminary hearings before NTCAT, this is made clear in the Tribunal's decision. *Various applicants from Santa Teresa v Chief Executive (Housing)* (**Reasons)** [2019] NTCAT 7 at [1]-[2], Appeal Book [**AB]** at 4-5.

issues raised on behalf of the two appellants and the response to the appeal by the Chief Executive Officer (Housing). However, the other 70 applicants who intend to raise similar issues before the Tribunal is a factor which may be regarded in assessing whether allowing the appeal on any ground made out would be in the interests of justice. The interests of justice is a significant consideration when determining whether to allow an appeal. [4]

[5] This case is unlikely to be a sound vehicle for a clear statement of principles to guide other litigants given the historical complexities around the initial pleadings and the late disclosure of important materials which appears to have led to some issues not being finally ventilated or determined by the Tribunal.

[6] The jurisdiction of this Court to hear an appeal from NTCAT is confined to a question of law pursuant to s 141 of the *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) (**NTCAT Act)**:

> **Division 2 Appeals**
>
> **141 Appeal to Supreme Court**
>
> (1) A party to a proceeding may appeal to the Supreme Court against a decision of the Tribunal on a question of law.
>
> (2) A person may appeal only with the leave of the Supreme Court.
>
> (3) On hearing an appeal, the Supreme Court must do one of the following:
>
> (a) confirm the decision of the Tribunal;

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**4** *Reynolds v Chief Health Officer* [2020] NTSC 44; *HN v NTCAT & Ors* [2020] NTSC 48; *Booth v An Assessor* [2019] NTSC 89.

(b) vary the decision of the Tribunal;

(c) set aside the decision and:

(i) substitute its own decision; or

(ii) send the matter back to the Tribunal for reconsideration in accordance with any recommendations the Supreme Court considers appropriate;

(d) dismiss the appeal.

[7] In *Booth v An Assessor & Anor*,[5] Grant CJ made considered observations on the confined nature of the Court's jurisdiction when determining whether to grant leave to appeal from the NTCAT:

> **Question of law**
>
> An appeal restricted to a question of law invokes the original jurisdiction of this Court rather than its appellate jurisdiction. As counsel for the respondent submits, the subject matter of the appeal must be the question of law itself, rather than some mixed question of fact and law or a matter which merely "involves" a question of law. The formulation extends to both jurisdictional errors and non-jurisdictional errors of law.
>
> The 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. The dispositive powers of the Court extend to confirming or varying the decision below, or setting aside the decision below and either substituting its own decision or remitting the matter back to the Tribunal for determination in accordance with law. Before any intervention will be made, this Court must be satisfied that the error of law was such as to vitiate the decision below. While this Court may substitute its own decision in that event, that does not require or authorise this Court to make findings of fact or to determine questions of mixed fact and law. The Court will only substitute its own decision in circumstances where the correct answer to the

**5** [2019] NTSC 89 at [33]-[34].

> question of law is of itself determinative of the matter. (footnotes omitted)

[8] In *HN v NTCAT & Ors*,[6] Hiley J applied those observations and added: "by so confining the nature of the jurisdiction and the duties and powers of the Court, the NTCAT Act creates an "appeal" which is more in the nature of judicial review than an appeal in the conventional sense of re-hearing. The 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."[7] I have endeavoured to apply those same principles. The nature of the appeal reflects the principles underlying judicial review. If an error of law is found, the Court may vary or substitute the decision of the Tribunal. The powers of the Court in this instance appear to be somewhat broader than the powers on appeal from some comparable tribunals.[8]

**The proceedings before the NTCAT**

[9] It is necessary to consider the procedural history given that the resolution of some of the questions of law raised by the appellants rely on an understanding of how the litigation before the NTCAT developed.

[10] In brief, the Initiating Applications filed by the appellants in the NTCAT sought the following relief. Ms Young sought orders that the respondent make repairs to her premises, House 165 Santa Teresa Community, pursuant

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**6** [2020] NTSC 48.

**7** *HN v NTCAT & Ors* [2020] NTSC 48 at [9].

**8** For example, *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 71(4) which does not expressly provide for a substituted decision.

to s 63 of the RTA, which enables the NTCAT to order a landlord to ensure specified repairs to rental premises are made. The Initiating Application referred to the appellants' previous notice to the respondent which listed nine items requiring repairs. It sought the payment of compensation under s 122 (1) of the RTA for loss of amenity arising from the failure on the part of the respondent to carry out the repairs. Additionally, orders for the production of evidential material from a number of entities associated with housing and repair work at Santa Teresa were sought.[9] The Amended Initiating Application filed by Ms Young provided further particulars of the subject tenancy agreement including dates relevant to the rectification of repairs which she claimed had not been carried out. Further, Ms Young claimed the respondent failed to maintain the rental premises in a habitable condition as required by s 48 of the RTA.[10] Compensation was sought pursuant to s 122 RTA for loss which was claimed to be the result of breaches of s 48 and/or s 57 of the RTA.

[11] The Initiating Application filed on behalf of Mr Conway[11] was in respect of his residence at House 195 Santa Teresa. He sought an order for emergency repairs under s 63 RTA and referred to thirteen emergency repairs in his previous notice. The Initiating Application sought an order for compensation under s 122(1) of the RTA. The Application also sought evidential material from various entities associated with housing repair work at Santa Teresa.

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**9** AB at 75-77.

**10** AB at 80-85.

**11** AB at 97-101

The Amended Initiating Application filed on his behalf sets out further particulars of the claim including the details of rectification required and the claim that the respondent failed to maintain the rental premises in a habitable condition as required by s 48 of the RTA.[12]

[12] The Amended Initiating Applications were taken to have replaced the Initiating Applications.[13]

[13] The Response and Counterclaim initially *inter alia*, claimed both appellants owed the respondent sums for unpaid rent. The quantum claimed was significantly reduced during the course of the hearing and in the case of Ms Young, was not pursued. In the case of Mr Conway, the sum claimed for unpaid rent was not proven before the Tribunal. Additionally, the respondent alleged certain damage was caused by the appellants to their respective rental premises and the counterclaims were formulated accordingly. The damage was not proven during the course of the hearing.

[14] In their respective defences to the counterclaims, both appellants claimed that, at the time of entry into the tenancy agreement, they: were elderly and in the case of Mr Conway, suffered from serious illness; spoke English only as a second language; possessed very limited numeracy and literacy skills, lacked commercial experience, lacked financial or legal advice and had a cultural tendency towards gratuitous concurrence.[14] In the light of those

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**12** AB at 102-106.

**13** Reasons at [109].

**14** Appellant Young at AB 93, 74; Appellant Conway AB 114-115.

factors they claimed the respondent knew or ought to have known that they did not understand the nature and content of the tenancy agreement, including their obligations in relation to rent payable, rental arrears and other factors relevant to the counterclaim. As a result of those factors, both appellants claimed reliance on the respondent to collect the correct rent and that the respondent was estopped from claiming arrears. Additionally, the appellants argued the respondent ought not to receive the benefit of any discretion that potentially could be exercised under s 122 of the RTA or have any amount of compensation awarded to the appellants reduced.

[15] It was necessary to consider the pleadings as the first question to be addressed on appeal necessitates consideration of whether the Tribunal was in error by not determining whether the tenancy agreements were void on the grounds of being unconscionable dealings according to the principles in *Commercial Bank of Australia Ltd v Amadio*.[15] That question requires consideration of whether the issue was genuinely raised before the Tribunal such that its merits should have been determined; notwithstanding, it does not appear in the Initiating Applications or the Amended Initiating Applications. The issue was, however, raised in the defence to the counterclaim. On appeal, the appellants argued the Tribunal was obliged to consider the merits of the submission on *Amadio*. The Tribunal declined to do so.

**15** [1983] HCA 14; (1983) 151 CLR 447.

[16] The NTCAT proceeded on the basis, consistent with *Cavanagh v The Chief Executive Office (Housing),*[16] that notwithstanding the arrangements in place under the *Northern Territory National Emergency Response Act* 2007 (Cth) with the community of Santa Teresa, the RTA applied to the dispute. On a number of issues before the NTCAT, it is apparent there was a lack of evidence and records. The difficulties encountered by the learned member when dealing with deficiencies in the evidence and the untimely production of material, which impacted detrimentally on the presentation of the case before the Tribunal, were reflected in his comments, particularly in the reasons of the costs decision following the hearing.[17]

[17] The Tribunal found the relevant tenancy agreements were invalid pursuant to s 19(4) of the RTA. Specifically in relation to the case of Ms Young, it found the terms relating to maintenance and cleanliness were not consistent with the terms prescribed in s 51(1)(a) of the RTA and therefore were contrary to the requirements of s 19(1)(d).[18] In the case of Mr Conway, the 2011 tenancy agreement was held invalid under s 19(4) of the RTA because it was not signed by the respondent, contrary to the requirements of s 19(1).[19] The Tribunal found that in the case of invalidity, the relevant terms were governed by the "Prescribed Agreement" in Schedule 2 of the *Residential Tenancies Regulations 2000* (NT). The Tribunal rejected the

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**16** [2018] NTSC 52.

**17** *Various Applicants from Santa Teresa v Chief Executive Officer (Housing) (No 2)* [2019] NTCAT 12.

**18** Reasons at [66]-[81].

**19** Reasons at [63]-[64].

appellants' argument that the prescribed agreements were void for uncertainty and that they were entitled to compensation for overpayment of rent and the return of security deposits.

[18] The Tribunal also rejected the claim that the premises rented by the appellants were 'Improvised Dwellings' for which no rent would be payable under the respondent's *Remote Housing Rent* policy.[20] With the exception of two periods when Ms Young was not provided with an air conditioner, the Tribunal rejected the claim the premises were not habitable under s 48 of the RTA.

[19] After a detailed analysis of the deficits in the premises, the notifications, the time frames and the reasonableness of the response, the Tribunal made the following awards of compensation in favour of Ms Young. The respondent was ordered to refund rent ($4735.80) for the period that the premises was uninhabitable (540 days) due to the failure on the part of the respondent to install an air conditioner under s 48(1) of the RTA. For the distress arising from the physical inconvenience which persisted for a very long period of time, she was awarded $4,000.[21] In relation to the breach of duty to repair the back door under s 57(1), she was awarded nominal damages of $100 and for the breach of duty to repair the stove, she was awarded $200.[22] In total, the Tribunal concluded Ms Young was entitled to an order in the sum of

**20** Reasons at [110]-[113].

**21** Reasons at [284.2].

**22** Reasons at [288]-[289].

$9,035.80 for the respondent's failure to comply with the prescribed agreement or their obligations under the RTA relating to that agreement (s 122(1)(a)).[23]

[20] Mr Conway was awarded $1,000 for disappointment and distress recoverable due to significant physical inconvenience as a result of the failure of the respondent to fix his leaking shower and replace tiles following repairs to his shower taps. This meant he and his wife had to clean up water every time they had a shower. The physical inconvenience was exacerbated by their poor health.

[21] As mentioned above, the respondent's counterclaims were dismissed.

**Question A: Whether the NTCAT failed to evaluate and apply the principles from *Commercial Bank of Australia v Amadio*[24] to the appellants' cases concerning the 2010/2011 tenancy agreements, in circumstances where those principles were expressly relied upon and relevant evidence was led by the appellants on the question of whether the 2010/2011 tenancy agreements were void for this reason?**

[22] The appellants argued the failure of the NTCAT to consider the merits of the *Amadio* claim constituted an error of law. The reasons do not deal with the *Amadio* principles, nor do the reasons discuss the evidence relevant to that issue in any detail, or the submissions which were made on that issue. The Tribunal found that the claim fell outside of the pleadings. The claim was not made in a conventional manner. Notwithstanding the Tribunal must act

**23** Reasons at [292.2].

**24** [1983] HCA 14; 151 CLR 447.

with as little formality and technicality as possible,[25] the case was conducted with pleadings[26] and parties were represented by counsel. Additionally, evidence was called and witnesses were cross examined in a similar manner as a court.

[23] The Tribunals reasons are detailed and considered on all other issues, save for this one. While the Tribunal exercises no general equitable jurisdiction, it has been held the Tribunal exercises jurisdiction similar in nature to equitable jurisdiction through s 122 of the RTA, which regulates the payment of compensation and additionally on the basis of s 53 of the NTCAT Act.[27] The appellants submitted the error of law was: the failure on the part of the Tribunal to evaluate a submission of substance;[28] the denial of procedural fairness referable to two elements of the hearing rule, which requires both that the affected person have an opportunity to provide submissions[29] and to be heard by the decision-maker when the submission is

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**25** NTCAT Act s 53(c).

**26** Reasons at [109].

**27** *Cavanagh v The Chief Executive Officer (Housing)* [2018] NTSC 52 at [63], [64], [68], per Southwood J, noting in particular s 122(3) of the RTA together with s 53 of the NTCAT Act which requires the Tribunal to act fairly and according to the substantial merits of the matter.

**28** *Minister for Immigration and Multicultural Affairs* v *SBAA* [2002] FCAFC 195 at [44] per Wilcox and Marshall JJ; *SZSSC v The Minister for Immigration and Border Protection* [2014] FCA 863; 317 ALR 365 at [75]-[76], [78]-[81] per Griffiths J, citing the *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; 77 ALJR 1088 at [24] per Gummo and Callinan JJ.

**29** *Minister for Immigration and Border Protection v SZSSJ*, *Minister for Immigration and Border Protection v SZTZI* [2016] HCA 29; 259 CLR 180 at 915; *BMF16 v Minister for Immigration and Border Protection* [2016] FCA 1530 at [159]-[166], per Bromberg J.

given;[30] a failure to exercise jurisdiction or a failure by the decision-maker to expose a path of reasoning.[31]

[24] The Tribunal did not deal with the merits of the *Amadio* claim. However, as may be appreciated from the brief outline given above, the *Amadio* issue was raised only in the appellants' Amended Initiating Applications in defence of the counterclaim. Specifically, it was put forward in the context of raising estoppel as an answer to the s 122 claims in order to either exclude the respondent from receiving compensation, or reduce the scope for such a claim. In *Cavanagh v Chief Executive Officer (Housing)*,[32] Southwood J held the power to deal with equitable estoppel was reasonable and necessary for the determination of an application for compensation under s 122 of the RTA.

[25] At a deeper level, however, the appellants argued there were more fundamental reasons why the *Amadio* issue was not made explicit prior to the hearing before the Tribunal. The appellant argued the lack of provision of relevant documents in a timely fashion hindered the ability to properly plead the *Amadio* principles. The respondent submitted the appellant was invoking the *Amadio* principles simply as an alternative route to its ultimate goal, namely, to have all of the rent repaid by the respondent. That is a reasonable observation; however, if the tenancy agreements came into

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**30** *Forrest and Forrest Pty Ltd v Minister for Mines and Petroleum* [2017] WASCA 153; 51 WAR 425 at [103].

**31** *Beale v The Government Insurance Office of New South Wales* (1997) 48 NSWLR 430.

**32** [2018] NTSC 52 at 65.

existence in circumstances that engage the *Amadio* principles, the appellants may be entitled to relief in those terms.

[26] The respondent raised the following problems with this ground of appeal. In addition to the *Amadio* principles not being set out in the pleadings, those principles were not addressed in the appellants' opening before the Tribunal. On the respondent's view, it was also not addressed in the evidence in chief or in the unattested declarations. Given the *Amadio* claim was the basis for claiming the repayment of all rent, the respondent submitted it did not have a fair opportunity to deal with the issue because it was essentially formulated in the appellants' closing submissions (although this point was disputed and will be discussed below). The focus of the respondent throughout the case was primarily on the repairs and proving its counterclaim. The respondent submitted it should have been given an opportunity to lead additional evidence before the Tribunal because if the claim based on *Amadio* principles was successful, the 2010/2011 tenancy agreements would be declared void. The respondent argued this was a new claim and opened the argument for repayment of the rent. The claim for repayment of rent paid was not pleaded.

[27] While senior counsel for the respondent accepted the appellants' response to the counterclaim pleaded reliance on the respondent followed by estoppel,[33] it was emphasised the appellants' response did not allege that the

**33** AB at 116.

agreements were void or voidable. It was merely that the respondent be estopped from enforcing a right to payment of arrears. The respondent argued the claim of unconscionable conduct was a different claim. As such, it was submitted that if the Tribunal found *Amadio* applied to the circumstances, the respondent should have had an opportunity to lead evidence and make the case about the appropriateness of any discretionary remedy. This would require consideration of whether any order for rental payment would be just in circumstances where the appellants had the benefit of occupying the premises or had been paid compensation.

[28] On appeal, counsel for the respondent noted that an application for an adjournment and for leave to reopen the respondent's case was made on day four of the NTCAT hearing. Senior counsel on appeal drew attention to the detailed application made by the respondent's counsel at the NTCAT hearing, to the effect that if the respondent was forced to close its case, it would be a breach of natural justice given the *Amadio* point was a new matter in the appellants' case.[34] The member rejected the respondent's application for an adjournment in the following terms:[35]

> I reject the respondent's application for an adjournment. It seems to me that the matter he approved to are one's for submission. The respondent is perfectly entitled in submissions and I will just for the Tribunal's benefit give leave to the respondent to file more detailed submissions given that I've already called for submissions from the applicant. But it does seem to me that the matters that have been raised by the respondent relating primarily to issues going into

**34** AB at 433.

**35** AB at 442-443.

> submissions as to whether the claim is covered by the pleading such as they are that they have been filed, we are in an unusual situation in that we are in a Tribunal and this one has become much more formalised than what would normally occur in the Tribunal but you can make submissions to say that the Tribunal should not entertain aspects of the applicant's submissions because they are outside the matters as pled.

[29] The respondent made the following submissions on that point in its written submissions:[36]

> [29] The Applicant's argue that should the Tribunal accept that any of the agreements were not valid, the Tribunal should proceed to make compensation orders under s 122 of the Act for the refund of any rent paid under the agreement.
>
> [37] These proceedings, until the third day of the hearing, were predicated on compensation and for repairs or arrears of rent. The Tribunal should not embark on the exercise invited by the Applicants without the benefit of considered pleadings and thorough preparation of an appropriate case. The Tribunal should make its decision on the matters in issue between the parties in the present proceedings, and the applicants should bring separate proceedings to recover any alleged rent owing to them.[37].

[30] In the Reasons for Decision, the Member dealt with the issue as follows:

> In the light of my finding regarding the validity of the prescribed tenancy agreements, it is not necessary for me to address the Respondent's submission that the applicant's claim for overpayment of rent falls outside the scope of its pleadings. In this regard, I note only that such a claim for compensation would fall under s 122(1)(b) of the RTA. Nowhere in the Amended IA filed by any of the capital Applicants was reference made to this provision, or to any claim for overpayment of the rent.[38]

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**36** AB at 215.

**37** AB at 216. See also the respondent's written submissions filed on 21 November 2018 at [146], [149] and [150].

**38** Reasons at [108]; AB at 29.

> Counsel for the applicants noted that in The Initiating Application reference was made to s 122(1)(b), however this does not assist the Applicants. The Respondent and the Tribunal were entitled to proceed on the basis that the Initiating Application was replaced by the Amended IA. While, admittedly the Tribunal was required by s 53(2)(C) of the *NTCAT Act* to act with as little formality and technicality as a proper consideration of the matter permits, in a case such as this where both sides were represented by counsel the Tribunal was entitled to expect that the Amended IAs reflected the bases on which the Applicants were putting their case. Unfortunately in this proceeding, much of the Applicant's case, particularly in relation to the validity of the tenancy agreements, bore little resemblance to the facts pled in the Amended IA's, or to the facts that were admitted by the Respondent in its Amended Response based on the Applicants' Amended IA.[39]

[31] On appeal the respondent also argued that the claim that the tenancy agreement was void was made on the basis that there was a valid tenancy agreement in order for damages to be awarded under s 122 of the RTA. It was submitted that if the tenancy agreement was declared void, the order below awarding damages to the appellants should not have been made. Further, the *Amadio* argument was put in the alternative. The respondent submitted that, given the Tribunal agreed with the primary argument that the tenancy agreements were invalid under the RTA, there was no need for the Tribunal to consider whether they were void under the *Amadio* principles.

[32] While the arguments on behalf of the respondent have some appeal, it is clear there were procedural problems that were likely to have skewed the direction of the proceedings well before the hearing. The preliminary processes were obviously fraught. The Tribunal's decision on costs tends to

**39** Reasons at [109]; AB at 29.

confirm that both parties fundamentally changed their cases during the trial because important documents were only produced by the respondent just prior to the hearing's commencement. The member makes reference to a number of examples where, in his opinion, the respondent had not acted as a model litigant would be expected to act.[40] For example, the member refers to the respondent failing to bring the existence of the 2017 tenancy agreement to the attention of Southwood J when *Cavanagh v Chief Executive Officer (Housing)*[41] was heard in the Supreme Court.[42]

[33] On appeal, counsel for the appellants stressed that at the time of filing the Initiating Applications, the respondent had failed to provide a copy of the 2017 tenancy agreement. Additionally, in respect of some of the 2010 agreements, the appellants' requests for discovery of the respondent's versions were ignored and requests for the relevant documents were met by the following response from the respondent's counsel who appeared at the Tribunal: "We remind you that these proceedings are in the NTCAT jurisdiction. It is not a jurisdiction of pleadings. You are not as of right entitled to particulars and discovery as you may be in other jurisdictions". On appeal, the Court was told this was the response after orders were made for particulars and discovery. The respondent was prepared, at least for some time, to continue with less formal arrangements before the Tribunal.

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**40** *Various applicants from Santa Teresa v The Chief Executive Officer (Housing) (No.2)* at [26] - [34].

**41** [2018] NTSC 52.

**42** The 2017 tenancy agreements, in the case of Ms Young could not be found by the respondent; in the case of Mr Conway and a number of other applicants, the 2017 agreements were held invalid. Reasons at [32]; [54]-[62].

The Landlord has a statutory obligation to keep and produce relevant records.[43] Both parties materially altered their case during the hearing to be responsive to the issues which only then emerged or became clearer once the records, including all the relevant tenancy agreements, were produced.

[34] The following additional points were raised by the appellants on appeal. Notwithstanding that there were pleadings and counsel appearing at the Tribunal, the essence of the NTCAT remains its accessibility and informality. The Tribunal could have adapted to changes in the proceedings, given what occurred in the lead up to the hearing. The evidence called by the appellant was tailored and specific, and was obviously led to engage the *Amadio* principles. For example, evidence was led from Ms Young about her own and her family's linguistic background; her lack of language skills; her inability to read; and the circumstances of signing the lease in a rushed manner without assistance.[44] Similar evidence was led from Mr Conway about being rushed at the time of signing and some brief supporting evidence was led. Supporting evidence on some points was adduced from Ms Annie Young and the witness for the respondent, Ms Jacobson.

[35] In terms of when the respondent became aware of the *Amadio* issue, and to demonstrate it was no surprise to the respondent that the principles would be raised, counsel for the appellants drew the Court's attention to the

**43** See eg. RTA s 36.

**44** AB at 160-161.

respondent's closing submissions which engaged with the *Amadio* principles:[45]

> It is noted that the Applicant plead that, due to their particular circumstances, they were particularly vulnerable and that the Respondent ought to have taken account of that fact.
>
> To the extent that the Applicant seeks to rely on these alleged vulnerabilities, the Respondent submits that they do not rise to the standard of special disadvantage accepted by Mason J (as he then was) in *Commercial Bank v Amadio* being:
>
> > An underlying general principle which may be invoked whenever one party by reason of some condition or circumstance is placed at special disadvantage vis-à-vis another and unfair or unconscientious advantage is then taken of the opportunity thereby created. I qualify the word 'disadvantage' by the adjective 'special' in order to disavow any suggestion that the principle applies whenever there is some difference in the bargaining power of the parties and in order to emphasize that the disabling condition or circumstance is one which seriously affects the ability of the innocent party to make a judgment as to his own best interests, when the other party knows, or ought to know of the existence of that condition or circumstance and of its effect on the innocent party.
>
> It is not understood that the Applicants assert that they were incapable of making decisions in their own best interest or that they suffered any other relevant disability…

[36] The date of those written submissions is 21 November 2018, which was day three of the Tribunal hearing. Those submissions were made before the appellant made oral submissions. On 22 November 2018, counsel for the appellant made oral submissions, which was day four of the hearing. The appellants' oral submissions included the submission that the preferable

**45** AB at 233-234.

position was that the tenancy agreements be declared void and that as a consequence the alternative positions fell away.[46] The oral submissions included details, in summary form, of five circumstances drawn from the evidence to establish that the case fell within the *Amadio* principles.[47] The oral submissions addressed relevant legal principles including a discussion of *Thorne v Kennedy,*[48] a recent decision based, in part, on the *Amadio* principles.[49] The appellants' written submissions were filed and received by the Tribunal one month later.[50] The submissions include the heading "The principles from *Amadio* make each agreement voidable" and continue to discuss the principles and the relevant evidence.[51]

[37] In terms of the submission that there was no need to deal with the *Amadio* principles, as the Tribunal found the tenancy agreements invalid for other reasons, the consequences of a finding that either of the tenancy agreements were void on the basis of *Amadio* were potentially more beneficial for the appellants. The respondent would need to be given an opportunity to put its case that rent should not be repaid, but as a threshold matter, it is not correct to suggest the result of a successful finding on the basis of the *Amadio* principles would be the same as the invalidity finding which was made

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**46** AB at 390-391.

**47** AB at 398-400.

**48** [2017] HCA 49.

**49** AB at 401-404.

**50** Filed on 20 December 2018; AB at 244-266.

**51** AB at 257-258.

under the RTA. If the agreements were found to be void, there would be no prescribed tenancy agreement imposed under s 19(4) of the RTA.

[38] Under s 53(1) of the NTCAT Act the Tribunal must act fairly and according to "the substantial merits of the matter". Once the history of the proceedings is fully appreciated, it is clear the *Amadio* matter was before the Tribunal but not dealt with by the Tribunal. There were procedural and timing reasons why the *Amadio* issue was not included in the Amended Initiating Application, however the relevant evidence was clearly raised on behalf of the appellants and was directed to that issue. The respondent also knew of evidence which it could call and which it submitted was relevant to that issue; however, the respondent was not permitted to re-open its case to deal with it. The respondent was aware that the issue was effectively being raised as a defence to its counterclaim at an earlier time. The appellants' closings, both the oral submissions and the later written submissions which were filed a month after the hearing, dealt with the issue comprehensively, apparently with the expectation that this matter would be considered by the Tribunal. The respondent, at least during the course of the hearing and most likely at around day two of the hearing, realised the significance of the issue, hence foreshadowed the application to re-open proceedings. That application having been refused, the respondent still made submissions in its closing about the issue. The Tribunal then determined not to deal with the merits of the matter because it was not pleaded in the Amended Initiating Application.

[39] Although the balance of the issues were dealt with comprehensively by the Tribunal in what was obviously fraught and complex proceedings, the Tribunal failed to exercise jurisdiction[52] in relation to the *Amadio* principles and/or failed to evaluate a submission of substance.[53] The freedom of the NTCAT to determine the issues which it needs to address, is subject to s 53(1) of the NTCAT Act and the duty to deal with the substantial merits.

[40] The failure to determine an issue of significance gives rise to a reviewable error. Further, the failure to make a finding on a particular matter raised by an applicant, in some cases, may reveal an error of law.[54] In *Dranichnikov v The Minister for Immigration and Multicultural Affairs*,[55] Gummow and Callinan JJ noted that the Refugee Review Tribunal had treated the claimant's case as based on membership of a particular social group, namely "businessmen in Russia", whereas the case the applicant had presented was a significantly narrower one, namely membership of the group comprising "businessmen who publicly criticised and sought reform of the law enforcement authorities to compel them to take effective measures to prevent crime".[56] The failure of the Tribunal to determine the issue raised by the applicant was treated by their Honours as a failure to exercise

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**52** *DWN042 v The Republic of Nauru* [2017] HCA 56 at [17].

**53** *SZSS v The Minister for Immigration and Border Protection* [2014] FCA 863; 317 ALR 365 at [75]-[76], [78], [81] per Griffiths J.

**54** In the context of the *Migration Act* and The Refugee Review Tribunal see *Minister for Immigration and Multicultural Affairs v Yusef* [2001] HCA 30; 206 CLR 323 at [37], per Gaudron J.

**55** [2003] HCA 26; 77 ALJR 1088.

**56** *Dranichnikov v The Minister for Immigration and Multicultural Affairs* [2003] HCA 26; 77 ALJR 1088 at [18].

jurisdiction and hence a jurisdictional error. It was said to be analogous to the circumstances in *Minister for Immigration and Multicultural Affairs v Bhardwaj*[57] in which the High Court found that the Tribunal's failure to consider a matter raised before it constituted a breach of natural justice.[58]

[41] In *SZSSC v Minister for Immigration and Border Protection*[59] Griffiths J considered a submission on whether the Tribunal had considered and evaluated all submissions of substance relating to an extortion claim. After citing *Dranichnikov* and dealing with relevant submissions, his Honour made a number of comments. His Honour said he did not accept that procedural unfairness occurs only if the Tribunal has failed to deal with a substantial and clearly articulated submission which relies upon an established fact. That would preclude a finding of procedural fairness or constructive failure to exercise jurisdiction if the Tribunal failed to deal with the submission of substance relating to a legal issue. His Honour said the error in *Dranichnikov* was not merely described as a denial of natural justice or procedural unfairness, it was also regarded as a constructive failure to exercise jurisdiction.[60] When determining whether or not a

**57** [2002] HCA 11; 209 CLR 597.

**58** *Dranichnikov v The Minister for Immigration and Multicultural Affairs* [2003] HCA 26; 77 ALJR 1088 [32], per Gummow and Callinan JJ.

**59** [2014] FCA 863; 317 ALR 365 at 387.

**60** *SZSSC v Minister for Immigration and Broder Protection* [2014] FCA 863; 317 ALR 365 at [78]-[80].

Tribunal has committed jurisdictional error by failing to evaluate a substantive and clearly articulated submission, his Honour stated:[61]

> "In my opinion, the duty to review obliges the tribunal to consider and deal with submissions of substance which are clearly articulated. As noted above, in assessing whether a submission is one of substance it may be relevant to take into account whether it relies upon an established fact, but that is not the only way in which that requirement may be met. Substantiality might also be established by the fact that, for example a submission has been made in direct response to an important issue which the tribunal has raised which bears upon the state of satisfaction which it is required to meet…"

[42] However, it must also be remembered a tribunal's failure to deal with a submission does not necessarily amount to a jurisdictional error.

[43] I have come to the conclusion that although the issue was not raised directly on the pleadings, the Tribunal was not relieved of the burden of dealing with the *Amadio* question. After much consideration, I have come to the conclusion that it is in the interests of justice that the *Amadio* issue be tried, save that I am not aware of the attitude that may be taken by the estate of the late Mr Conway, but the issue is still relevant to Ms Young. The issue under Ground D will also be referred back to the Tribunal, so it is not a matter of dealing with a single issue in the Tribunal. Clearly, both parties will need to be given an opportunity to call evidence and make submissions, not only on the *Amadio* point but also on what the consequences of a favourable ruling for the appellants would be. Some of the possibilities in relation to the consequences for compensation have been mentioned above.

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**61** *SZSSC v Minister for Immigration and Broder Protection* [2014] FCA 863; 317 ALR 365 at [81].

Consistent with Southwood J's approach in *Cavanagh v The Chief Executive Officer (Housing)*,[62] the Tribunal has the power through a combination of its duties under s 53 of the NTCAT Act and as an incidental power to its jurisdiction under the RTA to determine whether a tenancy agreement is void. The Tribunal possesses implied or incidental powers to deal with the consequences of any ruling made on that basis.

[44] I will uphold this ground.

**Question B: Whether the tenancy agreement prescribed under the *Residential Tenancies Act* was void for uncertainty having regard to Schedule 2, clause 2(2) of the *Residential Tenancies Regulations* by reason that the amount of rent was not agreed at the beginning of the tenancy between the landlord and the tenant because:**

**i. In respect of the first appellant, the agreement was signed by the landlord and tenant 17 months after the tenancy began, not at the beginning of the tenancy; and**

**ii. In respect of the second appellant, the landlord did not sign any agreement at all.**

[45] It can readily be accepted, as the Tribunal did, that rent is an essential term of a tenancy agreement. If there is neither an agreed rent nor an agreed mechanism for determining the rent, the tenancy agreement is void for uncertainty and is unenforceable.[63] As has been mentioned above, the Tribunal concluded the tenancy agreements for both appellants, for different

**62** [2018] NTSC 52.

**63** *Mattila v Gardner & Anor* [2012] NTSC 76 at [122]-[123].

reasons, were invalid or inoperative because of non-compliance with the RTA.[64] As a consequence, the Tribunal concluded the operative tenancy agreement was the default statutory agreement provided in Schedule 2 of the *Residential Tenancy Regulations*.[65] The appellants argued, contrary to the ruling of the Tribunal, that the statutory agreement provided in Schedule 2 of Regulation 10 in their circumstances is void for uncertainty.

[46] Regulation 10 of the *Residential Tenancy Regulations* (The Regulations) provides:

> **Prescribed residential tenancy agreement**
>
> For the purposes of section 19(4) of the Act, the tenancy agreement set out in Schedule 2 is prescribed.

[47] Section 19(4) of the RTA governs tenancy agreements which are not compliant with certain parts of the RTA. This was found to be the case with the appellants' tenancy agreements. Section 19(4) provides:

> If a tenancy agreement is not in accordance with subsection (1) or is not signed by all parties to the agreement, a tenancy agreement, if any, prescribed for the purposes of this section is to be taken to be the agreement between the parties for the purposes of this Act.

[48] Clause 2(2) of the Schedule 2 prescribed tenancy agreement provides:

> The tenant must pay, before each rental payment period in respect of the premises to which this agreement relates, the amount of rent, if any, agreed at the beginning of the tenancy between the landlord and the tenant to be payable in respect of the rental payment period.

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**64** Reasons at [63]; [78].

**65** Reasons at [81].

[49] The appellants submitted the phrase "rent, if any, agreed at the beginning of the tenancy between the landlord and the tenant" means there must be an agreement between the parties on the rent at the beginning of the tenancy. Further, there must be a meeting of minds demonstrated in some way, for example by the affixing of signatures to the terms of the agreement. This is because of the list of requirements for written tenancy agreements under s 19(1) of the RTA and in any event is a plainly accepted practice to indicate acceptance of the terms by a party to an agreement.

[50] Because of the wording of clause 2(2) of the prescribed tenancy agreement, the appellant submitted it was crucial that the agreement as to rent be made "at the beginning of the tenancy" and be contemporaneous with the commencement of the tenancy by the particular tenant. In the circumstances of the appellants, it was submitted that Ms Young's tenancy agreement included a rent amount; however, it was not "at the beginning of the tenancy". The delay in finalising that term was over 17 months.[66] With respect to Mr Conway, the tenancy agreement was not signed by or on behalf of the landlord at any time and thus, there was no rent amount "agreed". It was therefore submitted that there was no appropriate mechanism for the determination of rent under clause 2(2) and consequently the prescribed tenancy agreement was void and unenforceable.

**66** Reasons at [83].

[51] The member formulated the question as follows, indicating broadly acceptance of the appellants' arguments:[67]

> The questions for the Tribunal, therefore whether the maximum amount of rent payable for each dwelling can be ascertained and, if so, was there agreement between the parties as to the amount of rent payable as at the commencement of the tenancy.

[52] I do not agree s 19(4) of the RTA or the Schedule 2 prescribed tenancy agreement is to be applied in the manner submitted on behalf of the appellants. The provisions under s 19(4) and the Schedule 2 prescribed tenancy agreement apply if there is a tenancy agreement in existence. The Schedule 2 prescribed tenancy agreement will then apply to specify the terms of the agreement. Aside from the question of whether the agreement was void by virtue of the submissions under question (A) above, the case proceeded before the Tribunal on the basis that there were tenancy agreements in existence. However, due to breaches on the part of the respondent, various claims for compensation were made under the RTA. In terms of the definition of a tenancy agreement, s 4 of the RTA defines tenancy agreement to mean an agreement under which a person grants to another person for valuable consideration a right (which may be, but need not be, an exclusive right) to occupy premises for the purpose of the residency.

[53] As a matter of fact, the Tribunal found the appellants paid money to the respondent by way of rent. As such, there was a valuable consideration

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**67** Reasons at [86].

exchanged for the right of occupancy and a tenancy agreement therefore existed. If the tenancy agreement exists, then notwithstanding its deficiencies, by operation of the RTA, the residential tenancy agreement provided in Schedule 2 of the Regulations will apply. This is the very purpose of the prescribed agreements.

[54] Regardless of the construction point raised on behalf of the appellants, the member found as a matter of fact the Mr Conway agreed to pay $184 per week. The fact that the actual rent paid may have been less than $184 per week from time to time was, as the member held, irrelevant. The approach of the Tribunal was largely in accordance with the way the appellants put their case. The member painstakingly considered all of the facts, including the tenancy agreements which were found to be invalid. The member did not rely on the invalid tenancy agreements exclusively. He took into account how much the appellants had been paying over the material time. The cumulative force of the evidence in relation to Mr Conway was that there was an agreement to pay $184 per week, and in relation to Ms Young, $184 per week.[68] Further, the Schedule 2 prescribed tenancy agreement applied in relation to the respondent's failure to sign the tenancy agreement with Mr Conway.

[55] The amount the appellants were paying to the respondent was clear. The Tribunal found the agreed amount of rent did commence at the beginning of

**68** Reasons at [82]-[90]; [93]-[97].

the tenancy. In my view, clause 2(2) of the Schedule 2 prescribed tenancy agreement needs to be read in the context of how tenancy agreements generally come into existence, including importantly periodic tenancies. In my view, the purpose of the clause is to place an obligation on the tenant to pay rent in advance. The use of the words "if any" indicates the legislature contemplated circumstances where there may not have been agreement as to rent at the commencement of the tenancy agreement.

[56] Even if I am wrong in concluding how the prescribed agreement applies, the Tribunal found as a matter of evidence that both appellants agreed the rent before the commencement of the prescribed tenancy.

[57] I would not uphold this ground.

**Question C: Whether the Respondent's definition of 'improvised dwelling', being a premises 'which does not have the full range of amenities' or 'features…..additional to standard facilities', is properly construed as meaning premises 'with the amenities one would expect to find in public housing in a remote community'?**

[58] The phrase "improvised dwelling" was included in the Remote Rent Framework. The Remote Rent Framework was the mechanism by which the respondent determined rent for remote public housing tenants. There was evidence from the respondent's witness Ms Jacobsen that the Remote Rent Framework was distributed to remote communities and was designed to

inform tenants of their rights. It was used to calculate rent rates.[69] Through a classification process, the Remote Rent Framework set out four categories of housing and applied formulas to calculate rent within a classification, having regard to certain variables as between premises and tenants.

[59] One of the categories was for housing defined as an "improvised dwelling." A glossary contained in the respondent's Housing Operational Policy provided a definition of "improvised dwelling" which was used during the relevant period. The departmental glossary defined an "improvised dwelling" as: "one which does not have the full range of amenities available or is a structure never intended to be a house, e.g. a shed, car body, humpy or iron/tin structures". "Amenity" was defined as a: "Feature that a Department of Housing dwelling has that is additional to standard facilities. "Standard facilities" was not defined in the glossary. The Department of Housing had a policy that "people living in improvised dwellings are not charged rent".

[60] The Tribunal dealt with the issue of improvised dwelling as follows:[70]

> **Improvised dwelling**
>
> 110. In support of their submission that they should be repaid all monies paid to the Respondent for rent, the Applicants argued that the homes they occupied were 'improvised dwellings'. Reference was made to the Remote Housing Rent policy of the

**69** Affidavit of Daniel Kelly dated 9 May 2019 at [71].

**70** Reasons at [110]-[113].

Respondent in which it was stipulated that no rent was payable by people living in improvised dwellings.

111. In the Respondent's document entitled Glossary, which was entered as exhibit 147 at the hearing, the term 'improvised dwelling' was defined as follows:

> An improvised dwelling is one which does not have the full range of amenities available or is a structure never intended to be a house, eg. a shed, car body, humpy or iron/tin structures.

112. The term 'amenity' is defined in the Glossary as, a [f]eature that a Department of Housing dwelling has that is additional to standard facilities".

113. While there were issues with the homes the Applicants rented from the Respondent (discussed in detail below), they were not 'improvised dwellings'. The structures the Applicants lived in were houses with the amenities one would expect to find in public housing in a remote community. A large part of the Applicants' compensation claim rests on the assertion that such amenities, periodically during the course of the tenancy, required repair. The amenities were available, but at times did not work properly for which a claim was made by the Applicants under the RTA.

[61] The appellants argued the Tribunal ignored that part of the Remote Rent Framework which referred to an "improvised dwelling" as one that "does not have the full range of amenities available" read with the definition of "amenity", namely, "a feature that a dwelling has that is additional to standard features". The appellants argued that if the Tribunal had applied the definition as it should have, it would have led to the Tribunal considering the full range of features additional to standard features available. It was also argued the Tribunal substituted its own definition by defining an improvised dwelling as one that did not have "amenities one would expect to find in public housing in a remote community". The

appellants submitted the Tribunal applied a substantially more limited definition than the respondent's policy. It was argued the reference point of the respondent's policy was not "amenities one would expect" but rather "features additional to standard facilities".

[62] The Remote Rent Framework is a helpful document for housing officers and others who work in the field of providing remote public housing, and for tenants who live in remote areas. Although, as the respondent points out, there is no evidence to indicate the Framework was incorporated into any of the tenancy agreements, nor the Schedule 2 prescribed agreement. However, the Framework, including the glossary, may be relevant and of assistance in consideration of the appellants' equitable claims for rent repayment. This is especially so given the Framework was distributed in remote communities.

[63] It does not appear there was evidence as to what constituted "standard facilities" in the context of remote rental properties. On the one hand, it is obvious that in relation to Ms Young's rental property, a door would be considered a standard facility. In the usual course of events, which is accepted did not occur here, a defect such as a missing door would most likely be of a temporary nature and would not readily lead to characterising the property as being without "standard facilities". However, given the extended period that the premises was without a back door, it must be acknowledged that for some time, Ms Young's property was without at least one standard facility. Both Ms Young's and Mr Conway's properties, Ms Young's more so, suffered significant defects in terms of amenities.

However, if that part of the definition is to be relied upon "does not have the full range of amenities available", more evidence or information would be required to assess whether a given dwelling did in fact come within that part of the definition. Even on the appellants' argument, it is not clear that the subject premises fell within the definitions.

[64] The overall context in which the glossary definition appears, needs to be considered. The various terms and phrases used in the glossary attempt to give meaning, by explaining in different ways how to characterise an "improvised dwelling". Taking the various terms in the glossary in context, I have concluded the definition of an "improvised dwelling" was not intended to include houses with temporary or even significant defects, which may impact temporarily on the available amenities. There may be cases where it is a matter of fact and degree but the overall definition seeks to delineate between genuine dwellings and buildings or structures which are improvised as dwellings.

[65] The Tribunal found on the facts that although there were deficiencies in terms of the amenities, the premises did not fall within the definition of improvised dwelling. Although a misconstruction of the glossary terms could constitute an error of law, my conclusion is the Tribunal did not misconstrue the definitions. In terms of whether the Tribunal erred in law in its application of the definition to the facts before it, such an error would constitute an error of fact, not of law or at least constitute a question of mixed fact and law. It was reasonably open to the Tribunal to determine that

on the evidence before it, the premises did not fall within the ordinary meaning of "improvised dwelling".

[66] The definition "improvised dwelling" provides examples for those who need to draw on the definition: a shed, car body, humpy or iron/tin structures. The definition does not extend to structures which are houses, purposely built as dwellings, even with significant defects and even if in need of repair. While the subject houses were in poor condition, they did not meet the description "improvised". There is no reason to criticise the Tribunal's use of the term "amenities one would expect". On my reading that phrase is simply bringing objectivity and reasonableness to the assessment required.

[67] I would not uphold this ground.

**Ground D whether the term "habitable" in s 48(1)(a) of the *Residential Tenancies Act* is properly construed to be limited to matters affecting the safety of the tenant, or whether it extends to:**

**(i) injury to health, and/or**

**(ii) premises not meeting contemporary standards of one humaneness, and/or to reasonable comfort?**

[68] Section 48 of the RTA provides as follows:

> **Premises to be clean and suitable for habitation**
>
> (1) It is a term of a tenancy agreement that the landlord must ensure that the premises and ancillary property to which the agreement relates:
>
> (a) are habitable;

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

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

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

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

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

[69] Section 48 expresses the duty of the landlord in strong terms. Use of the word "ensure" has been held to place an obligation on the landlord to take reasonable steps to ascertain and satisfy themselves that the premises meet the statutory threshold. In *Shields v Deliopoulos*[71] Daly AsJ said of the term "ensure":

> The strict obligation imposed by s 68 is consistent with the presence of the word 'ensure' in s 68 of the RTA, which the authorities suggest is synonymous with 'make sure'.
>
> In *Gration v C. Gillan Investments Pty Ltd*, the Queensland Court of Appeal considered the content of obligation of a landlord under that State's residential tenancies legislation to ensure that the premises were in good repair at the commencement of a tenancy. Williams JA noted that the dictionary definition of 'ensure' was 'make sure, convince, … make certain the occurrence of an … outcome.' He later went on to state:
>
> To the best of my researches only Vaisey J has provided a judicial definition of the term 'ensure' when used in a statute. In *Reliance Permanent Building Society v Harwood-Stamper* [1944] Ch 362 at

**71** [2016] VSC 500.

373 he said, speaking of the term ‘ensure’ used in s 10 of the *Building Societies Act* 1939 (UK):

> The word ‘ensure’ has puzzled me a good deal. I think it is used in the common and colloquial sense in which ‘making sure’ is used, that is, as equivalent to ascertaining or satisfying oneself, and does not mean anything in the nature of warranty or guarantee.

With respect, I agree with that approach, and would give the word when used in ss 103(2) of the 1994 Act the same meaning. On that approach s 103(2) obliges the lessor to take steps to ascertain and satisfy himself that the premises are in a state of good repair at the start of the tenancy; the lessor cannot sit back and say that as the previous tenant has not complained of any defect therefore the premises must be in a state of good repair. The use of the term ‘ensure’ obliges the lessor to take reasonable steps to ascertain and satisfy himself that the premises are in good repair at the start of the tenancy.

His Honour adopted with approval the following statement of Judge Kitchen of the South Australian District Court in *Kneuppel v Zarpas:*

> If that is the sense in which ‘ensure’ is used in s 68 then before the tenancy begins the landlord (or at least some person on his behalf) must inspect the premises to ascertain the state of repair in order that the landlord is in a position to make sure they are in a reasonable state of repair at the beginning of the tenancy. That state of disrepair which such an inspection would reveal to a reasonable observer, the landlord has notice of.

Finally, after considering the authorities concerning the obligations of a landlord at common law, his Honour went on to conclude:

> All of that to my mind reinforces the conclusion that the obligation imposed by the 1994 Act to ensure that at the start of the tenancy the premises are in good repair obliges the landlord, prior to the commencement of the tenancy, to inspect the premises to ascertain the state of repair in order that he is in a position to discharge the duty imposed on him by the statute.

[70] The factual context in which the appellants claimed their respective houses were not habitable was as follows. Ms Young claimed her house was not habitable because of any or a combination of the following: showerhead and drain leaking for 2117 days; toilet having poor flush which did not clear waste for 534 days; leak under the kitchen sink for 477 days; absence of a backdoor for 2090 days; perimeter fence bent to the ground for 2328 days; light and fan removed and circuit breaker turned off the 58 days; wires left exposed and dangling from the ceiling the 58 days; and left without an air conditioner 2121 days. Mr Conway claimed the house was not habitable because of any or a combination of the following: air-conditioner which leaked water into the bedroom when it was used which caused him to sleep in the kitchen for 1989 nights; his shower leaked for 1991 days, when part of the shower wall was left without tiles; and his house was infested by insects for 1035 days.[72]

[71] As previously noted, Ms Young received compensation for 540 days for the breach of s 48 of the RTA due to the absence of the air-conditioner. Mr Conway received some compensation for the leaking shower due to a breach of the duty to repair. He and his wife were found to have ameliorated any threat to health and safety because they wiped up the water. The Tribunal construed the term "habitable" in s 48(1)(a) as follows:[73]

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**72** Summarised from Applicants' Submissions on Appeal filed on 17 June 2019 at [38].

**73** Reasons at [120].

> To find that the Respondent had failed in its obligation to ensure that the premises and ancillary property were habitable, I must conclude that the state of the premises and ancillary property were such that there was "a threat to the tenant's safety, going to both structural and health issues", to use the words of the Tribunal in *De Soleil v Palhide Pty Ltd* [2010] NSWCTT 464. Further, the obligation is on the tenant to show that the state of the premises and ancillary property were such that a threat to the tenant's safety will naturally occur from the ordinary use of the premises. Finally, I agree with the conclusion of the NSWCTT in *De Soleil* that the test the tenant must meet is high.

[72] Earlier in the Reasons, after considering some of the authorities, the Tribunal emphasised "The test is a very high test."[74]

[73] The term "habitable" is included in many contexts in the RTA. In s 3(d) of the RTA: "to ensure that tenants are provided with safe and habitable premises under tenancy agreements and enjoy appropriate security of tenure"; s 3(e): "to facilitate landlords receiving a fair rent in return for providing safe and habitable accommodation to tenants"; s 47: " a landlord must not enter into, or offer to enter into, a tenancy agreement unless the premises and ancillary property to which the agreement relates or would relate : (a) are habitable; and(b) meet all health and safety requirements specified under an Act that apply to residential premises or ancillary property"; s 88(c) and 92(c) in relation to termination as a result of flooding, in the event of a threat to health and safety or members of the public or the property, or because "the premises have become uninhabitable". Invariably under the RTA, expression is given to "habitable"

**74** Reasons at [118].

separately from health and safety issues, although it is clear the two concepts overlap to a significant degree.

[74] The respondent argued the Tribunal applied the correct test in accordance with the authorities in the sense that "habitable" is essentially concerned with protecting a tenant's safety and health. On appeal, senior counsel for the respondent submitted the types of matters which have been held to render premises not fit for habitation at common law were aimed at ensuring safety and health. The examples given were the infestation of bugs, defective drainage, infection by measles and recent occupation by a person suffering from pulmonary tuberculosis.[75] Further, reference was made to Atkin LJ's observations in *Morgan v Liverpool Corporation*:[76] "the state of repair of the house that is such that by ordinary use damage may naturally be caused to the occupier, either in respect of personal injury to life or limb or injury to health".

[75] The respondent submitted that Parliament did not intend that "habitable" be given any broader meaning. It was submitted that the presence of s 48 (1)(b) of the RTA to meet all health and safety requirements provided no basis for concluding "habitable" is not confined to safety and health. It was said that clearly there is an overlap between the concepts of "habitable" and "health

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**75** Respondent's Submissions filed on 28 June 2019 at [56], citing Woodfall *"Landlord and Tenan*t" at 13.003.

**76** [1927] 2KB 131 at 145; adopted by the House of Lords in *Summers v Salford Corporation* [1943] AC 283 at 289;290;291; 294-295; quoted with approval in *Gray v Queensland Housing Commission* [2004] QSC 276).

and safety" and they are not used in contra distinction. Further, that "health and safety requirements" in s 48 refer to requirements "under an Act", consequentially, "habitable" embraces health and safety matters that are not subject to an Act. Section 48 does not, however, say that. Parliament could have used the terms "health and safety" instead of "habitable" if that was the intention. It was submitted the weight of authority clearly favours a narrow approach to the meaning of "habitable"; that is, if by ordinary use, damage may be caused to the occupier either in respect of personal injury to life or limb, or injury to health. Further, it was submitted that "humaneness" and "reasonable comfort" are not separate qualifying criteria.

[76] In my view the respondent's submission construes s 48(1)(a) too narrowly. Certainly it is accepted there is a significant overlap between the concept "habitable" and health and safety; however, the two terms are used in different contexts throughout the RTA. Importantly, "habitable", and more particularly, "safe and habitable", is included under the objectives of the RTA under s 3(d) for the benefit of tenants. It would seem the term "habitable," in the context of the RTA, would be redundant if the meaning is to be associated solely with health and safety.

[77] The Tribunal quoted the 2013 Macquarie Dictionary which defined "habitable" to mean "capable of being inhabited". The appellants included a number of dictionary definitions in written submissions which are

instructive:[77] "suitable or good enough to live in" (The Oxford English Dictionary); "providing conditions that are good enough to live in or on" (Cambridge Dictionary); "it is good enough for people to live in" (Collins Dictionary); "capable of being inhabited; suitable for habitation" (Merriam-Webster Dictionary). Both the ordinary and dictionary meanings of "habitable" draw on factors broader than, yet may include elements of health and safety.

[78] Both parties have drawn attention to the oft quoted New South Wales Residential Tenancy Tribunal decision *Jex v Struk*[78] where the Tribunal found the following as the basic propositions held with respect to habitation:

> 1. "Fit for habitation" means at least that the premises may be lived in without risk of "personal injury to life or limb or injury to health".
>
> 2. "Fit for habitation" sets an objective standard.
>
> 3. The phrase must be judged by contemporary standards;
>
> 4. Whether the premises, or part of the premises, are fit for habitation depends on the known used to be made of them by the tenants;
>
> 5. The premises may not be "fit for habitation" even though the landlord was unaware of the facts which lead to this conclusion…"

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**77** Applicants' Submissions on Appeal filed on 17 June 2019 at [46]-[47].

**78** [2000] NSWRT 111.

[79] This is consistent with a line of older authority including *Proudfoot v Hart*[79] which stated "habitable", in respect of premises for rent, includes premises occupied not only with safety, but with reasonable comfort, for the purposes for which they are taken. In *Summers v Salford Corporation*[80] the House of Lords added that habitability "imports some reference to what we call humanity or humaneness".

[80] 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.

[81] I would uphold this ground and remit matter back to the Tribunal for reconsideration of the claim under s 48 RTA.

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**79** (1890) 25 QBD 42.

**80** [1943] AC 283 at 292; see in *Matthew Hanney and Belinda Smiley v Lachlan McCabe and Amanda Toshack* [2014] NSWCATCD 239; *Jex v Struck* [2000] NSWRT 111.

**Question E: In respect of the First Applicant, whether a door allowing for entry to and egress from a house is a "security device", or is otherwise an element of reasonable security, for the purposes of s 49 (1) of the Residential Tenancies Act?**

[82] This ground is relevant to Ms Young only. The Tribunal noted Ms Young's evidence:[81] "I had no back door on the house until about March 2016. When they put a door there, they left a hole on the side between the door and the frame. We had a snake come through the hole, so we had to block off the door".

[83] The Tribunal also noted the letter from Ms Young's solicitor of 22 January 2016 that "There is no back door, on the premises, the tenant has installed a mesh-steel door to secure the property. A new door is required."[82] Reference was made to the appellant's Amended Initiating Application where she claimed that the door was installed in late March 2016 and that no evidence was led by the respondent as to why the premises were let without a back door, nor was there any evidence to suggest the back door was removed by the occupants of the premises.

[84] Before the Tribunal the respondent submitted the installation of a back door was not an emergency repair but rather was an example of a repair requested and completed "in the ordinary course of business". The Tribunal agreed that the installation was not an "emergency repair" within the meaning of

**81** Reasons at [160].

**82** Reasons at [161].

s 63 of the RTA; however, that was only because Ms Young had installed a door herself. The Tribunal rejected the respondent's submission that the door was installed "in the ordinary course of business".[83] It found that once notified of the need to install a back door, the respondent should have acted sooner. In taking over six weeks to install the back door, the Tribunal found the respondent was in breach of its duty to repair under s 57(1) of the RTA and proceeded to award compensation on that basis.

[85] The Tribunal rejected Ms Young's alternative claim that the absence of a backdoor rendered the premises uninhabitable within the meaning of s 48(1)(a) and not reasonably secure, within the meaning of s 49(1). The finding on both claims was as follows:[84]

> "While the absence of the back door is odd in an Australian context, it does not render a house uninhabitable within the test articulated at [120] above. Further, it is difficult to see how the absence of a back door, and hence a lock, could constitute a breach of the respondent's obligation under s 49(1). The respondent cannot be required to "provide and maintain" a lock on a door that does not exist".

[86] Section 49(1) of the RTA provides:

> "It is a term of a tenancy agreement that the landlord will take reasonable steps to provide and maintain the locks and other security devices that are necessary to ensure the premises and ancillary property are reasonably secure".

[87] On appeal, the respondent conceded that s 49(1) could include a door within the phrase "other security devices". The respondent now accepts the

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**83** Reasons at [161]-[163].

**84** Reasons at [166].

Tribunal erred by dismissing Ms Young's claim for a breach of s 49(1). The concession is properly made. As the appellant points out "security device" is not defined in the RTA. Clearly, a door to the premises is the most basic way ensure security. Without a door, a house cannot be secured. Once a door is installed, other features such as locks and bolts or other security devices may be added, but at a fundamental level, a landlord who does not provide a backdoor will be in breach of s 49 of the RTA.

[88] Unlike repairs that fall within s 57 and s 58, redress does not depend on the landlord receiving notice from the tenant. The Tribunal found the absence of the door was a repair under s 57 which required notice. Ms Young was only compensated for the period of six weeks which represents the period from when the respondent received notice. Nominal damages of $100 was awarded, on the basis that the claim under s 57 was considered a mere repair which should have been attended to earlier.

[89] In assessing compensation on the basis of the material that was before the Tribunal and the submissions on appeal, the complete absence of a back door was a fundamental failing by the respondent to provide reasonably secure premises of a ground level house. Ms Young is an elderly woman who was left vulnerable to proven animal intruders and potentially human intruders. She took steps to block off the door, but it is the respondent who was under a duty to provide secure premises. The relevant period the premises was without a door provided by the respondent was 30 June 2010 until March 2016. I do not think it is sufficient to award nominal damages

for the distress and disappointment associated with such a fundamental breach. While it is the case there is little direct evidence about the particular vulnerability of the appellant in circumstances where her house had no back door, it is obvious that not having a door will cause distress and disappointment associated with the physical inconvenience of not being able to secure the premises. I have some, but little regard to the replacement door referred to below. There is very little evidence about it and it would appear it was a structure that just blocked off the entry. It did not keep a snake out. By installing a door, Ms Young did attempt to mitigate her loss. The fact some effort was put into an alternative way to secure the premises points to physical inconvenience.

[90] Both parties recognise the principles from *Baltic Shipping Co v Dillon*[85] 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

**85** [1993] HCA 4; 176 CLR 344.

have drawn attention to and made further submissions on the recent High Court decision of *Moore v Scenic Tours Pty Ltd*[86] 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'.[87] The Court also endorsed the following passage by Brennan J in *Baltic Shipping*:[88]

> "[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.

[91] 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

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**86** [2020] HCA 17. See the Submissions *on Moore v Scenic Tours Pty Ltd* of the Applicant filed on 18 May 2020; Respondent's Supplementary Submissions filed on 3 June 2020.

**87** *Moore v Scenic Tours Pty Ltd* [2020] HCA 17 at [44], [56]-[57], [39].

**88** *Moore v Scenic Tours Pty Ltd* [2020] HCA 17 at [45].

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.

[92] I will uphold this ground.

[93] I would assess compensation under s 122 of the RTA in the sum of $10,200. This is based on $150 per month for 68 months.

**Orders**

1. Ground A is upheld. The decision of the Tribunal not to deal with the question based on the principles in *Commercial Bank of Australia v Amadio* is set aside. In the case of Ms Young, the matter is remitted to the Tribunal. In the case of the late Mr Conway, should his estate file appropriate proofs of its participation in any further proceedings, the matter is to be remitted to the Tribunal. It is recommended the appellants clearly formulate the claim before the Tribunal, and the respondent to provide its response. It is recommended the parties be given an opportunity to file or call any further evidence on the issue of the *Amadio* principles and to make submissions, including submissions on the consequences in the event of a successful claim.

2. Ground B is dismissed

3. Ground C is dismissed

4. Ground D is upheld. The decision of the Tribunal to dismiss the appellants' claim under s 48 of the *Residential Tenancies Act* is set aside. In the case

of Ms Young, the matter is remitted to the Tribunal to reconsider. In the case of the late Mr Conway, should his estate file appropriate proofs of its participation in any further proceedings, the matter is to be remitted to the Tribunal to reconsider. It is recommended the Tribunal assess the claim in the light of paragraphs [75] – [80] of these reasons.

5. Ground E is upheld. The decision of the Tribunal to dismiss Ms Young's claim under s 49 of the *Residential Tenancies Act* is set aside. The respondent is to pay compensation under s 122 of the *Residential Tenancies Act* to Ms Young in the sum of $10,200. Payment is to be made within 28 days from today.

6. The parties have liberty to apply on reasonable notice if any orders are required concerning the consent of the estate of Mr Conway to participate further on the part of the proceedings remitted.

7. I will hear the parties on costs.

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