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FACEBOOK INC v AUSTRALIAN INFORMATION COMMISSIONER & ANOR (S137/2022)

Court appealed from: Full Court of the Federal Court of Australia
[2022] FCAFC 9

Date of judgment: 7 February 2022

Special leave granted: 16 September 2022

Facebook Inc is an American corporation whose subsidiary Facebook Ireland Limited (“FIL”) operates the Facebook internet platform in Australia. Users of that platform upload personal information and receive electronic cookies on their devices. Pursuant to a written agreement between the companies, users’ personal data is provided by FIL to Facebook Inc for processing. The stated purposes of such processing include personalising content, identifying connections between Facebook users, and targeting and assessing the effectiveness of advertising.

In March 2020, the First Respondent (“the Commissioner”) commenced Federal Court proceedings against Facebook Inc and FIL, alleging contraventions of the *Privacy Act 1988* (Cth) (“the Act”). In particular, the Commissioner pleaded breaches of both Australian Privacy Principle (“APP”) 6, which restricts the use of information collected by an organisation to the purpose for which it was collected, and APP 11.1(b), which requires an organisation to take reasonable steps to protect personal information that it holds from unauthorised disclosure.

The Commissioner alleged that from 12 March 2014 to 1 May 2015, personal information which Australians had uploaded to Facebook was disclosed by the Facebook companies to third parties via an app called “*This is Your Digital Life*”. That app required each user to log in using a Facebook account and, if agreed by the user, access was then given not only to personal information of the user, but also to personal information of the user’s Facebook friends. By that means, the installation of the app by 53 users in Australia resulted in the disclosure of personal information of more than 311,000 users.

The Commissioner contended that the Act and the APP’s extended to the practices of the Facebook companies outside Australia by virtue of s 5B(1A) of the Act, on account of the existence of an “Australian link” as required in that provision. This was on the basis that the two essential requirements for such a link, prescribed in s 5B(3)(b) and s 5B(3)(c), were met. Those requirements, respectively, were that an organisation carried on business in Australia and that it collected or held personal information in Australia.

After Facebook Inc and FIL had been served with the documents filed by the Commissioner (pursuant to leave to serve outside Australia, granted by Thawley J), Facebook Inc applied for the service on it to be set aside (FIL did not make a similar application). On 14 September 2020, Thawley J dismissed the application, finding that the Commissioner had established a prima facie case for relief, including an Australian link, sufficient to warrant service on Facebook Inc in the USA. His Honour found inferences open that Facebook Inc carried on business in Australia in its own right, and that it both collected and held personal information in Australia. Thawley J considered that two elements of the business conducted by Facebook Inc were the installation of cookies on users’ devices, and the provision

to app developers of an interface known as the “Graph API”, which allowed third-party apps to use Facebook as a means of logging in.

The Full Court of the Federal Court (Allsop CJ, Perram and Yates JJ) unanimously dismissed an appeal by Facebook Inc. Their Honours found that it could be inferred that Facebook Inc had installed cookies, which were an important part of the operation of the Facebook platform, on devices in Australia. Their Honours also found it open to infer that the provision of Facebook login functionality to Australian app developers via the Graph API was an activity that had occurred in Australia. Both activities were aspects of Facebook’s business of providing data processing services to FIL, and Thawley J therefore had correctly concluded that an inference was open that Facebook Inc carried on business in Australia within the meaning of s 5B(3)(b) of the Act.

The Full Court held that the second requirement for an Australian link, that prescribed in s 5B(3)(c) of the Act, also was met. This was despite holding that Thawley J had erred by finding inferences open that certain caching servers in Australia were controlled by Facebook Inc (and that the corporation thereby had collected users’ personal information in Australia), and that Facebook Inc had *held* personal information on the users’ devices by the use of cookies. Thawley J however had correctly concluded, held the Full Court, that it was open to infer that Facebook Inc had *collected* personal information in Australia by the use of cookies. This was because the cookies were installed in Australia and, as they were involved in the process of creating targeted advertising, an inference was available that they were used to collect personal information.

FIL took no active part in the appeal below and it has filed a submitting appearance in the appeal to this Court.

The grounds of appeal are:

- The Full Court erred in holding that there was a prima facie case that Facebook Inc “*carrie[d] on business in Australia*” within the meaning of s 5B(3)(b) of the Act.
- The Full Court erred in holding that there was a prima facie case that Facebook Inc “*collected ... in Australia*” the personal information the subject of the proceedings within the meaning of s 5B(3)(c) of the Act.

The Commissioner has filed a Notice of Contention, raising grounds which include:

- The Full Court ought to have concluded that the Commissioner had established a prima facie case that Facebook Inc was carrying on business in Australia within the meaning of s 5B(3)(b) of the Act by reason of:
 - a) FIL carrying on business in Australia on behalf of, and as part of the worldwide business of, Facebook Inc;
 - b) Further, or in the alternative, Facebook Inc carrying out its activities in Australia for the purpose of Facebook Inc conducting its business of operating the Facebook service in North America.

MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS v THORNTON (B42/2022)

Court appealed from: Full Court of the Federal Court of Australia
[2022] FCAFC 23

Date of judgment: 25 February 2022

Special leave granted: 16 September 2022

There are two issues arising in this appeal. The first issue is whether s 184 of the *Youth Justice Act 1992 (Qld)* (“the YJA”) engages s 85ZR(2) of the *Crimes Act 1914 (Cth)* (“the Crimes Act”) such that the Minister took into account an irrelevant consideration when making his decision by considering the “conviction” and circumstances of the offending by the Respondent, in relation to offences committed while he was a minor (but for which no conviction was recorded) under ss 183 and 184 of the YJA. The second issue is whether the Full Court erred in reaching its state of satisfaction as to there being a realistic possibility that a different decision could have been made by the Minister had he not taken into account the Respondent’s criminal history as a child.

On 2 February 2018, the Respondent pleaded guilty and was convicted of “*Assaults occasioning bodily harm - domestic violence offence*”, and was sentenced to 24 months imprisonment. On 21 February 2018, the Respondent’s visa was cancelled pursuant to s 501(3A) of the *Migration Act 1958 (Cth)* (“the Act”) because he did not pass the character test (ss 501(6)(a) and (7)(c)), as he had a substantial criminal record and was subject to full-time imprisonment. On 16 March 2018 (and later), the Respondent made representations pursuant to s 501CA(4) of the Act, seeking revocation of the cancellation decision. On 26 April 2019, the Minister personally made the decision under s 501CA(4) not to revoke the cancellation decision. The Minister was not satisfied that the Respondent passed the character test (s 501CA(4)(b)(i)), or that there was “another reason” why the cancellation decision should be revoked (s 501CA(4)(b)(ii)).

The Minister considered a number of matters, observing that domestic violence is a serious problem in our society and that the Respondent’s offending was a serious example of such offending. The strength, nature, and duration of the Respondent’s ties to Australia were considered, and the Minister accepted that the Respondent had a “close relationship with his family” in Australia. However, he could not rule out the possibility of future offending by the Respondent which could expose the Australian community to harm. As such, the Respondent represented an unacceptable risk of harm to the Australian community, and the protection of the Australian community outweighed any other consideration.

The Respondent unsuccessfully sought judicial review of the decision in the Federal Court. Relevantly, the Court determined that the construction of s 184(2) of the YJA was indistinguishable from s 12(3) of the *Penalties and Sentences Act 1992 (Qld)* (“the PSA”), and so followed the decision of *Hartwig v Hack* [2007] FCA 1039, that s 85ZR(2) of the Crimes Act was not referring to a provision regarding the non-recording of a conviction. Therefore, s 184(2) of the YJA was also not a law to which s 85ZR(2) of the Crimes Act applied.

On the appeal to the Full Court, the Full Court agreed with the primary judge, that the other grounds of review were not established. However, the Full Court held that s 184(2) of the YJA did engage s 85ZR(2), and allowed the appeal on the basis that the Minister had taken into account an irrelevant consideration.

The grounds of appeal are:

The Full Court erred in holding that:

- The Minister's decision refusing to revoke the cancellation decision under s 501CA(4) of the *Migration Act 1958* (Cth) dated 26 April 2019, took into account an irrelevant consideration contrary to s 85ZR(2) of the *Crimes Act 1914* (Cth) because the Court held that pursuant to s 184(2) of the *Youth Justice Act 1992* (Qld) the Respondent was taken never to have been convicted of any offence committed as a minor, where he was found guilty but no conviction was recorded, whereas on a proper construction of s 184(2), it did not engage s 85ZR(2) of the Crimes Act and the Minister did not take into account an irrelevant consideration; or
- Alternatively, there was a realistic possibility that the Decision could have been different if the Minister did not take into account any convictions (for which no conviction was recorded) of the Respondent, when he was a minor because:
 - a) The Court failed to objectively evaluate the significance of any failure to conform to the statutory task to ascertain whether the jurisdictional error was material, by considering a counter-factual analysis, backward looking; and
 - b) If the Court had properly engaged in an assessment of the objective significance of the Respondent's offending as a minor, for which no conviction was recorded, by the Minister, the Court would have found those matters were of such marginal significance objectively, that taking them into account could not have had a realistic possibility of a different decision.

CCIG INVESTMENTS PTY LTD v SCHOKMAN (B43/2022)

Court appealed from: Supreme Court of Queensland Court of Appeal
[2022] QCA 38

Date of judgment: 18 March 2022

Special leave granted: 16 September 2022

In the early hours of 7 November 2016, the Respondent (Schokman) was asleep in staff accommodation at his employer's (CCIG) resort on Daydream Island. He shared that accommodation with another employee (Hewett). About half an hour earlier, Schokman had heard Hewett vomiting in the bathroom. Schokman went back to sleep before waking with a distressing sensation of being unable to breathe. He then realised that Hewett was standing over him and urinating on his face. He yelled at Hewett to stop, and after a short time, Hewett went to the bathroom, from which he soon emerged to apologise. Almost immediately Schokman suffered a cataplectic attack. He had been previously diagnosed as suffering from cataplexy, which is a sudden and usually brief loss of voluntary muscle tone triggered by strong emotions. He had also been diagnosed with a condition called narcolepsy, which is a sleep disorder characterised by daytime drowsiness and sudden attacks of sleep.

Mr Schokman sued his employer, claiming damages upon two bases: a) that CCIG was in breach of the employer's duty of care owed to him as its employee; b) alternatively, that Hewett had committed a tort for which CCIG, as Hewett's employer, was vicariously liable. The trial judge rejected each argument and gave judgment for CCIG. On the vicarious liability case, the judge found that Hewett's act was tortious, but concluded that CCIG was not vicariously liable because the tort was not committed in the course Hewett's employment.

On appeal Schokman pursued only the issue of vicarious liability. The Court of Appeal unanimously allowed the appeal. The Court found that this case was analogous to *Bugge v Brown* (1919) 26 CLR 110, although the act in this instance occurred in the course of the provision of shelter, rather than sustenance, to the employee. It was a term of Hewett's employment that he reside in the staff accommodation on the island, and more particularly in the room assigned to him. Whilst he remained employed at the resort, he was required to live there, and once he ceased to be employed at the resort, he was required to leave. The terms of his employment required him to take reasonable care that his acts did not adversely affect the health and safety of other persons. That was an obligation which governed his occupation of this room. He was not occupying the room as a stranger, but instead as an employee, pursuant to and under the obligations of his employment contract. There was in this case the requisite connection between his employment and the employee's actions. The Court found that CCIG should be held to be vicariously liable for Hewett's negligence and the loss which it caused.

The grounds of appeal are:

- The Court of Appeal erred in its finding the appellant is vicariously liable because:
 - a) the appellant's employee's tortious act was not within the "scope of employment";

- b) the relevant tortious act was “so remote from his duty as to be altogether, outside of, and unconnected with, his employment”;
- c) the relevant tortious act occurring outside of hours bore no sensible relationship to any aspect of the discharge of his work duties;
- d) the provision of accommodation for its employees did not provide “occasion” or “opportunity” for the employee’s wrongdoing in such a case to render the appellant liable;
- e) it was not otherwise “just” to extend the employer’s responsibility to the tortious act; and
- f) the court’s decision in *Bugge v Brown* [1919] HCA 5; (1919) 26 CLR 110 did not require the appellant to be held liable.

**DISORGANIZED DEVELOPMENTS PTY LTD & ORS v
STATE OF SOUTH AUSTRALIA (A22/2022)**

Court appealed from: Supreme Court of South Australia
Court of Appeal
[2022] SASCA 6

Date of judgment: 10 February 2022

Special leave granted: 9 September 2022

Three questions were reserved by a Justice of the Supreme Court of South Australia for the consideration of the Court of Appeal, concerning the validity, and if valid, the scope of application of regulations purporting to declare certain land to be prescribed places within the meaning of Part 3B, Division 2 of the *Criminal Law Consolidation Act 1935 (SA)* (“the CLCA”).

Part 3B of the CLCA proscribes a range of conduct directed toward “disrupting the activities of criminal organisations”. Section 83GD(1), located in Part 3B of the CLCA, makes it an offence for a participant in a criminal organisation to enter a prescribed place. The Second and Third Appellants are members of a declared organisation within the meaning of the *Serious and Organised Crime (Control) Act 2008 (SA)*, namely the motorcycle club known as the Hells Angels, and therefore a “criminal organisation” within the meaning of Division 2, Part 3B of the CLCA. The Second and Third Appellants are the directors and shareholders of the First Appellant (“DDPL”). DDPL became the registered proprietor of certain land (“the Cowirra Land”) in October 1997. The land is on two titles comprising approximately fifteen hectares of rural land. There are improvements on the Cowirra Land, such as buildings, cabins (including a cabin occupied by the Second Appellant, and a separate cabin occupied by the Third Appellant), recreational facilities, roads and lawned areas.

Section 370 of the CLCA confers a general regulation making power. Section 83GA(2) imposes procedural requirements on the making of regulations: a) it must take the form of regulation; b) that regulation must be laid before each House of Parliament; and 3) that regulation may only relate to one entity, one event, or one place. Three kinds of regulations have been promulgated for the purposes of Part 3B, Division 2:

- i) *Criminal Law Consolidation (Criminal Organisation) Regulations 2015* (the Consolidated Regulations) as made by the *Statutes Amendment (Serious and Organised Crime) Act 2015* (the Amending Act). These commenced in August 2015.
- ii) The Cowirra Regulations, (No. 1 and No. 2) made in December 2020; and
- iii) The Consolidated Regulations as subsequently amended by, inter alia, the Cowirra Regulations (Amended Consolidated Regulations). These were varied in December 2020 to reflect the declarations of the Cowirra Land as a prescribed place.

Before gazettal of the Cowirra Regulations, no notice was first given by the Respondent to the Appellants of the proposed making of those regulations, and no opportunity was given to the Appellants to be heard on whether either or both of the regulations should be made, or if made, should be subject to any, and if so, what conditions or qualifications.

The Appellants contended that there had been no valid declaration of the Cowirra Land as a prescribed place, as the varied reg 3 purports to declare more than one place to be a prescribed place, contrary to the requirement in s 83GA(2) of the CLCA. They further contended that neither the Cowirra (No. 1) Regulations nor the Cowirra (No. 2) Regulations were valid, as procedural fairness was not accorded to them prior to making those regulations when there was an obligation to do so. They also contended that even if the regulations were validly made and the Cowirra Land effectively declared to be a prescribed place, the prohibition under s 84GD of the CLCA should be construed not to apply to the owner or occupier of the land or their authorised agents, whether or not those people are ‘participants’ in a criminal organisation.

The Court of Appeal held that although the Cowirra Regulations did not expressly declare the Cowirra Land to be prescribed places, that did not mean that the regulations failed to give effect to a relevant declaration, and that the word ‘declare’ is not indispensable. The Court accepted that the Appellants’ rights are directly affected in a manner sufficient to give them standing to challenge the Cowirra Regulations, but it did not consider that this was determinative of the question about whether procedural fairness was required. The Court concluded that no duty to afford procedural fairness was implied.

The grounds of appeal are:

- The Court of Appeal erred in its answer to the questions on the case stated in holding that:
 - a) Although r 3 of the *Criminal Law Consolidation (Criminal Organisation) Regulations* (“the principal regulations”) is ineffective to declare the places comprising the Cowirra Land to be prescribed places, and each of the *Criminal Consolidation (Criminal Organisations) (Prescribed Place – Cowirra) Variation Regulations 2020* (“Cowirra No. 1 Regulations”) and *Criminal Consolidation (Criminal Organisations) (Prescribed Place – Cowirra) Variation (No 2) Regulations 2020* (“Cowirra No. 2 Regulations”) seeks only to insert additional place details in the principal regulations, nevertheless, each of the Cowirra No. 1 and No. 2 Regulations impliedly declares the place identified in the text of the regulations to be a “prescribed place” for the purpose of s 83GA(1) of the *Criminal Law Consolidation Act 1935 (SA)*, and is valid accordingly. The Court of Appeal ought to have held that neither regulation declares, or has the effect of declaring, the identified place to be a “prescribed place”, and is invalid accordingly.
 - b) The Cowirra No. 1 and Cowirra No. 2 Regulations are not invalid by reason that there was not an obligation to accord procedural fairness to persons adversely affected by their making. The Court of Appeal ought to have held that the making of those regulations was subject to the obligation to accord procedural fairness to the Appellants; and that both regulations are invalid because (as is conceded) procedural fairness was not accorded to them.

ENT19 v MINISTER FOR HOME AFFAIRS & ANOR (S102/2022)

Date application for a constitutional or other writ filed: 6 July 2022

Date further amended application referred to Full Court: 5 September 2022

The Plaintiff is a citizen of Iran who was detained in December 2013, when he arrived in Australia without a valid visa. The Plaintiff later applied for a protection visa. Subsequently, he pleaded guilty to an offence of people smuggling under s 233C of the *Migration Act 1958* (Cth) (“the Act”), whereupon he was sentenced to 8 years’ imprisonment (backdated to December 2013). The sentencing judge found that the Plaintiff had acted out of desperation for his circumstances, particularly a desire to join family members who had already come to Australia, and that the weight given to the factor of general deterrence should be reduced to a small extent.

Upon his release on parole in December 2017, the Plaintiff was immediately returned to immigration detention. In July 2018, the Immigration Assessment Authority found that the Plaintiff had a well-founded fear of persecution in Iran as a Christian, and that Australia’s protection obligations under the United Nations Refugees Convention were engaged in respect of him. The Plaintiff’s application for a protection visa nevertheless was then refused by the First Respondent (“the Minister”) personally on two occasions: firstly under s 501(1) of the Act and, after that decision had been set aside by the Federal Court, under s 65 of the Act. The second decision, too, was set aside by the Federal Court.

On 27 June 2022, the Plaintiff’s application for a protection visa was again refused by the Minister under s 65 of the Act (“the Decision”), on the basis that the Minister was not satisfied that the grant of the visa was in the national interest (the criterion in cl 790.227 of Schedule 2 to the *Migration Regulations 1994* (Cth) (“the Regulations”). In so deciding, the Minister observed that pursuant to s 197C(3), the Plaintiff would not be returned to Iran, and acknowledged that the Plaintiff would face prolonged or indefinite detention in Australia as a result of the refusal to grant him a visa. The Minister found however that that consideration was outweighed by the national interest considerations arising from the prospect of granting a protection visa to a person convicted of people smuggling and the importance of safeguarding Australia’s territorial and border integrity. The Minister stated that the grant of a visa to a person convicted of people smuggling might erode the community’s confidence in the protection visa program.

The Plaintiff then commenced proceedings in this Court. By a revised application filed on 20 December 2022, the Plaintiff challenges the validity of the Decision and of cl 790.227 of the Regulations. He seeks relief in the form of writs for his release from detention and for the grant of a protection visa, or to quash the Decision and to have his visa application reconsidered by the Minister.

The Plaintiff’s grounds include that cl 790.227 is invalid by reason of inconsistency with the Act. This is on bases which include that the provision subsumes the criteria in ss 36 and 501 for the ability to refuse protection to a person such as the Plaintiff who otherwise satisfies the criteria for a protection visa, and the regulation-making powers in ss 504 and 31(3) would not have been intended by Parliament to authorise a criterion which gives a very broad discretion such that the Minister or a delegate could refuse a visa for any reason that may be politically attractive. Even if cl 790.227 is valid, the Plaintiff submits it should be read down so as not to

permit the Minister to deliver a consequence additional to those prescribed in the Act for convictions for people-smuggling offences.

The Plaintiff claims that the Decision contravenes the separation of powers necessary in view of Chapter III of the *Constitution*, as it was an exercise of power by the Executive for a punitive purpose. It involves a purpose of general deterrence of people smugglers, and it effects a further deprivation of liberty of the Plaintiff (having already served the sentence imposed by a court) that is not reasonably connected with detention authorised under the Act for the purpose of removal from Australia. The Plaintiff also argues that the Decision is invalid because the Minister failed to consider the relevant matters of the Plaintiff's criminal punishment, which involved a judicial determination of general deterrence, and the reason for the Plaintiff's engagement in people smuggling. Another basis of invalidity, contends the Plaintiff, is that the Minister proceeded on a misunderstanding of the law because she was unaware that she could decide to *grant* the visa. This is because the only available options presented to the Minister in a brief on the Plaintiff's application were to refuse the visa or to decline to make the decision herself, whereupon a delegate would decide.

The Minister and the Second Defendant (the Commonwealth of Australia) contend that cl 790.227 is not inconsistent with the Act, as it operates cumulatively with ss 36(1C) and 502; the Act does not deal with the "national interest" exhaustively so as to preclude its prescription as a criterion in the Regulations; the national interest is a broad concept; cl 790.227 is a criterion additional to others, rather than one which subsumes them; and s 35A(6) of the Act expressly provides that criteria for protection visas include any that are prescribed by regulation.

The Defendants submit that the Decision was not punitive, as deterrence is not innately linked to criminal punishment; the Decision was made to achieve stated objectives of territorial and border integrity and community confidence in the protection visa program, and the effects of detention on the Plaintiff do not determine whether the Minister's purpose was punitive. The Plaintiff's detention results from his being an unlawful non-citizen, and it is authorised by ss 189(1) and 196(1) of the Act. The Defendants argue that the Minister was not required to have regard to everything relevant to those national interest matters which were the subject of her consideration, nor were all the potential considerations raised by the Plaintiff relevant. The Plaintiff's allegation that the Minister acted upon a misunderstanding of the law should not be accepted, as the power to grant or refuse a visa is plain in the Act.

Notices of a constitutional matter were filed by the Plaintiff. No Attorney-General is intervening in the proceeding.

YOUNG & ANOR v CHIEF EXECUTIVE OFFICER (HOUSING) **(D5/2022)**

Court appealed from: Court of Appeal of the Supreme Court of the
Northern Territory
[2022] NTCA 1

Date of judgment: 4 February 2022

Special leave granted: 16 September 2022

In 2016, Ms Enid Young applied to the Northern Territory Civil and Administrative Tribunal (“the Tribunal”) for orders that repairs to the premises in which she lived be carried out by her landlord, the Chief Executive Officer (Housing) (“the CEO”). Ms Young’s proceeding in the Tribunal came to include a claim for compensation under s 122(1)(a) of the *Residential Tenancies Act 1999* (NT) (“the Act”) for alleged breaches by the CEO of the tenancy agreement or of related obligations under the Act. One basis of Ms Young’s compensation claim was the fact that the premises’ back doorway had lacked a door for more than five years.

The Tribunal found several breaches by the CEO and awarded Ms Young compensation accordingly. In respect of the missing back door, Ms Young was awarded only nominal damages of \$100 for the CEO’s breach of an obligation of repair, on the basis that the CEO had taken more than six weeks to install a door after being notified that a new door was required (and in the absence of evidence from Ms Young as to any loss or distress suffered as a result of that breach). The Tribunal found no breach of an obligation, prescribed in s 49(1) of the Act, for the landlord to ensure that premises were reasonably secure by providing locks and other necessary security devices, as the CEO could not be required to provide a lock for a door that did not exist.

On an appeal to the Supreme Court, Blokland J found (as had been conceded by the CEO) that a back door was a necessary security device and the CEO had long breached the obligation in respect of reasonable security of the premises by failing to provide one. Blokland J awarded Ms Young compensation of \$10,200 for disappointment and distress arising from that breach, calculated at the rate of \$150 per month for 68 months. This was after her Honour had referred to Ms Young’s having experienced “*reduced enjoyment of the premises and subsequent distress and disappointment due to the failure to provide a premises which was secure.*”

An appeal by the CEO was unanimously allowed by the Court of Appeal (Grant CJ, Southwood and Barr JJ) on the issue of the compensation awarded to Ms Young for the lack of a back door. Their Honours held that Blokland J had erred by applying an unavailable exception to the common law rule that damages for breach of contract are generally not awarded for mental distress. The Court of Appeal considered that s 122 of the Act required a causal nexus between breach and an entitlement to compensation, which involved considerations of foreseeability and remoteness. Their Honours held that compensation could not be awarded under s 122 for mental distress on the basis of “reduced enjoyment”, because a tenancy agreement was not a contract of a kind to which that exception to the general rule against damages applied. This was because the central object of a tenancy agreement was the tenant’s right to make full use of the subject premises without interference by the landlord; it was not to provide the tenant with pleasure or relaxation. The Court of Appeal found that compensation could not be awarded

based on an alternative exception, that of distress arising from physical inconvenience, as the Tribunal had made no finding that the lack of a back door had caused Ms Young physical inconvenience.

The grounds of appeal include:

- The Court of Appeal erred in holding that in order to recover damages for emotional disturbance or “mental distress” in a claim brought under s 122 of the Act it is necessary to apply the restrictions imposed by the principles of remoteness and foreseeability.
- The Court of Appeal erred in holding that the CEO’s undisputed failure, in breach of s 49 of the Act, to take reasonable steps to provide Ms Young’s premises with reasonable security could not found a claim for compensation for emotional disturbance or “mental distress”.

The second appellant is the administrator of the deceased estate of the late Mr Robert Conway. Mr Conway was, with Ms Young, among seventy tenants of premises in the one remote community who lodged claims against the CEO in the Tribunal. His claim and Ms Young’s were among four which were heard and determined together. The appeal by Ms Young to the Supreme Court from the Tribunal’s decision was made jointly with Mr Conway, who passed away before Blokland J gave judgment on that appeal.